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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

Disclosure of Identity of Informant Required in Order to Allow Challenge To Validity of Arrest—The defendant was arrested for selling and possessing heroin by police officers who acted without a warrant on information obtained from an informant. At the time of his arrest, the defendant was found to be in possession of heroin and certain bills that had previously been dusted with fluorescent powder and had been used by the informant to purchase heroin from him. At the trial, the defendant challenged the validity of his arrest on which admissibility of this evidence depended and demanded to know the identity of the informant. The police officers refused to disclose the informer's identity, claiming that it was privileged. The California District Court of Appeal, in reversing the defendant's conviction, held that the informant's identity must be disclosed in order to support the arrest without a warrant where the informer's testimony might have been beneficial to the defendant in showing that the police did not have reasonable grounds for the arrest. *People v. McShann*, 321 P.2d 533 (Calif. App. 1958).

On the voir dire to determine whether reasonable grounds for the defendant's arrest existed, the court said that the defendant was entitled to produce evidence to rebut the showing of the officers that they had reasonable grounds to believe that a felony was being committed. Since the informant's testimony might be of material benefit to the defendant in showing that the officer did not have reasonable grounds to justify an arrest without a warrant, the court felt that the defendant was entitled to have access to the informant on this issue. "It is just as important to a defendant to have access to a material witness who may satisfy the court that evidence against him should be excluded because it was obtained as a result of an illegal search and seizure as it is to have access to material witnesses who may give evidence which will result in overcoming in the eyes of the jury the prosecution's evidence against him on the merits of the charge." The court also stated, that since the informant was a participant in the alleged unlawful sale of heroin and was then a material witness and the only person other than the defendant who could furnish direct evidence pertaining to the sale, the privilege against disclosure of the informant must give way to the defendant's right to have an opportunity to produce such a witness.

Exposure to Jury Of Defense Counsel's Tampering With Evidence Violated Defendant's Constitutional Rights—A police officer was killed in a gun battle between the defendant, who was a wanted criminal, and police officers who had set up a road block in an attempt to capture him. The bullet that killed the officer passed through his belt buckle. The guns of the officers were all .38

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ments, respondent did not move to quash but went to trial on one indictment and pleaded *nolo contendere* to another. He now, in effect, seeks to attack the indictments collateraly and have us go behind the convictions. If actual fraud in the commission of an offense involves moral turpitude, and we so hold, then *respondent's convictions under unchallenged indictments charging fraud establishes moral turpitude and summary disciplinary action was properly invoked on the records of the convicting court.*" (Emphasis added.)

The court then distinguished the three cases which had been decided prior to the *Teitelbaum* decision and had held the other way. *Kentucky State Bar Ass'n v. McAfee* was distinguished on the ground that the income tax evasion in that case was prosecuted under section 145(a). *Baker v. Miller* was distinguished on the ground that the result there reached was due to that court's interpretation of the federal law on the subject. The Illinois court noted that the law of *Chanan Din Khan*, a recent federal case, was contrary to the Indiana case. (See footnote 22, *supra.*) The court noted that its decision was *contra* to that of the leading case of *Hallinan*, but chose not to follow that decision. *Hallinan*, it will be remembered, specifically rejected any contention that words added to the indictment by a careful or over-zealous prosecutor could be the basis of any decision holding that fraud is involved in a violation of section 145 (b). The Illinois court, in *Teitelbaum*, not only refused to follow the lead of *Hallinan* on this phase of the case, but instead made the allegation of fraud in the indictment the very foundation of its holding.

The decision in *Teitelbaum* apparently rejects the theory that fraud is an *inherent* and *necessary* element of income tax evasion. Though the result reached in the *Teitelbaum* case was certainly a correct one, it is submitted that it would have been more desirable to hold that *any* income tax evasion conviction involving a "willful-intent-to-evade element" *necessarily* involves fraud and, therefore, moral turpitude, rather than rely on an allegation of fraud in the indictment as the basis of the decision. Whatever conflict may have existed among the earlier federal cases (see footnote 16, *supra*), the latest authority supports this contention. Chanon Din Khan v. Barber, 147 F.Supp. 771 (N.D. Cal. 1957) and Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957). Further support is found in the *Seijas* case, the most recent state disbarment case before *Teitelbaum*, which was not mentioned by the Illinois court, although in that case an attorney was summarily disbarred because moral turpitude was found to be necessarily involved in income tax evasion. The weakness of the *Teitelbaum* opinion would seem to be that in any subsequent case where fraud is not alleged in the indictment a summary proceeding will not be available in Illinois.

calibre, while the defendant had a .22 calibre pistol. At the trial, the belt buckle of the deceased policeman was introduced in evidence and testimony indicated that the hole in it had been made by a .22 calibre bullet. During a recess in the trial, the defendant's counsel, while alone in the courtroom, took a wooden dowel and was pushing it down into the bullet hole in the belt buckle, materially altering its size, when the district attorney caught him in the act. The trial was delayed for a short time while the attorneys conferred with the judge. When the trial was resumed, *and in the presence of the jury*, the district attorney asked, and received, permission to state the foregoing facts for the record. Defendant's counsel admitted that he had changed the size of the bullet hole. The judge's only comment was a warning to the jury not to further tamper with the evidence when they retired to the jury room. The defendant was convicted and sentenced to death. After fruitlessly pursuing his appropriate state remedies he applied for a writ of habeas corpus in a federal district court. The writ was granted and the defendant was freed, subject to the right of re-arrest by the state and a subsequent new trial, on the ground that he had been denied his constitutional right to effective assistance of counsel. *Grandsinger v. Bovey*, 153 F. Supp. 201 (Neb. 1957).

In a strongly worded opinion, the court condemned the actions of defendant's counsel as "furtive" and "dishonest" and a deliberate attempt to distort a critical piece of evidence. It was conduct, the court said, for which the attorney could be subject to punishment for contempt of court and even permanent disbarment. He had the choice between "cooperating" with the district attorney and acknowledging his actions before the jury and denying the incident and representing the defendant as vigorously as possible. He "patently", said the court, chose the former alternative, thereby attempting to save himself while "betraying" the defendant.

> "In that instant and by that display, what had theretofore been an orderly trial was perverted into a virtual legal lynching. From that time forward, Mr. Fisher stood discredited before the jury in respect of petitioner's case."

The state claimed that such actions were all on the part of defendant's counsel and that it was without fault. This contention was rejected. Once the misdeed had occurred, the court said, it was turned into a dramatic incident paraded before the jury by the prosecutor to counsel's "humiliation and disgrace and petitioner's immense peril." Moreover, the court concluded that the trial judge was not without fault. It would have been preferable to declare a mistrial, regardless of the loss of time and money or even a possible subsequent double jeopardy defense, than to permit such a flagrant violation of the defendant's rights. On these grounds, the court said, it was not within the province of the state to disclaim all responsibility for what occurred and to exclaim, "Shake not thy gory locks at me, nor say I did it."

Loss of Citizenship For Desertion as Cruel And Unusual Punishment—The petitioner was convicted of desertion in wartime and dishonorably discharged from the military service. He later applied for a passport and it was refused because the Nationality Act of 1940, U.S.C.A. §1481 (a) (8) (g), provides that those convicted of wartime desertion, and dishonorably discharged from the service, lose their American citizenship. Petitioner brought suit in a United States District Court for a declaratory judgment that he was a citizen. The court granted the government summary judgment and the Court of Appeals for the Second Circuit affirmed. The Supreme Court reversed, holding that loss of citizenship as a punishment for the crime of desertion, was one of a cruel and unusual nature forbidden by the eighth amendment. *Trop v. Dulles*, 26 Law Week 4219 (March 31, 1958).

In a case decided the same day, *Perez v. Brownell*, 26 Law Week 4206 (March 31, 1958), the Supreme Court held that it was within the power of the government to take away the citizenship of a native born American. For the majority of the Court the question was whether or not the denationalization bore a reasonable relationship to a specific power of Congress. Thus the question was essentially one of due process. In that case the citizen had voted in a foreign political election and it was held that by so doing he lost his citizenship because this act interfered with the government's conduct of foreign affairs. The dissent denied the government had any power to take away the citizenship of a native born American—that citizenship could only be relinquished by some voluntary act.

In light of the *Perez* case, it became necessary to find some other basis for restoring Trop's citizenship if that was to be done. In the opinion of Chief Justice Warren and three other members of the Court who had dissented in the *Perez* case, that

basis was the eighth amendment's prohibition against cruel and unusual punishment. To reach this conclusion it was necessary to find first that loss of citizenship was a criminal penalty and a punishment for the crime of desertion; for if it was merely a regulation of nationality the eighth amendment would not apply. The Court found that the loss of citizenship was indeed a *penalty* because:

"The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve. Denationalization in this case is not even claimed to be a means of solving international problems, as was argued in *Perez*. Here the purpose is punishment, and therefore, the statute is a penal law."

Wartime desertion is punishable by the death penalty but the Court put this argument to one side, "... the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."

The loss of citizenship involves "... the total destruction of the individual's status in organized society," said Chief Justice Warren. An American who loses his citizenship is an alien in this country and has only the rights of an alien. And even these limited rights may be lost if the government wishes to deport him. No other country is, of course, obligated to admit an alien. "In short, the expatriate has lost the right to have rights."

Justice Frankfurter, who wrote the majority opinion in the *Perez* case, spoke for the dissenters in *Trop*. In applying the due process test of the *Perez* case he found a rational relationship between the power of the government to take away citizenship for desertion and the government's war powers.

"It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers know that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens."

The dissent also disagreed with the Warren opinion on the question of whether or not this deprivation of citizenship was a penal action. This statute was no different, the dissent argued, than one which takes away the voting rights of a convicted felon. And even assuming that the statute imposed a penalty, it was not of a cruel or unusual nature because the loss of citizenship was not a fate worse than death and the death penalty had never been considered cruel or unusual.

The swing man in the *Trop* decision was Justice Brennan. He had voted with the majority in *Perez* on the ground that deprivation of citizenship for voting in a foreign political election had a reasonable relationship to the power of the government to conduct foreign affairs. Applying this due process test in the *Trop* case, however, he joined with the majority in determining that there were no grounds for depriving Trop of his citizenship because of his desertion. This was so, he declared, because:

"It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done."

Since the "requisite rational relation" between the war power and the deprivation of citizenship was not apparent to Justice Brennan, he voted with the majority and Trop and more than 7,000 other wartime deserters regained their citizenship.

Business And Pleasure Trips Not Absences From Jurisdiction For Purpose of Statute of Limitations—The defendant was indicted for income tax evasion and he moved to dismiss the first two counts of the indictment on the ground that the six year statute of limitations on such actions had run. The government contended that (1) by instituting the complaint before a state justice of the peace, in the absence of a United States Commissioner, the time for instituting the prosecution was extended and that (2) the defendant, by making frequent business and pleasure trips outside the district in which he was indicted, had tolled the statute of limitations. The court held for the defendant and dismissed the two counts of the indictment. *United States v. Gross*, 159 F. Supp. 316 (D.C. Nev. 1958).

This case involved the construction of the six year statute of limitations applicable to prosecution for evasions of the income tax laws which provided:

"... The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the

commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district." 26 U.S.C. §3748 (a) (3).

The government first argued that the period for commencing the prosecution had been extended by instituting a complaint before a state justice of the peace. This type of proceeding was a mere formality, the government said, and because the United States Commissioner in Reno was out of the district, it was proper to institute the proceeding before the justice of the peace, who would be a "properly qualified magistrate" in other criminal prosecutions under Rule 3 of the Federal Rules of Criminal Procedure. The court rejected this contention, noting that other United States Commissioners within the district had been available and that a local justice of the peace "is simply not synonymous with a commissioner of the United States."

The government's main argument concerned the interpretation of the phrase "absent from the district" in the statue. The defendant conceded that he had spent a total of 137 days outside the district during the six year period of the statute of limitations and that the indictment would have been timely if these 137 days were such absences from the district as tolled the statute. The court noted that there was a conflict on the interpretation of this phrase in the lower federal courts and chose to follow those cases which had held that such trips did not toll the statute. The court noted that "absent from the district" had been substituted for the phrase "fleeing from the jurisdiction" in an earlier law. Moreover, the court pointed out that the phrase "absent from the district" was one usually found in civil statutes where the problem was one of obtaining personal jurisdiction over the defendant. There is no requirement that the defendant be present in the district when he is indicted in a criminal case. The statute is to tolled only where ". . . . the defendant's absence either indicates 'flight' from justice or substantially impairs and impedes the investigatory and enforcement functions of the Government."

Overseas Civilian Army Employees Subject to Court Martial—The petitioner, a *civilian* employee of the Army, was convicted of larceny by an Army court-martial in Morocco. He brought an action for habeas corpus in the District Court for the District of Columbia, claiming that he could not constitutionally be tried by a court-martial in view of the Supreme Court's decisions in *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1955) (which held that the Army could not try by court-martial a member of the Army who had been discharged and was then a civilian) and *Reid v. Covert*, 354 U.S. 1 (1957) (which held that the army had no jurisdiction over the civilian dependents of a member of the Army). The court rejected this claim and held that the employee, though a civilian, could constitutionally be tried by an overseas court-martial. *United States ex rel Guagliardo v. McElroy*, 158 F. Supp. 171 (1958).

The court noted that the Constitution gives to the Congress the power to make rules and regulations for the government of the land and naval forces and the power to direct where trials may be held when a crime is not committed within the United States. However, the fifth amendment provides that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces . . . ." And the sixth amendment guarantees that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." The essential question, then, is whether civilian employees of the military services are part of the "land or naval forces?" The court concluded that they were because (1) civilian employees are oftentimes "indispensable" for the operation of the armed services, and (2) an examination of legislative history shows that certain civilians, "suttlers and retainers" to the American Revolutionary Army, were regarded as subject to the rules and regulations of that army and it may be inferred that the members of the Constitutional Convention of 1787 were aware of this practice and meant to include such persons in the broad phrase "land or naval forces."

The court also examined possible alternatives to trial by court-martial for overseas civilian employees of the armed services. It might be possible to set up federal civilian courts overseas to try these employees, the court said, but there was no guarantee that the foreign countries would accept this exercise of extra-territorial jurisdiction, and further, there could be no way of compelling the attendance of jurors and witnesses. The possibility of returning civilian offenders to the United States for trial was also rejected for there was no way

that witnesses could be compelled to come to this country to testify and the process would be too costly and cumbersome for petty offenses. A third alternative examined was that of turning the offenders over to foreign courts for trial.

It appeared that the district court was more impressed with the impracticality of any possible alternatives to court-martial than it was with the legal arguments involved.

Court Martial Had Jurisdiction Where Soldier Remained in Army Beyond Minimum Enlistment Age—The petitioner enlisted in the Army when he was 15 years old. The defendant's enlistment was void because the minimum enlistment age, even with parental consent, was 16 years. After his 17th birthday the defendant committed a crime and was convicted by an Army court-martial and sentenced to 12 years at hard labor. He brought a habeas corpus action in a United States District Court seeking his release on the ground that his original enlistment was void and consequently he was at all times a civilian over whom an Army court-martial had no jurisdiction. This contention was denied, the court holding that his enlistment, though void, "ripened" into a valid enlistment when he remained in the Army beyond the minimum enlistment age. *Barrett v. Looney*, 158 F. Supp. 224 (1958).

There is apparently a conflict among the federal courts as to whether an enlistment under the minimum age is absolutely void or merely voidable. The court in the instant case chose to follow the line of authority which holds such an enlistment to be only "voidable." Had the soldier been tried by the court-martial *before* he reached the age of 16, the court said there would be no doubt that the Army would have had no jurisdiction over him. Since the soldier in this case remained in the Army after he had reached the age of 16, such acts as serving on active duty and receiving pay, were held to be the equivalent of *enlistment* after that age.

(For other recent case abstracts see "*Police Science Legal Abstracts and Notes*", *infra* pp. 191–192).