Journal of Criminal Law and Criminology

Volume 52
Issue 1 *May-June*

Article 7

Summer 1961

Abstracts of Recent Cases

will be adopted is a query that only the legislators and judges can answer.

A final issue raised is whether the husband would be deprived of the privilege against self incrimination if his wife voluntarily offered damaging evidence or were compelled to testify against him. Those who would argue a violation of the fifth amendment and similar state constitutional provisions would point to the common law fiction that husband and wife are legally one person and conclude that the husband is being forced to testify against his will. However, to hold that husband and wife are one person at law would be to disregard the vast changes in the status of the woman the extension of her rights and correlative duties—whereby a wife's legal subversion to her husband has been wholly wiped out in this country.[74] Accordingly, it may be said that the privilege against self incrimination is not jeopardized by the incorporation of the proposed evidentiary privilege into our legal framework.

In conclusion, assuming that the qualified privilege is approved by the lawmakers, it remains for the court to balance the injury to the marital relation and the danger of perjured testimony against the benefit derived from the due administration of justice in order to resolve whether to admit or exclude the testimony of the spouse. There appears to be little, if any, opposition to such a procedure when utilized to determine the admissibility of relevant evidence in other cases.[75] Surely, the balancing process would not be an illogical element in our judicial machinery when applied to the husband-wife privilege.

JACK KLINGENSMITH

[74] United States v. Dege, 364 U.S. 51 (1960) (husband and wife held capable of conspiring together in violation of a federal conspiracy statute).

[75] State v. Haney, 219 Minn. 518, 18 N.W.2d 315 (1945); Farris v. People, 129 Ill. 521, 21 N.E. 821 (1889); Beyl v. State, 165 Neb. 260, 85 N.W.2d 653 (1957).

ABSTRACTS OF RECENT CASES

Abstractors

Richard K. Janger* and Alan H. Swanson*

Arrest, Search and Seizure—*Robinson v. United States*, 283 F.2d 508 (D.C. Cir. 1960). Defendants were convicted of housebreaking and grand larceny. On appeal, they contended that the trial court erred in admitting certain tools as evidence because the police officers, at the time of their search of defendants' automobile without a warrant, did not have probable cause to believe that defendants had committed a felony. The Court of Appeals, affirming the conviction, held that probable cause for the arrest did exist where police officers stopped defendants' automobile traveling sixty miles per hour early on a Sunday morning, and defendants refused to explain coins and a money bag on the car's floor, revealed when defendants opened the car door. Since the arrest was valid, the subsequent search resulting in the seizure of defendants' tools was held to be proper.

Arrest, Search and Seizure—*California v. O'Neill*, 10 Cal. Rptr. 114 (2d Dist. Ct. App. 1960). Defendant was convicted of possessing heroin. On appeal, he claimed that the trial court erred in admitting the heroin into evidence because the police had neither a search warrant nor probable cause for an arrest. The Court of Appeals, reversing the conviction, held that where the officers admitted that they lacked knowledge of their informer's reliability and the defendant had slammed the door in the officers' faces upon their seeking admittance, no probable cause for an arrest or a search existed.

Arrest, Search and Seizure—*Platt v. State*, 341 S.W. 2d 930 (Tex. 1960). Defendant was convicted of the unlawful possession of morphine. On appeal, he contended that the trial court erred in admitting evidence obtained as a result of the allegedly illegal search of a cabin in which he and others were found. The Court of Criminal Appeals affirmed, holding that when, after receiving reliable information that people in a particular cabin would be using narcotics, the officer, upon approaching the cabin and looking through the screen door,

* Senior Law Students, Northwestern University School of Law.

saw defendant apparently giving himself an injection of narcotics the search was lawful as an incident to defendant's lawful arrest made upon "probable cause" and that in any case defendant did not have standing to object to the search in the absence of a showing that the cabin was his private dwelling.

Bail—*Bandy v. United States*, 81 Sup. Ct. 197 (1960). Defendant applied for bail on personal recognizance and an elimination of bond, claiming that he lacked the funds to post the bond. Mr. Justice Douglas denied the application without prejudice and held that the Court of Appeals should hear the appeal, stating that a defendant's right to freedom pending the final determination of his case outbalances the government's requirement of security by way of bond which may be dispensed with in certain circumstances under FED. R. CRIM. P. 46(d).

Confessions—*Mezzatesta v. State*, 166 A.2d 433 (Del. 1960). Defendant and one Williams were convicted of violating Delaware lottery laws. On appeal, defendant contended that his silence in face of an admission by Williams implicating both of them in the crime could not be admitted in evidence as an "implied confession" by defendant because the admission resulted from an accusation made while defendant was under arrest. The Supreme Court affirmed, stating that it would follow Dean Wigmore's rule that silence under accusation is admissible evidence even though the accused is under arrest, provided that the circumstances were such as would naturally call for reply.

Confessions—*Hawaii v. Yoshida*, 354 P.2d 986 (Hawaii 1960). Defendant was convicted of procuring and pimping. On appeal, he contended that his confession should not have been admitted because a confession cannot be used to support a conviction unless all of the essential elements of the corpus delicti (in this case inducing the female and intent to participate in the earnings) have been established by independent proof, and that without his confession, the evidence failed to prove that he intended to obtain a portion of the prostitute's earnings. The Supreme Court, affirming the conviction, held that in Hawaii full proof of the corpus delicti, without regard to the confession, is not necessary if the circumstances assure the trustworthiness of the confession; here, the independent evidence at least tended to prove defendant's intent, and thus consideration of the confession with the other evidence was warranted.

Demonstrative Evidence — *California v. Robillard*, 10 Cal. Rptr. 167 (Cal. 1960). Defendant was convicted of murder in the first degree. On appeal, he claimed that the trial court erred in permitting the use of a manikin to illustrate the path of the bullets fired into the deceased's body. The Supreme Court affirmed the conviction holding that in a bench trial the manikin was a proper use of demonstrative evidence, even if it had some prejudicial effect, because it tended to clarify the circumstances of the crime and prove a material fact, i.e., that the murder was a cold-blooded killing.

Double Jeopardy—*United States v. Gori*, 282 F.2d 43 (2d Cir. 1960). Defendant was convicted of knowingly receiving and possessing goods stolen in interstate commerce. On appeal, he contended that where he had neither requested nor consented to a mistrial, but merely did not protest it, he was subjected to double jeopardy by being tried a second time. The Court of Appeals, affirming the conviction, held that the discontinuance of the first trial to which defendant had not protested did not support a claim of double jeopardy because defendant had not been harmed by the first trial and had accepted the benefits of the new trial granted by a judge who had been overzealous in protecting defendant's rights. Judge Waterman dissented.

Double Jeopardy—*Boyle v. State*, 170 N.E.2d 802 (Ind. 1960). Defendant was convicted in the Sullivan County Court of operating an automobile upon a highway in Sullivan County while under the influence of liquor. On appeal, he contended that he had been placed in double jeopardy because he had previously been tried and acquitted by the Vigo County Court on a charge arising out of the same act for which he was tried and convicted in the Sullivan County Court, except that the first affidavit charged him with operating a vehicle in Vigo County and the second charged him with operating a vehicle in Sullivan County. The Supreme Court, by an equally divided court, affirmed the conviction, two judges holding that defendant

could not be tried a second time for the offense of operating a motor vehicle while under the influence of liquor even though defendant had allegedly committed the same offense in two separate counties, one judge concurring on the ground that the continuous operation of a motor vehicle in two or more counties while under the influence of liquor constituted a single offense subject to the rule of double jeopardy but finding that defendant failed to provide sufficient evidence to sustain his defense of former jeopardy, and one judge holding that two separate crimes had been charged since one was alleged to have occurred in Vigo County and the other in Sullivan County.

Double Jeopardy—*Coffey v. State*, 339 S.W.2d 1 (Tenn. 1960). Defendant, a police officer, was convicted of assault and battery upon, and official oppression of, a private citizen. On appeal, he contended that his conviction for these two crimes constituted double jeopardy. The Supreme Court affirmed the judgment in the official oppression case but set aside the judgment in the assault and battery case and abated that suit, holding that where two or more offenses of the same nature are by statute carved out of the same transaction, and are properly the subject of a single investigation, an acquittal or conviction for one of the offenses bars subsequent prosecution for the others.

Fair Trial Procedure—*Dyson v. United States*, 283 F.2d 636 (9th Cir. 1960). Defendant was convicted by a jury of robbing a national bank. On appeal, he contended that the trial court erred in permitting the prosecution to comment on defendant's failure to deny or explain incriminating facts when defendant only testified as to material facts concerning his innocence. The Court of Appeals, affirming the conviction, held that although defendant's counsel told the jury that defendant would only be asked to testify in order to show whether the confession was voluntarily given, the questions, in fact, displayed defendant's intent to deny his guilt before the jury. Under such circumstances the prosecution could properly comment on defendant's testimony.

Habeas Corpus Ad Prosequendum—*Carbo v. United States*, 81 Sup. Ct. 338 (1961). After being arrested for extortion and posting bond before a federal district court in California, defendant went to New York where he was convicted of three misdemeanors and given a two year prison term. Subsequently, defendant moved to quash a writ of *habeas corpus ad prosequendum* issued by the California court to the New York prison directing the return of defendant to California for trial, but the motion was denied. On appeal, he claimed that the California federal court lacked the power to direct the writ to an officer located outside the territorial limits of its jurisdiction under 18 U.S.C.A. §2241. The Supreme Court denied the motion to quash, holding that a court's ability to issue the writ of *habeas corpus ad prosequendum* extended throughout the entire country and that although 18 U.S.C.A. §2241 merges all writs of habeas corpus, the territorial limits in the statute only refer to *habeas corpus ad subjiciendum* (inquiry into the cause of restraint). Chief Justice Warren and Mr. Justice Black dissented.

Immunity from Prosecution—*Reina v. United States*, 81 Sup. Ct. 260 (1960). Defendant was convicted of criminal contempt for refusing to answer questions before a federal grand jury. On appeal, defendant contended that Congress only intended to grant immunity from federal, and not state, prosecutions when it enacted 18 U.S.C.A. §1406 (which grants immunity from prosecution to witnesses compelled to testify before federal grand juries investigating violations of federal narcotics law) because to grant state immunity would make the statute unconstitutional under the tenth amendment. The Supreme Court, affirming the conviction, held that Congress could, under federal supremacy, constitutionally grant immunity from state, as well as federal, prosecution. Mr. Justice Black and the Chief Justice dissented on other grounds.

Insanity—*People v. Bender*, 169 N.E.2d 328 (Ill. 1960). Defendant was convicted of armed robbery. On appeal, he contended that he was deprived of due process of law when the lower court instructed the jury at a pre-trial sanity hearing concerning fitness to stand trial that the burden of proving defendant's *insanity* rested upon *defendant*. The Supreme Court reversed and remanded, holding that when the defendant raises a reasonable doubt as to his sanity then the burden is upon the *State* to prove defendant's

sanity by a preponderance of the evidence and that the lower court's instructions were therefore erroneous.

Juries—*Fisher v. Georgia*, 116 S.E.2d 641 (Ga. 1960). After being convicted of an offense, defendant moved for a new trial which was denied. On appeal, he contended that during the course of the trial, two bailiffs escorted the jury to a hotel where each occupied a room with one juror and did not see the ten remaining jurors until the next morning. The Supreme Court reversed and remanded holding that when bailiffs fail to supervise and attend the jury at all times, the case must be retried irrespective of whether harm to the defendant is shown to have resulted.

Juries—*Contee v. State*, 165 A.2d 889 (Md. 1960). Defendant, a Negro, was convicted of raping a white woman. On appeal, he contended that it was reversible error for the trial court to refuse to ask prospective jurors, on *voir dire*, the questions he had submitted with respect to possible racial bias or prejudice and to allow the prosecutor to constantly refer to the prosecutrix as a "white girl." The Court of Appeals, reversing on the ground that it was error to deny defendant the opportunity of submitting proper questions relating to racial bias or prejudice to be propounded by the court to prospective jurors on *voir dire*, stated also that the trial court should have cautioned the State's Attorney to desist from making remarks calculated to evoke racial prejudice or should have admonished the jury to disregard the reference to racial matters.

Manslaughter—*State v. Fennewald*, 339 S.W. 2d 769 (Mo. 1960). Defendant was convicted of manslaughter. On appeal, he contended that he could not be guilty of manslaughter, although he had agreed with one Schweppe to have an automobile race, because the act of culpable negligence causing the death of the driver of a third car was not defendant's act but the act of Schweppe. The Supreme Court, reversing and remanding on other grounds, stated that defendant could properly be found guilty of manslaughter by reason of entering into the agreement to conduct an automobile race and doing so in a reckless manner whereby the death of a third party resulted.

Prejudicial Remarks By Prosecutor—*Montana v. Peterson*, 356 P.2d 925 (Mont. 1960). Defendants were convicted by a jury of a misdemeanor. On appeal, they contended that they were denied the right to a fair trial when the trial judge permitted the prosecution to interrupt the defense attorney's direct examination of a witness to state that he wished to bring his secretary into the courtroom to take the testimony down so as to have it available in case of possible perjury. The Supreme Court reversed and remanded, holding that the prosecution's insinuations and threats in the presence of the jury were so prejudicial that they could not be cured by the court's admonition to the jury that the statements should be disregarded.

Receiving Stolen Property—*McCoy v. State*, 170 N.E.2d 43 (Ind. 1960). Defendant was convicted of receiving stolen goods from two minors. On appeal, she contended that the affidavit was defective in that it alleged that the property was "feloniously" stolen by minors and therefore erroneously charged the minors with having committed the felony of grand larceny when in fact they were subject to the juvenile laws. The Supreme Court affirmed, holding, that the word "feloniously" may be considered surplusage, that the word "stolen" (which appears in the Indiana statute defining the crime of receiving stolen goods) has a broad meaning and would apply to property unlawfully taken by minors subject to the juvenile laws, and that another section of the statute further provides that in any prosecution for the offense of receiving stolen property "it shall not be necessary on the trial thereof to prove that the person who stole such property had been convicted."

Right to Counsel—*People v. Friedrich*, 169 N.E.2d 752 (Ill. 1960). Defendant was convicted of the crime of conspiracy to fraudulently obtain the assets of another's estate. On appeal, defendant contended that he was deprived of his constitutional right to counsel of his own choice because the trial judge had refused to allow him to engage the services of the same attorney who represented another member of the alleged conspiracy on the ground that a conflict of interest existed between the co-conspirators (as evidenced by a motion for a severance) and that the Canons of Ethics would be violated if the same attorney were to represent conspirators who could not agree upon a joint trial. The Supreme Court reversed and remanded, holding that conflicts of interest which authorize a severance do not necessarily preclude the same

attorney from representing both parties under Canon 6 of the Canon of Ethics of the Illinois State Bar Association and even if the interests of the two conspirators were so adverse that they should have been represented by separate counsel, either conspirator had the unquestioned privilege to waive his right to separate counsel.

Self-Incrimination—*In Re Greenspan*, 187 F. Supp. 177 (S.D.N.Y. 1960). The Commissioner of Internal Revenue moved for an order adjudicating the defendant in contempt of court. Defendant contended that the privilege against self-incrimination should apply to corporate books and records when the corporation embodies a purely personal interest as when there is but one stockholder in the company. The District Court, compelling defendant to produce the records or be held in contempt, held that the privilege against self-incrimination only applies to natural persons and that irrespective of the fact that defendant was the sole stockholder of the corporation, he, as agent of the corporation, could not invoke the privilege.

Speedy Trial—*Moore v. Hand*, 356 P.2d 809 (Kans. 1960). After being convicted of issuing worthless checks, defendant applied for a writ of habeas corpus which was denied. On appeal, he claimed that he was entitled to his release because his right to a speedy trial under §10 of the Kansas Bill of Rights and his right to discharge under Kansas law, G.S. 1949, 62-1432, had been violated because three terms of the court had passed between the filing of the information in 1957 and the bringing of the defendent to trial in 1959. The Supreme Court, affirming the denial of defendant's application, held that where a defendant had voluntarily pleaded guilty at the time of trial in 1959, he had waived any rights relating to a speedy trial and any right to discharge under the Kansas statute.

Testimony Under the Influence of Tranquilizers —*Washington v. Murphy*, 355 P.2d 323 (Wash. 1960). Defendant was convicted of murder and sentenced to death. On appeal, he claimed that a new trial should be granted because the jury would not have condemned him to death if it had not been for his casual appearance and lackadaisical attitude which had been caused by a medical trustee giving the defendant tranquilizers immediately preceding the trial, and defendant's not being aware of their effect. The Supreme Court granted a new trial holding that the jury's decision to impose the death penalty may have been influenced by the defendant's attitude and appearance, and that since defendant may have been affected by the tranquilizers, administered under these circumstances, his right to a fair trial was impeded.

Wiretapping—*Simons v. O'Connor*, 187 F. Supp. 702 (S.D.N.Y. 1960). Plaintiff sued a New York district attorney for damages arising from defendant's tapping of plaintiff's telephone without the latter's consent and in violation of §605 of the Federal Communications Act (but under a state court order authorizing such wiretapping). On defendant's motion to dismiss, plaintiff contended that she had a private right to damages against a state officer for intercepting and divulging her phone call without her assent, even though he was discharging his official responsibilities. The District Court granted the motion to dismiss holding that since the state court permitted the wiretapping (performed for purposes of obtaining evidence to prosecute plaintiff for jamming phone lines of another with intent to interfere with his business), the officer in performing his duty was immune from civil action.

Witnesses—*Froman v. State*, 339 S.W.2d 601 (Ark. 1960). Defendants were convicted of robbery. On appeal, they contended that their conviction could not stand because the only testimony that tended to show that they committed the crime was that of one of the defendant's girl friends who allegedly was an accomplice since she participated in the crime by waiting in the automobile near the scene of the crime while the robbery was perpetrated, by knowing the crime was committed, by permitting the defendants to go to her apartment and divide the money obtained in the robbery, by harboring the men in her apartment, and by not telling anyone about the crime for a year. The Supreme Court reversed, holding that the evidence established that the witness was an accomplice *as a matter of law* and since there was no corroborating evidence, the lower court's judgment could not stand in view of the fact that it was based solely on her testimony. One judge dissented.

Witnesses—*Central Mutual Insurance Company v. D. & B., Inc.*, 340 S.W.2d 525 (Tex. 1960.). The insured recovered judgment under a mercan-