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Abstracts of Recent Cases

not to pursue its request for disclosure to the point of a contempt proceeding.[39]

[39] If a legislature were to adopt the view that the informer's privilege should be extended to private civic anti-crime groups on the bases that such action is necessary to protect the identity of undercover agents and to provide for the use of information which cannot be confirmed, it is submitted that only a qualified privilege should be granted. Basically, such a privilege would be one which would allow these organizations to conceal the informer's identity at their discretion; but if a court found the disclosure to be essential in furtherance of the public interest, it would have the power to compel such a disclosure. See text at note 37 *supra*.

ABSTRACTS OF RECENT CASES

Pre-trial Bail Held Excessive Where Undue Emphasis Placed on Invocation of Privilege Against Self-incrimination—Pending determination of a petition for certiorari to the United States Supreme Court, the petitioner applied to the Court for an order to reduce his pre-trial bail from $30,000 to $10,000. Petitioner is under indictment for violation of the "membership clause" of the Smith Act, 18 U.S.C. §2385, having been charged with being a member of the Communist Party from January, 1946 to November, 1954. The petitioner had refused to answer any questions upon arraignment relating to his activities during a four year period, most of which was included in the indictment. This refusal to disclose any information was based on the Fifth Amendment Privilege against self-incrimination. The District Court fixed bail at $30,000 and the Court of Appeals for the Second Circuit affirmed the order, one member dissenting. The $30,000 figure compares favorably with pre-trial bail set in four other "membership" cases under the Smith Act, in which bail ranged from $35,000 to $20,000. Since bail had been made in all but one of these cases, there had been no contest on the reasonableness of those figures. In a memorandum opinion by Mr. Justice Harlan, sitting in chambers, it was held that since there was a substantial question as to whether the bail affixed here offends the Eighth Amendment, the bail will be reduced to $10,000. *Noto v. United States*, 100 L. Ed. 95 (U.S. Dec., 5, 1955).

The reversal was based on the finding that the lower courts had placed undue emphasis on the invocation of the Fifth Amendment privilege. "No doubt," Mr. Justice Harlan declared, "a defendant's past history and activities are relevant circumstances to be considered in fixing proper bail. But it would seem that in fixing bail, as in a criminal trial, an unfavorable inference should not be drawn from the mere fact that the Fifth Amendment privilege has been invoked. Assuming that a court when fixing bail can consider the absence of information concerning a defendant's history, even though the absence results from a valid claim of the privilege, that should be a permissible consideration only to the extent that it bears upon the risk that the defendant will not be available for trial. What weight should be given it depends upon all the facts and circumstances in the particular case." The opinion concluded by noting that the record of this case disclosed no special circumstances to justify the high bail. Mr. Justice Harlan further rejected the argument that the burden of proof to show lack of such circumstances is on the petitioner, for to require this might require waiver of the privilege against self-incrimination in order to sustain the burden.

Judgment of Mental Incapacity to Stand Trial Remains Effective Until Subsequent Hearing Finding to the Contrary Is Held: Records and Communications of State Hospital Are Hearsay and Their Admission Constitutes Prejudicial Error—The defendant was initially indicted for murder, but on the motion of the county attorney a hearing was held under the applicable Arizona statute, ARIZ. CODE ANN. §44-1701 (Supp. 1952), which resulted

in the determination that the defendant was *unable* to understand the nature of the proceedings against him. An order committing the defendant to the Arizona State Hospital was entered; after three months the defendant was discharged as competent to assist in his defense, but another hearing under the above section resulted in his being committed to the hospital for an additional eleven months. Following a discharge from this second commitment no judicial redetermination of the defendant's mental capacity was held before trial of the cause, in which defendant was adjudged guilty and sentenced to life imprisonment. At the trial before the jury the defendant entered a plea of not guilty by reason of insanity at the time of the *commission* of the offense. In rebuttal to this plea and over objection of the defense counsel the trial judge admitted into evidence hospital records, progress reports, doctor's decisions and opinions and recorded communications between the defendant and his doctors, all having been compiled while he was committed to the state hospital. On appeal the defendant argued that the failure to redetermine his mental capacity to stand trial and the admission of the hospital records constituted reversible error.

The Supreme Court of Arizona first held that under the state statute it is mandatory that a defendant once found to be *unable* to understand the nature of the proceedings against him be accorded another judicial hearing to remove the continuing disability with which the prior judgment has clothed him. It is immaterial that the defendant does not demand such a hearing for he cannot waive this right to the second determination. On the question of the alleged erroneous admission of the hospital records and other documents, the court said in a dictum that the statutory privilege granted a patient as to communications to his doctor is not overridden by a broad statute making admissible those public records which are kept in accordance with state requirements, absent a showing that they are so kept. In the instant case there were no specific state requirements that that the medical officers or officials of the state hospital keep the patient's progress reports, results of consultations, doctor's opinions and declarations of the defendant to his doctors which were admitted over objection. Furthermore, the admission of these records was prejudicial to defendant in that he was denied the right to cross-examination and much of the matter contained within the records was recorded from hearsay. However, the court did not rule on the question of whether general hospital records which do fall within the public records exception could be excluded by invoking the patient-physician privilege—although it appears that such records had been introduced in this case. *State v. Stracuzzi*, 289 P.2d 187 (Ariz. 1955).

Minor Appearing Before Juvenile Court is Entitled to Assistance of Counsel Under Federal Constitution—A sixteen year old youth had been committed to the local training school as a juvenile delinquent under the Juvenile Court Act of the District of Columbia. 34 STAT. 73 (1906), D.C. CODE, c. 960, § 11–901 *et seq.* (1951). The commitment was for automobile theft, which is a crime if committed by an adult. At none of his appearances before the Juvenile Court was the boy represented by counsel or advised of his right to counsel. Shortly after his release from the training school he was charged with a parole violation. He then applied for a writ of habeas corpus, contending that the sentence imposed by the Juvenile Court was unconstitutional because the court did not inform him of his right to counsel, guaranteed to him by the Sixth Amendment. The writ was granted, the court holding that even though the Juvenile Court is not a criminal court as such, nevertheless the Sixth Amendment requires that a juvenile defendant must be advised that he is entitled to the "effective assistance of counsel." *In re Poff*, 135 F. Supp. 224 (D.D.C. 1955).

The decision was based on the court's conclusion that although the Juvenile Court is non-criminal in character and an adjudication by it "is in no sense the counterpart of a conviction in a criminal court," its "ultimate function . . . is to determine the guilt or inno-

cence of the individual in order to make an adjudication of whether he is a delinquent." Furthermore, the court reasoned, the statute was enacted to afford additional safeguards for the benefit of the juvenile offender—not to diminish the protection to which he was already entitled. Since this was the purpose of the act, it is unlikely that there was any legislative intent to remove the right to advice and assistance of counsel.

The court concluded from these arguments that any deprivation of the right to advice of counsel violates the Sixth Amendment and constitutes a denial of due process. The statute authorizing the Juvenile Court is not itself unconstitutional for it does not take away the right. But any failure to advise the juvenile of his rights or any attempt to have him waive his rights will be deemed a violation of the Sixth Amendment and will constitute grounds for the issuance of a writ of habeas corpus.

Prosecutor's Use of a "Rap Sheet" in Cross-examination Constitutes Prejudicial Error—The defendant was convicted of first degree murder which was later modified by the trial court to second degree murder. During the course of the trial the prosecution introduced a lengthy pre-trial statement made by the defendant to the prosecutor, which tended to establish a deliberate intention upon the part of the defendant to take the life of the decedent. Taking the stand on his own behalf, the defendant entered a plea of self-defense and attempted to establish that he had committed the homicide while in a state of fear and confusion. In order to bolster his credibility in the minds of the jury the defendant testified to a clean record prior to this occurrence. On cross-examination the prosecuting attorney began his questioning by displaying a sheet of paper which he contended had been taken from the files of the Federal Bureau of Investigation and which he stated showed that a William Jones had been arrested on suspicion of an offense some twenty years previous. When the defendant disclaimed any knowledge of such an occurrence the prosecutor stated: "So the files of the Federal Bureau of Investigation of the United States are in error, . . . [i]n other words, you deny the records of the F.B.I. are correct?" Upon objection by the defendant's counsel that this "rap sheet" was not properly identified the prosecutor stated that defense counsel well knew that "these records are prepared from fingerprints." On appeal the District Court of Appeals of California, Third District, found that such action by the prosecuting attorney constituted prejudicial error. "We think we are compelled to assume that this was a deliberate misrepresentation in that the district attorney sought to give, and no doubt did give, to the jury the impression that defendant's fingerprints matched those upon the documents he held in his hand. . . . This episode was followed by vigorous cross-examination based upon the discrepancies between the direct testimony of appellant and his statement. . . . It may well have been that the effects of these conflicts were greatly magnified by the misconduct of which the district attorney had been guilty at the beginning of cross-examination." *People v. Jones*, 288 P. 2d 544 (Cal. App. 1955).

Failure to Establish Familiarity with General Reputation of a Witness in the Community Does Not Constitute Basis for Exclusion of Testimony—The defendant was indicted and convicted of sodomy and convicting a lewd and lascivious act upon a child. A witness for the prosecution, the father of the child involved, testified relative to the interfamily conditions under which the principals lived. Although the prosecution's case did not rest on this testimony in any material degree, defendant urged that the refusal of the trial court to permit a showing of the witness' bad reputation was prejudicial error since the entire case was very weak. The testimony which was excluded was given by the mother of both the witness and the defendant and was to the effect that the witness' general reputation for truth and honesty was bad. However, she stated that she did not know of his reputation in the community at large, but only through discussion with his fellow workmen and with friends and other people who visited in their home. On the basis that no familiarity with the witness' general reputation in the com-

munity at large was shown, the trial judge ordered the opinion of the mother stricken from the record. On appeal the court held that the general rule that evidence of a bad reputation for truth and veracity is properly excluded where the reputation is confined to a limited area or restricted group of people is not "in line with modern conditions." A review of cases and authorities showed that the trend in recent years has been to permit reputation testimony upon the showing that the witness is familiar with the reputation of a person in a distinct circle of people or in a given area other than the community at large. The reason given for this departure from precedent is that increasing mobility has resulted in a growing tendency to live in one area while spending a great deal of time in another. Thus, a person may have a general reputation of one sort in the suburb in which he lives and another at his place of business in the city. He may or may not be known by his next door neighbor, but he will be known by intimate friends who call upon him in his home and those persons with whom he works. Based on this analysis the court concluded that the mother should have been permitted to testify as to the bad reputation of the witness in the community as discussed by his fellow workers, and, in addition, "that there was a like reputation among his circle of friends and the people who visited at their home." However, because the witness' testimony was not material to the state's case, the error was found to be harmless. *People v. Workman*, 289 P.2d 514 (Cal. App. 1955).

Reversible Error to Exclude Evidence of Supervening Bankruptcy in Prosecution for Violation of "Bogus Check Law"—South Carolina has a "bogus check" statute which creates a presumption of fraudulent intent upon the showing of a failure to pay check within seven days after written notice of dishonor. After such a showing had been made the defendant proffered evidence to show that he had been adjudicated a bankrupt between the date of issuance of the checks and the date of written notice of dishonor. This offer was denied and the evidence excluded, followed by a conviction of the defendant. The Supreme Court of Carolina, after noting that there must be a showing of fraudulent intent to support a conviction under the "bogus check" law, held that "the fact of bankruptcy should be admitted in evidence as tending to rebut" the statutory presumption. *State v. Sutton*, 89 S.E. 2d 874 (S.C. 1955).

Indiana Criminal Sexual Psychopath Act: Trial Judge Has Discretion to Deny Petition by Defendant for Hearing—Indiana has an act which relieves persons from punishment under other criminal statutes upon a hearing and adjudication that such person is a criminal sexual psychopath. IND. ANN. STAT. c. 124, §§9-3401-3412 (Burn's 1942 repl., Supp. 1954). The Act excepts insane or feebleminded persons and those charged with murder, manslaughter or rape on a female child under the age of twelve. A proceeding can be commenced as soon as a charge has been filed or after a conviction or plea of guilty if no judgment has been entered thereon. If the prosecution files the petition for determination the trial court *shall* appoint two physicians to make an examination and report to the court; but if the accused files the petition, the court *may* appoint the physicians. Should the court find upon a hearing that the person is a criminal sexual psychopath he is confined in state mental hospital and cannot thereafter be tried for the offense charged even upon discharge from committment. An accused charged with robbery entered pleas of not guilty and not guilty by reason of insanity. Two physicians were appointed by the court for an examination as to his sanity; based on their findings that the accused was a criminal sexual psychopath, the accused filed an application for a hearing under the criminal sexual psychopath act. The trial judge denied the petition and an appeal followed.

The Supreme Court of Indiana affirmed the ruling of the trial judge, one member of the Court concurring in the result on the ground that the Act was unconstitutional. The majority construed the purpose of the proceedings under the Act as being designed to protect the public against criminal sexual psychopathic

persons regardless of criminal guilt by making possible institutional treatment as opposed to criminal punishment; the latter offering no deterrent to a repetition of the offense upon release. Reserving judgment on any constitutional questions under the Act, the court examined similar statutes in Minnesota, Michigan, Illinois and California. Drawing upon the rationale of a California decision in an analogous case, the court held that since the criminal offense here charged is not sexual offense, the accused is not entitled to a hearing under the Act as a matter of right absent an application by the prosecuting attorney. Furthermore, since the Act clothes the trial judge with discretion to deny an application made by an accused, the exercise of this discretion is not reviewable unless there is a "positive showing that fraud, prejudice or some other capricious action influenced the decision." *State v. Criminal Court of Marion County*, 130 N.E. 2d 128 (Ind. 1955).

A dissenting judge argued that there was a constitutional question presented by the Act which was of sufficient importance to compel judicial recognition despite the fact that it was not raised by either of the parties. He would have declared the Act unconstitutional under the Indiana Constitution in that it purports to give a court the power to grant a pardon after conviction by permitting a hearing after conviction on the original charge—while the state constitution reserves the right to pardon to the governor of the state. He would also have found the Act unconstitutional on the ground that it grants a privilege and immunity to one defendant not granted on equal terms to other defendants. Although he did not contest the reasonableness of the classification used in the Act, he argued that since the prosecution was free to file a statement in one case, but was not compelled to file a statement in all cases, it was conceivable that one sexual psychopath could be prosecuted while another would not. This provision was also felt to be in violation of equal protection of laws under the 14th Amendment to the Federal Constitution. Since the entire Act was constructed around the jurisdictional provisions which he felt were unconstitutional, he would have declared the entire act to be unconstitutional and void and affirmed the trial judge on that ground.

Bastardy: Instruction to Jury that Child Is Likely to Become a Public Charge Held Proper—The Supreme Court of Michigan has ruled that it does not constitute error to charge a jury in a bastardy proceeding that a "child born out of lawful wedlock . . . is likely to become a public charge." On three occasions the trial judge had charged the jury that one question which it had to consider was whether the child would have to be supported by the state. The Michigan Supreme Court examined the law in various other states and found that Indiana, Ohio and Wisconsin condemn such a charge; while Oklahoma and Kansas hold that it is not prejudicial. In adopting the latter view the court noted that it "is difficult to understand how a case . . . brought in the name of the People could be presented to a jury without some reference to the State's interest because of the possibility or likelihood of the child becoming a public charge." However, the court was careful to reaffirm the principle that "[t]he sole question in a bastardy proceeding is whether the defendant is guilty or not." *People v. Finks*, 72 N.W. 2d 250 (Mich. 1955).