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CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

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Judge May Not Answer Juror's Question as to Defendant's Opportunity for Parole—Defendant was indicted for the crime of rape. At the conclusion of the trial, the jury retired to the jury room. Shortly thereafter, the jury returned to the courtroom and, in the presence of defendant's counsel, asked the judge how long defendant would have to remain in prison before becoming eligible for parole. In reply, the judge stated that defendant would have to serve at least one-third of his sentence. Counsel for defendant objected to the judge's remarks, and thereupon the judge instructed the jury not to consider them. Defendant was convicted and sentenced to life imprisonment. The Supreme Court of Alabama reversed the conviction on the grounds that the judge revealed information to the jury which was not proper for them to consider. *Lowley v. State*, 87 S.2d 433 (Ala. 1956).

The court surmised that the jury intended to make sure that defendant served a certain number of years in prison by adding to the length of the sentence to compensate for the possibility of parole. The reduction of a sentence by a parole board, it was said, is not a proper factor to be considered by the jury and such information is of such a prejudicial nature that, once revealed, a subsequent instruction by the judge to disregard the information is insufficient to correct the damage. When a judge is confronted with such a question, the court said, "The trial judge should instruct the jury to impose such sentence as seemed to be just with no regard to what might happen to the sentence in the future."

Refusal To Allow Inspection Of Written Confession By Defendant May Violate Fourteenth Amendment—Shortly after his arrest on a charge of murder, defendant allegedly signed a written confession. Prior to trial in a state court, defense counsel requested permission to inspect a copy of defendant's confession, claiming that the information sought was essential for the proper preparation of the defense. The trial court granted permission for inspection, but its order was reversed by the Supreme Court of New Jersey. *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953). Thereafter, defendant again requested permission to inspect and denied that he had read the statement or that he had admitted the crime. The second application was denied and defendant proceeded to trial without having had the opportunity to examine his alleged confession.

During the course of the trial, defendant objected to the admission into evidence of the confession; the judge, according to New Jersey practice, held a hearing outside of the presence of the jury to determine the voluntariness of the confession. Defendant was not furnished a copy of the confession until after the judge had ruled the statement voluntary and admitted it into evidence. Upon his conviction, defendant initiated a habeas corpus proceeding in a federal district court. The Court of Appeals for the Third Circuit affirmed the denial by the district court of defendant's petition. *Application of Tune*, 230 F.2d 883 (3rd Cir. 1956).

The circuit court agreed with the arguments of defendant that denial of the privilege of

inspection might well hamper the preparation of the defense. However, the court concluded that, "While refusal to give the defense a copy of the confession may not be the better practice, failure to do so will violate due process only if prejudice can be shown." Defendant failed to convince the court that receipt of the confession would have altered the course of the defense.

Greater difficulty, however, was experienced by the court in disposing of the problems encountered by defendant in contesting the voluntariness of the confession without having had the opportunity to first examine it. An important factor which must be considered by the trial judge in ruling on the voluntariness of the confession is the accuracy of the statements contained therein. "The refusal of the state to allow petitioner to inspect the confession prior to the final ruling on voluntariness effectively deprived petitioner of an opportunity to inject the factor of the confession's accuracy and truth into the trial on the issue of voluntariness. That fact might very well make a difference in a trial judge's determination of that issue." Nevertheless, the court decided that defendant was not prejudiced in this regard because of the absence of any indication that the accuracy of the statement could have been challenged.

It was stated in a concurring opinion, however, "that in other circumstances, a grave due process question may arise out of the very unsatisfactory practice of deciding upon the admissibility of an alleged confession without first revealing its contents to the defendant and affording him a reasonable opportunity to use the text itself in support of his claim of coercion."

Voluntary Character of a Confession Must Be Determined in Illinois by The Court Outside the Presence of the Jury—Defendant was indicted on a charge of murder. The only direct evidence introduced at the trial connecting defendant with the homicide was a pre-trial confession obtained from defendant by police. Defendant objected to admission of the confession, contending that it was ex-

tracted from him by coercion, promises of leniency, and, in addition, that no proper foundation for its admission had been laid. The trial court overruled all objections and admitted the confession without a preliminary *voir dire* hearing outside the presence of the jury. The Supreme Court of Illinois reversed defendant's conviction and remanded the cause for a new trial on the ground that the trial court failed to follow the proper procedure in admitting the confession into evidence. *People v. Wagoner*, 133 N.E.2d 24 (Ill. 1956).

The court maintained that "confessions are competent evidence only when they are voluntarily made . . . if an objection is made [to the admissibility of a confession], it is the duty of the court to hear, out of the presence of the jury, such evidence as the parties may present concerning the circumstances under which the confession was made, for the purpose of determining whether it was voluntarily made or was procured by pressure, fraud, hope, fear or other undue influence . . . Such preliminary hearing pertains to the competency of the confession which must first be determined by the court. It can never be properly left to the jury." The court indicated that at the preliminary hearing, the prosecution must produce all witnesses to the interrogation and the defendant should testify and advise the court as to what took place during the questioning.

In a recent case, the conclusive determination by the trial judge of the voluntariness of a confession was held not to violate the Fourteenth Amendment. *Application of Trune*, 230 F.2d 883 (3rd Cir. 1956).

Prosecution May Determine Whether to Charge a Violation of Internal Revenue Code as a Felony or Misdemeanor—Petitioner was indicted for willfully attempting to evade federal income taxes by filing with the Collector "false and fraudulent" tax returns. This offense is punishable under either of two sections of the *Internal Revenue Code of 1939*, 26 U.S.C. Section 3616(a) provides that any person who delivers to the Collector a false

and fraudulent tax return is guilty of a misdemeanor and subject to a \$1,000 fine and one year of imprisonment. Defendants were indicted under section 145(b) which provides that "any person who willfully attempts in any manner to evade or defeat any tax . . . shall be guilty of a felony . . . and shall be fined not more than \$10,000 or imprisoned more than five years or both. . ."

The trial judge refused the petitioner's request that the jury be instructed to decide whether petitioner was guilty of a felony or a misdemeanor. The United States Supreme Court, in a 6-3 decision, affirmed the trial judge's refusal of the instruction saying that "here, whether §145(b) or §3616(a) be deemed to govern, the factual issues to be submitted to the jury were the same; . . . When the jury resolved those issues against the petitioner, its function was exhausted, since there is here no statutory provision giving to the jury the right to determine punishment to be imposed after the determination of guilt." *Berra v. United States*, 76 S.Ct. 685 (1956).

Mr. Justice Black, speaking for the dissent, said that "filing a fraudulent return could be proscribed by §145(b) because of the phrase 'in any manner', but the offense certainly falls within §3616(a) which expressly sets forth the punishment for filing fraudulent returns." Justice Black contends that the majority decision permits the prosecuting attorneys of the government to elect the punishment to be imposed. Mr. Justice Black said, "I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual . . . it is true that under our system Congress may vest the judge and jury with broad power to say how much punishment shall be imposed for a particular offense. But it is quite different to vest such powers in a prosecuting attorney." A judge and jury reach their judgments and verdicts at public trial in which the defendant has a right to be represented by an attorney. "No such protection is thrown around the decisions by a prosecuting attorney."

Trial of Conscientious Objectors for Failure to Obey Draft Boards' Order Must Take Place where Order Is to Be Performed, Not where Draft Boards Are Located—Defendants were conscientious objectors who had been indicted for violations of the *Universal Military Training and Service Act*, 50 U.S.C. Appendix §451st seq. They had reported to their local draft boards but subsequently refused to report for work in state hospitals as ordered. The state hospitals were located in judicial districts different from those of defendants' local draft boards. Defendants were brought to trial in the judicial district where the hospitals were located. The Court of Appeals for the Third Circuit reversed the trial court's dismissal of the charge for improper venue and remanded the case for trial. The United States Supreme Court, in a 6-2 decision, affirmed the ruling of the Court of Appeals and held that proper venue existed in the judicial district where defendants refused to report for work. Mr. Justice Reed, speaking for the majority, said ". . . the law and the facts in these cases convinces us that the venue of these violations of the orders lies in the district where the civilian work was to be performed. . ." *Johnston v. United States*, 76 S.Ct. 739 (1956).

The basis of this conclusion was "the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance is the situs of the crime." The court construed the facts in this case as placing two duties on the defendants: 1) to report to their local draft boards, which duty was performed; and 2) to report to the hospitals, which was not done. Trial was to take place in the state and district where the crime was committed, i.e., where defendants failed to report for work.

In a dissenting opinion, Justices Douglas, Black and Chief Justice Warren construed the crime to be the failure of the defendants to obey any order of their local draft boards and, thus, held venue proper in the judicial districts of the defendants' local draft boards. The dissenting justices believe that the de-

fendants should be given the benefit of trial in their home towns. "For their defiance of their local boards they are sent to distant places for trial where they have no friends, where they are unknown, and to which all witnesses must be transported . . . I would read the statute with an eye to history and try the offenders at home where our forefathers thought that normally men would receive the fairest trial."

Husband-Wife Privilege Is Waived when Husband Directs Police to Question Wife— Defendant was arrested for the murder of his wife's lover. When asked by police to make a statement, defendant replied, "Ask my wife." His wife was then questioned in defendant's presence and stated in a typewritten statement that defendant had admitted to her that he had committed the murder.

At the trial defendant objected to the ad-

mission as evidence of his wife's signed statement, claiming that his statement to his wife about his part in the homicide was a privileged communication between husband and wife. The Indiana Supreme Court affirmed defendant's conviction and approved the admission of the wife's statement on the grounds that defendant had waived his privilege by instructing the police officers to question his wife. *Hunt v. State*, 133 N.E.2d 48 (Ind. 1956).

The court concluded that "Where a party directs another to a third person for information or directions, he is bound by the statements of the third persons . . . Since the [husband-wife privilege] does not create any absolute incompetency but only a privilege, it necessarily follows that the privilege may be waived. The appellant waived the privilege when he told the police officers several times to ask his wife."

(For other recent case abstracts see "Police Science Legal Abstracts and Notes", *infra* pp. 392-394)