

1957

Abstracts of Recent Cases

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Recommended Citation

Abstracts of Recent Cases, 48 J. Crim. L. Criminology & Police Sci. 65 (1957-1958)

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determinations of admissibility as contrasted with the ultimate determinations reflected in the verdict.⁴⁰ This factor is especially significant to the defendant since his appeal may depend upon what specific error he can show in the proceedings below.⁴¹

CONCLUSION

The orthodox procedure offers both the court and defendant certain distinct advantages that are not found in the New York or Massachusetts methods. For example, since the jury is required to consider only credibility unhampered by preliminary considerations of

⁴⁰ See *Stein v. New York*, 346 U.S. 156 (1953.) where the Supreme Court considered this problem, "Under these circumstances, we cannot be sure whether the jury found the defendants guilty by accepting and relying, at least in part, upon the confessions or whether it rejected the confessions and found them guilty on other evidence" at 170. In rejecting the defendant's claim that the New York procedure violated his rights under the fourteenth amendment the Court said, "Despite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom" at 179.

⁴¹ The suggestion has been made that special questions be employed. The United States Supreme Court has pointed out that such a procedure has not been used in the United States. *Id.* at 188. See also Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 391, 395 (1927), where special questions concerning preliminary determinations are discussed and rejected as a "ponderous nuisance."

admissibility, the judge is permitted to give an uncomplicated instruction. Furthermore, the defendant is offered more protection against the jury's considering his coerced confession, because the orthodox rule is not based on the delicate assumption that a jury will be able to disregard evidence that has been placed before them. In addition, the defendant, under the orthodox procedure, is given a definite determination of the admissibility question. Where the jury decides the issue of voluntariness, the defendant and the appellate court have the impossible task of disentangling this determination from the general verdict. In spite of these factors, the trend in recent years has been toward the New York view.⁴² A reversal of this trend should result from a re-examination by the courts of the objectives of the procedures used to determine a confession's admissibility. These objectives can best be served through the adoption of the orthodox procedure.

⁴² Wigmore termed the orthodox rule the majority view. 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940). However, more recent writings note a trend toward the New York procedure which makes it the majority view. McCORMICK, EVIDENCE § 112 (1954); 2 WHARTON, CRIMINAL EVIDENCE § 355 (12th ed. 1955). A method of reversing this trend is illustrated by a recent Kentucky statute. KY. REV. STAT. § 422.110 (1953). The courts have interpreted this statute as requiring them to discontinue the use of the New York procedure and adopt the orthodox rule. *Bass v. Commonwealth*, 296 Ky. 426, 177 S.W.2d 386 (1944); *Herd v. Commonwealth* 294 Ky. 154, 171 S.W.2d 32 (1943). See also, MODEL CODE OF EVIDENCE rule 505 (1942); UNIFORM RULES OF EVIDENCE rule 8, which adopt the orthodox procedure.

ABSTRACTS OF RECENT CASES

Use of Confession Held to Violate Due Process Despite Absence of Physical Coercion— Following the attempted rape of a local resident, the defendant, an uneducated Negro, was apprehended by civilians. Police were summoned and the accused was jailed "on an open charge of investigation." The day after his arrest, a Sunday, began a ten-day period of detention during which the defendant was held

incommunicado and questioned at intermittent sessions of several hours' duration. On Monday morning the defendant was questioned for two hours, during which time he was permitted to talk to his employer. That afternoon the defendant was transferred, ostensibly for his protection, from the local jail to the state prison. At the prison, the defendant was kept isolated from the other prisoners and, during

the following week, was questioned almost daily at sessions lasting for several hours. On Thursday the defendant's father requested and was denied permission to see him. That evening, in response to questions asked by police, the defendant made a tape recorded confession. The confession consisted largely of yes-or-no answers to questions asked by police. On Saturday, a lawyer was denied permission to see the defendant and, the next day, the defendant was permitted his first contact with friends. The following Tuesday, the tenth day of his detention, the defendant made a second confession, consisting of answers to questions, which was transcribed by police and signed by the defendant.

Following this confession, the defendant was arraigned on a charge of burglary with intent to commit rape. At the trial, the court ruled the confession voluntary and admissible. The defendant did not testify regarding the procurement of the confessions because of the trial court's ruling that such testimony would subject the defendant to unlimited cross-examination concerning the offense. Following the affirmation of the defendant's conviction by the Supreme Court of Alabama, the defendant petitioned for and was granted certiorari by the United States Supreme Court. That Court, with three members dissenting, reversed the defendant's conviction, holding that "the use of the confession secured in this setting was a denial of due process" in violation of the fourteenth amendment. *Fikes v. Alabama*, 77 Sup. Ct. 281 (1957).

The Court noted that there was no evidence of physical brutality and indicated that elements which were present in prior cases in which the Court had held confessions coerced were not present in this case. However, the Court said, the determination of whether a confession has been obtained in violation of due process depends "upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." In the present case the Court considered significant the ten-day delay

in arraignment, in violation of state law, during which the defendant, an uneducated Negro characterized as "schizophrenic and highly suggestible", was not permitted to communicate with either a lawyer or friends. "The totality of the circumstances," the Court said, "that preceded the confessions in this case goes far beyond the allowable limits."

Mr. Justice Frankfurter, in a concurring opinion, emphasized that no single one of the circumstances portrayed would by itself violate due process. In regard to the absence of physical brutality, Justice Frankfurter saw no difference "between the subversion of freedom of the will through physical punishment and the sapping of the will appropriately to be inferred from the circumstances of this case." Commenting upon the delay in arraignment, it was said that, while such delay, even though violative of state law, is not a denial of due process, "it is to disregard experience not to recognize that the ordinary motive for such extended failure to arraign is not unrelated to the purpose of extracting a confession."

The dissent contended that the majority had overstepped its function of enforcing the fourteenth amendment and had interfered in a state's administration of its criminal laws. There was neither physical brutality, the dissent said, nor that degree of psychological coercion usually associated with a due process violation. The questioning of the defendant, it was said, was intermittent and never exceeded two or three hours at a time. The delay in arraignment, the dissent said, was not an unusual practice. In the absence of anything that "shocks the conscience," the dissent concluded, the Court should not interfere in state activities.

Confession Naming Co-Conspirators Held Admissible—The defendant Paoli and four co-defendants were indicted in a charge of conspiracy to evade the federal alcohol tax. After the termination of the alleged conspiracy, co-defendant Whitley prepared and signed a confession which directly implicated defendant Paoli in the crime. At the conspirators' joint trial in a federal district court, the confession was admitted into evidence despite Paoli's

objection. The trial court refused to delete references in the confession to Paoli's part in the conspiracy. However, the court instructed the jury that the confession was to be used solely for determining the guilt of Whitley, the confessor, and not for ascertaining the guilt of any other defendant. Following the defendants' conviction, Paoli appealed, alleging error in the admission of Whitley's confession. The United States Supreme Court, with four members dissenting, affirmed the defendants' conviction, holding that a confession of one co-conspirator which implicates others and is made after termination of the conspiracy, is admissible in evidence at a joint trial of the conspirators, if the judge instructs the jury to consider the confession only in regard to the declarant's guilt. *Paoli v. United States*, 77 Sup. Ct. 294 (1957).

It is well settled, the Court said, that a declaration of one conspirator, made in furtherance of the conspiracy and prior to its termination, may be used against the other conspirators. In addition, it was said, such a declaration made after termination of the conspiracy, may be used only against the declarant and pursuant to an appropriate jury instruction. A difficult problem, the majority noted, is presented when the conspirators are tried together and a confession directly implicating the group is sought to be admitted in evidence against one member of the conspiracy. The issue presented is whether the trial court's instruction to the jury, limiting use of the confession to determining the declarant's guilt, sufficiently protected the other defendants. In the present case, the Court said, the conspiracy was simple in character and the roles of each defendant were easy to understand. In addition, it was said, no request for separate trial was made. The trial court's instructions were clear and were repeated at several points during the trial. Furthermore, the Court emphasized, a jury must be presumed to follow the court's instruction. "To say that the jury might have been confused," the majority concluded, "amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions

of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions."

The dissent criticized the majority for relying upon the jury's ability to disregard prejudicial evidence. "The fact of the matter is," the dissent said, "that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors." Since the prosecution, the dissent said, could have avoided the possibility of unfairness by trying the defendants at separate trials, "the Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."

Tape Recording Held Admissible to Impeach Witness—Prior to the defendant's trial on a charge of driving while intoxicated, the sheriff and the prosecutor had a conversation during which the sheriff told the prosecutor that he would testify that the defendant was drunk when arrested. This conversation was recorded by the prosecutor by means of a concealed tape recorder without the knowledge of the sheriff. At the trial, the sheriff testified as a witness for the defendant. When asked whether, in his opinion, the defendant was drunk at the time he was placed in jail, the sheriff replied that the defendant acted more like a man who had been using narcotics than like a man who was intoxicated. Thereafter, the prosecution, for the purpose of impeaching the sheriff, offered into evidence the recording of the conversation had between the witness and the prosecutor. The trial court, overruling the defendant's objection, admitted the recording into evidence as a prior inconsistent statement, for the purpose of impeaching the witness. The portions of the recording which were at variance with the testimony of the sheriff were then played before the jury. The Texas Court of Criminal Appeals, with one member dissenting, affirmed the defendant's conviction and approved the admission of the evidence. *Huston v. State*, 296 S.W.2d 245 (Tex. Crim. App. 1956).

On appeal, the defendant maintained that the use of a tape recording is an improper method of impeaching a witness. In addition, the defendant argued, the recording was inadmissible because it was obtained in violation of the Federal Wire Tapping Act. The court easily rejected the wire-tapping argument, holding that the recording of the conversation did not constitute an interception of a communication by wire or radio, as required by the federal act, but was merely a recording of a personal conversation.

As a further argument, the defendant contended that use of the recording deprived him of his right to confront and cross-examine opposing witnesses. In response, the court said that the defendant's right of cross-examination was sufficiently preserved since the defendant had the opportunity to cross-examine the prosecutor. The dissent supported the defendant's contention that use of the mechanical recording device denied the defendant his constitutional right to cross-examine his opponent's witnesses. "If the state can set a mechanical device in the witness chair in the courtroom and have it testify as a witness," the dissent said, "there is nothing to prevent it from having witnesses record their testimony upon a mechanical device and, upon the trial of the case, have that mechanical device testify to such a statement."

Witness Granted Immunity from State Prosecution must Testify before State Grand Jury Despite Active Cooperation between Federal and State Authorities—The defendant was subpoenaed by a New York grand jury and ordered to testify regarding the alleged bribery of labor union representatives. At the hearing, the defendant refused to testify, invoking the privilege against self-incrimination provided by the state constitution. The grand jury, pursuant to the New York immunity statute, then accorded the defendant immunity from prosecution by New York authorities for crimes which might be revealed by his testimony and renewed the order that he testify. Maintaining his refusal to answer questions, the defendant contended that his testimony would incriminate him under federal law and that the state immunity act would not

protect him from federal prosecution. Federal, as well as state law, the defendant maintained, made it a crime to bribe labor union officials. The defendant argued that the local United States district attorney had publicly expressed an intention to cooperate with local state authorities in the prosecution of cases involving the bribery of labor representatives. In addition, the defendant said, the local state's attorney intended to cooperate with federal authorities in the prosecution of such offenses in the federal courts. Thus, it was contended, the defendant's testimony would place him in imminent danger of federal prosecution if he were required by state authorities to incriminate himself. Upon his continued refusal to testify, the defendant was committed for contempt. On appeal, the Supreme Court of New York affirmed, holding that, where there is active co-operation between state and federal authorities in prosecuting crimes prohibited by both federal and state laws, a witness accorded immunity from state prosecution may not invoke the privilege against self-incrimination. *Knapp v. Schweitzer*, 157 N.Y.S. 2d 158 (Sup. Ct. App. Div. 1st Dep't. 1956).

The privilege against self-incrimination of the fifth amendment to the United States Constitution, the court pointed out, does not apply to state tribunals. Nevertheless, the court said, that privilege is provided by the New York constitution. While the validity of its state immunity act does not depend upon its ability to afford a witness protection against prosecution, the court said that "we cannot in fair compliance with our own constitution remain insensible to the actual dangers of nonimmunized compulsory incrimination in the United States courts where we compel testimony in the ever broadening areas and in subjects affected by the criminal laws of both governments. And while we can exercise no control over federal practice, we can exercise a judicial supervision over state enforcement officers." The general rule, the court said, is that federal authorities are not precluded from initiating a prosecution because of a state's action in compelling a defendant to incriminate himself. However, the court said, an analysis

of federal decisions in this area and in the analogous area of illegal search and seizure indicates that federal courts would refuse to prosecute a witness compelled by state authorities to incriminate himself where there was co-operation between federal and state law enforcement officials. For this reason, the court concluded, "a state prosecuting officer investigating an area in which the criminal laws of both the federal and state governments operate together, and requiring immunized testimony in the development of his case, could himself give adequacy to state constitutional safeguards by tendering cooperation with the appropriate United States attorney."

Motion to Suppress Evidence Constitutes an Admission against Interest—On the basis of evidence seized by federal agents armed with a search warrant, the defendants were indicted for violation of the federal alcohol tax laws. Prior to their arraignment before a federal magistrate, the defendants' attorneys filed a motion to suppress the evidence on the grounds that it was procured through an illegal search and seizure. The motion, which was signed only by the attorneys, alleged that the seized property belonged to the defendants. At the hearing on the motion the defendant Fowler testified that the evidence belonged to him. The defendant Scott, on the other hand, repudiated the allegations contained in the motion and testified that he had no interest in the seized evidence. The motion was overruled. During the trial, the court admitted the motion into evidence against both defendants. Scott's testimony alleging ownership of the property was also admitted, while Fowler's testimony, denying ownership in the evidence, was excluded. The court instructed the jury that the motion was signed by the defendants' attorneys and that "the defendants are bound by their statements." On appeal from their conviction, the United States Court of Appeals for the Tenth Circuit held that a motion to suppress, together with the testimony in support of the motion, where the motion is overruled, is admissible in evidence as an admission against interest. However, the court further held that the motion is not admissible where it is signed only by the defendants' attorneys and not by

the parties themselves. *Fowler v. United States*, 239 F.2d 93 (10th Cir. 1956).

A motion to suppress, the court said, constitutes an admission by the moving party that he is the owner of the incriminating evidence. The court indicated, however, that such a motion should not be admissible where the trial court sustains the motion. The prosecution, the court said, should not have the benefit of evidence found to be unlawfully acquired. Where the motion is overruled, on the other hand, and the evidence is found to have been lawfully acquired, the motion and testimony in its support is a valid admission against interest. However, the court said, it is well settled that pleadings from former cases which are not under oath and are signed only by the parties' attorneys, are incompetent as admissions. A motion to suppress, the court said, is in the same category as such a pleading and is therefore inadmissible where it is signed only by the defendants' attorneys.

Black-Out of Epileptic Motorist Constitutes Criminal Negligence—As the result of an automobile accident, the defendant, an individual subject to epileptic attacks, was indicted on a charge of criminal negligence. The applicable statute provided that "a person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death." The indictment alleged that the defendant "*knowing* that he was subject to epileptic attacks rendering him likely to lose consciousness was culpably negligent in that he *consciously* undertook to and *did operate* his sedan on a public highway and while so doing suffered such an attack which caused his automobile" to travel at a reckless rate of speed, jump the curb and fatally injure four pedestrians. At the trial, the defendant demurred to the indictment, alleging that it did not charge a crime. The trial court overruled the demurrer and the defendant was convicted. On appeal, the Court of Appeals of New York, with two members dissenting, while granting a new trial on other grounds, affirmed the validity of the indictment, holding that a person who operates an automobile with

knowledge that he is subject to epileptic seizures, whose vehicle goes out of control while he is having an attack and kills others, is guilty of criminal negligence. *People v. Decina*, 157 N. Y. S. 2d 558 (1956).

The essence of the crime of criminal negligence, the court said, is "conduct which manifests a disregard of the consequences which may ensue from the act, and indifference to the rights of others." In the present case, the court said, the defendant knew that he might suffer an attack at any time. He also knew that an uncontrolled vehicle on a public highway is a dangerous instrumentality. "With this knowledge," it was said, "and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow. His awareness of a condition which he knows may produce such consequences," the court concluded, "renders him liable for culpable negligence."

The dissent maintained that the language of the statute made criminal only "vehicle operation in a culpably negligent manner" which results in a fatality. The defendant's indictment charged that the acts of the automobile were caused by the defendant's loss of consciousness. The defendant, the dissent said, was not charged with operating the vehicle in a reckless manner. Culpably negligent driving, as required by the statute, the dissent argued, presupposes consciousness. "It does not touch at all," it was said, "the involuntary presence of an unconscious person at the wheel of an uncontrolled vehicle." The dissent maintained that the construction of the statute formulated by the majority would make driving a crime for anyone suffering from a wide variety of common ailments which might conceivably cause unconsciousness. "Such a construction of a criminal statute," the dissent concluded, "offends against due process and against justice and fairness."

In a companion case involving similar facts, the New York court, upholding an epileptic motorist's conviction for criminal negligence, reasoned that the statute does not merely apply

to the conscious manipulation of the controls of the vehicle. It encompasses, the court held, driving with knowledge that the driver's physical condition renders the operation of a vehicle perilous to others. *People v. Eckert*, 157 N.Y.S. 2d 551 (1956).

Presence of Federal Employees On Grand Jury Does Not Invalidate Federal Indictment—The defendant had been indicted by a grand jury for the offense of unlawfully refusing to answer questions before a United States Senate committee. Thereafter, the defendant made a motion to dismiss the indictment on the grounds that fourteen members of the grand jury which returned the indictment were federal employees and, the defendant alleged, were therefore biased and prejudiced against the defendant. In addition, the defendant claimed, such employees may have feared possible investigation by federal authorities if they had voted against the indictment. The court denied the motion, holding that grand jurors are not subject to disqualification for bias. *United States v. Knowles*, 147 F.Supp. 19 (D.D.C. 1957).

The legal qualifications of grand jurors, the court said, relate to such matters as citizenship, residence and the ability to read and write. Challenges for bias or for causes other than lack of legal qualifications, it was said, are not permissible. The function of grand jurors, the court indicated, does not require that they be impartial. A grand jury, the court said, is only an accusatory body, and does not determine guilt. In addition, it was said, in contrast to petit juries, there is no constitutional requirement that a grand jury be impartial. Furthermore, the court said, it is inconceivable that a government employee would fear government reprisal if he voted against an indictment for a federal crime. Moreover, the court concluded, "to investigate a grand juror who happens to be a government employee in order to determine whether he might have had a dread of adverse consequences if he voted to ignore the charge, may, in itself, be a form of intimidation against voting in favor of an indictment in any similar case in the future."