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Abstracts of Recent Cases

follow the basic rule of timely assertion.[68] However, the Court of Appeals for the Third Circuit substantially departed from these principles in *United States v. Asendio*.[69] The defendant, without exceptional circumstances present, was entitled to a new trial despite a failure to move for suppression of the illegally seized evidence before trial.

The *Asendio* ruling would allow a defendant to gamble on the effect of the seized evidence, and then to attack it. This is a minority view; clearly in majority practice the "seasonable objection" principle remains strongly entrenched and only permits the defendant to protect his rights without harassing the judicial system or unduly hampering law enforcement officers. In all events, since the exclusionary rule is in itself an exception, it appears the courts are justifiably strict when applying it to strike out competent evidence.

[68] See Peters v. United States, 97 F.2d 500 (9th Cir. 1938); Brink v. United States, 60 F.2d 231 (6th Cir. 1932), *cert. denied*, 287 U.S. 667 (1932); Durkin v. United States, 62 F.2d 305 (1st Cir. 1932).

[69] 171 F.2d 122 (3rd Cir. 1948).

Conclusion

Substantively, federal law of search and seizure is gradually deviating from earlier liberal decisions involving the constitutional protection. While lip service is paid to principles which preclude seizure of articles solely for evidentiary purposes and which sanction seizure only of articles particularly described in a search warrant, the courts are able to avoid these principles by loosely designating the character of the seized articles as public or as instrumentalities of crime. This is particularly accomplished in conjunction with a search and seizure justified as incident to lawful arrest. The courts have been consistent only in the area of the *Silverthorne* rule respecting indirect and derivative use of unreasonably seized evidence.

Procedurally, the tendency is to reaffirm the limitations of standing and seasonable objection, but at the same time the courts appear to be more receptive to liberal interpretations and bona fide exceptions so as to afford the aggrieved defendant greater opportunities to assert his constitutional rights. The *Jeffers* and *Asendio* holdings foreshadow this trend.

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Testimony of Witness Before Congressional Hearing Cannot Be Used Against Him in Any State or Federal Criminal Proceeding—In response to a summons by the Senate Committee investigating crime, petitioner appeared and confessed to running a gambling business in Maryland. This confession was used to secure his conviction, in a state court, of violating Maryland's anti-lottery statutes. On appeal to the Supreme Court, petitioner claimed that the use of this testimony was barred by Federal law providing that no testimony given by a witness in congressional inquiries "shall be used as evidence in any criminal proceeding against him in any court . . . ." 18 U.S.C. § 3486 (1946). In opposition the state argued that this law was inapplicable because the petitioner did not claim the privilege against self-incrimination or, in the alternative, that the testimony was barred only in federal courts and, finally, that congress lacks the power to exclude such evidence from state courts. A unanimous Court overruled all three of the state's contentions and reversed the conviction. *Adams v. Maryland*, 347 U.S. 179 (1954). The Court reasoned that to construe the statute as requiring the invocation of the Fifth Amendment would leave section 3486 with no effect whatever. As to the second contention the Court ruled that "any court" was language plain enough. The last argument was summarily dismissed as being clearly within the "necessary

and proper" clause of Article 1 of the Constitution.

Defendant's Being Placed on Trial a Second Time Held Not to Constitute Double Jeopardy—Petitioner and Cook and Matthews were arrested for assault with a deadly weapon. The latter two were tried first and found guilty. While their case was pending appeal, petitioner was placed on trial. When Cook and Matthews were asked, as witnesses for the state, to corroborate their pre-indictment statement that petitioner helped them plan the assault, they claimed the self-incrimination privilege. The trial court upheld their claim and then granted the prosecution's motion for mistrial and continuance until final disposition of Cook's and Matthew's appeal. After their conviction was affirmed—thus ending their self-incrimination risks—petitioner was brought to trial again. He objected that such action constituted double jeopardy and thus denied him the due process of law guaranteed by the Fourteenth Amendment.

The United States Supreme Court affirmed his conviction. *Brock v. North Carolina*, 344 U.S. 424 (1953). (Of course the question of whether this procedure would be double jeopardy within the Fifth Amendment was not raised here because the Fifth Amendment applies only to federal prosecutions. *Palko v. Connecticut*, 302 U.S. 319. The Court said due process was not denied because the procedure here did not violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Moreover, the Court favors the rule giving the trial judge discretion to declare a mistrial and try the defendant again if the rules of justice will be best served.

In vigorous dissent, the late Mr. Chief Justice Vinson argued the action was contrary to the scheme of "ordered justice" and hence a denial of due process. One of the dissent's strongest points is the assertion that under the results reached by the majority a state is free, if the prosecution thinks a conviction probably cannot be won on the testimony at the trial, to stop the trial and insist that it be tried again another day when there are stronger men on the field.

Where Conviction Is Overruled Because of Failure to Permit Defendant to Poll Jury, Subsequent Re-trial Does Not Constitute Double Jeopardy—Counsel for defendant was not in the courtroom when the jury returned but he had left instructions where he would be and that he should be called when the jury returned. He was not so notified and thus could not poll the jury when they returned a guilty verdict. Since a statute provided for the right to poll the jury, the conviction was reversed by the trial court and a new trial ordered. Defendant appealed, claiming that a new trial would subject him to double jeopardy. The court overruled this contention. *Allen v. State*, 70 So.2d 644 (Ala. 1954). When a judgment of conviction is reversed for a mere irregularity, not going to its validity, an appeal by the defendant causing a reversal does not entitle him to his discharge as having once been in jeopardy.

Where Public Officer Solicits Illegal Sale Defendant Is Entitled to Instruction on Entrapment—A federal narcotics officer purchased heroin from defendant. Defendant claimed entrapment based on the theory of *Sorrells v. United States*, 287 U.S. 435 (1932) that "when the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion . . . or inducement lured into the commission of a criminal act, the government is estopped by public policy from prosecution." But, the instant court points out, there is a corollary to this rule; namely, that there can be no entrapment if the defendant was already disposed to such wrongdoing and awaiting only an advantageous and apparently safe opportunity. Thus, in reversing, the court held there was a jury question whether the defendant was disposed to trade in narcotics or whether he yielded to importunations contrary to his own inclination. *United States v. Sawyer*, 210 F.2d 169 (3rd Cir. 1954).

Conviction Cannot Be Upheld Solely on an Extrajudicial Confession Unless It Is Corroborated by Other Proof of the Corpus Delicti—In *Masse v. United States*, 210 F.2d 419 (5th Cir. 1954), petitioner appealed from conviction of violating the Mann Act. At the trial the government introduced into evidence the confession Masse had made when he was apprehended and other evidence which tended to show that Masse had transported a woman across state lines for immoral purposes and that he had had illicit relationships with her. In affirming, the Court stated the prevalent rule that guilt cannot be proved by the extrajudicial confession of the defendant unless corroborated by proof aliunde of the corpus delicti. However, full, direct and positive evidence of the corpus delicti is not indispensable. Thus a confession will be sufficient if there is such extrinsic corroborative circumstances as will, when taken in connection with the confession, establish guilt beyond reasonable doubt. The court ruled that a sufficient amount of this type of evidence was present.

Defendant Who Voluntarily Takes the Stand May Be Cross-examined Over His Failure to Make Statement to Arresting Officer—Immediately after his arrest on an abortion charge, defendant was asked if he had anything to say about the charge. He said he had no statement. During trial defendant took the stand on his own behalf and upon cross-examination he was asked why he made no statement at the time of his arrest. On appeal from conviction defendant contended this questioning violated the self-incrimination privilege. While the court reversed on other grounds, it did deny this argument. *Peckham v. United States*, 210 F.2d 693 (D.C. Cir. 1953). The rule is well established that when a defendant takes the stand in his own defense he may be cross-examined about his failure to testify on his previous trial for the same offense. Implicit in this rule, the court reasoned, is the right to cross-examine a defendant about his failure to seek to exonerate himself when questioned on a previous occasion. Certainly if the former does not invade the protection of the Fifth Amendment neither does the latter.

The Constitutional Right of Confrontation May Be Waived—The defendant and eight others were indicted for attempt to commit murder. Defendant was granted a separate trial; the others were tried first and four were found guilty by a jury. Cruzado waived trial by jury and when he came before the same judge he agreed to the following stipulation. It was agreed that the case against Cruzado should be submitted to the judge upon the evidence introduced by the prosecution and by the defense at the earlier trial against his co-defendants, including the entire cross-examination and redirect examination of each of the witnesses for both sides. The judge approved the stipulation and found the defendant Cruzado guilty. On appeal Cruzado argued that the Sixth Amendment had been offended because he was deprived of the right "to be confronted with the witnesses against him." The conviction was affirmed. *Cruzado v. Puerto Rico*, 210 F.2d 789 (1st Cir. 1954). Judge Magruder reasoned, first, that the principal advantage of the right of confrontation is that it affords the opportunity to subject the prosecution witnesses to cross-examination. Since the accused can forego cross-examination it ought to follow that he can waive the right altogether. Another basis for the right of confrontation is that it aids the trier of fact in determining the credibility of witnesses, by observing their demeanor while testifying. Here, however, the same trier of fact did have the opportunity to observe the witnesses. But, even apart from the last fact, the court concluded that the right to confrontation is waivable and here it was so waived.