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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

Abstractors

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Access to Courtroom—*Atlanta Newspapers v. Grimes*, 114 S.E.2d 421 (Ga.1960). Plaintiffs brought a petition against defendants, a sheriff and the State of Georgia, alleging that an order issued by a judge of the Superior Court, which provided in part that no photograph of any participant in or at any trial shall be taken at any place in the courthouse building or on the adjacent streets, was erroneous and invalid in that its enforcement denied to petitioners and other members of the public the liberty of speech and press guaranteed by the United States and Georgia constitutions, as well as liberty and property without due process of law. The trial court held for the defendants and the Court of Appeals was equally divided. The Supreme Court affirmed the trial court's decision, stating that the courts have power to determine the manner in which they shall operate in order to administer justice with dignity and decorum in such manner as shall be conducive to fair and impartial trials as well as to the ascertainment of truth uninfluenced by extraneous matters or distractions, and that liberty of the press is subordinate to the independence of the judiciary and the proper administration of justice.

Arrest, Search and Seizure—*Neely v. State*, 164 N.E.2d 110 (Ind. 1960). Defendant was convicted for unlawful possession of narcotics. On appeal, he contended that the court erred in overruling his motion to supress as evidence narcotics found during a search of defendant's car made by police officers who had arrested him for running a stop sign. The Supreme Court affirmed, holding that the search of the car appeared to have been a reasonable incident to the lawful arrest of defendant and was properly made although accomplished without a search warrant.

Arrest, Search and Seizure—*State v. Mallory*, 336 S.W.2d 383 (Mo. 1960). Defendant was convicted of burglary and larceny. On appeal, he contended that the trial court erred in admitting into evidence stolen merchandise discovered by police officers who, after arresting defendant for "running a red light," noticed that there were partially covered firearms within the automobile and that the rear end of the car sagged and thereupon ordered defendant to open the trunk of the car where the stolen merchandise was found. The Supreme Court affirmed, holding that, under the circumstances described, there was no unreasonable search and seizure, and hence the stolen merchandise was admissible.

Arrest, Search and Seizure—*United States v. Bonanno*, 180 F. Supp. 71 (E.D.N.Y. 1960). Defendants moved for an order to suppress as evidence statements procured by police who without warrant stopped defendants' automobiles and directed defendants to a police station where they were questioned and released. The District Court denied the motion and, in holding the action was neither an illegal arrest nor an unreasonable search and seizure, stated defendants were not arrested because the police did not intend to hold any of them to answer for a crime, that statements voluntarily given to police are admissible in federal court, and that the stopping of defendants' automobiles without a warrant was reasonable because the police believed that a crime might have been committed.

Attempt—*States v. Damms*, 100 N.W.2d 592 (Wis. 1960). Defendant was convicted of attempt to commit murder in the first degree. On appeal, he contended that since it was impossible for him to have committed the act of murder he could not be convicted of the offense of *attempt* to commit murder. The Supreme Court affirmed, holding that, under WIS. STAT. §939.32 (1957), defining criminal attempt, the fact that, when defendant pointed a gun at his wife's head and pulled the trigger, the gun was not loaded did not absolve him of attempted murder since the jury found that he actually thought the gun was loaded at the time of the act and intended and would have committed the crime but for the unanticipated frustration.

Confessions—*Goldsmith v. United States*, 277 F.2d 335 (D.C. Cir. 1960). Defendants were convicted of robbery and assault with a dangerous

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weapon. On appeal, they contended that the trial court erred in admitting evidence of their reaffirmations of pre-arraignment confessions obtained during a period of unnecessary delay, inasmuch as the reaffirmations were the fruit of the original, illegally obtained confessions. The Court of Appeals affirmed, holding that although the pre-arraignment confessions, standing alone, might have been inadmissible under the *McNabb-Mallory* doctrine, such confessions were rendered admissible by defendants' post-arraignment reaffirmations of the original confessions, as well as their re-enactment of the crime.

Confessions—*Blackburn v. Alabama*, 361 U.S. 199 (1960). Defendant was convicted of robbery in an Alabama state court. On certiorari, defendant contended that under the fourteenth amendment to the federal constitution his written confession should not have been admitted during the trial because it was involuntarily given. The Supreme Court, reversing the conviction, held that the evidence established the strongest probability defendant was insane, and thus the confession which he gave after eight or nine hours of sustained interrogation in a tiny room filled with police and in the absence of his friends or counsel was not voluntarily given and violated his rights under the due process clause of the fourteenth amendment.

Confessions—*People v. Pelkola*, 166 N.E.2d 54 (Ill. 1960). Defendant was convicted of robbery. On appeal, he contended that the trial court erred in admitting, for purposes of impeachment, testimony concerning an oral confession, because the prosecution failed to supply defendant or his counsel with the names and addresses of the persons before whom the confession was allegedly made, as required by ILL. REV. STAT. ch. 38, §729 (1957). Although holding the error to be harmless, the Supreme Court stated that the statute leaves no area of discretion to a trial court and that the legislature intended compliance with the notice provisions before an oral confession could be admitted in evidence *for any purpose.*

Counsel—*People v. Ford*, 168 N.E.2d 33 (Ill. 1960). Defendant was convicted of murder. On appeal, he contended that the trial court improperly allowed private counsel, compensated partially by the victim's widow and partially by the State's Attorney, to assist in the prosecution of the case. The Supreme Court affirmed, holding that there was no error inasmuch as previous Illinois Supreme Court decisions have consistently held that a trial court, in its discretion, may permit a privately employed attorney to assist the State's Attorney in the prosecution of a criminal case so long as the defendant is adequately represented and is not prejudiced by the presence of privately employed counsel.

Discovery—*United States v. Sheer*, 278 F.2d 65 (7th Cir. 1960). Defendants were convicted of making false statements concerning matters within the jurisdiction of the United States Treasury Department. On appeal defendants claimed that the trial court erred in refusing to require the government to produce *reports* written by two of its agents who testified at the trial. The Court of Appeals reversed the conviction and remanded for new trial, holding that under the Jencks Act, 18 U.S.C. §3500(e)(1), the written *reports* were "statements" made by government witnesses and were admissible for impeachment purposes though not made contemporaneously with the events to which they referred.

Discovery—*Karp v. United States*, 277 F.2d 843 (8th Cir. 1960). Defendant was convicted of bank robbery involving a federally insured bank. On appeal, defendant claimed that the trial court erred in refusing to require the government to produce prior statements written by an F.B.I. agent who testified. Although the Court of Appeals held the error to be harmless, it rejected the government's contention that "statements" under the Jencks Act, 18 U.S.C. §3500(e)(1), are limited to statements given to an agent by a non-government person, and held that the report of one government agent to another government agent covering an interview with a defendant is a statement within the meaning of the Act.

Double Jeopardy—*Northcott v. Hand*, 352 P.2d 450 (Kan. 1960). On October 25, 1958, petitioner was placed on parole by the Osage County Court for a term of two years. On January 10, 1959, his parole was revoked and he was committed to the penitentiary. On April 29, 1959, he was granted a writ of habeas corpus by another district court and discharged from the penitentiary on the ground that the Osage County Court failed to afford him a hearing and an opportunity to show cause why his parole should not be revoked. On May 18, 1959, he appeared before the Osage County Court once more and was found to have violated his parole, whereupon he was again committed to the penitentiary. He then sought a writ of habeas corpus

in the Supreme Court, contending that he had been subjected to double jeopardy by the last commitment order. The Supreme Court denied the writ, holding that a discharge on habeas corpus, being merely from custody and not from the penalty, does not operate as an acquittal and is not a bar to subsequent proceedings irrespective of whether the individual has undergone any part of the punishment imposed.

Embezzlement—*State v. Lawrence*, 168 N.E.2d 21 (Ohio 1960). Defendant, on trial on a charge of embezzlement, contended that since he was the operator of his own collection agency he could not be considered an "agent" within the meaning of the word as used in OHIO REV. CODE ANN. §2907.34 (Baldwin 1958) which provides that no "agent" shall embezzle anything of value which comes into his possession by virtue of his employment. The Common Pleas Court held that the legislature used the word "agent" in the ordinary or popular sense of one who does something for and on behalf of another, and therefore defendant, technically an independent contractor, was nevertheless an "agent" within the meaning of the embezzlement statute.

Felony Murder—*People v. Wood*, 167 N.E.2d 736 (N.Y. 1960). Defendant was indicted for murder, but his indictment was dismissed. On appeal, the State contended that N.Y. PEN. LAW §1044 (defining murder in the first degree as "the killing of a human being . . . committed . . . without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony . . . .") should be interpreted so as to hold defendant guilty of murder in the first degree where a bystander and one of defendant's companions were killed by a party assisting an officer who was attempting to restore order after defendant and his companions had feloniously assaulted two others. The Court of Appeals affirmed, holding that the homicides, having been committed neither by defendant's own hand nor by someone acting in concert with him, could not actually or constructively be attributed to him.

Felony Murder—*People v. Mason*, 4 Cal. Rptr. 841 (1960). Defendant was convicted of murder in the first degree. On appeal, he contended that the giving of a felony murder instruction was erroneous inasmuch as the burglary he committed, if any, was completed upon defendant's entry into his victim's house and that therefore the killing about 20 hours later while he was still in the house was not committed in the perpetration of a burglary. The Supreme Court affirmed, holding that although the killing occurred about 20 hours after defendant entered the house, if the jury found that he committed burglary by entering the house with the intent to commit a felonious assault, the homicide and the burglary were parts of one continuous transaction.

Informers—*People v. Amos*, 5 Cal. Rptr. 451 (Cal. 1960). Defendant moved to set aside an information against him and the motion was granted. On appeal by the State, the prosecution contended that an informer's statement that he had obtained marijuana from defendant provided reasonable cause for the police to search the defendant even though the informer had not previously furnished information to the police. The District Court of Appeals affirmed, holding that, even though marijuana was discovered in defendant's clothes, the search of defendant was unlawful because the information upon which the police acted was furnished by a person whose reliability had not been established and therefore probable cause for the arrest or search of defendant was not established.

Informers—*People v. Hammond*, 4 Cal. Rptr. 887 (Cal. 1960). Defendant was convicted of a narcotics violation. On appeal, he contended that even though competent evidence established his guilt beyond a reasonable doubt he was still entitled to a reversal which would terminate the proceeding and effect his complete discharge because the identity of the informer who, by participating in narcotics violations with the defendant, led police to his capture was not revealed to him at a preliminary hearing, and therefore he was deprived of the informer's testimony which *might* have been helpful to his defense, the informant having died shortly after the preliminary hearing. The District Court of Appeal affirmed, holding that nothing in the record indicated that defendant was prejudiced and no showing was made that would in any way justify an inference that the informer's availability at trial might have aided his defense or weakened the prosecution's case. (One judge dissented.)

Juries—*Lewis v. State*, 336 S.W.2d 154 (Tex. 1960). Defendant was convicted of driving while intoxicated. On appeal, he contended that he should have been granted a new trial because the officer in charge of the jury during their deliberations informed the jurors in effect that they would

have to forego lunch or refreshments until they reached a verdict and two jurors testified that this might have caused them to change their vote so that a verdict could be agreed upon. The Court of Criminal Appeals affirmed, holding that the trial judge did not abuse his discretion in overruling the motion for a new trial because the officer's statement to the jurors was not such as to require the granting of a new trial and furthermore because a juror is not allowed to impeach or explain his verdict by showing the reason for the conclusion he reached.

Jurisdiction to Try Cause—*Bundy v. United States*, 277 F.2d 818 (6th Cir. 1960). Defendant was convicted of conspiring to utter and deal in counterfeit securities. On appeal, defendant claimed that since, at the time of his trial, he had been arrested for the identical offense and bail had been set by another United States District Court, the present District Court lacked jurisdiction to indict, try, and convict him. The Court of Appeals, affirming the conviction, held that the present court had jurisdiction inasmuch as no indictment had been returned by the other court when defendant was tried.

Jury Instructions—*Commonwealth v. Conklin*, 160 A.2d 566 (Pa. 1960). Defendant was convicted of murder in the first degree. On appeal, she contended that the trial judge erred in his instructions by failing to inform the jury on the possible verdict of "not guilty." The Supreme Court vacated the judgment and remanded for a new trial, holding that neither the admission of facts by the defendant nor her failure to deny the killing serves to relieve the prosecution of its burden of proof, and it is therefore necessary adequately to remind the jury in the charge that if the prosecution's evidence fails to convince them beyond a reasonable doubt on any essential element of the prosecution's case they must return a verdict of "not guilty." (Two judges dissented.)

Nolo Contendere Plea—*United States v. Bagliore*, 182 F.Supp. 714 (E.D.N.Y. 1960). Defendant was indicted by a federal grand jury for receiving stolen property. Defendant petitioned the court to accept a plea of nolo contendere on the grounds that although he was now competent to understand the proceedings and to assist counsel, he had been under psychiatric treatment since 1951. The District Court granted the plea stating that in view of defendant's medical history, he should be afforded the plea's benefits.

Pre-Sentence Investigation Reports—*State v. Pohlabel*, 160 A.2d 647 (N.J. 1960). Movant's motion to vacate an allegedly illegal and improper sentence was denied. On appeal, he contended that the trial judge, in imposing the sentence, misapprehended the contents of a presentence investigation report and was influenced by inaccurate and misleading information contained therein. The Superior Court reversed and remanded, holding that, although there is no court rule or statute in New Jersey requiring that pre-sentence reports be shown to a defendant or his counsel, movant had a right to be relieved since he showed that he was probably prejudiced when the sentencing judge acted under a material misapprehension of fact as to movant's criminal record and that sufficient doubt had been cast upon the legality of the imposition of sentence as to require the vacation thereof and appropriate resentencing in light of a new pre-sentence investigation report.

Public Trial—*Levine v. United States*, 80 Sup. Ct. 1038 (1960). Defendant was convicted of criminal contempt for refusing to answer questions before a grand jury on the ground of self-incrimination after he had been granted immunity from prosecution and before a district court where the courtroom had been cleared upon defendant's request and had not been reopened for the rendering of the decision. On certiorari, defendant claimed that the secret court proceedings violated his rights under the due process clause of the fifth amendment and/or his right to a public trial under the sixth amendment to the federal constitution. The Supreme Court, in a five-to-four decision, affirmed the conviction holding that summary conviction and sentencing occurring without the public returning to the courtroom does not violate the Constitution when defendant has not requested a public hearing after waiving same. Mr. Justice Black, with the Chief Justice and Mr. Justice Douglas joining, said that the defendant had requested reopening of the courtroom by requesting a trial according to due process. Mr. Justice Brennan, also dissenting, with Mr. Justice Douglas again joining, added that a defendant may waive his constitional rights only when it is based on clear consent and such consent was lacking here.

Right to Counsel—*People v. DiBiasi*, 166 N.E.2d 825 (N.Y. 1960). Defendant was convicted of murder in the first degree and attempted

murder in the first degree. On appeal, he contended that the trial court erred in permitting a police officer to testify to statements and admissions made by defendant in the absence of his attorney during a period of questioning after his indictment and surrender for arraignment. The Court of Appeals reversed, holding that this questioning was a violation of his constitutional right to counsel and that the entry in evidence, over objection, of his admissions made during that questioning was so gross an error as to require reversal. Three judges dissented.

Right to Counsel—*Hudson v. North Carolina*, 80 Sup. Ct. 1314 (1960). Defendant was convicted of robbery in a North Carolina state court. On certiorari, defendant, who was eighteen years of age, urged that the trial court's refusal to appoint counsel after co-defendant's lawyer withdrew was a deprivation of defendant's rights under the fourteenth amendment because of his comparative youth. The Supreme Court held that failure to appoint counsel had deprived defendant of his constitutional rights, not because of his youth, but because the trial court failed to instruct the jury that a co-defendant's plea of guilty should not imply defendant's guilt and that defendant, a layman, could not be expected to request such an instruction. Mr. Justice Clark, with Mr. Justice Whittaker concurring, dissented because the ground for the majority's opinion was not raised by defendant on appeal and because the majority had merely speculated as to the prejudice resulting from co-defendant's plea of guilty.

Search and Seizure—*People v. Gonzales*, 5 Cal. Rptr. 920 (Cal. 1960). Defendant was convicted of possession of marijuana. On appeal, he contended that narcotics found in his clothing (in the presence of a policeman) by doctors treating him in a hospital for a knife wound were discovered during an unlawful search and therefore were inadmissible as evidence. The Supreme Court affirmed, holding that the search was reasonable in light of the fact that a hospital is required by statute to make a record of each of its patients and to report to the police concerning any person suffering from an injury inflicted by a knife, and the officer who was present during the search was not required to close his eyes to the contraband he discovered merely because the initial purpose of the search was merely to learn the patient's identity.

Search and Seizure—*Ohio v. Price*, 80 Sup. Ct. 1463 (1960). Defendant was convicted of failing to admit municipal housing inspectors into his home in violation of a municipal ordinance. On a petition for habeas corpus, defendant contended that the ordinance authorizing housing inspectors to enter his home without a search warrant was unconstitutional under the fourteenth amendment. By an evenly divided Court, the decision was affirmed *ex necessitate*. The four Justices who would have reversed the decision—the Chief Justice and Justices Black, Douglas, and Brennan—felt that this case went further than *Frank v. Maryland*, 359 U.S. 360 (1960), because in the *Frank* case the inspector was looking for a specific violation, while here the inspectors had no such basis for their inspection; the four Justices who would have affirmed expressed no opinion.

Sexual Assault—*State v. Dobbins*, 167 N.E.2d 916 (Ohio 1960). Defendant was convicted under OHIO REV. CODE ANN. §2903.01 (Baldwin 1958) which states that, "No person over the age of eighteen years shall assault a child under the age of sixteen years, and willfully take indecent and improper liberties with person of such child ...." On appeal, defendant contended that proof of an assault, in the classic sense of a threat of physical injury coupled with a present ability to inflict the same, was a necessary element of the offense charged. The Supreme Court affirmed, holding that proof of an actual assault is not required since the act of taking indecent and improper liberties with a child under 16 by a person over 18, even with the child's consent, constitutes sufficient proof of an "assault" within the meaning of §2903.01. One judge dissented.

Sexual Psychopathy—*People v. Nastasio*, 168 N.E.2d 728 (Ill. 1960). Defendant was found to be a sexually dangerous person and was committed to the custody of the Director of Public Safety for confinement and treatment. On appeal, defendant contended that the admission in evidence of two depositions taken in his absence violated ILL. CONST. art. II, §9, which provides that in all criminal prosecutions the accused shall have the right to appear and defend in person and to meet the witnesses face to face. The Supreme Court reversed, holding that although the Illinois Sexually Dangerous Persons Act adopts the general structure of the state's Civil Practice Act, the nature of the hearing under the former Act so closely resembles a criminal prosecution that in order to avoid constitutional problems and doubts as to its