Journal of Criminal Law and Criminology

Volume 24
Issue 3 *September-October*

Article 6

Fall 1933

Recent Criminal Cases

RECENT CRIMINAL CASES

Edited by the

STUDENT PUBLICATIONS BOARD OF
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

HARRY R. HORROW, Case Editor NEWMAN F. BAKER, Faculty Adviser

HOMICIDE DURING THE COMMISSION OF A FELONY.—[New York] Four men were interrupted by three policemen while robbing a 'speakeasy.' Two of the police officers entered the place and arrested two robbers without seeing a third robber, Walsh, who was standing guard inside the door leading out to the vestibule and thence to the street. The third officer stood guard outside that street door, while the fourth robber was waiting outside beside an automobile. Walsh, who was armed, had seen the arrest and the disarming of his associates, attempted to escape, but quickly opened the door, stepped back into the vestibule when he saw the officer outside the door. Later, however, he again stepped out and fired the fatal shot killing the officer. All four defendants were jointly indicted in the common-law form for murder in the first degree, the case having been tried solely as a felony murder. The trial judge instructed the jury that if it believed, beyond a reasonable doubt, the events as outlined by the State's witnesses, then the homicide as a matter of law was committed during the perpetration of the felony, and the defendants were all guilty of first degree murder. All were convicted as charged and sentenced to die. *Held,* reversed and remanded: this instruction was prejudicial error for the jury was precluded from finding the facts in accordance with the State's testimony, and at the same time finding that the defendant was not engaged in the commission of a felony when the homicide occurred: *People* v. *Walsh* et al. (1933) 262 N. Y. 140, 186 N. E. 422.

Two questions arise from this and allied cases: first, whether a homicide, committed subsequently to a felony, is in the perpetration of that felony, i.e., the termination of the felony, and second, the status of an accessory before the fact in a felony murder. At common law every homicide committed in the perpetration of a felony was murder, and this was so whether or not there was any precedent intention of doing the homicidal act: *Washington* v. *State* (1930) 187 Ark. 1011, 28 S. W. (2d.) 1055; *State* v. *Best* (Wyo. 1932) 12 Pac. (2d) 1110. Thus premeditation, deliberation, or malice is not essential to this crime: *Cole* v. *State* (1922) 192 Ind. 29, 134 N. E. 867; *People* v. *Arnold* (Cal. 1926) 250 Pac. 168; *Berryhill* v. *State* (1921) 151 Ga. 416, 107 S. E. 158. It was the theory of the State in the principal case that the homicide occurred in the commission of a robbery and therefore it was murder in the first degree and therefore it was not necessary to prove deliberation,

often a difficult task: *State* v. *Sharpe* (Mo. 1930) 34 S. W. (2d) 75. But the difficulty arises here in proving that the robbery was taking place at the time of the homicide. If the homicide occurs at the beginning of the robbery, it is not difficult to say it was done in its perpetration, nor is there much question if the robbery is in progress when the killing is done. But when the homicide occurs during the escape of the parties the decisions differ somewhat. The termination of the robbery is determined by the desistance or abandonment of the intent to rob. The tests applied are many; time, place of commission, possession of loot are all significant. A shooting about two minutes after the robbery which occurred as a part of a continuous assault lasting from the robbery to the shooting, done for the purpose of preventing detection, was held to be first degree murder: *State* v. *Williams* (1905) 28 Neb. 395, 82 Pac. 353. Where an accused shot the deceased in the back after his money had been taken and he started to walk away and had gone five or six feet, this crime was committed: *Christian* v. *State* (1913) 71 Tex. Cr. 566, 161 S. W. 101. Whether or not the stolen property had been removed and whether or not the defendant was at the scene of the robbery are other determining factors: *People* v. *Michalow* (1920) 229 N. Y. 325, 128 N. E. 228; *People* v. *Smith* (1921) 232 N. Y. 239, 133 N. E. 574. A different test often is used, namely, whether the robbery was so close to the killing as to be a part of the *res gestae,* even though the homicide occured during flight: *Conrad* v. *State* (1906) 75 Ohio St. 52, 78 N. E. 957. *Contra*: *People* v. *Giro* (1910) 197 N. Y. 152, 90 N. E. 432; *People* v. *Marwig* (1919) 227 N. Y. 382, 125 N. E. 535. In general, however, it may be said that the attitude of the New York court prevails, that is, escape and flight are not to be considered as part of the perpetration of the robbery, which is completed when the loot is at rest. At least, in New York, the question must be submitted to the jury and the trial judge may not pass upon it as a matter of law: *People* v. *Marwig, supra.* When there is some question concerning the abandonment of the felony, the courts are strict in stating that the instructions must be explicit as to the law applicable to this phase of the situation. In the principal case the instruction outlined above was found to be erroneous for the charge had the effect of a directed verdict, and unless the evidence was susceptible of only one construction such an instruction may not stand: *People* v. *Huter* (1906) 184 N. Y. 237, 77 N. E. 6; *People* v. *Schleiman* (1910) 147 N. Y. 383, 90 N. E. 950.

The decisions concerning the question of the status of accessories may be generalized into two formulas: either the common design to rob did include the common design to kill if necessary to escape, in which case the accessory should suffer the same penalty as the one killing; or that it did not, and then the design to kill in order to escape was a totally new one which must be proved, i.e., it must be proved that the accessory was accomplice to the *new design* before he may be held for murder: *Romero* v. *State* (1917) 101 Neb. 650, 164 N. W. 554. New York follows the second formula through the majority in the principal case does not discuss the matter. Judge Crane in the dissenting opinion followed the first

formula when he held, in effect, that since a robbery was committed and someone was killed all were guilty of first degree murder. Those courts that adhere to the first view make the vital assumption, that *when armed criminals commit robbery they are prepared to kill* in order to effect their escape. Those that follow the second view contend that persons may be prepared to rob, and yet not prepared to "resist to the death" but may prefer to surrender if caught. If, in the principal case, the court had adhered to the first formula, the defendants other than Walsh would have been convicted of first degree murder merely by proving the felony. Perhaps the State, attracted by the ease of prosecution, attempted to base its case upon this theory. The first view illustrates the possible harshness in applying accessory statutes for it has been held that even if the accessory attempts to dissuade his companions from taking life, where the killing was in furtherance of the felony, he was guilty of first degree murder: *People* v. *Marriques* (1922) 188 Cal. 602, 206 Pac. 63.

The situations arising under the second formula are usually tried as conspiracy cases, and it must be shown that the conspiracy extended not only to the robbery but also to the killing: *State* v. *Marwig, supra; State* v. *Roselli* (1921) 109 Kan. 33, 198 Pac. 195. In such a case if the defendants had ended their felonious intent and were seeking to escape, a killing would not be a felony murder unless the above conspiracy was shown, or else deliberation was proved. In the principal case it would have been difficult to prove that the conspiracy extended to the taking of life to effect an escape, and no common design to kill could have been assumed since two of the defendants had given themselves up immediately after they were confronted by the arresting officers. In New York, the frequent reversals of the cases tried as felony murders when there are several defendants point to the fact that the New York Court of Appeals is sensible of the harshness of the accessory statutes as applied to this offense. Since the crime has but one penalty and that one the most extreme in the list of penalties it is no wonder that a trial practically clear of error is insisted upon and reversals are frequent.

RAYMOND NAJARIAN.

ENFORCEABILITY OF PROSECUTORS' AGREEMENT NOT TO PROSECUTE.—[West Virginia] In 1925 fourteen indictments were returned against the defendant for violation of the state banking laws. It was agreed between the defendant's counsel and the prosecuting attorney with the approval of the court that if the defendant should plead guilty to one indictment and aid the commissioners to liquidate the accounts of the bank, he would be discharged from the other thirteen indictments. Both parties carried out the agreement, the defendant was sentenced to ten years imprisonment and the other indictments were *nolle prossed.* After some time served the defendant obtained his release on good behavior. An indictment was later presented containing the same charges that appeared in one of the dismissed indictments. The lower court ruled against the defendant's special plea based upon the above agreement. *Held,* reversed: an agreement approved by the court between a prosecuting attorney and an accused not to prose-

cute should be upheld when the accused has fulfilled his part of the agreement: *State* v. *Ward* (West Va. 1932) 165 S. E. 803.

The decision in this case might well raise the constantly recurring question of the justification of such a procedure on the part of prosecuting attorneys or courts or both. But the practice has at least the approbation due to long usage and the plain necessities of successful criminal prosecution. It has long been found useful in the detection and punishment of crime to resort to aid and information obtained from the criminals themselves: 1 *Wharton* "Criminal Law" (12th ed. 1932) sec. 401; *Rex* v. *Rudd* (1875) 98 Eng. Rep. 1114. The necessity certainly has not diminished now that many crimes are committed by highly organized groups. Countless cases arise in which agreements are made between prosecuting attorneys and the accused whereby criminal prosecutions are dismissed in return for aid given to the state by the accused. In the most common of these cases, an accessory turns state witness against his co-defendants: *People* v. *Bogolowski* (1927) 326 Ill. 253, 157 N. E. 181; *Nickelson* v. *Wilson* (1875) 60 N. Y. 362; *Lowe* v. *State* (1909) 111 Md. 1, 73 Atl. 637, 24 L. R. A. (N. S.) 439; *Camron* v. *State* (1893) 32 Tex. Cr. Rep. 180, 22 S. W. 682. Often the defendant pleads guilty to one or more indictments in consideration that other indictments be dismissed: *State* v. *Kiewel* (1926) 166 Minn. 302, 207 N. W. 646; *State* v. *Lopez* (1854) 19 Mo. 255; *State* v. *Keep* (1917) 85 Ore. 265, 166 Pac. 936. And the prosecuting attorney may agree to dismiss the original felony charges in an indictment if the defendant will plead guilty to a lesser offense: Rep. of Sub-Commission on Statistics of Crime Commission of N. Y. State (1927) p. 8. In one case the indictment against the accused was dismissed in order to make his wife a competent witness against the other defendants: *Rios* v. *State* (1898) 39 Tex. Cr. Rep. 675.

In practice the condonation and compromise of criminal cases is frequent: *J. Miller* "The Compromise of Criminal Cases" (1927) 1 So. Cal. L. Rev. 1. Admittedly such a course offers a premium to treachery and sometimes permits the more guilty to escape, yet it tends to break up criminal combinations and to lead to the punishment of those who might otherwise escape. Courts generally agree that the accused who has advanced information to aid the state should be given some protection. In any event, it would seem that the courts and the prosecution are bound in honor, at least under some circumstances, to carry out the understanding whereby a witness testifies and admits, in so doing, his own turpitude: *United States* v. *Lee* (1846) 4 McLean 103, Fed. Case No. 15,588; *People* v. *Whipple* (N. Y. 1826) 9 Cow. 707; *Commonwealth* v. *St. John* (1899) 173 Mass. 566, 54 N. E. 254.

Assuming, then, that the practice of awarding immunity to criminals may be to some extent justified, it remains to determine which of several methods is the more expedient and effective in accomplishing the ends of the prosecution. In this respect the authorities are in conflict. As the present time, three methods are generally used: first, by the enforcement of the agreement between the prosecutor and the defendant made with the approval of the court: *Wight* v. *Rindskoff* (1877) 43 Wis. 344; *State* v. *Moody* (1873) 69 N. C. 29;

State v. *Graham* (1879) 41 N. J. 15; *Scribner* v. *State* (1913) 9 Okla. Cr. 465, 132 Pac. 933; Penal Code of Cal. (1931) secs. 1385, 1386; Ore. L. O. L. secs. 1696, 1697, 1699; *State* v. *Keep, supra; State* v. *Kiewel, supra;* second, by agreements between prosecutor and defendant without the knowledge of the court: *People* v. *Bogolowski, supra; Camron* v. *State, supra; Kansas* v. *Finch* (1929) 128 Kan. 665, 280 Pac. 910, 66 A. L. R. 1369; and third, by judicial recommendation to the chief executive that a pardon be granted: *United States* v. *Ford* (1879) 99 U. S. 594; *State* v. *Graham, supra; State* v. *Lyon* (1879) 81 N. C. 600; *Lowe* v. *State, supra; State* v. *Lopez, supra.* The question then is: What governmental official should have the final power to grant immunity—the prosecutor, the judge, or the chief executive? The best method would appear to be that adopted in the instant case wherein the prosecution and the court combined assume the power to dismiss criminal actions. Certain objections to the method which relies solely on executive pardon present themselves. First, there is the expense and delay of trial, appeal and review by the executive. Second, the necessary uncertainty accompanying a plea for executive clemency militates against a willingness on the part of the defendant to agree to any deal with the prosecution. Of course, the granting of immunity by the prosecutor alone is a questionable practice and subject to grave abuses. It is a weapon which may produce good results but the weapon is an extraordinarily dangerous one as its use is secret, it opens the prosecutor's to the "fixer," and it welcomes the play of outside influences upon criminal prosecution. The method followed in the instant case is not subject to these objections. On the contrary the combination of prosecutor and judge, the former with the intimate knowledge of the merits and necessities of the case, the latter with the power to curb an abuse of the power, is a complementary one. And the criminal, assured of a greater certainty that the agreement will be enforced, will, in all probability, be less reluctant to enter into such an agreement.

SAMUEL NICOSIA.

COURTS — STATE JURISDICTION OVER FEDERAL PROBATIONER.—[Federal] The defendant was indicted and convicted in a federal court for violating the provisions of the National Banking Act. In the face of extenuating circumstances his sentence was suspended and he was placed on probation. During this probationary period state authorities seized him for an alleged violation of a state statute without first obtaining the permission of the federal government. *Held:* the petitioner should be discharged from custody on the ground that he was under the exclusive jurisdiction of the federal court, although out on probation, and therefore not subject to prosecution by the state government without the consent of the federal authorities: *Grant* v. *Guernsey* (C. C. A. 10th 1933) 63 F. (2d) 163.

For jurisdictional purposes the federal and state governments are separate and distinct, each sovereignty having the right to punish offenders of its criminal law without molestation by the other. However, to prevent friction, the law rewards diligence in apprehending wrongdoers by giving to the court which first takes the sub-

ject-matter of the litigation into its custody, whether this be person or property, the right to exhaust its remedy before the other court may attempt to take it for its purpose: *United States* v. *Traeger* (C. C. A. 9th 1930) 44 F. (2d) 312; In re *Johnson* (1897) 167 U. S. 120, 17 Sup. Ct. 735; *Covell* v. *Heyman* (1884) 111 U. S. 176, 4 Sup. Ct. 355; *Taylor* v. *Taintor* (1872) 83 U. S. 366; *Abelman* v. *Booth* (1858) 62 U. S. (21 How.) 506.

The problem involved in the instant case is whether the probationer can be considered to be in the custody of the federal authorities so as to clothe them with exclusive jurisdiction over him. The term "custody" is one susceptible of broad interpretation and may be a convenient vehicle to a desirable result. The question then devolves into one of expediency rather than one of mere definition. It is worthy of note that the term "custody" is not limited to actual physical detention but is capable of receiving a more liberal interpretation so as to embrace constructive possession, as where it has been held that a writ of habeas corpus will issue even though the petitioner is at liberty on bail: *Adamy* v. *Parkhurst* (C. C. A. 6th 1932) 61 F. (2d) 517; *MacKenzie* v. *Barrett* (C. C. A. 7th 1905) 141 Fed. 964. In an analogous situation it has been held that one out on parole is in "custody" so as to be immune to extradition in the absence of waiver of jurisdiction: *Cozart* v. *Wolf* (1916) 185 Ind. 505, 112 N. E. 241. *Cf. State* v. *Freauff* (1926) 117 Ore. 214, 243 Pac. 87.

The doctrine of comity which exists between both sovereignties makes possible the smooth administration of governmental processes with the aim of achieving justice. An excellent example of this cooperation is evidenced by the case of *Ponzi* v. *Fessenden* (1922) 258 U. S. 254, 42 Sup. Ct. 309, which held that a federal prisoner, while serving sentence, may be lawfully taken on a writ of habeas corpus with the consent of the Attorney-General, into a state court and there put on trial upon indictments there pending against him. In the instant case no permission was sought or given by a federal official to try the defendant in a state court. Inasmuch as he was not incarcerated but out on probation, the necessity for obtaining this formal consent or approval was seemingly obviated. Certainly the federal government did not expressly prohibit the defendant's trial in the state court but on the contrary it might be said to have tacitly acquiesced. It is submitted that since the prior exclusive jurisdiction is a right of the court itself, and not a personal privilege of the defendant, the latter should not be permitted to avail himself of that defense: United *States* v. *Taylor* (D. C. Tenn. 1921) 284 Fed. 489; *United States* v. *Marrin* (D. C. Penn. 1915) 227 Fed. 314. So far as the prisoner is concerned, it is well-settled that he may not be heard to complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction for crimes against it: *United States* v. *Taylor, supra;* In re *Andrews* (D. C. Vt. 1916) 236 Fed. 300. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial: *Ponzi* v. *Fessenden, supra.*

It was aptly pointed out in the

dissenting opinion that the trial in the state court would violate none of the conditions of the defendant's probation. For this reason it may be that the federal authorities declined to assert their rights to the custody of the defendant. At any rate, it is universally conceded that delay in trial is one of the greatest hindrances in securing criminal justice and where that obstacle may be overcome with little difficulty it should readily be done. Since no great harm could have been done in the case under consideration, the state should have been permitted to proceed with the trial, although it could not have carried out any sentence inconsistent with the terms of the defendant's probation. The doctrinal result of the instant case imposes no great hardship on the state because the federal government, in a spirit of reciprocal comity, probably would have relinquished control over the defendant if requested so that he could be tried in the state court.

STANLEY GORDON.

MURDER — PLEA OF GUILTY BY PERSON PRESUMED TO BE INSANE.— [Illinois] The defendant, a fugitive from the state hospital for feebleminded and epileptic persons, in which he had been confined by order of the juvenile court, killed the deceased in an attempted holdup. Arraigned shortly thereafter, he pleaded not guilty, indicating at the same time that his defense would be insanity. In view of this fact the court directed two alienists to examine him for the purpose of determining whether he was mentally competent. On the day set for the submission of their conclusions, however, the defendant asked leave to withdraw his former plea and to substitute a plea of guilty. Although the only evidence of his restoration to sanity was an unsworn report by the state's psychiatrist, the court accepted it as conclusive and granted the accused's request. Then, other testimony relating to his mental condition having been introduced in mitigation and aggravation of the offense at the hearing, sentence of death was pronounced. *Held:* on appeal, reversed and remanded. The mental competence of a defendant, who has been adjudicated insane and who is therefore presumed to continue to be so, must be proved by the state before a plea of guilty is entered, not subsequent to it. And the mere unsworn statement in writing of an alienist, even if seasonably offered, will not operate to rescind the decree of a court of record finding the accused to be feeble-minded: *People* v. *Varecha* (1933) 353 Ill. 52, 186 N. E. 607.

The universal rule, embodied in a long line of decisions, has always been that a plea of guilty may be received only if made freely and voluntarily and with complete understanding of its nature and effect: *Fogus* v. *U. S.* (1929) 34 F. (2d) 97; *Pope* v. *State* (1909) 56 Fla. 81, 47 So. 487; *People* v. *Utter* (1920) 209 Mich. 214, 176 N. W. 424. Thus a conviction based upon such a plea must be reversed whenever it appears that the defendant acted under a misapprehension of its consequences: *People* v. *Lavendowski* (1927) 327 Ill. 173, 157 N. E. 193; *People* v. *Byzon* (1915) 267 Ill. 498, 108 N. E. 685; *People* v. *Kleist* (1924) 311 Ill. 179, 142 N. E. 486; *People* v. *Carzoli* (1930) 340 Ill. 587, 173 N. E. 141; or in reliance upon an unfulfilled promise by the public prosecutor: *Lowe* v. *State* (1909) 111 Md. 1, 73 Atl.

637; *People* v. *Bogolowski* (1925) 317 Ill. 460, 148 N. E. 260; *contra: Camarata* v. *U. S.* (1924) 2 F. (2d) 650; or upon a false assurance by counsel that he had "arranged" matters with the state's attorney: *People* v. *Walker* (1911) 250 Ill. 427, 95 N. E. 475. Likewise, since volition and understanding on the part of the accused are requisites for a plea of guilty, and since the defense of insanity would be inconsistent with it, no person of unsound mind will be allowed to plead guilty: *Taylor* v. *State* (1918) 88 Tex. Cr. Rep. 470, 227 S. W. 679. The correct procedure is to consider the issue of mental infirmity under a plea of not guilty: *Yantis* v. *State* (1923) 95 Tex. 541, 255 S. W. 180; *Ex parte Maple* (1930) 116 Tex. Cr. Rep. 383, 33 S. W. (2d) 734.

If, however, a defendant with no previous record of insanity pleads guilty, his subsequent motion for the suspension of sentence lies within the broad discretion of the court: *People* v. *Croce* (1929) 208 Cal. 123, 280 Pac. 526. And the same is true when an accused, on other grounds, seeks to withdraw a plea of guilty: *State* v. *Shropulas* (1927) 164 La. 940, 114 So. 844; *State* v. *Yates* (1894) 52 Kan. 566, 35 Pac. 210. Indeed a rule to the contrary "would be replete with mischief," causing undue delay and working great hardship upon the state: *Clark* v. *State* (1895) 57 N. J. L. 489, 31 Atl. 979.

All of these principles seem to be settled law. Appreciable difficulties arise only when courts apply them to situations in which presumptions of insanity are involved. These may have their origin in a statute, such as the one in Illinois, which specifically provides that an adjudication of feeble-mindedness "shall stand and continue binding upon all persons whom it may concern until rescinded or otherwise regularly superseded or set aside: Ill. Rev. Stat. (Smith-Hurd 1931) ch. 23 sec. 354. But independently of any legislation upon the subject, it has been held in practically all jurisdictions that where insanity is proved as existing at a particular period it will be presumed to continue until disproved: *People* v. *Maynard* (1932) 347 Ill. 422, 179 N. E. 833; *Allams* v. *State* (1905) 123 Ga. 500, 51 S. E. 506; Cochran v. *State* (1913) 65 Fla. 91, 61 So. 187. *Contra: Commonwealth* v. Calhoun (1913) 238 Pa. 474, 86 Atl. 472. The only qualifications are: (1) that the insanity must be of a permanent, continuing, or habitual type and not merely spasmodic or temporary: *Sims* v. *State* (1903) 17 Tex. Cr. Rep. 962, 99 S. W. 555; *People* v. *Schmitt* (1895) 106 Cal. 48, 39 Pac. 209; and (2) that not too long a period elapse between the finding of mental incompetence and the commission of the crime charged: *People* v. *Maynard, supra.*

Since the accused in the instant case met both requirements, a presumption of insanity existed in his favor, which the state was obliged to rebut in order to validate the plea of guilty. This duty it performed to the entire satisfaction of the trial judge; but the Supreme Court was of the opinion that the plea should not have been received, because proper evidence of the defendant's sanity had not been presented until after, instead of prior to, its acceptance.

The question then arises whether, as a matter of practical administration, the time of proof really makes such substantial difference as to constitute prejudicial error. To this the answer must be in the nega-

tive. In fact, if any method is to be preferred for utilitarian reasons, it is the one criticized by the Supreme Court. For, if the determination of the defendant's mental condition were permitted after his plea of guilty, the State, spared the necessity of proving every element of the crime, would be able to save both time and money. As a result of this decision, however, public prosecutors when dealing with criminals who are presumed to be insane will prefer to try the issue of mental competency under a plea of not guilty, rather than go to the extra expense of providing the special sanity proceedings impliedly required before a plea of guilty by the wording of our statute: Ill. Rev. Stat. (Smith-Hurd 1931) ch. 23, sec. 354.

But, disregarding purely practical considerations, the holding of the Supreme Court seems sound. Legal terms, though not inflexible, have their breaking point, beyond which they may not be strained if their integrity is to be preserved. Thus a plea of guilty has always been defined as a voluntary confession in open court by a *sane* person, fully capable of appreciating its consequences. To say therefore that a plea of guilty may be entered by one who may or may not be insane but who is presumed to be so would lend to that term a connotation entirely foreign to it. Accordingly, the Supreme Court, motivated in all probability by a desire for logical consistency, delivered the present opinion. But it may be suggested that the court could have effected a convenient compromise by endowing the trial judge with discretionary powers on a motion to withdraw a plea of guilty because of a prior adjudication of insanity instead of granting the defendant's petition as a matter of right. *Cf. People* v. *Croce, supra.*

SAMUEL ZELKOWICH.