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Criminal Law Case Notes and Comments: Abstracts of Recent Cases

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to the above similarities, added elements are present supporting parallel application. Prior to the *McNabb* decision, confessions secured under the circumstances of that case were still open to scrutiny by the trial court under the voluntary-trustworthy test, giving to the alleged confessor a safeguard in spite of the methods used by the enforcement officers.⁵² There is no like safeguard in the conspiracy situation. Once indicted, the defendant is subject to the gauntlet of risks inherent in the conspiracy trial without a trial court's inquiry into the sufficiency of the grounds for indictment. Furthermore, the application of the supervisory power in the conspiracy field is more likely to attain effective results since the Court is dealing with a grade of federal officers who would understand and comprehend its decision.⁵³

Past decisions of the Supreme Court, if not in their direct holding, yet in their practical interpretation, have generally limited the possible employment of conspiracy indictments.⁵⁴ In as far as the actual grounds for reversal are concerned, the instant case cannot be said to have a similar result, but must rather be seen as a prevention of a further extension of the conspiratorial concept by means of an implied conspiracy theory. It is suggested however that the concurring opinion is indicative of a stirring in the Court which could result in the addition of another decision to the short but important list of cases limiting the use of conspiracy indictments in the federal courts.

KENNETH J. BURNS, JR.

Abstracts of Recent Cases

Wiretapping Upheld If One Party to the Conversation Consents—In *United States v. Lewis*, 18 L. W. 2323 (D. C. Dist. Ct. 1950), recordings of a telephone conversation were admitted into evidence as not being in violation of the Federal Communications Act which would prohibit their use. It was held that such recordings without the permission of either party to the conversation would be illegal, but consent of one of the parties made it proper. The court decided that since there was no pro-

(1929) 206 ("The State's Attorney normally dominates the grand jury, and can obtain an indictment if he wishes on a very slight showing. In the investigation before the grand jury, the state's attorney has a free hand . . . the members depend on him for the law." *Id.* at 299).

⁵² See Inbau, *Confession Dilemma in the United States Supreme Court* (1948) 43 Illinois L. Rev. 442 (the author indicates that from the standpoint of protection of innocent defendants, the *McNabb* case was unnecessary, since the voluntary-trustworthy test was available and adequate.).

⁵³ *Ibid.*, where the author indicates the practical view that the average police officer would not be sensitive to the decision of the Supreme Court. The same cannot be said regarding United States Attorneys who are officers of the federal courts.

⁵⁴ *United States v. Katz*, 271 U.S. 354 (1926) (conspiracy indictment will not lie where the substantive offense cannot be committed without joint action.); *cf.* *Gebardi v. United States*, 287 U.S. 112 (1932) (conviction on a conspiracy charge reversed due to the Court's interpretation of the controlling statute as not punishing petitioner's participation in the offense, but accord is given the theory of the *Katz* decision); *Braverman v. United States*, 317 U.S. 49 (1942) (although conspiracy may contemplate several offenses, each offense does not render the agreement punishable as a separate conspiracy.); *Sealfon v. United States*, 332 U.S. 575 (1948) (*res adjudicata* applied as a limitation on the use of conspiracy indictment in addition to prosecution on charge of aiding and abetting), see Note 39 J. Crim. L. & Criminology (1948) 58 for enlightening remarks regarding the case; *Kotteakos v. United States*, 328 U.S. 750 (1946) (Held: petitioner has a right not to be tried for a conglomeration of separate conspiracies.).

hibition against one party to a telephone conversation making recordings of the conversation, and the rule should be no different just because a third party actually did the recording but with the consent of a conversing party. This decision is contrary to the ruling of the Federal Communications Commission on the same point, and also to a decision of another federal court, in *United States v. Polakoff*, 112 F. (2d) 888 (C. A. 2d 1940). The Commission will authorize one party to the conversation to record the talk only if the other party is kept continuously aware that a recording is being made. From that it follows that third parties must also inform both sides in the conversation that they are listening in. This subject is becoming of increasing importance in federal courts, and may be argued before the Supreme Court before long, so this case is not the last word on it. (For a discussion of the law on wiretapping generally, see Vol. 40, page 476 of this *Journal*.)

Insanity after Sentencing—The United States Supreme Court decided that a state was not required to give a sentenced person who claims insanity since receiving his sentence a hearing on this matter, in *Solesbee v. Balkcom*, 70 S. Ct. 457 (1950). There the complainant had been sentenced to death by the Georgia courts, but claimed that since that time he had become insane and so could not be executed. The Governor received a report from several psychiatrists sent to examine him that he was still sane, and so refused to stay his sentence. The Supreme Court felt there was no question of denial of due process here. The majority found that the rule in Georgia was, as elsewhere, that an insane man would not be executed, but this did not mean that the 14th Amendment required any particular procedure in finding whether the person was insane. So long as the post-sentence procedure is fair, there is no requirement of any particular type of hearing, or a hearing at all. This was based upon the decision in *Williams v. New York*, 337 U.S. 241 (1949), where it was held that once the person was convicted in a proper trial, he could not demand the same sort of procedure for all subsequent occurrences, such as the decision of the length of his sentence or whether he should be put on probation. The dissent in the *Solesbee* case felt that the real decision of the majority was that an insane man could be executed.

Res Judicata Effect of a Denial of Habeas Corpus—In *Barrett v. Hunter*, 18 U.S.L. Week 2388 (10th Cir. 1950), the Federal Circuit Court of Appeals applied §2255 of the Criminal Code that when a district court passes upon a petition for habeas corpus this decision becomes res adjudicata as to all later petitions unless new matter is alleged which the petitioner could not have known at the time of the first petition. Prior to the enactment of §2252 the federal courts would entertain all petitions of a federal prisoner no matter how many times before he had been denied his freedom on the same grounds. The result was that some federal prisons became regular habeas corpus factories, some prisoners submitting a fabulous number of petitions until the federal courts were completely inundated. The purpose of §2255 was to correct this, and still provide an adequate remedy for prisoners who are improperly detained, by leaving it within the discretion of the second judge to decide whether new developments or some other reason made it necessary for him to consider the new petition.

Evidence Found During Search Incident to Arrest for a Misdemeanor Admissible in Larceny Prosecution—In *Arthur v. State*, 86 N.E. (2d) 698 (Ind. 1949), the defendant was stopped by a police officer for driving a car without proper identification, bill of sale and license plates. Incident to this arrest the automobile was searched and the money which the defendant was alleged to have stolen in the instant case rolled out of the glove compartment when it was opened. In over-ruling a claim of unreasonable search and seizure, the Indiana Court held that (1) a person lawfully arrested for a misdemeanor may be searched without a warrant and the search may extend to an automobile which he was operating at the time of the arrest, and (2) that evidence of another crime, discovered in this manner, may be used at the trial of the defendant for that crime.

The fact that automobiles may be searched without a warrant for evidence of a reasonably suspected crime rests on the sound practical consideration that an automobile is a highly mobile vehicle and may be removed from the jurisdiction while a search warrant is being obtained. This is recognized, even under the more stringent Federal rule. (See the discussion of *Brinegar v. U. S.*, (1949) 40 J. Crim. L. & Criminology 393, and also, upon the general subject (1947) 38, at p. 239.) However, the admission of evidence of another crime than that for which the arrest was made is on more dubious grounds since it tends to encourage mere fishing expeditions, particularly when extended to misdemeanors which include all traffic law violations. While upheld in this case, it is a highly questionable procedure and is not recognized in many cases purporting to follow the Federal rule.
