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Abstracts of Recent Cases

graphic transcript of the trial court record, or a partial transcript, or any other aid adequate for the compilation of the appellant's bill of exceptions, according to the needs of each particular case.

(A) Where the petitioner was convicted after April 23, 1956 [the date of the United States United States Supreme Court decision in the *Griffin* case] the petition shall be verified by the petitioner and shall state facts showing that he was at the time of his conviction without financial means to prepare an adequate bill of exceptions.

(B) Where the petitioner was convicted prior to April 23, 1956, the petition shall be verified by the petitioner and shall state:

(1) The date of his conviction and the charge upon which he was convicted.

(2) Facts showing that he was at the time of his conviction without financial means to prepare an adequate bill of exceptions or to pay the printing costs of an appellate brief. In a case where the petitioner is indigent at the time of filing his petition under this act, he shall be afforded financial aid. In the case where the petitioner at the time of filing his petition is no longer indigent, he shall not be afforded financial aid; but he nevertheless may obtain the appellate review which, because of his prior indigency was not available to him at the time of his conviction.

(a) If the petitioner, following his conviction, had requested and was refused such aid for reasons other than failure to establish his indigency, his contention of prior indigency shall be presumed true. This presumption may be rebutted by evidence indicating the falsity of the petitioner's allegation of prior indigency.

(b) If the petitioner, following his conviction, had not requested aid, he shall have the burden of substantiating his allegations of prior indigency.

(3) The alleged errors which petitioner claims occurred at his trial.

(4) That he desires to apply for issuance of a writ of error to review the conviction.

ABSTRACTS OF RECENT CASES

Trial Court May Grant Defendant Discovery Of His Statement Made To Police—Following his arrest on a charge of murder, the defendant was taken to a hospital for medical treatment. At the hospital, the defendant, in response to questioning by police, made a statement setting forth the circumstances of the crime. The statement was recorded by a court reporter. Prior to the trial, defense counsel unsuccessfully sought to inspect or obtain a copy of the statement from the police and the trial judge refused to order such inspection. At the trial, selected portions of the statement were introduced in evidence by the prosecution for the purpose of impeaching the defendant's testimony. Because the jury was unable to agree on a verdict, a mistrial was declared. Thereafter, the prosecution obtained a change of venue and proposed to retry the defendant before a different judge. Prior to this trial, the judge, upon defendant's motion, ordered the prosecutor to permit defense counsel to inspect and copy, before trial, the statement taken from the defendant. The prosecution then petitioned the Arizona Supreme Court to restrain the trial court from enforcing its order. The appellate court, with two members dissenting, affirmed the trial court's order, holding that, unless expressly prohibited by statute, a court has the inherent power to order discovery by defense counsel of the defendant's statement in the hands of the prosecutor. *State v. Supreme Court of Santa Cruz County*, 302 P.2d 263 (Ariz. 1956).

On appeal, the prosecution contended that the order requiring that defense counsel be permitted to inspect the defendant's statement was "in excess of the jurisdiction and authority" of the trial court. Such statements, the state argued, are part of the "work product" of the prosecution, access to which by the opponent is forbidden. In addition, the state said, such

discovery would seriously jeopardize the state's chance of obtaining a conviction. The defendant maintained that such inspection was expressly authorized by the state rules of court procedure and that, in addition, requiring such discovery was within the inherent power of the trial court. The state Supreme Court Rule providing for discovery in criminal cases, the court said, is identical in language to rule 16 of the Federal Rules of Criminal Procedure. For this reason, the court examined those cases which have interpreted the federal rule pertaining to discovery. A majority of federal courts, it was said, have held that federal rule 16 has no application to statements made by the defendant. Accordingly, the court held that the Arizona court rule neither authorizes nor sanctions inspection by the defendant of his statements in the hands of the prosecutor. However, the court said, the rule "does not express a policy prohibiting discovery." For this reason it was further held a court has the "inherent residual power" to permit broader discovery that than authorized by the rule. Nevertheless, the court indicated that a defendant does not have an unqualified right to discovery of his statement or confession. An application for such discovery, the court said, is addressed to the trial court's discretion and should be granted only in exceptional cases where such inspection is "essential to the due administration of justice."

In regard to the state's contention that the defendant's statement is part of the prosecution's "work product", the court conceded that an attorney's work product is not subject to pre-trial inspection. The court encountered difficulty, however, in defining the term "work product". That term, the court said, has been held to include "interviews, memoranda, and statements" taken down by an attorney. However, the court indicated that a proper definition of an attorney's work product should not include materials which are to be used as evidence at the trial. Since, in the present case, the prosecution used the defendant's statement as evidence at the first trial and indicated an intention to use it at the second trial, the court concluded that the statement was not part of the prosecution's work product and is subject to pre-trial inspection.

The dissent pointed out that, prior to the majority's decision, a defendant was precluded from discovery of his statements on the grounds that they were "the private papers" of the person who records then. The trial court, the dissent said, had no authority to adopt a different view.

Prosecutor's Reference To Lie-Detector Test Held Not Prejudicial—Following his indictment on a charge of breaking and entering with intent to steal, the defendant voluntarily submitted to a lie-detector test. Before trial, the defendant filed a motion, which apparently was never ruled upon by the trial judge, requesting that he be given a new lie-detector test using questions approved by the court. At the trial, the prosecutor, during the *voir dire* examination, asked the jury, "if this man is shown to have taken a lie-detector test, is there anybody who at the outset feels that the lie-detector is all wrong, they should never be used or that its results are entirely unreliable?" The defendant, objecting to this inquiry, called the court's attention to the defendant's earlier motion for a new test and requested, in the presence of the jury, that questions regarding the lie test be excluded until the court ruled upon whether the results of a test would be admitted. The objection was sustained. Thereafter, the prosecution introduced as a witness the interrogator who had administered the lie-detector test and proceeded to question him regarding the test. Upon the defendant's objection, the court excluded testimony regarding the results of the test but permitted the witness to testify about a conversation presumably had with the defendant during the test. The Ohio Court of Appeals affirmed the defendant's conviction, holding that the prosecutor's reference to the lie-detector test was, under the circumstances, not prejudicial. *State v. Rhoads*, 137 N.E.2d 628 (Ohio 1955).

The court based its decision upon the fact that the defendant had voluntarily submitted to a test and, in addition, had requested a

second test. Furthermore, the court said, the defendant had commented upon this request for a new test in the presence of the jury. Under these circumstances, the court concluded, "the jury could not have been misled or prejudiced by the reference to the test."

Wife Of Prosecutor Is An Incompetent Juror—The defendant was indicted for killing a pedestrian while driving in an intoxicated condition. At the trial, the wife of the prosecutor was a member of the jury panel from which a jury was to be selected. During her *voir dire* examination, the prosecutor's wife testified that she had no fixed opinion as to defendant's guilt and could accord him a fair trial. In addition, she said that she would like to sit on the jury and did not want to be disqualified. The trial judge overruled the defendant's objection to the juror. The defendant then exercised a peremptory challenge and the juror was removed. In so doing, however, the defendant exhausted his peremptory challenge and thereafter was forced to accept an objectional juror. On appeal, the Texas Court of Criminal Appeals reversed the defendant's conviction, holding that the wife of a prosecuting attorney may not serve as a juror in a case which is prosecuted by her husband. *Reynolds v. State*, 294 S.W.2d 108 (Tex. Crim. App. 1956).

There is no statutory provision, the court said, which disqualifies the wife of the representative of the state from serving as a juror. However, it was said, a defendant is constitutionally entitled to a fair and impartial trial. The court expressed doubt that a defendant would be afforded a fair hearing under these circumstances. "While the wife of a district attorney may say and feel in her heart that she can give a fair and impartial trial to a person charged with crime and prosecuted by her husband," the court said, "yet human nature tends strongly to the contrary."

Tape Recording Of Confession May Be Played By Jury During Deliberations—The defendant was arrested for murder and taken for examination to a state mental hospital. At the hospital the defendant made a confession of the crime to physicians in the presence of police officers. The statement was recorded on a tape recorder. At the trial, the recording was received in evidence and played to the jury. At the conclusion of the trial, one juror was instructed in the operation of the recording device and the jury was permitted to take the recording into the jury room and play it during their deliberations. After the jury had retired, the defendant objected to the jury's use of the recording on the grounds that no juror was qualified to properly operate the device and, in addition, that to permit the playing of the recording in the jury room would give undue prominence to this evidence. The Supreme Court of Iowa affirmed the defendant's conviction, holding that a recorded confession may be taken into the jury room. *State v. Triplett*, 79 N.W.2d 391 (Iowa 1956).

While expressing doubt as to the timeliness of the defendant's objection to the jury's use of the recording, the court nevertheless considered the merits of the objection. The court easily disposed of the defendant's contention that no juror was competent to operate the machine. The court observed that one juror had been instructed in the machine's use and that there was no showing that the recorder was improperly operated. In regard to the question of whether the recording should have been taken to the jury room at all, the court relied on the case of *State v. Gensmer*, 235 Minn. 72, 51 N.W.2d 680 (1951), in which the Minnesota Supreme Court had compared the use by the jury of recordings with the accepted practice in taking longhand statements into the jury room. That court had said, "No one questions that statements in longhand which have been properly received in evidence may be taken by the jury into the jury room. We can see no reason why the mechanism and the mechanical version of the statement may not also be received in evidence."

Prospective Jurors Cannot Be Asked Reaction To Evidence Which Might Be Offered—The defendant was indicted on a charge of unlawfully selling narcotics. At the trial, the defendant's counsel, during the *voir dire* examination of the jury, asked two prospective jurors

whether they had any prejudice against a person charged with a narcotics violation and, in addition, whether they would consider in arriving at a verdict the possibility that a witness for the prosecution might be biased against the defendant. Later, defense counsel asked another prospective juror a long, hypothetical question to the effect that "if it can be shown that the state officers for reasons that are unexplained deliberately failed to use available scientific instruments in their investigation, if this is shown as an effort to show a deliberate lack of evidence would you have any prejudice or bias against such a defense?" The trial court sustained the prosecution's objections to these questions. On appeal, the Supreme Court of Louisiana affirmed the defendant's conviction. *State v. Williams*, 89 So.2d 898 (La. 1956).

The court construed the questions asked by defense counsel as an attempt to elicit the jury's reaction to evidence which might be introduced at the trial. A state statute, the court said, provides that the *voir dire* examination of prospective jurors is to be limited to an examination of their qualifications to try the case. Such an examination, the court observed, may not be used "to elicit in advance the jurors' opinions as to whether they were prejudiced concerning some future defense." For these reasons, the court concluded, the trial judge wisely exercised his discretion by sustaining objections to the questions.

Where Conviction Of Lesser Offense Than That Charged In Indictment Is Reversed, Retrial For Crime Charged In Indictment Does Not Constitute Double Jeopardy—The defendant, indicted on a charge of first degree murder, had been convicted of the lesser included offense of second degree murder. On appeal this conviction was reversed and a new trial ordered on the grounds that the trial court erred in instructing the jury (and to the defendant's prejudice) that they might return a verdict of second degree rather than first degree murder, since "all the testimony pointed to murder in the first degree and nothing else." Green v. United States, 218 F.2d 856 (D.C. Cir. 1956). Thereafter the defendant was retried on the charge of fisrt degree murder contained in the original indictment. The evidence presented at the second trial was substantially the same as that considered at the previous trial. The judge, however, did not instruct the jury as to second degree murder. At this trial, the defendant was convicted of first degree murder. The United States Court of Appeals for the District of Columbia Circuit, with two members dissenting, affirmed the conviction, holding that, where a defendant has been convicted of a lesser offense than that charged in the indictment, and that conviction is reversed on appeal, a new trial for the crime charged in the indictment, rather than for the lesser offense, does not constitute double jeopardy. *Green v. United States*, 236 F.2d 708 (D.C. Cir. 1956).

The defendant contended on appeal that his conviction, at the first trial, of second degree murder amounted to an acquittal of the charge of first degree murder and that he could not be retried for an offense of which he had been acquitted. The majority based its rejection of this argument on *Trono v. United States*, 199 U.S. 521 (1905), in which the United States Supreme Court had said, "the better doctrine is that which does not limit the court or jury, upon a new trial, to the consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place."

The dissent reasoned that the defendant's conviction of second degree murder constituted an acquittal of first degree murder. The defendant, the dissent said, had appealed only from the second degree murder conviction. That appeal, it was said, did not bring before the court the defendant's acquittal of the first degree murder charge. For this reason, the dissent said, the defendant did not waive his right not to be placed in jeopardy a second time for first degree murder. The dissent maintained that the *Trono* case was not applicable to the present situation

since that case arose under Philippine law. The law of that jurisdiction, the dissent continued, permitted the entire case to be reviewed and tried *de novo* before the appellate court. Thus, it was said, under Philippine procedure an appellant convicted of a lesser offense, by seeking review, waived his acquittal of a more serious offense. Since such is not the practice in the United States, the dissent urged the adoption of the prevailing view at common law which would preclude a re-trial of the greater offense of which the defendant had been acquitted.

Entrapment By State Officers Is Good Defense To Federal Prosecution; Denial Of Crime Charged Does Not Preclude Defense Of Entrapment—A state police officer, while on inactive duty and engaged in nonpolice work was requested by a local deputy sheriff to assist him in the detection of violations of state liquor laws. As a result, the state officer contacted the defendant and, after several meetings, persuaded the defendant to open a moonshine distillery with the police officer. While operating the still with the defendant, the officer was appointed a special investigator for the state attorney general. Thereafter, the United States Treasury Department assigned an agent to assist the state officer. Subsequently, the defendant and several companions were arrested by the federal agent and charged with distilling moonshine in violation of the Internal Revenue Code. At the trial in a federal district Court, the defendant, pleading not guilty, admitted operating the still but denied participating in the alleged conspiracy. In addition, the defendant pleaded entrapment by the state police officer. The prosecutor admitted that the defendant opened the still as the result of the state officer's persuasion. The trial court, however, refused to instruct the jury on the issue of entrapment on the grounds that the defendant, by denying participation of the conspiracy, was precluded from relying on the defense of entrapment. The United States Court of Appeals for the Fifth Circuit reversed the defendant's conviction, holding that denial of the act charged does not preclude reliance on the defense of entrapment and that entrapment by a state officer is a valid defense to a federal prosecution. *Henderson v. United States*, 237 F.2d 169 (5th Cir. 1956).

The initial question considered by the court was whether entrapment may be relied upon when commission of the crime is specifically denied. Rule 8(e)(2) of the Federal Rules of *Civil* Procedure permits a party to plead all possible defenses "regardless of consistency." While there is no such provision applicable to criminal proceedings, the court observed that rule 12(a) of the Federal Rules of Criminal Procedure provides that all possible defenses are included within a plea of not guilty. It is well settled, the court said, that a not guilty plea raises the defense of entrapment. However, it was said, the defendant may not necessarily rely on entrapment as well as deny the act charged. As the test of when reliance on both defenses is permissible, the court adopted the rule followed at common law in regard to civil actions. The test, the court said, is whether proof of one defense is so inconsistent with proof of the other defense that proof of the one must disprove the other. In the present case, the court concluded, the defendant could consistently claim that "I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down to the road to crime, I was entrapped." Thus, the court said, both defenses, entrapment and denial of the crime, could properly be presented.

The court was unable to find prior decisions on the question of whether inducement by state, rather than federal, officers constituted entrapment. It is well settled, the court said, that inducement by a private citizen, rather than a law enforcement officer, does not constitute entrapment. In addition, the court observed, cases involving double jeopardy and the use of evidence obtained through illegal search and seizure appear to establish that the state and federal governments are separate sovereignties. The court, however, rejected these analogies. State officers, it was said, do not stand in the same relation to the federal government as do private citizens or officers of a foreign sovereignty. It has been held, the court observed, that state offi-

cers may be required to enforce federal law. In the present case, the court said, while the state officers were not required by statute to enforce the federal law, it was permissible and proper for them to assist the federal agents. For this reason, the court concluded that "when a state officer has induced a person otherwise innocent to commit a crime in order to punish him therefore, the United States cannot take over the task of punishment by prosecuting for the federal offense without allowing the defense of entrapment, the same as if the inducement had been by a federal officer."

(For other recent case abstracts see "Police Science Legal Abstracts and Notes", *infra* pp. 741–745.)