Journal of Criminal Law and Criminology

Volume 52
Issue 2 *July-August*

Article 5

Summer 1961

Abstracts of Recent Cases

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Recommended Citation
Abstracts of Recent Cases, 52 J. Crim. L. Criminology & Police Sci. 185 (1961)

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ABSTRACTS OF RECENT CASES

Abstractors

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Arrest, Search, and Seizure—*Channel v. United States*, 285 F.2d 217 (9th Cir. 1960). Defendant was convicted of violating federal narcotics laws. On appeal, he contended that heroin seized in his room should not have been admitted into evidence because the police did not have a search warrant and defendant did not consent to the search while being questioned by the police at their station. The Court of Appeals reversed and remanded, holding that a search of a defendant's apartment without a warrant while defendant is still in custody can be lawful where defendant gives his unequivocal and specific consent but that where, as here, defendant, during an interrogation by the police, said either, "I have no stuff in my apartment and you are welcome to go search," or "You can go out and search the place," the police could not interpret this as an unequivocal and specific consent, and hence the heroin seized as a result of the unlawful search should not have been admitted.

Arrest, Search, and Seizure—*United States v. Gaitan*, 189 F. Supp. 674 (D. Colo. 1960). In 1958 defendant was convicted of narcotics violations by a federal court on the basis of evidence which had been illegally seized by city police officers. Subsequently, the defendant moved to vacate, set aside, or correct his sentence under 28 U.S.C.A. §2255, claiming that in light of *Elkins v. United States*, 364 U.S. 206 (1960) (where the Supreme Court held such illegally seized evidence inadmissible in federal prosecutions), he is entitled to relief because the exclusion under *Elkins* was for the purpose of enforcing rights guaranteed by the fourteenth amendment to the Federal Constitution. The District Court denied the motion, holding that in *Elkins*, the question was one of admissibility of evidence rather than constitutional enforcement and thus 28 U.S.C.A. §2255 was not available to defendant inasmuch as it affords relief when there is an infringement of constitutional rights and not where the question raised is one of admissibility of evidence.

Arrest, Search, and Seizure—*People v. Faginkrantz*, 171 N.E.2d 5 (Ill. 1961). Defendant was convicted of unlawful possession of burglary tools. On appeal, he contended that the trial court erred in denying his motion to suppress as evidence certain tools found in his possession inasmuch as his consent to the search of his car was not a true consent, but rather a submission to the authority of police officers. The Supreme Court affirmed, holding that it was unnecessary to analyze the quality of defendant's consent because the defendant's unlikely explanation of his presence in an alley far from his home at 4:30 a.m. and his inability to produce any indicia of ownership of the car, coupled with his admitted criminal record and a history of burglaries in the alley, gave the police reasonable cause to believe that defendant was committing a crime and hence the search of defendant's car was not unreasonable.

Building Inspections—*City of St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960). Defendants, a landlord and a janitor, were charged with violating a city ordinance prohibiting the obstruction of city inspectors in the discharge of their duties. From judgments of dismissal, the City of St. Louis appealed and contended that the trial court erred in holding that city ordinances providing for the entry and inspection of buildings for the purpose of administering ordinances relating to public health, safety, and welfare were violative of the Missouri constitutional provisions against self-incrimination, double jeopardy, and unreasonable searches and seizures, as well as the due process clause of the fourteenth amendment. The Supreme Court, affirming in part and reversing in part, held that the Missouri constitutional provisions and the federal due process clause do not prohibit a city from enacting ordinances prescribing regulations for the promotion of the health and welfare of people, including

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provisions for the reasonable entry and inspection of buildings.

"Common Thief"—*State v. Cherry*, 167 A.2d 328 (Md. 1961). Defendant was indicted for being a "common thief" but the trial court granted his motion to quash the indictment on the ground that the statute imposing a duty on police officials to arrest all persons whom "they shall know or have good reason to believe are common thieves" violated both the federal and state due process clauses, inasmuch as the statute failed to set out any positive guides or definite standards for determining the guilt of a person charged with being a "common thief." On appeal, the State contended that the statute was not so vague and indefinite as to run afoul of the state and federal due process clauses. The Court of Appeals reversed and remanded, holding that although the statute did not define "common thief," the term nevertheless had a sufficiently technical and well established meaning in law (i.e., a person who is "habitually and by practice" a thief) so that in conjunction with the remainder of the statute, the term fixed an ascertainable standard of guilt sufficiently definite to satisfy the requirements of due process.

Conspiracy—*United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960). Defendants were convicted of conspiring to commit perjury and obstruct justice by giving false and evasive statements before federal grand juries. On appeal, they contended that the evidence was insufficient to prove any conspiracy among the defendants to lie about their purpose in gathering at Apalachin, New York. The Court of Appeals reversed the convictions, holding that although the government's evidence may have justified a finding that at least some of the defendants lied as to their purpose for meeting, it did not support a finding that the defendants agreed to lie, nor did the government prove that defendants knew or should have known at the date they met that they would be asked to testify as to the subject matter of their Apalachin meeting.

Contraceptives—*Trubeck v. Ullman*, 165 A.2d 158 (Conn. 1960). Plaintiffs brought an action for a declaratory judgment to determine the constitutionality of Connecticut statutes prohibiting the *use* of contraceptives, and the counseling or abetting of such use. A demurrer to the complaint was sustained, whereupon plaintiffs appealed. The Supreme Court of Errors found no error and held that such statutes are valid as a proper exercise of the police power and do not invade rights guaranteed by the fourteenth amendment to the Federal Constitution.

Disorderly Conduct—*Drews v. State*, 167 A.2d 341 (Md. 1961). Defendants, two white men, a white woman and a Negro woman, were convicted of violating a disorderly conduct statute by disturbing the peace in a place of public amusement. On appeal, they contended that since the privately owned amusement park would not admit Negroes it therefore could not be regarded as a "place of public resort or amusement" within the meaning of the Maryland disorderly conduct statute. The Court of Appeals affirmed, holding that a privately owned amusement park is a "place of public resort or amusement" under the statute and the regular exclusion of Negroes did not keep the park from coming within the terms of the statute.

Double Jeopardy—*Crawford v. United States*, 285 F.2d 661 (D.C. Cir. 1960). Defendant was convicted of operating a lottery (a felony) and knowingly possessing lottery slips (a misdemeanor). On appeal, he contended that the trial court erred when, after determining that certain jurors had voted on the misdemeanor but not on the felony charge, it set aside the entire verdict, ordered a new trial, and refused to accept defendant's plea of former jeopardy. The Court of Appeals affirmed, holding that defendant's right to be free from jeopardy after a jury renders its verdict is not absolute and that the trial court had discretion to refrain from sentencing on the verdict as rendered and, instead, to set aside the entire verdict and order a new trial where, as here, the jury exhibited a considerable degree of confusion as to what it had done and could not be reassembled.

Double Jeopardy—*Commonwealth v. Taylor*, 165 A.2d 134 (Pa. 1960). Defendant was convicted on three counts, the first charging assault on one DiCicco with intent to rob, the second charging aggravated assault and battery on DiCicco and assault with intent to murder, and the third charging aggravated assault and battery on Di-

Cicco's wife. On appeal, defendant contended that the trial court erred in imposing three separate sentences on the three counts because all three counts allegedly involved the same crime arising out of one transaction. The Superior Court dismissed the appeal, holding that the test of whether one criminal offense has merged into another is whether one crime necessarily involves the other and not whether the two criminal acts are successive steps in the same transaction, and therefore where defendant, armed with a revolver, entered a business establishment, announced that there was a holdup, and shot DiCicco and DiCicco's wife, defendant was properly charged with three separate crimes.

Felony Murder—*Commonwealth v. De Moss*, 165 A.2d 14 (Pa. 1960). Defendant was convicted of first degree murder. On appeal, he contended that the only evidence connecting him with the robbery and homicide of an elderly widow was that he had been *in association*, prior to and subsequent to the happening of the robbery and homicide, with the persons who actually participated in both crimes. The Supreme Court affirmed, holding that even though defendant did not take part in the actual robbery and killing, the evidence nevertheless showed that he was an active participant in the conspiracy to rob, and this was sufficient to convict him of first degree murder since co-conspirators are all liable for a killing which takes place in the course of a robbery even though the death of the victim was not planned. One judge dissented.

Fingerprinting—*United States v. Krapf*, 285 F.2d 647 (3d Cir. 1961). Defendant, on a plea of guilty, was convicted of the misdemeanor of knowingly and wilfully violating I.C.C. regulations dealing generally with brake systems required on truck-tractors moving in interstate commerce. At the close of the sentenceing proceeding in which he was awarded probation, defendant refused to be fingerprinted by the United States Marshal, whereupon the district court ordered the defendant to submit to such fingerprinting. On appeal, defendant contended that the Marshal's right to fingerprint is derived solely from 28 U.S.C.A. §549 which limits the Marshal's power to that possessed by a sheriff in the state where the Marshal is located (New Jersey) and that New Jersey did not consider defendant's crime of such a nature as to warrant fingerprinting. The Court of Appeals, affirming the order to fingerprint defendant, held that the Marshal's power to fingerprint is derived from the power to discharge duties imposed upon him by the Attorney General, as well as 28 U.S.C.A. §549, and that since fingerprinting is not a punishment but a means of facilitating identification and enforcement of federal law, there is no reason to distinguish in this connection between federal crimes which are merely mala prohibita and those which are mala in se.

Illegal Detention—*Tate v. United States*, 283 F.2d 35 (D.C. Cir. 1960). Defendant was convicted of entering a hospital and stealing property. On appeal, defendant contended that the trial court erred in permitting the prosecution, on rebuttal, to submit statements alleged to have been made by defendant to the police during an unnecessary delay between his arrest and the preliminary hearing. The Court of Appeals affirmed the conviction, holding that where the defendant takes the stand to testify, the *McNabb-Mallory* doctrine does not require the exclusion of prior contradictory statements made during a period of alleged illegal detention when such statements are introduced for impeachment purposes only.

Insanity—*United States v. Amburgey*, 189 F. Supp. 687 (D.D.C. 1960). After being convicted of forgery, defendant moved for either acquittal by reason of insanity or a new trial. He contended that since on trial he had produced some evidence of mental illness, the government had the burden of proving beyond a reasonable doubt his sanity at the time of the crime. The District Court, in ordering a new trial, reversed its own ruling made during the trial that, in order to put the burden of proving sanity on the prosecution, the defendant must not only produce (1) "some evidence" of mental illness *but also* (2) "some evidence" that the crime was the *product* of the alleged mental illness. The Court concluded instead that, under the *Durham* rule, the defendant, in order to raise the defense of insanity, need only produce evidence of mental illness and that, for purposes of shifting the burden to the prosecution, it will then be presumed that the crime was the product of the alleged mental illness. The Court's opinion also includes a detailed, annotated discussion of the

respective functions of the expert medical witness and the trier of facts under the *Durham* rule.

Involuntary Manslaughter—*Palmer v. State*, 164 A.2d 467 (Md. 1960). Defendant was convicted of involuntary manslaughter. On appeal, she contended that her conduct in allowing her paramour to inflict upon her 20-month-old child a number of beatings which finally resulted in the child's death did not constitute gross, or criminal, negligence, and that her negligence, if any, was not a proximate cause of the death. The Court of Appeals affirmed, holding that defendant was guilty of gross or criminal negligence in permitting the prolonged and brutal beatings of her child, and that her failure to remove the infant from the peril supported the lower court's finding that her negligence was a proximate cause of the child's death.

Involuntary Manslaughter—*People v. Marshall*, 106 N.W.2d 842 (Mich. 1961). Defendant, who had permitted a drunk to drive his (defendant's) automobile, was convicted of the involuntary manslaughter of a person who was killed in an auto accident caused by the drunk while driving defendant's car. On appeal, defendant contended that he could not be found guilty of involuntary manslaughter on these facts especially since he was at home in bed at the time of the accident. The Supreme Court set aside the verdict of involuntary manslaughter but held that defendant was properly convicted of the misdemeanor of knowingly permitting one's car to be driven by a person who is under the influence of intoxicating liquor.

Involuntary Manslaughter—*State v. Sealy*, 117 S.E.2d 793 (N.C. 1961). Defendants were convicted of involuntary manslaughter based on an automobile collision. On appeal, defendants claimed that the trial court erred when it instructed the jury that they could find defendants guilty if they found that defendants violated the statute relating to stopping at stop signs, and that such violation was the proximate cause of the deaths. The Supreme Court ordered a new trial, holding that the instruction was erroneous because unintentional violation of the statute, by itself, would not constitute culpable negligence and that the jury must also find that defendants acted with a thoughtless disregard of consequences or with a heedless indifference to the safety of others.

Juries—*Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960). Defendents, Holmes and Bedami, convicted of interstate transportation of stolen automobiles, moved for a new trial, but it was denied. On appeal, defendants contended that the trial court erred in not granting a new trial because the deputy marshal had improperly communicated prejudicial information to the jury. The Court of Appeals reversed and remanded, holding that where the deputy marshal, when asked by a juror where the defendants were staying, said that Bedami was serving a six year jail sentence, it was clear that the deputy marshal improperly informed the jury of a prior conviction of one of the defendants, and where a finding of guilty was so dependent upon the connection between the two defendants, collateral information clearly prejudicial to Bedami was also harmful to Holmes.

Public Trial—*Reynolds v. State*, 126 So.2d 497 (Ala. 1961). Defendant was convicted of indecent molestation of a child under the age of sixteen. On appeal, defendant contended that he was deprived of his constitutional right to a public trial when the trial judge excluded from the courtroom all children under the age of eighteen. The Court of Appeals reversed and remanded, holding that the trial judge's order of exclusion went beyond the dictum of a previous Alabama decision which stated that children of "tender years" could be excluded and therefore operated to deprive defendant of his constitutional right to a public trial.

Right to Counsel—*McNeal v. Culver*, 81 Sup. Ct. 413 (1961). After being convicted of assault to murder in the second degree by a Florida state court, defendant filed a petition for a writ of habeas corpus with the Florida Supreme Court, but it was denied without a hearing. On certiorari, defendant claimed that he was denied due process under the fourteenth amendment to the Federal Constitution by virtue of the Florida Supreme Court's refusal to permit him a full hearing and the trial court's refusal to appoint counsel. The Supreme Court held that where the record showed defendant's ignorance, indigence, mental illness, and complete unfamiliarity with law and court procedures, plus the trial judge's scant assistance, the state court was obliged to grant a hearing and if the alleged facts were true, trial court's denial of counsel constituted a denial of due process.

Sentences—*Callanan v. United States*, 81 Sup. Ct. 321 (1961). Defendant was convicted of obstructing commerce by extortion as well as conspiracy to perpetrate the substantive offense. He was sentenced to consecutive terms of twelve years for the conspiracy and five years of probation for the substantive offense. After his motion to correct his sentence was denied, defendant, on certiorari, claimed that the trial court erred in sentencing him to *consecutive* terms because Congress, by including the conspiracy and the substantive offense in one provision of the Hobbs Act, 18 U.S.C.A. §1951, intended that only *concurrent* terms should be given. The Supreme Court affirmed the denial of the motion, holding that the trial judge has discretion in fixing consecutive terms for violation of the Hobbs Act inasmuch as the Act authorizes separate punishments for the conviction of separate offenses. Chief Justice Warren and Justices Stewart, Black, and Douglas dissented.

Sentences—*Smith v. United States*, 284 F.2d 789 (5th Cir. 1960). Defendants were convicted of postal robbery and, in accordance with statute, given a 25-year mandatory sentence. On appeal, defendants contended that the statute requiring a mandatory sentence invaded the the judiciary's right to exercise independent discretion and thus violated article III of the Federal Constitution. The Court of Appeals affirmed the conviction and upheld the statute, stating that Congress has the power not only to determine what constitutes a crime but also to state what punishment will be given by a court after guilt is found.

Year-and-a-Day Rule—*Commonwealth v. Ladd*, 166 A.2d 501 (Pa. 1960). Defendant was indicted for murder and for manslaughter. He moved to quash the indictments, contending that under the common law of Pennsylvania he could not be held since the death of the victim occurred more than a year and a day after the injury was inflicted. The lower court overruled the motions, and the Supreme Court affirmed, holding that the "year-and-a-day" rule, which it termed a mere rule of evidence or procedure, should no longer be recognized inasmuch as "modern conditions have moved beyond it" and "left it sterile." Two judges dissented.