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Abstracts of Recent Cases

Conclusion

An accusatory statement is, by its nature, highly prejudicial to the defendant. A jury is likely to give it greater weight than its probative value warrants In addition, a jury may consider the statement for the truth of its contents. It is difficult for a jury to make the technical distinction between the consideration of an accusation only for the purpose of giving meaning to the defendant's reply, and consideration of an accusation itself for the truth of the matter stated. For this reason, a judge should exclude this evidence unless he is convinced of the existence of conditions under which the defendant can reasonably be expected to deny a statement.[45] In addition, if this type of evidence is admitted, the jury should be instructed that the probative value of this evidence is not great, and that the evidence should be considered with caution.[46]

[45] Model Code of Evidence rule 509 (1942).

[46] See, *e.g.*, Albano v. State, 89 So.2d 342 (Fla. 1956).

ABSTRACTS OF RECENT CASES

Proof of Prior Convictions Admissible as Part of Prosecution's Case in Chief When Clear that Defense of Entrapment Will be Raised—The defendant, a narcotics addict, was approached by another addict who asked his assistance in securing drugs. After several such requests the defendant agreed and several transfers were made. Thereafter the addict, who was awaiting sentence on a narcotics charge and who had in the past co-operated with the federal narcotics bureau, informed federal agents of his dealings with the defendant. The latter was then arrested and charged with the unlawful sale of narcotics. At the trial in a federal district court, the defense counsel, in his opening statement, argued that the defendant had been entrapped. Thereafter the prosecution sought to introduce in evidence as part of its case in chief proof of the defendant's prior convictions as a narcotics addict. The trial court overruled the defendant's objections and admitted the evidence. At the conclusion of the prosecution's case the defense elected to go to the jury without introducing evidence. On appeal from his conviction, the United States Court of Appeals for the Second Circuit affirmed, holding that, when it is clear from the circumstances of the case that the defendant will raise the defense of entrapment, the prosecution may introduce proof of the defendant's prior convictions as part of its case in chief. *United States v. Sherman*, 240 F.2d 949 (2nd Cir. 1957), *cert. granted*, 25 U.S.L. Week 3305 (U.S. April 23, 1957).

The court easily disposed of the defendant's argument that evidence of prior convictions is only admissible if the defendant first testifies in his own behalf or introduces evidence of his good character. The court said that in prior decisions it had expressly adopted the rule that such evidence is admissible to rebut the defense of entrapment. The defendant aruged, however, that those decisions were not applicable since they involved the admission of proof of prior convictions in rebuttal to the defense of entrapment, whereas in the present case the evidence was introduced as part of the prosecution's case in chief. The court rejected this notion, maintaining that "making the admissibility of such evidence always depend upon whether the defendant had introduced evidence would emasculate the rule and work grave prejudice to the government in cases where defendant, as here, elected to go to the jury on the proofs adduced by the prosecution in its case in chief." But the court refused to declare a general rule that this evidence is always admissible as part of the prosecution's case in chief whenever there is a possibility that the defense of entrapment will be raised and limited its holding to the case where it is clear that the defense will be raised. In the present case, it was said, defense counsel, in his opening statement, indicated his intention to rely on that defense.

Invocation of Privilege Against Self-Incrimination at Civil Hearing Held Admissible at

Later Criminal Trial—Prior to his arrest on a charge of larceny, the defendant had attended a judicial hearing held to determine the ownership of the property for the theft of which he was later arrested. At this hearing the defendant appeared as a claimant and voluntarily testified. However, on advice of counsel, the defendant invoked his privilege against self-incrimination and refused to answer certain questions relating to the disputed property. At his subsequent trial for the theft of the property, the prosecution introduced in evidence, as part of its case in chief, testimony that the defendant, at the earlier civil hearing, had refused to answer questions relating to the stolen property on the grounds that they might incriminate him. On appeal from the defendant's conviction, the Supreme Court of Arizona approved the admission of the evidence. *State v. Marvin*, 307 P.2d 607 (Ariz. 1957).

While the prosecution argued that invoking the privilege is a tacit admission of guilt, the defendant maintained that the privilege would become worthless if he were penalized for invoking it. The court noted that, in addition to the privilege contained in the state constitution, a state statute provides that the invocation of the privilege may not be used against the defendant "on the trial or proceedings." The court interpreted the scope of this statute, however, as limited to the trial at which the privilege is invoked. While most courts, it was said, permit a prior claim of the privilege to be revealed upon the cross-examination of the defendant, there is some indication that a prior refusal to testify is inadmissable unless the accused voluntarily takes the witness stand. However, the court held that where the accused voluntarily appears at the prior civil hearing, his refusal to testify is admissible at a subsequent criminal action as part of the prosecution's case in chief.

A concurring opinion expressed disapproval of the "whitling away" of the privilege by the majority opinion. A prior refusal to testify, it was said, should not be admissible unless the defendant voluntarily testifies at the subsequent trial. It was said, however, that sufficient other evidence was present to sustain the conviction.

Waiver of Preliminary Hearing Constitutes Waiver of Defects in Arrest Warrant—A federal narcotics agent obtained a warrant for the arrest of the defendant on a charge of unlawfully receiving narcotics. During the following day the officer observed the defendant several times but did not arrest him until that evening when he emerged, carrying a package, from the home of a friend. The officers informed the defendant that they were arresting him under authority of the warrant obtained a day earlier. The package was found by the officers to contain narcotics, the possession of which was admitted by the defendant. He was then arraigned before a commissioner. At the commitment hearing, the defendant, who was represented by counsel, waived his right to a preliminary examination. Thereafter, the defendant was indicted for the unlawful possession of the narcotics in the package seized by the officers. This was not the crime for which the arrest warrant was issued. Before the trial, the defendant made a motion to suppress evidence of the narcotics found in his package on the grounds that the seizure was made without a search warrant and that it was not permissible as incident to a lawful arrest because the arrest either was not made under authority of the warrant possessed by the officer or, in the alternative, the warrant was void because it neither contained a statement of the essential facts, nor were its allegations based upon the personal knowledge of the officer who obtained it. In addition, the defendant maintained, the delay between the issuance and execution of the warrant rendered it ineffective. The trial court denied the motion and the defendant was convicted. On appeal, the United States Court of Appeals for the Fifth Circuit, with one member dissenting, affirmed, holding that the waiver of a preliminary examination constitutes a waiver of the right to object to defects in the arrest warrant. *Giordenello v. United States*, 241 F.2d 575 (5th Cir. 1957).

A preliminary examination, the court said, would have afforded the defendant "full opportunity to test out the sufficiency of the complaint and the legality of the warrant and the legality of his arrest under it or the presence

of probable cause if arrested without a valid warrant." The defendant's objections, the court said, are all subject to waiver. Since they should have been raised at the preliminary examination, the court held, waiver of this hearing constitutes a waiver of the right to object to the alleged defects in the arrest.

The dissent agreed with the majority that waiver of a preliminary hearing constitutes a waiver of the right to object to "informalities or irregularities in the warrant or in the complaint." However, the dissent argued that waiver of the hearing should not constitute a waiver of the right to object to the fact that the arrest warrant did not state the facts of the crime charged but related to another, separate alleged offense. If there were sufficient evidence to establish probable cause, the dissent said, demanding a preliminary hearing to inquire into the legality of the arrest would be futile, since, even if the arrest were illegal, re-arrest could follow the hearing. "No lawyer would dream," the dissent concluded, "that by failing to demand an apparently unnecessary preliminary hearing he had waived the right of his client to object to the legality of his original arrest and the search that followed."

Numbers Game is not a Crime Involving Moral Turpitude—The defendant was indicted on a charged of aiding in the operation of a gambling establishment. At the trial a defense witness was asked, on cross-examination by the prosecution, whether he had recently been convicted of operating a type of lottery known as a "numbers game." The trial court overruled the defendant's objection to the question and admitted the answer for the purpose of impeaching the witness. On appeal from the defendant's conviction, the Supreme Court of Appeals of Virginia held that conducting a numbers game is not a misdemeanor involving moral turpitude and hence is not admissible for impeachement purposes. The court affirmed the defendant's conviction, however, on the grounds that the error was not prejudicial. *Parr v. Commonwealth*, 96 S.E.2d 160 (Va. 1957).

The court adhered to the view that proof of conviction of a misdemeanor involving moral turpitude is admissible to impeach a witness. But the court noted that authorities disagreed as to the definition of such a crime. While some courts, it was said, have held the proper test to be whether the crime is *malum in se* rather than *malum prohibitum*, there is general agreement that a crime involving moral turpitude is "an act of depravity in the duties which a man owes to his fellowmen, or to society in general." Conducting a lottery, it was said, was not an offense at common law unless conducted in such manner as to be a public nuisance. Furthermore, the court noted, while lotteries are prohibited by statute in this state, in some states they are licensed and permitted to operate. For these reasons, the court concluded, "while the conduct of a 'numbers game' is contrary to the public policy of this state and our standard of morals, it is not *per se* immoral or inherently evil and does not involve moral turpitude."

Failure to Afford Indigent Appellant Assistance of Counsel Violates Due Process—While serving a term in a state prison, the appellant sought to appeal from his conviction for grand larceny. Alleging that he was without funds to employ counsel or to pay for a transcript of the trial court record and that he was physically unable to inspect the trial record, the defendant requested that the New York Supreme Court appoint him counsel to assist his appeal. Upon the denial of his request the defendant appealed to the New York Court of Appeals. That court, in a *per curiam* opinion, reversed the denial of his request, holding that, under the circumstances of this case, the refusal to furnish counsel without charge denied the appellant due process and equal protection guaranteed by the state constitution. The court refused to hold, however, that every indigent appellant is entitled to the assistance of counsel, and expressly limited its holding to the facts of the case. *People v. Kalan*, 140 N.E.2d 357 (N.Y. 1957).

Publicity Attendant Upon Civil Suit Held to Deprive Defendant of a Fair Trial in Criminal Action—The defendant and others were accused of conspiring to defraud the state through the acquisition and subsequent sale to the state of

land which they had been informed the State Roads Commission was about to acquire. On the same day that the judge hearing the criminal action adjourned the trial for a weekend recess, another judge of the same court and his wife, who had sold land to those accused in the criminal case, brought a civil suit against the defendant in which the judge and his wife made allegations of facts substantially similar to those involved in the criminal action. Although the judge attempted to prevent the civil suit from becoming public knowledge, it received much publicity through the media of radio, television and the newspapers. The accounts of the allegations in the judge's complaint were fair, but they identified the defendant in the civil suit as the same defendant in the road fraud conspiracy case, which also had been given much publicity. When the court trying the criminal case reconvened, the defendant filed a motion for a mistrial based upon the publicity which had been given to the civil suit. The trial judge overruled the motion and the defendant was convicted. On appeal, the Court of Appeals of Maryland reversed, holding that the defendant had been deprived of his right to a fair trial in the criminal action because of the publicity given to the civil action involving substantially the same issues. *Basiliko v. State*, 129 A.2d 375 (Md. App. 1957).

The state's contention that the publicity relating to the civil suit was not harmful to the defendant, because it added nothing to what was brought out by the testimony in the criminal case, was rejected by the court. The court stated that the publicity "could have left no doubt in anyone's mind that the well known, highly respected, competent and experienced judicial officer who was one of the plaintiffs in the civil suit believed Basiliko guilty of conduct of the very kind with which he was charged in the criminal case. It amounted almost to a finding by him on the very questions on which the jury would have to pass in determining whether Basiliko was guilty." Although it was not shown that any individual juror actually read or heard any of the publicity given the civil suit, the court indicated that, because of the widespread and intensive coverage given the civil suit, the inference that some jurors were in fact reached by the publicity was too reasonable and too strong to disregard. In addition, the court said that questioning the jury in the midst of the trial as to whether they were aware of the civil suit, would have only served to emphasize the information. The court also stated that a special instruction by the trial judge would have had the same effect. Furthermore, it was said, questioning the jury after the verdict would have been fruitless, for an admission by a juror that publicity concerning the civil suit influenced him would be an admission that he considered evidence other than that adduced at the trial.

Federal Auto Theft Act Includes Embezzled Vehicles—The defendant arranged to borrow an automobile for the purpose of transporting friends to their homes. Upon receiving the auto, however, the defendant drove it to another state and sold it, without the owner's consent. Thereafter the defendant was arrested and charged with violating the National Motor Vehicle Theft Act, commonly known as the *Dyer* Act, which prohibits the transportation in interstate commerce of a motor vehicle by one "knowing the same to have been stolen." At the trial in a federal district court, the court granted the defendant's motion to dismiss the indictment on the grounds that the word "stolen" as used in the Act referred only to thefts which constitute common law larceny. The defendant's act, the court said, was an embezzlement rather than a common law larceny and therefore not within the scope of the Act. The prosecution then appealed to the United States Supreme Court. That Court, with three members dissenting, reversed, holding that the Act "includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common law larceny." *United States v. Turley*, 77 Sup. Ct. 397 (1957).

The majority of the court acknowledged the general rule that where a statute uses a term

which has an established common law meaning and does not otherwise define it, the common law meaning will prevail, but the court found that "stolen" has no well accepted common law meaning. Therefore, it was said, the word must be defined within the context of the Act. Examining the legislative history of the Act, the Court noted that Congress had used "stolen" synonomously with "theft," which, it was said, has a broader meaning than common law larceny. Moreover, the Court concluded, "professional thieves resort to innumerable forms of theft and Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion."

The dissent argued that the word "stolen" should, in the absence of other statutory definition, be given its everday meaning. "It would hardly be used," it was said, "even loosely, by the man in the street to cover 'cheating.'"

Military Court May Not Consider Voluntariness in Assessing Weight to be Given Confession—The defendant was charged with larceny in violation of the Uniform Code of Military Justice. At the trial in a military court, the prosecution sought to introduce in evidence the defendant's alleged confession. The defendant objected, contending that the confession was obtained while he was under the influence of narcotics and was therefore involuntary. The law officer ruled the confession admissible. At the conclusion of the evidence, he instructed the court that "the voluntariness of the statements before you here constitutes a matter you should consider in determining what weight, if any, you are to give to those statements." On appeal from the defendant's conviction, the United States Court of Military Appeals ruled the instruction erroneous, holding that a military tribunal may not consider the voluntariness of a confession as a factor in determining its weight. *United States v. Jones*, 7 U.S.C.M.A. 623, 23 C.M.R. 87 (1957).

The Uniform Code of Military Justice, the court held, restates the view of a majority of federal courts and recognizes a distinction between voluntariness and truthfulness. "While it is true," the court said, "that an involuntary confession may be untrustworthy and hence unworthy of belief, it is also true that a confession may be absolutely truthful yet inadmissible because of involuntariness." The initial determination of admissibility, the court noted, is a question to be determined solely by the law officer or judge. However, it was said, where the evidence relating to voluntariness is in conflict, the jury or military court may re-examine the issue of voluntariness and "reject a confession in toto if it disagrees with the judge's original admissibility determination." But, it was said, the jury or tribunal may not consider the weight and credibility of the statement unless they first find it voluntary. "Where voluntariness is in issue," the court concluded, "it must be decided by the court members unfettered by any simultaneous considerations of weight and credibility."

For a discussion of the procedures used in both state and federal courts to determine the voluntariness of a confession, see *The Role of Judge and Jury in Determining a Confession's Voluntariness*, 47 J. CRIM. L., C. & P.S. 000 (1957).

Prosecution Must Reveal Identity of Informer—A government informer had arranged to purchase narcotics from the defendant and a meeting in the informer's automobile was arranged to complete the transaction. Prior to the transfer, federal narcotics agents secreted themselves about the area and observed the defendant carry a package to the car. One agent, who had hidden in the trunk of the informer's car where he overheard the parties' conversation during the sale. After examining the powder received by the informer from the defendant, the latter was arrested and charged with the unlawful sale and transportation of narcotics. Confronted by the defendant at police headquarters, the informer denied having seen or known the defendant prior to the narcotics sale. At the trial in a federal district court, the defendant unsuccessfully requested the court to order the prosecution to reveal

the identity of the informer. The trial court denied the request, accepting the prosecution's contention that the informer's activity in other cases required the non-disclosure of his identity. During the trial, the prosecution offered the testimony of the agent who had been in the trunk of the informer's car about the parties' conversation during the sale. The informer did not testify. Following his conviction and its affirmance by the United States Court of Appeals for the Seventh Circuit, the defendant petitioned for and was granted certiorari by the United States Supreme Court. That Court, with one member dissenting, reversed the defendant's conviction, holding that, under the circumstances of the case, the trial court should have required disclosure of the informer's identity. *Roviaro v. United States*, 77 Sup. Ct. 623 (1957).

The informer's privilege, the majority noted, which permits the prosecution to withhold an informer's identity from disclosure, is designed to encourage citizens to reveal law violations by insuring their anonymity. However, the Court said, the privilege is subject to several limitations. For example, it does not apply where the informer's identity is known to those harmed by his information. In addition, the Court held, "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." The Court indicated, however, that "no fixed rule with respect to disclosure is justifiable." Whether disclosure is required, the majority said, depends upon "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." In the present case, it was said, the defendant and the informer were the only parties to the transaction and the informer was the only person who could amplify or contradict the prosecution's witnesses. The informer's testimony, the Court said, might have disclosed entrapment or have cast doubt upon elements of the prosecution's case. Moreover, it was said, the informer's denial of having known the defendant indicated that the latter did not know the informer's identity.

Mr. Justice Clark, dissenting, argued that the defendant had failed to establish "a single substantial ground essential to his defense which would make it necessary for the Government to name the informer." In addition, the dissent said, evidence established that the defendant had dealt with the informer on several occasions and therefore probably knew his identity. The nature of narcotics traffic, it was said, requires the use of informers. The majority's decision, the dissent concluded, will increase the difficulties attendant upon the apprehension of addicts.

In another recent case, a California appellate court, with one member dissenting, affirmed the prosecution's refusal to reveal an informer's identity. *People v. Alaniz*, 309 P.2d 71 (Cal. Dis. Ct. of App. 1957). In that case, police officers arrested the defendant without a warrant on the basis of information furnished by an unidentified informer. A concurring opinion distinguished the *Roviaro* decision on the grounds that in that case the informer was a witness to the transaction complained of, while in the *Alaniz* case the informer merely furnished information.

(*For other recent case abstracts see "Police Science Legal Abstracts and Notes", infra pp. 234–239.*)