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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

General Supervisory Power of Federal Courts Prohibits Federal Agents from Using Illegally Seized Evidence in State Courts—Petitioner was indicted under federal law for the unlawful acquisition of marihuana, based on evidence obtained with a search warrant issued by a United States Commissioner. Petitioner moved under Rule 41(e) of the Rules of Criminal Procedure to suppress the evidence on the ground that the search warrant was improperly issued under Rule 41(c) in that it was insufficient on its face, no probable cause existed, and the affidavit was based on unsworn statements. The District Court granted the motion to suppress and later dismissed the indictment. The federal narcotics agent then swore to a complaint before a New Mexico judge, causing a warrant for petitioner's arrest to issue. While petitioner was awaiting trial in the state court for violation of the state narcotics law, he presented a motion in the District Court to enjoin the federal narcotics agent from using the illegally seized evidence and from testifying in the state case with respect to this evidence. The District Court denied the motion and the Court of Appeals affirmed. *Rea v. United States*, 218 F.2d 237 (10th Cir. 1955). The Supreme Court, in a five to four decision, reversed, holding that the agent was subject to the injunction. *Rea v. United States*, 76 Sup. Ct. 292 (1956).

After putting aside possible constitutional issues under the Fourth and Fourteenth Amendments, the Court stated that the case presented merely a question of the Court's supervisory power over federal law enforcement agencies. In support of the injunction, the Court pointed out that the Federal Rules, prescribed by it, govern the method of search and seizure, that the power of the federal courts extends to policing those requirements and that a federal agent cannot evade these Rules by using the illegally acquired evidence in a state court prosecution.

The dissent considered this case as coming under the Fourth Amendment and indicated that the "supervisory power over federal law enforcement agencies" invoked by the majority was an unprecedented pronouncement. The dissent was also unable to reconcile the present decision with *Wolf v. Colorado*, 338 U.S. 25 (1949), which held that the Fourteenth Amendment does not require state courts to follow the federal exclusionary rule.

Convictions of Intoxication or Drunken Driving Are Not Convictions of Misdemeanors Involving Moral Turpitude—Within a period of fourteen months the defendant had been convicted of misdemeanors of driving while intoxicated and disorderly conduct. Following a subsequent apprehension by the police for disorderly conduct, he was indicted under a statute which made any person who had been convicted of a misdemeanor involving moral turpitude an "habitual offender." (*R.C.* § 2949.34, Ohio). If convicted, he would have been sentenced to prison for up to three years. On a demurrer to the indictment the court held that the offenses of intoxication and drunken driving did not come within the purview of a misdemeanor involving moral turpitude. *State v. Deer*, 129 N.E.2d 667 (Ohio 1955).

While the statute did not define the term in question, the court applied a definition from a previous Ohio case which declared that a crime involving moral turpitude is an act "denounced by the statute (which) offends the generally accepted moral code of mankind." Since it had already been established that mere conviction of a crime did not ipso facto constitute moral turpitude, the court looked to the public policy of the state to determine whether drunken driving offended "the generally accepted moral code of mankind." Noting that the State of Ohio is in the business of selling liquor and issuing permits to others to sell it, the court concluded that "the drinking of intoxicating liquor is not in and of itself moral turpitude. If it [were], then the State of Ohio is guilty of contributing to it." This reasoning then led to the final result that drunken driving did not involve moral turpitude either.

This conclusion was buttressed by straight

statutory construction. The court pointed out that there were many misdemeanors which specifically involve moral turpitude. Since the intoxication and drunk driving provisions do not cover this aspect, it was inferred that the legislature must have meant to exclude it from the moral turpitude definition.

New Trial Granted Where Juror's "Freedom of Action" Affected by Communication He Had Interpreted As A Bribe Offer—Three weeks after a trial concerning the wilful evasion of income taxes had started, one Smith, a juror in the action, was approached by a friend of the defendant and engaged in a conversation about the trial. Smith was told that petitioner had "$300,000 under the table which he daresn't touch. Why don't you make a deal with him?" Greatly disturbed by this communication, Smith told the trial judge about the statement; the judge, although dismissing the comment as a "joke," related the incident to the FBI. Shortly thereafter, an agent of the FBI talked to Smith, telling the juror that he was investigating the "possibility of an improper adproach." The Government subsequently dropped the matter on determining that a criminal prosecution was unwarranted, but never relayed this information to Smith. The United States Supreme Court reversed the conviction for wilful evasion of income taxes and sent the case back for a new trial, stating that the judgment of Smith as a juror "may have (been) influenced and disturbed" by the prejudicial circumstances surrounding the trial. *Remmer v. United States*, 24 U.S.L. Week 4123 (March 6, 1956).

After summarizing the evidence concerning the statements made to juror Smith and the acts of the FBI agent, the opinion concluded in these words: "As he sat on the jury for the remainder of the long trial and as he cast his ballot, Smith was never aware of the Government's interpretation of the events to which he . . . had become a party. He had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposely made." Thus, the Court reiterated its former attitude that "any . . . tampering . . . with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial if not made in pursuance of known rules of the court."

Slot Machine is Still a Gambling Device Despite the Substitution of Coin Slots and Pay-Out Tubes with Device Permitting Operation by Remote Control—The FBI seized certain devices, known as "Trade Boosters," which had been shipped in interstate commerce in violation of 15 U.S.C. § 1171(a)(1)-(3) (1951). These Trade Boosters permitted slot machines to be operated by remote control after the slot machines had been altered by having the coin slots and certain other parts removed. The devices worked in this manner: If the machine were set at ten-cent play, "the customer would pay the bartender one dollar, at which time the bartender would press a button which would register ten plays on the cabinet control box located at the bar as well as the register located at the slot machine . . . , and if the customer pulled the lever or handle on the machine, the plays would either be depleted or added to if the customer had a winner, and if the customer had a winner he would be paid in free games or the amount in cash." The order for forfeiture was granted, the court holding that "the Trade Booster devices are gambling devices as defined by 15 U.S.C. § 1171(a)(3) in that they are subassemblies and essential parts of the gambling devices to which they were attached and of which they formed a part. *United States v. Three (3) Trade Boosters*, 135 F. Supp. 24 (M.D.Pa. 1955).

The key question in this case was whether or not the Trade Booster became an essential part or subassembly of the slot machine in its altered form. Noting that the altered slot machines could not be operated without the Trade Boosters, the court concluded that the devices were gambling devices. "The function of the Trade Booster is to permit the operation of the altered slot machine by remote control, and to the extent to which coins and coin slots were essential to the operation of the device prior to

its alteration the Trade Booster is essential to its operation in its present state. The use for which the slot machine was originally designed and manufactured has not been changed in any manner by the alterations made to the device."

The court rejected the argument that these Trade Boosters were not in and of themselves gambling device subassemblies because they could also be used in connection with the operation of other devices. This rejection was based primarily on the fact that the advertising literature of the manufacturer was "devoted almost exclusively to the use of the Trade Boosters in combination with altered slot machines."

Information Concerning Names and Addresses of Persons Paying Federal Gaming Taxes Available to Local Prosecutors—The Internal Revenue Code, § 6107, provides that the district offices of the internal revenue may furnish the prosecuting officials of any state, county, or municipality certified copies of lists containing the time, place and business of all persons who have paid taxes for gaming licenses. Such lists are available, as of public record, for which a fee of $1.00 for each 100 words or fraction thereof may be charged for the copies requested. Usually, such a certified copy is admissible in evidence when it is properly proved by attaching thereto a certificate by the Collector attesting to the copy's correctness and authenticity. Other relevant sections are 4403, 6103(b), and 7213.

Defendant Entitled To Full Hearing Before Sentence Where Uncontradicted Affidavit Alleges Juror Failed To Reveal Connection with Law Enforcement Agency—On *voir dire* examination every prospective juror was asked whether or not he had any connection with or was a member of a law enforcement agency. One particular juror failed to reveal that he was actually "a member of the Civil Defense Auxiliary Police", a group connected with a regular police force. The defense alleged that if this fact had been known to it, this juror would have been excused from the trial of the robbery charge. The Court of Appeals of New York held that the failure of the trial court to grant a full hearing in order to scrutinize the matter was error; the determination of the appeal was held up, so that the defendant might renew his motion for a new trial. *People v. Winship*, 130 N.E.2d 634 (N.Y. 1955).

While it is true that false answers about inconsequential matters do not necessarily disqualify a juror, such matters must be looked into in order to assure that the defendant's rights have not been impaired. The Court of Appeals then declared that since on the motion for new trial "it was uncontroverted that the juror did not reveal that he was a member of an auxiliary police force, we think further proof should be taken by affidavits or oral testimony in order that the trial court . . . and this court shall be fully informed as to all the circumstances relating to the questioning on the *voir dire* . . . ." The court said, however, that "if the prosecution had submitted answering affidavits sufficient to challenge the movant's statements at the time the trial court disposed of the motion, the trial court might have been justified in denying a hearing on the issues raised thereby."

Extent of Cross-Examination Permitted Under Statute Limiting Cross-Examination To Matters Testified to on Direct Examination—The defendant had been charged, as a fourth offender, with driving while intoxicated; previously, he had been convicted as a third offender and served time in the penitentiary. During the trial he had taken the stand in his own behalf and testified on direct only as to matters concerning the night he was arrested. On cross-examination he was asked if he had been convicted of three previous offenses; over objection of counsel the defendant was required to answer, admitting his prior convictions. On appeal, following his conviction by the jury as a fourth offender, it was contended that this evidence was inadmissible under the Iowa statute, IOWA C.A. § 781.13 (1954), which provided that "the state shall be strictly confined to the matters testified to in the examination in chief." The Iowa Supreme Court, although finding that the evidence was properly admitted because of the failure of counsel to

make proper objections, went on to uphold the right of cross-examination "on any relevant subject even under statutes such as ours." This interpretation of the patently restrictive Iowa statute was based on Wigmore's construction of the nature of direct examination, which is to the effect that "the subject of cross-examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over relevant facts except those merely affecting credibility." 7 WIGMORE, EVIDENCE, § 2276(d) (3d ed. 1940). The evidence of the prior convictions was deemed a relevant subject and therefore admissible. *State v. Shepard*, 73 N.W.2d 69 (Iowa 1955).

This statute was also involved in an incest case decided the same day by the Iowa court. In this case the cross-examination of the defendant by the prosecuting attorney concerned the basis of a separate maintenance suit, a matter not brought out on direct. This error, among others, required reversal of the conviction for incest, the court saying that "only when the cross-examination is so limited [to matters testified to in the examination in chief] may [the defendant] be required to make disclosures which tend to discredit or incriminate him." *State v. Leuty*, 73 N.W.2d 64 (Iowa 1955).

The possible conflict between these two interpretations of the cross-examination statute was summarily dismissed by the court in the *Shepard* opinion. The distinction "lies in the word 'relevant'; the cross-examination in the *Leuty* case went far into irrelevant and improper matters."

Where Legitimacy is in Issue the Patient-Physician Privilege Extends to The Infant—While in military service the plaintiff met and courted a young French girl. Following his return to this country she came over here and the parties were married shortly thereafter. Some ten days after the ceremony it was discovered that she was already pregnant; separation ensued. The wife then returned to France and gave birth to a child. Plaintiff then sued for an annulment of the marriage. In order to support an alleged confession of these facts certain interrogatories were submitted to the attending obstetrician with respect to blood-grouping tests and to the delivery of the child. The wife defaulted in the action, but a special guardian was appointed by the court to protect the interests of the infant. This guardian objected to the inquiries directed to the details of the delivery of the child on the ground that this disclosure would violate the confidential nature of the relationship between the physician and the infant. The Supreme Court of New York held that the privilege arising out of the confidential relationship of the physician and patient may be invoked by the guardian and that, therefore, these proposed interrogatories will be disallowed. *Jones v. Jones*, 144 N.Y.S.2d (Sup. Ct. 1955).

The invocation of the privilege was supported on several theories. The court reasoned that the child on its own had become a patient of the mother's doctor, either on the theory that the infant was a third-party beneficiary of the mother-doctor contract or as a principal for whom the mother acted as agent. More broadly, the court continued, the privilege could exist by reason of the fact that the obstetrician did in fact treat the child as well as the mother. The opinion stated in support of this result that "the infant, hopefully expected to live a happy and secure adult life, is entitled as much to the protection of the privilege during that life as one who has lived his years and himself can no longer suffer or be hurt by the disclosure." The court concluded by allowing the blood-grouping tests, noting that this evidence might support the plaintiff's cause of action by itself.

Symposium on the Law of Arrest—The *Minnesota Law Review* has published a three article symposium exploring some of the recent trends in the law of arrest. 39 MINN. L. REV. 473 (1955). The first article by Professor Morris Ploscowe has raised some of the basic questions which must be resolved before a modern law of arrest can be formulated. He recognizes the need for certain changes in the law of arrest which will give police officers the powers to make necessary arrests while at the same time protecting the basic civil liberties of the private

citizens. Professor Roy Moreland addresses his comments to substantive and procedural trends in the law of arrest. Noting that there is a tendency to overlook needed changes on the substantive side, the author first considers some of these problems, including the question of the use of force by an officer in effectuating an arrest, and that of the reduction of the penalty for an intentional unlawful killing from murder to voluntary manslaughter because of provocation. However, Moreland devotes much of his attention to the procedural trends in the law of arrest. In particular, the author feels that there is a noticeable tendency to question "the reason for, and the wisdom of, the rude and hostile manner which the police so often use toward those other members of society with whom they come into contact." He indicates that there is a pattern in the profession of "being tough and rude and overbearing" in situations that do not demand that sort of attitude.

The final article deals with tort remedies for police violations of individual rights. Professor Caleb Foote initiates his discussion by reference to a rather high incidence of illegal arrest and search which clearly invades the rights of the affected individuals. While the traditional tort remedies, such as recovery for false imprisonment and trespass for illegal search, are still available, these remedies have become relatively ineffective. They have never realized "their deterrent potential" because of several factors: one reason is that those who would most likely bring such suits are of a class which would just not bring these actions. Furthermore, the measure of damages, defenses and evidentiary rules have imported a "clean hands" doctrine into the traditional legal remedies. However, Foote does conclude that despite the obvious defects in the tort remedies they do offer "the best hope of achieving increased control over police illegality."