Journal of Criminal Law and Criminology

Volume 56
Issue 2 *June*

Article 10

Summer 1965

Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

Prepared by

James R. Thompson

Assistant Editor-in-Chief

Confessions and the Right to Counsel—*People* v. *Dorado*, 398 P.2d 361(Cal.1965). The defendant, a prisoner at San Quentin, was tried, found guilty of the murder of a fellow prisoner and sentenced to death. On appeal he claimed that his confession had been obtained by prison authorities and an Assistant District Attorney in violation of the Supreme Court's holding in *Escobedo* v. *Illinois* 378 U.S. 478(1964), abstracted at 55 J. CRIM. L., C. & P. S. 493(1964). In a 4–3 decision, the Supreme Court of California reversed the conviction and, in so doing, extended the rule of the *Escobedo* case beyond the facts there involved. The confession by Dorado, the court held, was inadmissible because before it was taken "the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent."

In the *Escobedo* case, the Supreme Court had held that a confession taken from a suspect in the police station after the police had refused his request (and the concurrent request of his lawyer) that he be allowed to confer with retained counsel violated defendant's sixth amendment rights. Because Escobedo had a lawyer who came to the police station while the interrogation was in progress the Supreme Court did not have to decide whether a defendant without counsel at that stage of the proceeding would be entitled to be *told* of his right to counsel, or, at the least, given the advice that counsel would supposedly have given him—the right to invoke his privilege against self-incrimination. Dissenting in *Escobedo*, however, Justice White had said that "it would be naive to think that the new constitutional right announced will depend upon whether the accused . . . has asked to consult with counsel in the course of interrogation."

This prediction of Justice White concerning the ultimate reach of the *Escobedo* rationale has proved accurate, for the Supreme Court of California refused to distinguish between the case where counsel had already been obtained and the case where the record simply failed to reflect that the defendant was aware of his right to counsel. The *importance* of Escobedo, the court reasoned, was not that Escobedo had been denied the right of counsel by affirmative police conduct, but that the opinion established that the right to counsel *existed* during the interrogation of a "focal" suspect in custody (i.e., an interrogation designed to elicit an incriminating statement). If the right existed, the court then said, it could not be *waived* unless the record demonstrated that the defendant knew of its existence: "In the absence of evidence that defendant already knew that he had a right to counsel during interrogation, the failure of the officers to inform him of that right precludes a finding that he knowingly waived it." And, the court concluded, a waiver of counsel is not alone sufficient if the police have not told defendant of his right to remain silent.

In support of its decision to extend the *Escobedo* rule before being compelled to do so by the Supreme Court of the United States, the California court said that its function was not merely to follow a Supreme Court opinion, but "to enforce it in situations wherever it logically applied." Moreover, the court was concerned that if it waited several years for the Supreme Court to further define the *Escobedo* rule, convictions had in California in the interim might be subject to reversal and the work of law enforcement officers "would come to naught."

In dissent, three justices concluded that *Escobedo* was a binding precedent only in a case where the suspect under interrogation had asked for, and been denied, an opportunity to consult with counsel before confessing. The court "should not extend the rule of the Escobedo case," the dissenters argued, but, on the contrary, should "take a realistic view of the holding in Escobedo . . . so as to support law enforcement officers when their activities are not clearly unlawful, and not to increase their difficulties in preventing future murders and other crimes."

Comment: The opinion of the Supreme Court of California in the *Dorado* case represents the view taken by a minority of state supreme courts in their construction of the requirements of the Supreme Court's opinion in the *Escobedo* case. Only the Supreme Court of Oregon, in *State* v. *Neely*, 398 P.2d 482(Ore.1965) and the Supreme Court of Rhode Island, in *State* v. *Dufour*, 206 A.2d 82(R.I.1965) now follow the *Dorado* viewpoint. The other state courts which have passed on the question have generally refused to extend the *Escobedo* holding beyond its application to the exact facts of that case and have approved the admission into evidence of confessions in cases where the accused was not warned of either his right to counsel or of his right to remain silent. See, e.g., *Commonwealth* v. *Patrick*, 206 A.2d 295(Pa.1965); *People* v. *Hartgraves*, 202 N.E.2d 33(Ill.1964); *Bean* v. *State*, 398 P.2d 251(Nev. 1965); *Browne* v. *State*, 131 N.W.2d 169(Wis. 1964); *State* v. *Worley*, 132 N.W.2d 764(Neb. 1965).

At least three courts have also passed on the issue of whether the *Escobedo* rule (whatever its ultimate reach) is applicable to cases in which convictions were had and ordinary appellate remedies exhausted before the Supreme Court's decision in that case. In *People* v. *Lopez*, 398 P.2d 380(Cal.1965) the Supreme Court of California concluded that *Escobedo* should not be applied retroactively, because that rule was promulgated not "to undo the procedures of yesterday, which despite their undesirability did not necessarily cause the conviction of the innocent," but only to "discourage oppressive police practices" in the future. A federal district court also refused to apply *Escobedo* retroactively in *Hayes* v. *United States*, 236 F. Supp. 225(E.D. Mo., E.D.1964), but an opposite result was reached in *Fugate* v. *Ellenson*, 237 F. Supp. 44(Neb.1964).

Search and Seizure—*United States* v. *Ventresca*, 85 S. Ct. 741 (1965). After the defendant was convicted for possessing and operating an illegal distillery, the Court of Appeals reversed the conviction on the ground that an affidavit which had been filed by an investigator for the Alcohol and Tobacco Division of the Internal Revenue Service did not state facts sufficient to show probable cause for the issuance of a search warrant, and that the search of defendant's home which revealed the operation of the illicit still was therefore unreasonable. The Supreme Court of the United States granted the government's petition for *certiorari* and, in a 7–2 decision, reversed the Court of Appeals and upheld the validity of the warrant and subsequent search.

Although several "investigators" were engaged in the investigation and surveillance which led to the application for search warrant, only one swore to the affidavit which set forth the facts purporting to show probable cause. In this affidavit he said that the information which he was presenting to the court was "based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation." The Court of Appeals held that the affidavit did not make clear whether the information was, in whole or in part, the personal knowledge of the affiant or of the other investigators, and if the latter, whether it was "hearsay received from unreliable informants rather than their own personal knowledge."

The Supreme Court, in a strongly worded opinion written by Mr. Justice Goldberg, held that the reading of the affidavit for search warrant by the Court of Appeals was "unduly technical and restrictive" and that upon examination of the affidavit as a whole it was clear that all the observations referred to were made by "full-time investigators" and that observations "of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."

Comment: The *Ventresca* opinion is a very important one, but not so much because of the holding that the facts stated in the affidavit for search warrant constituted probable cause (they clearly do), nor for the fact that the case serves as a reminder to law enforcement officers to be more specific in drafting complaints for search warrants to avoid problems of interpretation of what should ordinarily be routine phraseology. Rather, the opinion of Mr. Justice Goldberg is important for the emphasis placed by the Court upon the fact that in this case the officers applied for and obtained a search warrant instead of searching without warrant, and the Court's obvious concern that officers who act in this manner should be encouraged by "commonsense" opinions construing the validity of such warrants. Witness the following language, directed (it is fair to assume), not only at lower federal and state courts, but at *prosecutors and police officers:*

"Our cases . . . strongly [support] the pref-

erence to be accorded searches under a warrant, [and indicate] that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." * * * These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. *A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.* * * * This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires. * * * It is vital that having done so their actions should be sustained under a system of justice responsible both to the needs of individual liberty and the rights of the community." [Emphasis added.]

Defendant's Right to Waive Jury Trial—*Singer* v. *United States*, 85 S. Ct. 783 (1965). In a unanimous opinion, the Supreme Court of the United States has upheld the validity of Rule 23(a) of the Federal Rules of Criminal Procedure which requires the consent of the court and prosecutor before allowing a defendant to waive a trial by jury in a federal criminal case.

The defendant Singer was convicted of mail fraud. Before trial he sought to waive a jury "for the purpose of shortening the trial." Although the court was willing to try the case without a jury, the prosecutor refused to agree to a bench trial and the defendant was found guilty after a jury trial. In seeking to overturn Rule 23(a), the defendant argued that since he had a constitutional right to a jury trial, he had "a correlative right to have his case decided by a judge alone if he consider[ed] such a trial to be to his advantage." Moreover, the defendant argued, the right to a jury trial is one which the constitution grants to a defendant alone and a defendant can waive other rights granted by the constitution for his benefit without the consent of the prosecution, e.g., the privilege against self-incrimination and the protection against unreasonable search and seizure.

These arguments were rejected by the Court which found that "A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury" and "there is no federally recognized right to a criminal trial before a judge sitting alone. . . ." The Court also did not find the "waiver" argument persuasive. "The ability to waive a constitutional right," the Court said, "does not ordinarily carry with it the right to insist upon the opposite of that right." Since the Court found that there was no constitutional right to a trial without a jury, it upheld Rule 23(a) as a reasonable restriction upon the right to waive because when either the trial court or the prosecutor refuse to consent to a bench trial "the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him."

Indictment for Robbery—*People* v. *Blanchett*, 204 N.E.2d 173(Ill. App.1965). The defendant was tried for the crime of armed robbery and convicted. In his motion in arrest of judgment he contended that the information failed to comply with Ch. 38, §111-3(a)(4) Ill. Rev. Stat.(1963) which requires that a charge allege the commission of an offense by stating, *inter alia*, "the time and place of the offense as definitely as can be done." The information filed against the defendant stated only that "at and within the County of Adams, in the State of Illinois" the defendant, "on January 15, 1964," committed the crime of armed robbery.

The Appellate Court for the Fourth District of Illinois reversed the judgment of conviction on the ground that the information failed to comply with the statute, although the court refused to decide whether the information complied with the command of the Illinois constitution that requires informations and indictments to be specific enough to inform a defendant of the nature of the accusation, enable him to prepare his defense and protect him from double jeopardy. The court

concluded that since the state knew that defendant had been "robbed at his place of residence, 937½ Maine Street, Quincy, Illinois," that was the description that should have been given and since the information did not state the time and place of the offense "as definitely as could be done" the information was invalid.

Comments on Defendant's Failure to Testify *People* v. *Modesto*, 398 P. 2d 753 (Cal. 1965). After the decision of the Supreme Court of the United States in *Malloy* v. *Hogan*, 378 U.S. 1, which held the privilege against self-incrimination of the fifth amendment to be binding upon the states, a question much mooted was whether those states which allowed a trial court or prosecutor to comment upon the failure of the defendant to testify in his behalf would now have to conform their procedure to the federal practice which, by virtue of 18 U.S.C. §3481 and *Wilson* v. *United States*, 149 U.S. 60 has long forbidden such comment. In *Modesto*, the Supreme Court of California, though reversing a conviction of murder and sentence of death on other grounds, held constitutional under the fifth amendment, as applied to the states through the fourteenth, the California constitutional provision allowing limited comment by the court and prosecutor upon the defendant's failure to take the stand in his defense.

The Supreme Court of the United States, said the California court, has never held that comment upon the defendant's failure to testify was forbidden by the privilege against self-incrimination, and since the "federal rule is founded not on constitutional command but on statutory interpretation . . . the state must follow only the constitutional and not the statutory aspects of the privilege." Moreover, since the jury will draw adverse inferences from a failure of a defendant to testify "whether or not the court or prosecutor comments," allowing such comments does not *compel* a defendant to testify in violation of the privilege against self-incrimination. And, the court noted, in some cases "comments might aid the defendant by preventing the jury from giving too much weight to his refusal to take the stand."

Consent to Search—*McNear* v. *Rhay*, 398 P.2d 732 (Wash.1965). After the defendant had been arrested by the police for shoplifting, he signed a written consent to search his automobile and apartment for stolen goods. Two detectives from the larceny detail then executed the consent by searching the apartment. They found no stolen property, but during the course of their search they did find a marijuana cigarette in the drawer of a night stand. After calling for two officers from the narcotics detail, the first team of detectives left the apartment to search defendant's car. The second team then embarked upon a 2½ hour search of the apartment for additional narcotics and they eventually found two bags of marijuana. The next day, while defendant was still in custody, a narcotics officer confronted him with the marijuana and the defendant then signed a statement admitting that he had possessed narcotics. He was charged with the unlawful possession of narcotics and subsequently convicted of that charge.

On appeal, defendant contended that the officers unlawfully searched his apartment beyond the bounds of the consent, and that since the seizure of the marijuana was unlawful, it, as well as his confession which was a "product" of that seizure, should have been suppressed. Defendant's first argument was rejected by the court which held that since the detectives from the larceny detail were searching in good faith for stolen property—as the consent gave them the right to do—they were not bound to ignore the marijuana cigarette when it was uncovered during the course of that search, and that the cigarette was therefore admissible. The court also held, however, that the purpose of the second team of officers "was to find incriminating evidence supportive of the criminal offense suggested by the discovery of the marijuana cigarette by the officers of the larceny detail" and that the "search by the narcotics detail [did not constitute] in any way, a continuing search for stolen property." Since such a search was not within the bounds of the consent given by defendant, was conducted without warrant, and not incident to the arrest of defendant, the court held that it was unlawful. And, said the court, since "there can be little doubt that the confrontation induced the admission . . . [it], being the 'fruit' of the unlawful search, should have been excluded" under the doctrine of *Wong Sun v. United States*, 371 U.S. 471(1963).

Comment: Readers should note that this opinion is one of the few decided by state appellate courts since the *Wong Sun* decision that accepts the doctrine that admissions or confessions which are the "product" of a confrontation of the accused with the physical fruits of an unlawful search or seizure must be suppressed under the fourth amendment without regard to the question

of whether the admissions or confessions were "voluntary" in the traditional sense.

Obscenity—*State v. Locks*, 397 P.2d 949(Ariz. 1964). The defendant was convicted of keeping obscene magazines for sale and he appealed on the grounds that the statute under which the prosecution was brought was void for failure to define the term "obscenity" and that the magazines were not, as a matter of law, obscene. The Supreme Court of Arizona sustained both contentions and reversed the conviction.

Although the state's obscenity statute did not require that the unlawful possession be "knowing," the Supreme Court of Arizona had previously remedied this constitutional defect (see *Smith v. California*, 361 U.S. 147) in *State v. Locks*, 372 P.2d 724, by holding that "scienter is implicit in the statute." The court refused, however, to supply a definition of obscenity in this case, where the legislature had not, holding that it was "beyond the court's power to supply definitions necessary to render a deficient statute valid, since such action is legislative and not judicial." Because the statute did not define the term, the court held that a potential defendant had no way of determining what was and what was not obscene in view of the variety of definitions to be found in the dictionary and the case law, noting that even "the trial judge in this case had considerable difficulty in defining 'obscenity' to the jury." Since the "citizen cannot be held to answer charges based upon penal statutes, the mandates of which are so uncertain that they will admit to different constructions," the court said, "the Arizona statute under which the Information in this case was filed is too indefinite and uncertain to permit this conviction to stand."

Comment: While the decision of the court also rests upon its independent finding that the magazines were not obscene as a matter of law, it is strange that the court refused to supply a definition of "obscenity" in this case after it had judicially filled an even larger gap in the statute by holding that scienter was "implicit" in the statute in the first *Locks* case. Especially is this true when it is considered that the Supreme Court of the United States did not hesitate to judicially define the term "obscenity" in the federal statute in *Roth v. United States*, 354 U.S. 476, after the defendant Roth had been convicted, and the case was on appeal. Future obscenity prosecutions in Arizona, however, will not be affected inasmuch as the Arizona legislature has since amended the statute to supply the needed definition.

Prosecution Entitled to Discovery—*State v. Grove*, 398 P.2d 170(Wash.1965). In this case the defendant was convicted of murder and he appealed on the ground that the prosecution should not have been allowed to discover, from his attorney, a letter which defendant had written, while in jail, to his wife attempting to exculpate himself from criminal responsibility for the death of his wife's mother, the murder victim. The letter had been given, unsealed, to a jail guard; it was censored by prison authorities and then forwarded to the wife. A police investigator later learned of the letter's existence from a friend of the wife and secured a search warrant, which he served upon the defendant's attorney (who was by then in possession of the letter) in an attempt to obtain the letter. The attorney refused to surrender the letter in response to the warrant, but the prosecutor thereafter obtained an order from the trial court directing the attorney to produce the letter for use by the prosecution as evidence.

The Supreme Court of Washington was troubled by the attempted use of a search warrant to obtain evidence in this fashion, saying that "under some circumstances the use of a search warrant respecting the person and the offices of counsel for a criminal defendant could become highly debatable to say the least." Since the attorney refused production under the warrant, however, the court did not pursue the point.

The defendant contended that the order of production was a violation of the privilege of confidential communications between spouses and, additionally, a violation of the right to counsel and the privilege against self-incrimination. These contentions were not upheld by the court. The privilege against disclosure of husband-wife communications was not violated, the court said, because the defendant, knowing that his mail would be censored, did not intend, and did not successfully insure, that the communication would be *confidential*. Secondly, the court held, the letter was not a communication between attorney and client and the lawyer's possession was deemed to be merely "an effort to withhold evidence that was incriminating to the defendant."

Comment: Prosecutors ought to note that the *Grove* case is one of a growing number of opinions by state appellate courts (see, e.g., *Jones v. Superior Court of Nevada County*, 372 P.2d 919(Cal.