Journal of Criminal Law and Criminology

Volume 43 | Issue 6 Article 7

1953

Abstracts of Recent Cases

vision in the Model Code would remove the only serious objection to Rule 405 as it now stands. There should be no reason why a competent and willing expert could not be found if the trial judge, acting under Rule 410, provides for an adequate fee. Thus modified, the provisions of the Model Code would seem to answer most of the problems confronting the expert witness and the party-litigant who needs his services. While the expert's fee would be provided for, the litigant who is financially unable to hire an expert witness would nevertheless have the advantage of his services.

Abstracts of Recent Cases

Admissibility of Documentary Evidence to Impeach Witness—In *Gordon v. United States,* 73 S.Ct. 369 (1953), a case involving the unlawful possession and transportation of stolen goods in interstate commerce, petitioners were convicted largely on a statement made by Marshall, the chief prosecuting witness. On cross-examination it was brought out that Marshall, between the time of his apprehension and his final statement to the Government, had made three of four statements which did not implicate petitioners. A request that the trial judge order the Government to produce these earlier statements was denied. Cross-examination also revealed that prior to his statement incriminating petitioners, the prosecuting witness had pleaded guilty to the possession of stolen property in a Federal Court in Detroit, and was still unsentenced although nine months had elapsed. The trial judge refused to admit into evidence a transcript of the Detroit proceeding which indicated that Marshall had been warned he could expect no recommendation for lenient sentence or probation unless he satisfied the probation department he had given his complete cooperation to the law enforcement agencies.

The *Court of Appeals* affirmed the trial court's rulings on the ground that Marshalls' admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements, and the admission was all the accused were entitled to.

The *Supreme Court,* however, speaking first on the exclusion of the prior statements which did not incriminate petitioners, held these exclusions to be prejudicial error. By cross-examination defense counsel had laid a foundation for his demands by showing the documents existed, were in the possession of the Government, were contradictory to present testimony, and were relevant to material matters bearing on the main issue. He was therefore entitled to a court order requiring production of the documents. The excluded documents were a more reliable and complete source of information than a mere description of them, and would best inform the jury as to the document's impeaching weight and significance.

It was also error to refuse to admit the transcript of the prior case involving Marshall, as it was a question for the jury as to what effect the words of the judge might have had upon his mind and conduct.

Evidence Allegedly Obtained by Illegal Means; Who May Assert Rights Under "Search and Seizure" Clause—In *United States v. Weinberg,* 108 F. Supp. 567, (D.D.C. 1952), defendant was indicted by a Grand Jury and charged with perjury under Title 22, §2501 of the District of Columbia Code.

Defendant sought to set aside the indictment and to suppress evidence allegedly obtained by illegal means; *i.e.*, interception of telephone communications, mail, and the recording of conversations in private homes. He also specifically denied being a party to particular calls which he contended initiated a surveillance of his activities.

The Court refused to set aside the indictment, holding that the defendants affidavit's did not allege that any evidence would in fact be offered by the Government based on intercepted messages, and did not give reasonable assurances [as required by *Nardone v. United States,* 308 U.S. 338 (1939)] that the challenged evidence was tainted.

Defendant was also precluded from the relief sought as he was not in a position to assert the right. Relying on *Goldstein v. United States,* 316 U.S. 114 (1942), the Court held that so long as he refused to affirmatively identify himself as a party to the intercepted communications, he was not within the purview of the Fourth Amendment protection against unlawful search and seizure.

Use of Perjured Testimony to Obtain a Conviction—In *United States v. Spadafora,* 200 F.2d 140 (7th Cir. 1952), appellant filed a petition in the district court to vacate trial court proceedings which he alleged were fraudulent. To support the petition he cited inconsistent testimony, attached affidavits from himself and a co-defendant, and two other affidavits in the possession of the clerk of the court which were claimed would show him innocent. Appellant's affidavit also made numerous statements as to what various people would testify if called as witnesses; *i.e.*, that certain witnesses at the trial had perjured themselves.

While holding that the petition might properly have been dismissed under Title 28 U.S.C. §2255 (Supp. 1952), the court nevertheless considered the merits. As a general proposition, a criminal conviction procured by the use of testimony known by the prosecuting authorities to be perjured, and knowingly used by them in order to procure a conviction, violates the defendant's constitutional rights. *Mooney v. Holohan,* 294 U.S. 103 (1935). But a defendant has the burden of making a showing, not only that material perjured testimony was used to convict him, but that it was knowingly and intentionally used by the prosecuting authorities in order to do so. *Cobb v. Hunter,* 167 F.2d 888 (10th Cir. 1948). In the present case it was held the petitioner had not made a substantial showing. Trivial conflicts in testimony do not constitute perjury, and unsupported broad charges that perjury was committed by some witnesses or that perjured testimony was knowingly used will not suffice.

Cross-Examination Question on Defendant's Prior Plea of Guilty—In *State v. Weekly,* 252 P.2d 246 (Wash. 1952), defendant had pleaded guilty to the charge of attempted rape, but later obtained leave to withdraw this plea and enter a plea of not guilty. During the trial, the prosecuting attorney asked him the following question: "Mr. Weekly, on the 3rd day of September, 1951, did you appear in Judge Greenough's Court with your counsel, and enter a plea of guilty to this charge?" Objection to the question was sustained and the jury was instructed to disregard it. Defendant contended on appeal that the question was so prejudicial the trial court erred in not declaring a mistrial.

In sustaining the conviction, the majority in the court held the defendant must show that counsel did not act in good faith, and that asking the question

was in fact prejudicial. The good faith of counsel could be tested by these inquiries: Was the question based upon facts established by the record? Was it material and relevant? Did counsel have any basis for a belief that the court would overrule an objection to it? Did counsel abide by the ruling of the court and not pursue the inquiry after the objection was sustained? The court resolved these questions in favor of the prosecuting attorney. Nor was defendant prejudiced in not being permitted to explain the circumstances under which he made his plea of guilty. This privilege is allowed only on affirmance of the admission, which was not done in this case.

Mr. Justice Weaver, dissenting, applying what seems to be the majority rule, was of the opinion that the prosecutor's question, although stricken, was so prejudicial to appellant that no instruction to the jury could obviate its damaging effects. Merely asking it was enough to prevent a fair trial. See *Kercheval v. United States,* 274 U.S. 220 (1927); and cases referred to in 124 A.L.R. 1527 (1940).

Mr. Justice Finley, dissenting specially, argued that changing a plea of guilty to one of not guilty is permitted and recognized as a right of the accused. During trial, the accused is entitled fully and completely to the benefit of a presumption of innocence, which will vanish if the prosecutor is entitled to ask the accused whether he had initially pleaded guilty to the crime charged.

Prejudicial Remarks of Court Directed at Defense Counsel—In *McMahan v. State,* 251 P.2d 204 (Okl. Cr. App. 1952), defendant contended that the trial court was guilty of misconduct in the swearing in of witnesses at the commencement of the trial and in making statements directed at the defendant's counsel which created prejudice against the accused in the minds of the jury. In the presence of the jury, the trial judge told defense counsel: "You cannot pull this one on me in this court."

The court held that there was no apparent justification for the remarks; that such remarks, in reprimand, are highly prejudicial if made in the presence of the jury, and may furnish grounds for reversal. In the present case, because of the absolute guilt of the accused established by the evidence, the court contended itself with modifying the sentence.

But see *People v. Amaya,* 251 P.2d 324, 328 (Cal. 1952). If the supposed prejudicial words are used by the court in an explanatory sense, having reference to a purported ambiguity in the wording of a question posed by defense counsel, no error results.

Appeal by Prosecutor to Pecuniary Interest of Jury—In *State v. Muskus,* 109 N.E.2d 15 (Ohio, 1952), defendant was tried for murder. He contended that the prosecuting attorney, in his closing argument to the jury, made certain statements so prejudicial as to require a new trial. The prosecutor implied that defendants' own lawyers considered him guilty, and also that it would cost the county considerably more money if they gave defendant a prison sentence rather than send him to the electric chair. Repeated objections to the arguments were made by counsel for the defendant but were overruled by the trial judge with a direction to the prosecuting attorney to "proceed".

The court held that such arguments would have a highly prejudicial effect on the minds of the jurors, particularly where tacit approval was accorded by the trial judge in directing the prosecutor to proceed. Such conduct served effectively to prevent consideration by the jury of the element of mercy unimpaired by prejudice. The case was remanded for a new trial.
