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Can a Defendant Explain a Previous Conviction Used for Impeachment Purposes

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Can a Defendant Explain a Previous Conviction Used for Impeachment Purposes?

In a recent federal case, *United States v. Boyer*,[1] wherein the defendant was charged with obtaining money under false pretenses, the prosecution sought to impeach the defendant's testimony by inquiring about certain previous convictions on "bad check charges" and embezzlement. The defendant was allowed to say in explanation that the "bad check charges" were all due to a mistake of his secretary. The trial court did not allow him, however, to explain the circumstances of the previous conviction for embezzlement. On appeal from the defendant's conviction the court held that although the trial court's refusal to let the defendant offer any explanation of one conviction was technically wrong, it did not justify a reversal, for in view of the number of his previous convictions submitted in evidence, the failure to explain only one of them could not have affected the verdict in this particular case. The court laid down the rule that whether or not a defendant may explain a previous conviction should be left to the wide discretion of the trial judge.[2]

Most jurisdictions allow previous convictions of the defendant to be shown for purposes of attacking his credibility as a witness.[3] The controversial issue here is whether the accused should be allowed to make a brief protestation and explanation of his prior convictions. The courts which adhere to the strict rule and refuse to hear evidence designed to mitigate and rebut the impeachment take the position that a conviction by a competent court is conclusive proof of guilt and to allow such explanations opens the way to a collateral inquiry which may confuse and divert the attention of the jury from the real issue they were impanelled to try.[4] There would be a re-investigation of the former case; for if the defendant were permitted to explain, then the state should be allowed also to rebut the explanation.[5] The glib tongue of the accused would be a prolific source of alibis and explanations, and the threat of penalties for perjury would be of no avail to guarantee the authenticity of such explanations. Furthermore, an explanation of a conviction would allow the uncorroborated, oral testimony of witnesses to refute and contradict the verity of a judgment of a court of record.[6]

On the other hand it is argued that a brief protestation and explanation of a conviction would not seriously disrupt and prolong

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[1] 150 F. (2d) 595 (App. D. C. 1945).

[2] It is difficult to find strict consistency in the rule articulated by the court. On the one hand the opinion states that the admissibility of the defendant's explanation should be left to the wide discretion of the trial judge, and then asserts that the trial court was technically wrong in not allowing the defendant to give a brief explanation of his previous conviction of embezzlement. If the trial court is to be regarded as having exercised such discretion in not allowing the explanation, it could hardly be said that it was technically wrong.

[3] Wigmore, Evidence (3rd ed. 1940) §980(1), §987(4); Chandler, Attacking Credibility of Witnesses by Proof of Charge or Conviction of Crime (1932), 10 Tex. L. Rev. 257, 258.

[4] Lamoureux v. New York, New Haven & Hartford Ry. Co., 169 Mass. 338, 47 N.E. 1009 (1897); Smith v. State, 102 Miss. 530, 59 So. 96 (1912); State v. Evans, 145 Wash. 4, 258 Pac. 845 (1927).

[5] State v. Jones, 249 Mo. 80, 155 S.W. 33 (1913); State v. Lapan, 101 Vt. 124, 141 Atl. 686 (1928).

[6] State v. Kimmell, 156 Mo. App. 461, 137 S.W. 329 (1911); State v. Leo, 80 N.J.L. 21, 77 Atl. 523 (1910); Territory v. Garcia, 15 N.M. 538, 110 Pac. 838 (1910); State v. Keiller, 50 N.D. 728, 197 N.W. 859 (1924).

the proceedings of the issue being tried. The witness should be permitted to state the nature of the offense for which he was convicted, so that the jury may better tell the extent to which his credibility is impaired.[7] The prior conviction is admitted solely for purposes of impeachment, yet, where the defendant in a criminal case is the witness, such evidence unwittingly may have great influence on the jury and in their minds may prove his guilt of the crime for which he is then being tried.[8] A previous conviction of perjury or of an infamous crime undoubtedly reflects upon a person's credibility and veracity as a witness; however, most states allow the introduction of other types of convictions that involve no moral turpitude, such as involuntary manslaughter and lesser violations of the criminal law, and it would be most unreasonable to bar the defendant from explaining the circumstances behind such convictions.[9] Since not all guilty men are equally guilty and some convicted men are innocent,[10] the defendant should be allowed to explain his previous conviction for purposes of eliciting facts which may mitigate his guilt[11] in conformance with the prevailing policy of giving the defendant the benefit of the doubt.

Modern theories of penology would warrant carrying the argument one step farther with the contention that conviction and imprisonment should not affect the defendant's trustworthiness and credibility, for his incarceration was a period of reform and rehabilitation.[12] After his release he should be considered as having a clean slate and should not be prejudiced by his previous conviction. The argument has merits especially where the accused had been given an indeterminate sentence and his release was obtained only after a scientific study had proved him to be fully rehabilitated and ready to reenter society.[13] However, at present penologists are given so little control over the release and parole of convicts that complete reformation and rehabilitation are not common. Thus the argument would gain little reception in most courts today.[14]

The justification for the admissibility of convictions is based on the theory that the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testi-

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[7] Dixon v. State, 189 Ark. 812, 75 S.W. (2d) 242 (1934); Calvert v. State, 106 Tex. Cr. R. 245, 291 S.W. 906 (1927); Remington v. Judd, 186 Wis. 338, 202 N.W. 679 (1925).

[8] Rice v. State, 195 Wis. 181, 217 N.W. 697 (1928) (Where defendant, being tried for taking indecent liberties with small girl, had been previously convicted of similar crime). *But see*, Harris, Hints on Advocacy (American ed. 1892) 112: "There cannot be a greater mistake than to suppose that a man who is suffering punishment for a crime, and who comes into the box to give evidence, will not be believed because of his character. You will generally find that he is regarded with sympathy to begin with. The jury will weigh his evidence scrupulously; and their attention will be naturally drawn towards the probabilities of his story. If you cannot touch these, you will make little effect by constantly referring to his misdeeds. . . . It is testimony, and not character, you must deal with in this witness."

[9] Burgess v. State, 161 Md. 162, 155 Atl. 153 (1931); State v. Johnson, 76 Utah 84, 287 Pac. 909 (1930).

[10] Borchard, Convicting the Innocent (1932).

[11] Smith v. Commonwealth, 161 Va. 1112, 172 S.E. 286 (1934) (Defendant's previous conviction was caused by perjured testimony).

[12] Barnes and Teeters, New Horizons in Criminology (1943).

[13] Cantor, Crime, Criminals, and Criminal Justice (1932) 353, 395; Comment (1938) 3 John Marshall L. Q. 580.

[14] See notes 12 and 13 *supra*.

fying.[15] Therefore, it would seem that a conviction founded on a violation of municipal ordinances or for misdemeanors involving no element of inherent wickedness should not be allowed to be introduced to impeach a witness's credibility; and if such convictions are allowed in evidence, then the witness should be permitted to give an explanation so that he will not be unduly prejudiced by the impeachment.[16]

The authorities agree that all previous arrests and indictments charged to a witness on cross-examination should be allowed to be explained away on redirect examination, for such charges, where there were no subsequent convictions, are mere accusations of misconduct and do not evidence acts of misconduct nor affect the credibility of a witness.[17] The rule followed by most jurisdictions excludes such charges from being introduced at all since they carry so little weight in impeachment, and what little weight they do carry is unjustly prejudicial to the witness.[18] Also, a witness should be allowed to explain a conviction where, subsequent thereto, he was adjudged not guilty by reason of insanity;[19] or that the conviction was reversed on appeal.[20]

Since full pardon gives a new character to the person convicted, and re-establishes his credibility as a witness, a defendant should be allowed to introduce the pardon to offset the impeachment. As proof of the conviction of the accused is presented for the purpose of impeaching his credibility, proof of pardon, whether granted before or after the term of imprisonment has expired, is equally relevant to that issue. Thus it would seem to be prejudicial error to deny to the accused the right to introduce such pardon.[21] However, some authorities take issue on this point and contend that where a pardon has followed a previous conviction, the latter's admissibility for purposes of impeachment should not be affected be-

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[15] Lamoureux v. New York, New Haven & Hartford Ry. Co., 169 Mass. 338, 47 N.E. 1009 (1897); State v. Evans, 145 Wash. 4, 258 Pac. 845 (1934).

[16] Clowans v. District of Columbia, 62 F. (2d) 383 (App. D.C. 1932); Harper v. State, 106 Ohio St. 481, 140 N.E. 364 (1922). *Cf.* Bostic v. U.S., 94 F. (2d) 636 (App. D.C. 1937). *Contra:* State v. Lapan, 101 Vt. 124, 141 Atl. 686 (1928) (Where defendant being tried for murder was not allowed to explain a conviction based on a breach of the peace).

[17] State v. Weisman, 238 Mo. 547, 141 S.W. 1108 (1911); Anderson v. State, 113 Tex. Cr. R. 450, 21 S.W. (2d) 499 (1929); Wigmore, Evidence (3rd ed. 1940) §1117(4).

[18] Jones, Evidence (2nd ed. 1926) §2370; State v. Greenberg, 59 Kan. 404, 53 Pac. 61 (1898); Kennedy v. International Great Northern Ry. Co., Tex. Com. App., 1 S.W. (2d) 581 (1928). *Contra:* State v. Maslin, 195 N.C. 537, 541, 143 S.E. 3, 6 (1928): "But an indictment duly returned as a true bill, while in a sense an accusation, is much more than a bare charge; it is an accusation based upon legal testimony and found by the inquest of a body of men, not less than twelve in number, selected according to law, and sworn to inquire into matters of fact, to declare the truth, and as preliminary to the prosecution to find bills of indictment when satisfied by the evidence that a trial ought to be had."

[19] People v. Hoenschle, 132 Cal. App. 387, 22 P. (2d) 777 (1933).

[20] Bolling v. U.S., 18 F. (2d) 863 (C.C.A. 4th, 1927); Benedict v. State, 190 Wis. 266, 208 N.W. 934 (1926).

[21] Bryant v. U.S., 257 Fed. 378 (C.C.A. 5th, 1919); Perry v. State, 146 Fla. 187, 200 So. 525 (1941); State v. Taylor, 172 La. 20, 133 So. 349 (1931); Gaines v. State, 95 Tex. Cr. R. 368, 251 S.W. 245 (1922).

cause a pardon is not based upon a finding of innocence unless the pardon expressly so declares.[22]

Since it is probable that cases will arise where it would be extremely unjust to forbid a defendant to extenuate his guilt in a previous conviction, the strict rule forbidding explanations of convictions would bring with it a sub-standard type of justice. The suggestion in the principal case,[23] to the effect that a wide discretion be given to the trial court judge in determining whether the defendant should be permitted to explain his prior conviction, is a very practical solution to the problem.[24] He is best able to observe the witness and counsel and to estimate the effect such evidence will have on the jury.[25] In addition the trial judge is in the best position to determine the extent to which the admission of such evidence will divert the court from the real issue of the case.

The defendant can be admonished as to the penalties of perjury,[26] and his explanation limited to a brief statement or two. If the trial judge gives the accused too much leeway, it is likely that the jury would give very little credence and weight to an ex-convict's uncorroborated assertion of innocence or of extenuating circumstances. In the words of Wigmore, "It would seem a harmless charity to allow the witness to make such protestations on his own behalf."[27]

Thus in the principal case,[28] the court, in advocating a liberal policy toward admitting explanations of a defendant's prior convictions, has logic and justice substantiating its decision, and has set a sound standard for other jurisdictions to follow.

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[22] Gallagher v. People, 211 Ill. 158, 168, 81 N.E. 842, 847 (1904); Wigmore, Evidence (3rd ed. 1940) §980(3); Curtis v. Cochran, 50 N.H. 242 (1870): "A pardon is not presumed to be granted on the ground of innocence or total reformation. It removes the disability, but does not change the common-law principle that the conviction of an infamous offence is evidence of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the executive or legislative branch of the government."

[23] U.S. v. Boyer, 150 F. (2d) 595 (App. D.C. 1945).

[24] Donelly v. Donelly, 156 Md. 81, 143 Atl. 648 (1928).

[25] *See* U.S. v. Boyer, 150 F. (2d) 595, 596 (App. D.C. 1945).

[26] Mas v. U.S., 151 F. (2d) 32 (App. D.C. 1945).

[27] Wigmore, Evidence (3rd ed. 1940) §1117(3).

[28] U.S. v. Boyer, 150 F. (2d) 595 (App. D.C. 1945).