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Abstracts of Recent Cases

before he is found guilty of a second offense, and evidence of prior convictions is introduced during the trial.

An increasing number of jurisdictions have adopted methods of procedure under their habitual statutes which insure subsequent offenders the same measure of protection afforded other defendants in a criminal prosecution. Regardless of one's criminal past, a man is nonetheless entitled to be tried for a new crime without having his record used to prejudice his case before a jury. Illinois should afford him such protection.

Abstracts of Recent Cases

Evidence Obtained By Illegal Search Admissible In State Court—In *Irvine* v. *California,* 74 Sup. Ct. 381 (1954), defendant was convicted of book-making under the California anti-gambling laws. The proceeding was for a state crime in a state court. The evidence against defendant consisted of the federal gambling license (issued in accordance with the federal statute imposing a tax on the business of gambling) and evidence illegally seized by police in the following manner. A key was made to defendant's house. Then police bored a hole in the roof of his home. Using the key they entered and installed a microphone and attached it to a wire that ran through the hole in the roof to a garage where officers listened in relays. Twice more they used the key to enter the house in order to move the microphone into a closet and even the defendant's bedroom where he and his wife slept. Finally, after listening for more than one month, the police used the key to enter once more to arrest the defendant. At no time were the officers in possession of a search warrant. By the closest possible vote (four to affirm, one concurring, and four to reverse) the Supreme Court affirmed the conviction under the doctrine of *Wolf* v. *Colorado,* 338 U.S. 25 (1949). Under the latter decision it was held "that in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." In the present case the defendant sought resort to the exception to this rule embodied in *Rochin* v. *California,* 342 U.S. 165 (1952). The defendant's claim was that the facts of his case were just as shocking to the senses as were those in *Rochin.* The Court disagreed, however, stating that the dividing line between *Wolf* and *Rochin* is clear: in the latter case there was coercion upon the physical person. The instant case is like *Wolf* in that no such coercion was involved. In this situation the Court reasserts the policy factors lying behind the *Wolf* rule: namely, that since the chief burden of administering criminal justice rests upon the state courts it would be an unwarranted use of federal power to upset state convictions before the states have had adequate opportunity to adopt or reject the federal rule excluding illegally obtained evidence. Moreover, it would be unjustified to subject them to the hazards of federal reversal for non-compliance with standards as to which the Supreme Court itself has been so inconstant and inconsistent. The defendant's other contentions were more summarily dismissed. Because a microphone was used the Court held this was not a conventional wire-tapping case and therefore there was no interference with the communications system in violation of the Federal Communications Act. Also the federal act taxing gambling provides that payment of the tax does not exempt any person from punishment under state law. 53 STAT. 395, 26 U.S.C. §3276. As an alterna-

tive solution two Justices suggested that the defendant resort to the Federal Civil Rights Act for protection of his Constitutional rights. Justices Black and Douglas dissented on the ground that the Wagering Act violated the privilege against self-incrimination; Justices Frankfurter and Burton agreed with the defendant's contention that another exception should be carved from the *Wolf* doctrine; and Justice Douglas reasserted his belief that the Fourteenth Amendment should apply to bar evidence obtained by unlawful search from state courts. Justice Clark reluctantly concurred on the ground that certainty in the law should be maintained.

A Plea of Guilty May Be Withdrawn When Made Under Influence—Defendant pleaded guilty to a murder charge. After hearing evidence the court found him guilty and imposed a sentence of death. Defendant sought a new trial claiming that his plea was induced by the prosecutor's promise of leniency. The state's attorney admitted that in a conversation with defense counsel he stated that in his opinion only a plea of guilty could avoid a death penalty. In reliance on this statement defense counsel advised defendant to make a plea of guilty. On appeal held reversed, *People* v. *King,* 116 N.E. 2d 623 (Ill. 1953). The court admits the general rule that one who enters a plea of guilty, hopeful of leniency, cannot withdraw the plea merely because he is dissatisfied with the sentence imposed. However, where the death sentence is rendered, justice and all humane considerations require that the plea be free from any taint of misunderstanding, improper inducement by the prosecutor or anyone else in authority over the prisoner. In light of the conversation between the prosecutor and defense counsel the court concluded that it could not be said that defendant's plea was made clearly free from influence.

Acquittal For Variance Between Indictment and Proof Does Not Constitute Double Jeopardy—Defendant was indicted under a specific statute for burning an occupied dwelling. A motion for acquittal was granted because the state's proof dealt with the burning of an unoccupied house. Subsequently the grand jury returned another indictment for burning an unoccupied dwelling in violation of another specific statute. Defendant's appeal from conviction on ground of double jeopardy was denied. *State* v. *Midgeley,* 101 A.2d 51 (N.J. 1953). The court follows the prevailing rule that a person has been placed in jeopardy when he has been put on trial on a valid indictment or information before a court of competent jurisdiction, and has been arraigned and pleaded and a jury has been impanelled and sworn. But the court also recognizes the exception to the rule that when a person is acquitted on the ground of a material variance he cannot raise the plea of double jeopardy. This exception seems sensible on either theory that (1) the new indictment is for a different crime than charged in the first indictment or (2) the defendant cannot be placed in double jeopardy since he could not properly have been convicted upon the first indictment.

A Plea of Guilty to a Lesser Crime Than Charged in the Indictment Is Acceptable—In *People* v. *Carpenter,* 1 Ill.2d 347 (1953), defendant was indicted for the crime of murder and when arraigned he pleaded not guilty. Subsequently defendant sought and was granted permission to withdraw his plea of not guilty and thereupon he pleaded guilty to the crime of manslaughter. After being found guilty defendant appealed, claiming he should not have been allowed to change pleas since the indictment charged him with murder. In affirming the court reasoned that since murder includes the lesser

crime of manslaughter and that since a verdict of manslaughter would have been valid under a trial for murder, then a plea of guilty to the lesser offense is acceptable.

Instruction That Jury Might Find the Law as Well as the Facts Held Not Prejudicial—Petitioner had been convicted of murder in 1929. Under the Illinois Post-Conviction Hearing Act petitioner, Joyce, claimed that he was deprived of his constitutional right to trial by jury because, at the state's request, the jury had been instructed to decide the law as well as the facts. The instruction was qualified by the statement that the jury could find the law only if they could say upon their oaths that they knew the law better than the court. The instruction was given under the authority of a former statute (ILL. REV. STAT. c. 38, §741 (1929)) providing that "juries in all criminal cases shall be the judges of the law and the fact." Subsequent to Joyce's conviction the Illinois Supreme Court held in *People* v. *Bruner,* 343 Ill. 146, that it was not error to deny the request of a defendant that the jury be instructed to find the law because the statute violated the constitutional doctrine of separation of powers. The *Bruner* case, however, did not raise or decide the question of denial of the right to trial by jury since it was the defendant who sought the instruction. But here, since the state sought the instruction, the question was squarely presented. The court ruled there was no infringement of the right because there was no prejudicial error and therefore denied Joyce's petition. *People* v. *Joyce,* 1 Ill.2d 225 (1953). The court reasoned that the instruction itself so limited the possibility of the jury's judging the law as to render the instruction harmless. Moreover, since the instruction was neutralized by others which correctly stated the applicable law, the jury was in a position to find the petitioner guilty.

An Attempt To Commit A Crime Is Not Always A Crime—Defendants appealed conviction of violating a statute prohibiting hunting in off-seasons. In fact the defendants had shot a "stuffed," quite dead deer which had been placed in a field by conservation men. Held reversed, *State* v. *Guffey,* 262 S.W.2d 152 (Mo. 1953). The court follows the hornbook rule that one cannot be convicted of an attempt to commit a crime unless conviction for the crime itself would follow if the attempt had been successful.

A Perjury Conviction May Follow Even If One Has Made False Statements During A Trial That Was A Nullity—In *United States* v. *Remington,* 208 F.2d 567 (2d Cir. 1953), defendant was indicted and found guilty of perjuring himself when answering the perennial question of communist affiliation. On appeal Remington claimed the indictment should have been quashed because of improprieties in the grand jury proceedings and, in the alternative, that at the trial itself the charge to the jury was erroneous. The Second Circuit reversed on the latter ground, leaving open the question of grand jury improprieties. The government, apparently in fear that there had been misconduct in the original indictment, did not proceed to a re-trial of the same indictment; but rather it procured a new perjury indictment based on Remington's statements made in defense at the first trial. After conviction on the second indictment, Remington raised two ingenious contentions on appeal. The principal argument was that perjurious statements made at a trial under an illegally procured indictment cannot be subsequently prosecuted. This theory was based on a long line of cases holding that the government should be denied the fruits of its illegal conduct. See *Nardone* v.

United States, 308 U.S. 338 (1939), and *McNabb* v. *United States,* 318 U.S. 332 (1943). Remington's other contention, entrapment, was based on the unique theory that by procuring the first indictment the government knew defendant would have to make—and therefore he was incited to make—the same statements at the trial, for if he did not take the stand it would have been the equivalent of a plea of guilty. Assuming without deciding that the original indictment was invalid, the court nevertheless affirmed the conviction. In overruling the first contention the court reasoned that there was a new wrong committeed by the defendant in the presence of the court and therefore there was jurisdiction over the second perjury. The doctrine of entrapment was held inapplicable apparently on the ground that to hold otherwise would make the defense available in every case of perjury where the government questions a defendant. While Judge Learned Hand wrote a persuasive dissent, the Supreme Court has denied certiorari. 22 U. S. LAW WEEK 3209 (Feb. 9, 1954).

Admission Into Evidence of Coerced Confession Of One Defendant Does Not Violate Constitutional Rights Of Co-defendant Who Is Implicated—The coerced confession of one defendant, Gonzales, clearly implicated the two petitioners here. However, the trial court instructed the jury to the effect that the confession was not to be used or considered as evidence against petitioners. While the court reversed the conviction of Gonzales, it ruled that the admission of his confession did not violate due process as to the co-defendants. *Giron* v. *Cranor,* 116 F. Supp. 92 (E.D. Wash. 1953). The court was of the opinion that this question had been settled by the Supreme Court in *Malinski* v. *New York,* 324 U.S. 401 (1945). In the latter case, however, somewhat more protection was afforded the co-defendants in that before the coerced confession was introduced the co-defendants' names were stricken and "X" and "Y" were substituted. Therefore there may be some question as to whether this court went too far in interpreting the *Malinski* opinion.