Journal of Criminal Law and Criminology

Volume 47 | Issue 2 Article 7

1956

Abstracts of Recent Cases

adverse parties, a recent case[32] allowed the accused's wife to testify as to his acts of abuse toward her during the accused's trial for the murder of a *third person*. This decision appears to have misapplied this exception in view of the clear language of the applicable statute.[33]

Conclusion

In determining whether the privilege should be applied to a given act, courts rely upon several criteria: (1) the local statute or the common law rule in force in the jurisdiction; (2) whether the communication was originally made in confidence and the extent to which the marital confidence has been relied upon in making the communication; (3) whether the act was accompanied by a communicative intent; (4) the protection to be afforded the relationship under the circumstances (*e.g.*, in the cases of acts of abuse); and, (5) the prejudicial character of the evidence under consideration. The application of the first, second, fourth, and fifth criteria present relatively few problems. However, the third criterion, the *intent* test, which is closely connected with and parallel to the second, has presented difficulties to courts seeking to apply it as a test. Because of these problems it is submitted that a serious question exists as to the wisdom of retaining the *intent* test as a vehicle for the application of the privilege to acts. It is, at best, a test which must rest upon nebulous, indefinite, and subjective assumptions and inferences. The fact that courts have readily discarded this test and held acts privileged on other grounds, even where no intent is apparent, further illustrates the failure of the *intent* test as a definitive criterion. In the second class of cases, examined above, which present the most difficult problems, the tendency of the courts to apply the *Daghita* doctrine suggests that to a great degree the *intent* test is losing favor.

The *marital confidence* approach of the *Daghita* and similar cases has much to commend it. It stems from the underlying policy consideration that communications which arise from the confidential nature of the relationship should be protected in order to preserve the relation which society values and which the law seeks to encourage. Moreover, this approach suggests a simpler test: would an ordinary and reasonable person commit the act in question in the presence of the other spouse were it not for a natural assumption (growing out of the relationship itself) that the information thereby gained will be held inviolate? This test assumes and is consistent with the policy considerations underlying the privilege as well as its recognized exceptions.

[32] Newman v. State, 151 Tex. Crim. 628, 210 S.W.2d 171 (1948).

[33] See TEX. CODE CRIM. PROC., *supra* note 19.

ABSTRACTS OF RECENT CASES

The Equal Protection of the Laws Requires a State to Provide Free Transcripts of Record to Indigent Defendants in All Felony Cases—Defendants were tried and convicted of armed robbery; immediately thereafter they filed a motion in the trial court requesting that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost. They alleged that they were "poor persons with no means of paying the necessary fees to acquire the transcript and court records needed to prosecute an appeal." This motion was denied without a hearing. The defendants then filed a petition under the Illinois Post-Conviction Hearing Act under which only questions arising under the Illinois or Federal Constitutions may be raised. In these proceedings it was alleged that manifest nonconstitutional errors in the trial required a reversal of the convictions. It was further contended that the refusal to provide full appellate review solely because of poverty was a denial of due process and equal protection. The Illinois Supreme Court affirmed the dismissal of the petition on the ground that the charges raised no substantial state or federal constitutional issues. The United States Supreme Court, in a five to four decision, reversed the Illinois ruling, holding that destitute defendants in felony cases must be afforded as adequate

appellate review as defendants who have money enough to buy the transcripts required for full direct review of convictions. *Griffin v. Illinois*, 24 *U.S.L. WEEK* 4209 (April 24, 1956).

The entire court was in substantial agreement that the Fourteenth Amendment does not require a state to provide for any kind of appellate review. However, the majority declared that once a state does grant this review it must not "do so in a way that discriminates against some convicted defendants on account of their poverty." Thus, any denial of means for adequate review based on the economic position of the defendants is a "misfit in a country dedicated to affording equal justice to all and special privilege to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." But the majority opinion did not go so far as to require that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. It was indicated that the state could use alternative means to afford adequate review, such as a bystanders' bill of exceptions.

The concurring opinion, by Mr. Justice Frankfurter, recognized that this holding might provide a justification for proceedings both in state and federal courts by unknown numbers of convicts on claims that they were unable to appeal because of lack of money and that this was a denial of equal protection of the law. While this was recognized as possibly a burdensome condition, it was felt that this problem was a small price to pay for the protection of rights through this "new pronouncement of law."

The dissenting justices argued that the Equal Protection Clause of the Fourteenth Amendment requires only that a state refrain from affirmative discrimination; it does not demand that the states provide equal financial means for all defendants to avail themselves of full appellate review in non-capital cases. In support of the further argument that the Illinois practice is not a denial of the equal protection of the laws it was pointed out that the state offers alternative methods of presenting bills of exceptions to the appellate courts that would not prejudice indigent felons. On this theory it was maintained that the case did not present a constitutional question for the court to decide.

Request of Jury to Take Notes May Be Granted over Defendant's Objection—The defendant was indicted for falsely assuming and pretending to be an employee of the Veterans Administration. Shortly after the jury retired a written communication was transmitted to the court. In the presence of the defendant, his counsel and the jury the note was read; the jury requested that the testimony of six complaining witnesses be read to them and that they be allowed to take notes as the testimony was read. The court ruled that the testimony of the six complaining witnesses be read to the jury, but that the testimony of the defendant relating to the transactions need not be read; it was further ruled that the jury may take notes as the testimony was read. *United States v. Campbell*, 138 F. Supp. 344 (N.D.Iowa 1956).

The opinion easily disposed of the first question relating to the reading of only one side of the testimony by noting that this was a well established principle both in the federal and state courts. However, the problem of the note taking by the jury presented an issue upon which there is considerable conflict. The question for the court is whether he must forbid the practice, not whether he must permit it. Since only nine states have statutes on the subject, which give the jury the right to take notes, the question was resolved by an examination of the theories lying behind the conflicting views. One view is that the juror "is to register the evidence, as it is given, on the tablets of his memory, and not otherwise." This idea is based on the fear that jurors would be too apt to rely on what might have been imprefectly written, and thus make the case turn on only a part of the facts. The court here recognized that this might have been valid in the times when many, if not most, of the jurors were illiterate. However, the opinion pointed out that if there is a conflict between the recollection of the jurors and the notes, the jury could request, as was done here, to have the testimony read again. Furthermore, it is unlikely that mere notes would have any undue weight. Besides, it is

obvious that these notes would be valuable as memory refreshers; this is why there is no objection to the fact that the court and counsel may take notes.

Following the conclusion that note taking by the jury is permissible, the court added that the discretion of the judge in this matter would normally not permit him to bring the matter to the attention of the jury on his own motion. Perhaps the only time this might be possible would be in unusually complex and lengthy trials. Similarly, it would only be an exceptional case where a juror would be stopped by the court from taking notes on his own volition or where the court should deny the request of the jury for leave to take notes.

Presence of Same Jurors in Consecutive Trials of Jointly Indicted Defendants Does Not Vitiate Findings of Guilt—Defendant was indicted jointly with one Siskin for the crime of receiving stolen property. Since Siskin had signed a confession, the defendant's motion for severance of the trials was granted to avoid the possibility of guilt by association. Siskin was tried first and convicted. During his trial no mention was made of the present defendant's name other than a reference that he might have bought some of the stolen property, and Siskin's confession was not put in evidence. In the defendant's trial it was discovered that three jurors who had been on the jury in the Siskin trial were sworn as members of the jury in the second trial. At this time defendant's counsel had exhausted all their peremptory challenges, and did not challenge these three jurors for cause, believing that the court's ruling on *voir dire* that they were "competent" jurors removed challenge for cause. Defendant moved for a new trial contending that since the key prosecution witnesses were the same in both trials, the previous evaluation of their credibility by the three jurors prevented the defendant from receiving a trial on the merits. The denial of this motion was affirmed by the Court of Appeals on the ground that the fact that the jurors believed the key witnesses in both trials did not vitiate the verdict of guilty.

The court, however, did not approve of the practice of using the same jurors in both trials. "Hindsight, possessed by everyone, suggests that it would have been the part of wisdom not to have called any of the jurors who sat on the Siskin case to sit on [defendant's] case, inasmuch as serious and vital questions as to whether a defendant in a criminal case has had a fair trial often arise in this way." However, it was pointed out that the evidence in the two cases was not the same, although both were concerned with thefts from the same place. Furthermore, even though the credibility of the key witnesses had been passed on before, there was no reason why a jury in the defendant's case "would have been more prone to believe the testimony of the three convicted felons [the key witnesses] than the testimony of a man bearing an unquestioned reputation for honesty [the defendant]." It was more probable, the court observed, that the other evidence in the trial led the jury to its finding of defendant's guilt. *Winer v. United States*, 228 F.2d 944 (6th Cir. 1956).

Scope of State Immunity Statute Examined—A handbook operator was subpoenaed before the grand jury to testify concerning an investigation of gambling. He was asked a number of questions which he declined to answer, claiming the privilege against self-incrimination. After a preliminary hearing, the court invoked the Illinois Witness Immunity Act and ordered the witness to "answer such relevant and material questions as might be put to him and granted him immunity from prosecution for any matters concerning which he might be required to testify." After repeated refusals to testify the witness was convicted of contempt of court. Under the Illinois Witness Immunity Act, ILL. REV. STAT. c. 38, § 580a (1953), a witness charged with a criminal offense whose testimony would tend to incriminate him may be granted immunity from prosecution on all charges which could arise out of his testimony except perjury. However, this statute does not authorize a grant of immunity if it should reasonably appear to the court that the testimony would subject the witness to prosecution under the laws of another state or the United States. The

witness contended that his testimony might disclose possible violations of federal statutes and regulations relating to the tax on gambling.

The Illinois Supreme Court reversed the conviction for contempt on the grounds that the Illinois statute prohibits the entry of an immunity order when there is danger of federal prosecution arising out of the compelled testimony before any Illinois court or grand jury. The court held that this immunity statute affords the witness the protection of the Fifth Amendment of the Federal Constitution as well as Section 10 of Article II of the Illinois Constitution. Thus, the state courts must look to federal decisions in order to determine whether the testimony will lead to prosecutions under the federal law. Federal cases have held that the testimony of a witness will be regarded as not incriminating only if it is "perfectly clear" that the testimony will not tend to incriminate the witness. In applying the federal test to the facts of this case, the majority stated that it was not "perfectly clear" that the witness was mistaken in believing that his testimony would incriminate him under federal law.

The dissenting opinion said that the Illinois act did not require the trial court to be certain that there would be no prosecution under federal law before an immunity order was issued. The dissent claimed that the Illinois act only requires the trial court to be reasonably certain that prosecution under federal law will not lie, and if the federal records already disclose the substance of the alleged incriminating circumstances, possible federal prosecution is no reason for failing to issue an immunity order. Also, the trial court can be reasonably certain that the witness will not be subject to incrimination if the record indicates that the federal authorities are not interested in the state investigation of the witness' activities. It was further contended by the dissent that under the terms of the Illinois act the possible incrimination under federal law must be conclusively determined before the entry of the immunity order and that after the immunity order has been entered, the trial court should not inquire into the incriminating quality of the specific questions put to the witness. The dissent believed that every exemption from the basic obligation to testify impedes the administration of justice. *People v. Burkert*, 131 N.E.2d 495 (Ill. 1956).

Use of the Same Person as Complaining Witness and Prosecutor Is Not Good Practice—Defendant, a justice of the peace, was charged with assault and battery as a result of an altercation with the county prosecutor. Defendant overheard a conversation between the county prosecutor and the clerk of the county court in which the prosecutor implied that the defendant had been misappropriating funds collected in the discharge of his duties as justice of the peace. Despite defendant's objections, the trial was conducted by the prosecutor who was also the complaining witness. In his closing argument the prosecutor admonished the jury that a failure to convict would encourage assaults on public officials and interfere with their actions. In addition, the prosecutor said that no matter how large a fine might be assessed against the defendant someone would come to his rescue and assume the payment of it.

The Kentucky Court of Appeals reversed the conviction of the defendant on the grounds that the prosecutor's remarks to the jury were prejudicial and violative of the standard of conduct required of a prosecutor. The remark that someone other than defendant would pay whatever fine was levied was speculative and not based on evidence in the record. In addition, the court said that "coercion is implicit" in the inflammatory statements of the prosecutor that no duties would be performed by him if the defendant were acquitted. While it was not argued as a basis for reversal, the court indicated disapproval of the complaining witness acting as prosecutor in this case, saying, "another attorney should have tried the action in order to remove the self-interest factor and thereby reduce to a minimum the display of passion and prejudice that can scarcely be kept in abeyance where the same person was the victim and the prosecutor." *May v. Commonwealth*, 285 S.W.2d 160 (Ky. 1956).

Statute Vesting Discretion in Prosecuting Officials to Charge Carrying of Firearms

Either as Gross Misdemeanor or Felony is Unconstitutional—Defendant was charged with a violation of the state law on carrying firearms without a license, convicted and sentenced to the penitentiary for ten years. He then petitioned for a writ of habeas corpus charging that the statute fixing the penalty for the crime of which he was convicted authorizes the prosecutor in his discretion to charge a defendant with either a misdemeanor or a felony, and is therefore unconstitutional. The statute in question was based on the Uniform Firearms Statute with certain modifications. It declared that a violation of the act was "punishable by a fine or imprisonment for not more than one year or both or by imprisonment for not less than one year nor more than ten years." On the issue of whether this language gives a prosecuting attorney the sole discretion to charge one who violates the law with either a gross misdemeanor or a felony, the Washington Supreme Court held that since the statute prescribed different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations, it violated the equal protection clause of the Fourteenth Amendment and is unconstitutional. Therefore, the writ was issued.

The dissenting opinion rejected this construction of the language and stated that the statute merely provided the trial judge was to have a wide latitude in the matter of punishment for violations of the act. The dissent further argued that if the issue had been framed to ask the question whether the act authorizes alternative charges, a fair interpretation of the language would deny such authority and sustain the constitutionality of the law. *Application of Olsen*, 295 P.2d 324 (Wash. 1956).

Where Statute Precludes Evidence of Blood Tests for Intoxication without Defendant's Consent, Comment on Failure to Take Test is Prejudicial Error; Recording Machines May Not Be Substituted for Court Reporter—Following a conviction for operating a motor vehicle while under the influence of intoxicating liquor, the defendant appealed, contending (1) that the trial court erred in admitting in evidence testimony that he had refused to take a blood test; and (2) that it was error to direct that the proceedings be recorded by a magnetic recording machine instead of by a court reporter. The Supreme Court of North Dakota sustained both objections by the defendant, primarily on the basis of applicable state statutes.

The statute on blood tests for intoxication which provides that no defendant "shall be required to submit to any chemical test without his consent" was interpreted as a legislative grant to an accused of choice of whether or not he would submit to such a test. This was intended to be a choice "absolutely free and not encumbered by a liability." If it could be argued that the refusal to submit to such a test could be put in evidence and commented upon by the prosecutor, then the defendant would be faced with the risk of providing evidence for the prosecution by submitting to such test, or certainly provide it by refusing to take the test. Despite contrary decisions reached in other jurisdictions, the North Dakota court held that evidence of a refusal to take a chemical examination must be excluded from the trial.

On the second issue of whether a machine may be substituted for a court reporter or stenographer as a means of making a record of the proceedings, the court construed statutes requiring a court reporter to take in shorthand all testimony and proceedings, as giving a party in a litigated case the right to have a court reporter take down the proceedings, and excluding the use of a magnetic recording device. *State v. Severson*, 75 N.W.2d 316 (N.D. 1956).

Separation of Jurors Not Established where Jurors Are Bedded down in Such a Manner as to Permit Them to Come and Go Freely—Defendant was tried for murder and convicted of voluntary manslaughter, receiving a sentence to prison for twenty-one years. During the course of the trial the jurors were kept together, as required by statute. However, overnight the jurors were placed on the third floor of the local hotel with the sheriff and two jurors sleeping in one room and the other eight male jurors sleep-

ing two in a room. The sheriff stayed in the room nearest the stairway with the door open. The five rooms were not all adjoining and the rooms were not connected, but the doors were left open all night. The defense contended that this was not substantial compliance with the code requirements that the jurors not be allowed to separate. The Kentucky Court of Appeals reversed the conviction, ordering a new trial, observing that there was too great an opportunity for the jurors to be tampered with in this case. *Nicholas v. Commonwealth*, 286 S.W.2d 542 (Ky. 1956).

The opinion cited several key factors that prevented the arrangement from meeting the standards of the statute. Since the rooms did not adjoin and the doors remained open during the whole night, the jurors were free to come and go as they pleased. There was no arrangement whereby it was necessary to pass the bed of the officer in charge if any juror desired to go out. Any outsider could have had ready access to any of the jurors. Under the rule that if there is sufficient opportunity afforded for the exercise of improper influence, the state must clearly establish the absence of any harmful influence, the failure of the prosecution to prove the lack of harm necessitated a reversal of the conviction. (*For other recent case abstracts see "Police Science Legal Abstracts and Notes," infra pp.* 302–306)