Journal of Criminal Law and Criminology

Volume 58 | Issue 1 Article 10

1967

Abstracts of Recent Cases

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 58, No. 1

Printed in U.S.A.

ABSTRACTS OF RECENT CASES

(These case abstracts are prepared by students of Northwestern University School of Law under the supervision of the *Journal's* Assistant Editor-in-Chief. Comments accompanying the abstracts are the opinions of the individual students and not necessarily those of the *Journal* or its editors.)

Counsel for Misdemeanants Denied—*Winters v. Beck*, 87 S. Ct. 207 (1966). Defendant, an indigent Negro, was convicted of violating a city ordinance making "immorality" a misdemeanor. He was sentenced to 284 days in prison when he could not pay the fine. The Arkansas Supreme Court affirmed the conviction, holding that *Gideon v. Wainwright* did not apply to misdemeanors. A petition for *certiorari* was denied by the Supreme Court.

Justice Stewart, in a dissenting memorandum, pointed out that the Court in *Gideon* had made no distinction between felonies and misdemeanors. "Any person," the Court had said in *Gideon*, "haled into court who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Justice Stewart, joined by Justice Black, said that "No state should be permitted to repudiate those words by arbitrarily attaching the label 'misdemeanor' to a criminal offense". He also pointed out that various circuits had made conflicting decisions on this issue and that it was therefore appropriate to grant *certiorari* to resolve the question.

Coerced Confession Found—*Commonwealth ex rel Donnell v. Myers*, 220 A. 2d 376 (Pa. 1966). Petitioner was arrested and subsequently convicted of burglary, larceny, and receiving stolen goods. During his confinement he was questioned several times but refused to confess to the crime. He was then put in solitary confinement in a dark, cold cell, handcuffed, and chained to the wall, and fed bread and water for eleven days, after which he finally admitted the crime. The confession was found to be voluntary by the same jury that convicted the defendant.

Thereafter, on a petition for a writ of habeas corpus, a second hearing was held to determine whether the confession was in fact voluntary and a second jury found that it was.

The Supreme Court of Pennsylvania reversed, applying the test expressed in *Reck v. Pate*, 367 U.S. 433, (1961), that is, "whether a person's will is so overborne at the time he confessed . . . [that] . . . the confession can not be deemed the product of a rational intellect and free will." In this case the court felt that the confinement of the accused was for such a period of time and was under such cruel and inhuman conditions that it would be sufficient to destroy the will power of almost any person.

Intent In Common Law Robbery—*State v. Smith*, 150 S.E. 2d 194 (N.C. 1966). Defendant was tried and convicted upon two indictments. The first charged him with assault with a deadly weapon upon R. W. Spikes, a police officer; the second with armed robbery of a rifle from H. H. Adams.

The defendant and his partner, one Thomas Henry, had broken into a service station owned by Adams. Adams heard the breaking of glass, and came out of his bedroom with a rifle. He came upon Henry, who told him "that someone had his car and wouldn't give it back to him." At that time Adams saw a police car across the street, and approached it with Henry in front of him. When they reached the car, the defendant held Officer Spikes in front of him, and ordered Adams to drop the rifle. The pair then took the rifle and drove away.

On appeal, the defendant claimed that it was reversible error for the judge not to instruct the jury that they might "acquit him of the crime of armed robbery charged in the indictment, and convict him of an assault with a deadly weapon upon Adams." The court said that if the circumstances disclosed an inference that the rifle was taken without felonious intent, "it would have been the duty of the judge to submit to the jury the lesser and included offense of assault."

Robbery, said the court, is the "taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation." The felonious intent to appropriate the goods

taken can be met by "showing an intent to deprive the owner of his property permanently." The court held that even if the rifle was taken for a temporary use, the subsequent handling of it amounting to "reckless exposure to loss" is "consistent only with an intent permanently to deprive the owner of his property."

The court concluded that the defendant's actions in leaving the rifle against a pole "under circumstances which render[ed] it unlikely that the owner would ever recover his property and which disclose[s] the taker's total indifference to his rights" amounted to an intent to steal. Therefore, the trial court properly restricted the jury in returning a verdict of either guilty or not guilty of the crime charged in the indictment.

Determining Indigency In Criminal Cases—*State v. Anaya*, 417 P.2d 58 (N.M. 1966). The Supreme Court of New Mexico, in remanding a conviction for a narcotics violation to the trial court for a finding of whether defendant had a right to a court appointed counsel, held that an undefined interest in property and employment prior to arrest were not sufficient in themselves to deny defendant this right.

At the trial it was determined that defendant had purchased a trailer worth $7000 and presently owed $2800 on it. He also had a car worth $1500, with a $650 unpaid balance. Prior to his arrest, defendant was employed at $4.85 per hour. Upon these facts the trial court determined that defendant had enough property and was sufficiently solvent to borrow money to hire a lawyer.

The court held that the finding of the trial court was based upon an inadequate determination of the facts. It stated that "the fact that defendant had an undefined interest in three items of property and the fact that he was employed prior to his arrest is insufficient to determine the question of defendant's financial responsibility". The court noted that the trial court should have inquired into the matter of whether defendant's interest could be used as security to borrow money, whereupon he would be required to show that he tried to borrow money and could not. However, the court stated that borrowing ability is only one aspect of determining the basic question of whether the defendant has the financial means to employ counsel. The court further stated that although "the burden of proceeding rests first on the defendant" to make a reasonable showing of indigency, once this is done, sufficient questioning is required to enable the court to make its own determination.

The Bookmaker and His Telephone—*Sakol v. Public Utilities Commission*, 418 P.2d 265 (Cal. 1966). The issue before the court here was the question of the constitutionality of a Public Utilities Commission rule requiring the summary termination of telephone service upon reasonable cause to believe that petitioner's telephone was being used for unlawful activities. It was held that when the reasonable cause is based solely upon a written notice from a law enforcement official that the telephone is being used for such purposes, due process has been violated since there is no review of bare allegations prior to termination of service.

In this case, petitioner's telephone service was terminated by the telephone company pursuant to a notice from the Chief of Police that he had reasonable cause to believe that the telephone was being used in connection with bookmaking activities. Petitioner thereafter claimed that his business (a telephone club supplying racing tips) was ruined because of the action and that he was therefore deprived of his property without due process of law. The court stated that "there is no rule of universal application concerning the right of an individual to present his views at a hearing prior to the institution of action affecting his substantial rights." Therefore the court examined the details of the case since "what is due process depends on circumstances and varies with the subject matter and necessities of the situation."

The court agreed with the state that notification prior to termination would frustrate the policing of certain illegal activities but it also noted that the private rights of the individual must be taken into consideration. The termination of telephone service may deprive the subscriber of the monetary value of his economic venture and of an essential means of communication, thus impairing his right of free speech. The court further stated that had the police desired to search the premises occupied by petitioner and seize his property, they would have had to satisfy the reasonable cause requirement before obtaining a warrant.

The court could not find any "justification for applying standards of due process substantially less exacting than those pertaining to searches." Thus, held the court, the decision of the Commis-

sion "does not conform to the due process requirements of the state and Federal Constitutions in that it provides no review of the bare allegations of the police prior to the termination of service." The court further held, however, that the telepone company could not be sued for damages since "it would be manifestly unfair to impose civil liability upon a private person (or other entity) for doing that which the law [presumptively valid] requires."

Search By Landlord Consent—*United States v. Botsch*, 364 F.2d 542 (2d Cir. 1966). Defendant was convicted of thirteen counts of using the mails to defraud by using the name and credit of another to obtain merchandise. During the trial the defendant moved that certain evidence obtained as a consequence of a search without a warrant on November 6 (subsequent searches were based on information obtained during the November 6 search) be excluded.

The November 6 search arose upon the complaint of one Locasio to postal officials about purchases made by the defendant under the name and credit of Locasio's company. Postal inspector Daly went to the address to which the merchandise was being shipped and found a shack which the defendant had been leasing from one Stein. Stein, in addition to leasing the premises, had agreed to receive the merchandise, pay the freight out of money given him by the defendant, and place the merchandise in the shack to which the defendant had given Stein the keys.

When Daly questioned Stein about the shack, and about the operations of the defendant, Stein became concerned over the possibility that the premises were being used for illegal purposes and that by his actions he would be considered an accomplice to them. Stein asked Daly if he wished to look inside, and permitted Daly to look through a window and then admitted him to the shack. Inside, Daly observed boxes with the names of the shippers, and along with information obtained from Dun & Bradstreet, obtained two search warrants on November 8.

The defendant contended that if the November 6 search was unreasonable, the November 8 warrants were invalid and the indictment should be dismissed. The government admitted that it could not separate the tainted from the untainted evidence.

The court of appeals, in a 2-1 decision, affirmed the conviction holding that the November 6 search was not unreasonable. The majority based its decision on the right of Stein to cooperate and exculpate himself from the acts which were objectively facilitating a fraud or theft. The court used this active, though innocent, participation and the blanket permission to enter the shack granted to Stein, to distinguish this case from cases involving the simple landlord-tenant or innkeeper-guest relationship, which would be insufficient to make this kind of consent search valid.

Waiver of Right to Advice of Counsel During Interrogation—*Cox v. State*, 405 S.W. 2d 937 (Ark. 1966). The accused, a gas station attendant, was charged with the rape of a nineteen-year-old girl. The evidence showed that the prosecutrix had driven into the gas station and asked to have her brakes fixed. The accused then drove to a back road under the pretense of testing the brakes and had sexual intercourse with the prosecutrix.

After the incident was reported the accused was taken into custody and questioned by the deputy prosecuting attorney and two police officers. The officers testified that they informed the accused of his constitutional right to an attorney, but that he said he didn't need any. Before trial the accused underwent a mental examination in which it was found that he was a mild mental defective with an I.Q. of about 70 but was not a psychotic. The jury found him guilty of assault with intent to rape.

The issue on appeal was whether the accused was capable of "intelligently and knowingly" waiving his right to counsel under *Escobedo v. Illinois*, 378 U.S. 478 (1964). The appellate court felt that, under the circumstances presented, the accused understood the situation and the questions he was called upon to answer. The mental ability of the person questioned must be considered in light of the other facts, said the court, which here included the trial judge's determination that the accused could understand the questions presented, the accused's ability to support a family, and his testimony at the trial.

Compulsory Production of Tape Recordings Elicited From an Accused—*United States v. Sopher*, 362 F.2d 523 (7th Cir. 1966). Defendants, the mayor and commissioners of Streeter, Illinois, were arrested and convicted of violation of the Hobbs Act, 18 U.S.C.A., §1951, for extorting, and

conspiring to extort, money from employees of a power equipment company which was bidding on a city contract.

On appeal, the defense contended, *inter alia*, that the prosecution was required, under the Jencks Act, 18 U.S.C.A., §3500, to produce certain tape recordings taken from a hidden recording device carried by one of the bribery victims. Section 3500 requires, on motion of the defendant, the production by the prosecution of any statement of a witness relating to the subject matter to which he testified. "Statement" is defined as "either a written statement or a stenographic, mechanical, electrical or other recording . . ., which is a substantially verbatim recital of an oral statement made by some witness to an agent of the government and recorded contemporaneously with the making of such oral statement." The court held, however, that the recording in this case was not a statement required to be produced under section 3500, since the latter is necessarily a *present* statement of a *past* occurrence, where here, the tape recording was of a *contemporaneous* occurrence.

Police Officers Liability For False Arrest—*Herschel v. Dyra*, 365 F.2d 17 (7th Cir. 1966). The plaintiff was arrested by the defendant police officer for violation of a City of Chicago anti-litter ordinance regulating the distribution of handbills on public ways. Thereafter the plaintiff brought an action under the Civil Rights Act, 42 U.S.C. §1983, alleging that the defendant officer, while acting under the color of law, had deprived the plaintiff of his constitutional rights in that at the time of the arrest there were existent opinions of the corporation counsel of the City of Chicago informing the police that the ordinance did not apply to pamphlets expressing purely social, religious or economic views. The pamphlets that the plaintiff had been distributing were of a religious nature. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted.

The Court of Appeals reversed, relying upon the holding in *Monroe v. Pape*, 365 U.S. 167, that §1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions, and held that the complaint alleged more than a simple innocent false arrest. One judge dissented, saying that *Monroe v. Pape* should not be extended to apply to a police officer's honest misunderstanding of the law where no malice or intent to deprive a plantiff of any of his civil rights has been alleged.

Successive Contempt Sentences And Double Jeopardy—*United States ex rel. Ushkowitz v. McCloskey*, 359 F.2d 788 (2d Cir. 1966). On three separate occasions the relators were sentenced to a term of imprisonment and a fine for refusing to answer the same question directed to them before a New York grand jury after having been granted immunity from prosecution. After the third sentence, and having exhausted their state remedies, the relators applied for a writ of habeas corpus in a federal district court contending that the three separate prosecutions constituted double jeopardy in violation of the fifth amendment. The petition was dismissed but a certificate of probable cause was granted.

The Court of Appeals held that the three prosecutions did not constitute double jeopardy because each refusal to answer was a separate and distinct offense, separated by appreciable periods of time including prison terms imposed to induce a change in the conduct of the three relators.

Judge May Not Assume Prosecutor's Role—*Figueroa Ruiz v. Delgado*, 359 F.2d 718 (1st Cir. 1966). The petitioner applied for a writ of habeas corpus after being convicted of two misdemeanors in a District Court of the Commonwealth of Puerto Rico and after exhausting his local remedies. Appealing the dismissal of the petition, he contended that the procedure in the Commonwealth of providing no prosecutors in the District Court, but having the judge serve in both the judicial and prosecutorial roles, denied him due process of law.

The Court of Appeals, remanding with instructions to grant the writ, held that a court procedure by which the judge introduces evidence and cross-examines on behalf of the government denies the accused due process of law because it lacks the "appearance of justice" and could possibly upset the balance between the government and the accused.

No Liability For Injury During Prevention Of A Felony—*Vingst v. Pratt*, 220 N.E. 2d 276 (Ind. 1966). Plaintiff, Pratt, was shot in a tavern when the tavern owner struggled with a robber in an attempt to stop the robbery. The tavern owner

died and was represented by the administrator of his estate, Yingst.

Plaintiff alleged at the trial that as a business invitee of defendant's decedent he was owed a duty of care which was breached when defendant's decedent grabbed the robber's gun hand attempting to prevent the robbery. During the ensuing struggle, several shots were fired from the gun, one of which hit plaintiff.

Plaintiff claimed, and his claim was upheld in the trial court, that the reckless action of defendant's decedent was the proximate cause of his injuries. Defendant's motion for a directed verdict at the close of the evidence was denied.

On appeal from the order denying this motion defendant contended that the verdict of the jury was contrary to the weight of the evidence and contrary to law. In reversing and instructing the trial court to hold for defendant, the Appellate Court of Indiana held that the finding of the jury was indeed contrary to the notion of *justification* found in the law of torts.

Relying on such authorities as Prosser, Bohlen, and Beale, the court found that in certain transactions otherwise actionable the actor is sometimes justified and thus not vulnerable to liability. The prevention of a dangerous felony is one of these justifiable actions. In such a situation the actor is in fact commanded by public policy to use force to prevent the felony. To that end the victim of a crime as dangerous as armed robbery, during the course of such criminal act, is justified and privileged to use force in return.

These authoritative maxims, while absolving the actor from liability to the felon, however, did not explicitly delineate the duty he owed to innocent by-standers. The court thus had to add to the general rule the finding that the actor owed no legal duty to use greater care for the protection of others than he, in the emergency, had seen fit to use to protect himself.

Obscenity—*United States v. 25,000 Magazines*, 254 F. Supp. 1014 (D.C. 1966). The government sought a forfeiture of magazines imported from Denmark on the grounds of obscenity. The district court, setting up criteria by which the obscenity of photographic material could be determined, held only some of the magazines to be obscene.

The court used the basic guidelines for determining obscenity set forth in *Roth v. United States*. It was first concluded that the magazines had no redeeming social value. The court dismissed statements suggesting that the publications were for serious artists or for sunbathers as being spurious claims, finding that the magazines were designed solely to appeal to the prurient interests of adolescent and adult males.

The court stated that it was a more difficult problem to determine whether such publications did in fact appeal to a prurient interest and whether the material conformed to contemporary community standards. It thus attempted to define in greater detail the principles which should guide law enforcement officials in determining whether photographic material is obscene.

The court said that not all photographs of nude woman are obscene, "even if the focus is on the breast or pubic area . . . or [even if] the models are posed in an unusual or ugly position." Some of the factors which the court held may render a photograph obscene are "(1) that the model is on a bed or a bed is a part of the picture, (2) that the woman is in an enticing or lewd position, (3) that the pubic area is bare (and overaccentuated by the pose or clothing arrangement), (4) that properties are used in such a way as to heighten prurient interest . . . [and] (5) that any type of sexual activity is suggested or depicted.

The court further stated that even though the dominant theme of the material taken as a whole must be considered, a few obscene photographs might give a prurient appeal to the whole magazine.

Inaudible Tapes Inadmissible—*Duggan v. State*, 189 So. 2d 890 (Fla. App. 1966). The defendant, a police officer, was convicted of accepting bribes. Tape recordings were made of a conversation between the defendant and the person allegedly offering the bribes, but some portions of the recordings were inaudible.

A court reporter, not present when the recordings were made, prepared written transcripts of the recordings. The reporter prepared an initial series of transcripts by listening to a tape recorder. A second series was then prepared by using a tape recorder and a set of earphones. There were some variations between the two series of manuscripts because of the reporter's different interpretation of the inaudible parts of the conversation when listening to it through earphones.

In his oral argument to the jury, the prosecutor stated that the tape recording of the conversation

between the alleged briber and the defendant was "really the critical thing in this matter" because it covered the period of time when the payoff was made. This was the tape that contained the inaudible remarks. The second series of transcripts were admitted as evidence over the defendant's objection. The jurors were permitted to take their copies of the transcripts into the jury room, but neither the tapes nor any means for playing them were furnished. The defendant also objected to this procedure.

The District Court of Appeal of Florida reversed the conviction holding that the transcripts of the tape recordings were inadmissible as evidence because the transcripts furnished to the jury violated the best evidence rule, since the tape recordings were themselves the best evidence; the court reporter was not present when the recordings were made, thus his transcripts were inadmissible under the hearsay rule; and the juror's use of the transcripts violated the rules against undue repetition and improper emphasis of evidence.

The appellate court stressed the fact that the transcript of the inaudible parts of the tape could "under no recognizable theory" be received as evidence because the court reporter was not present when the conversation took place nor when the tapes were made. Therefore he could not testify as one who had witnessed the events which were stated in the transcript, "nor could he testify as an expert witness who is professionally skilled in the understanding of indistinguishable taped conversations. Since the conversation recited in that particular transcript pertained to the most critical issue in the prosecution's case against the [defendant] . . . the highly prejudicial effect of admitting the said transcript in evidence is obvious."

Invasion of Privacy—*Hahdu v. State*, 189 So. 2d 230 (Fla. App. 1966). The defendant was convicted of practicing medicine without a license. The proof showed that defendant had made an internal pelvic examination of a patient who was an employee of a private detective hired to investigate the defendant by the State Board of Medical Examiners. The patient carried a radio transmitter in her purse and the entire conversation between the defendant and the patient was heard by the detective on a radio receiver. At the trial, the detective related the conversation.

On appeal the defendant contended that the trial court erred in not suppressing the detective's testimony concerning defendant's conversation with the patient. In reversing the conviction the District Court of Appeals of Florida held that the use of such "surreptitiously obtained information" violated the defendant's right of privacy guaranteed by the fourth amendment. The court cited *Silverman v. U.S.*, 365 U.S. 505, in which the Supreme Court of the United States held that "a federal officer may [not] without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard." In this case, the detective had entered the defendant's premises through stealth, fraud, and deceit, said the court, and the secreting of the transmitting device in order that the detective might hear the conversation was therefore a trespass violative of the defendant's privacy.

Prosecution Suppression of Evidence—*People v. Fein*, 219 N.E. 2d 274 (N.Y. 1966). The defendant was convicted of second degree murder based mainly upon the testimony of the prosecution's key witness—a prostitute and girlfriend of the defendant. The prostitute testified that the defendant admitted killing the deceased and that she had seen the deceased's body in a trunk in the defendant's apartment. She and two of her friends, who corroborated her story, aided the defendant in disposing of the body.

The prostitute had recanted her story before the trial, but then withdrew her recantation and affirmed her original story. Another of the prosecution's witnesses had told investigators a story which differed from that of the prostitute and, if true, might possibly have cast doubt upon the prostitute's credibility and perhaps implicated her, or someone she was trying to protect, as the real murderer. These facts were known to the court and to the defense, but were not brought to the jury's attention during the trial.

At the post-trial hearing, the prostitute again recanted her original story when confronted by the prosecution's witness whose story differed from hers. Two days later the prostitute again withdrew her recantation and affirmed her original story.

On appeal the defendant contended that the facts revealed at the post-trial hearing established the prosecution's failure to disclose material exculpatory evidence and thus denied the defendant the benefit of a fair trial. In affirming the conviction the New York Court of Appeals held that a

prosecutor must have some discretion in determining which evidence to turn over to the defense. The prosecutor must be allowed to judge, in light of all the facts of the case, the value of evidence to the defense in terms of its potential impact on the jury. Quoting Judge Hastie, the court said, "There are many situations in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor should know that even testimony which he honestly disbelieves is of a type which *in all probability* would make it very persuasive to a fair-minded jury." U.S. ex rel. Thompson v. Dye, 221 F. 2d 763, 769 (1955). (Emphasis added.) The evidence which the prosecution failed to disclose to the jury in this case, the court concluded, would not have affected the jury's determination of the case.

Custody Requirement of *Miranda* Limited—*Duffy v. State*, 221 A. 2d 653 (Md. 1966). Defendant was convicted in the Criminal Court of Baltimore for carrying a deadly weapon, attempted robbery, and assault, for his participation in a gang attack on a robbery victim. On appeal he contended that the testimony of the arresting policeman as to his oral admission of guilt made after being awakened and asked, "Is this the knife you used in the fight?" should have been held inadmissible because he was not apprised of his constitutional rights before answering.

The Maryland Court of Appeals rejected this contention, holding that the exclusionary principles enunciated in *Escobedo* and *Miranda* are not applicable to a confession gleaned from a suspect who is merely *accosted* by the police, but deal instead with the safeguards that must be provided an accused who is in police *custody*. The court in a strict interpretation of the *Miranda* definition of "custodial interrogation," found that since defendant had neither been taken into custody at the time of the question, nor deprived of his freedom of action in any significant way, the warning rule was inapplicable.

Second Search Upheld—*Baca v. People*, 418 P. 2d 182 (Colo. 1966). Defendant was convicted in the District Court of possession of narcotic drugs. On appeal to the Supreme Court of Colorado, he contended that the search of his person at the police station (after he was taken into custody for being drunk in a public place and indecent exposure) was so remote from the place of arrest that it was unreasonable and that the evidence gained thereby should have been excluded.

The court recognized the rule that an arrest cannot be used as a pretext to search for evidence, but held that the search in the instant case was not prohibited. Instead it found that a second search of defendant's person for concealed weapons, improving on the earlier desultory "frisking," was a reasonable and indeed integral part of efficient police procedure. The court said that it was *reductio ad absurdum* to urge that a prisoner who may be armed, and thus able to kill or wound his jailers, or who may have on his person other evidence of the crime for which he was taken into custody, cannot be searched a second time, and a search in a police station immediately following an arrest was held to be not too remote in time or place.

Polygraph Tests—*People v. Potts*, 220 N.E. 2d 251 (Ill. App. 1966). Defendant was convicted of rape in the Circuit Court and was sentenced to three years. On a second count, based on the Habitual Criminal Act, he was sentenced to life imprisonment.

On appeal to the appellate court, defendant contended that the admission into evidence of polygraph tests (pursuant to a stipulation of defendant and the prosecution that the results of these tests would be admissible) was prejudicial error requiring reversal where the report was admitted without inquiry as to the qualifications of the operator of the polygraph machine.

The appellate court reviewed previous cases in which the results of polygraph tests were admitted by stipulation of the parties and came to the conclusion that the admission of such evidence was proper only if inquiry was made into the qualifications of the operator of the polygraph machine and the conditions under which the test was administered. In reversing, the court refused to become embroiled in the dispute among experts as to the scientific reliability of the polygraph, but held only that the expertise of the operator and interpreter had a substantial bearing on the question of reliability.

Bail-Jumping And Defendant's Presence At Post-Trial Proceedings—*People v. Cox*, 220 N.E. 2d 10 (Ill. App. Ct. 1966). Defendant was indicted, and subsequently convicted, for unlawfully failing

to appear at the hearing on a motion for new trial in violation of his trial bail bond and post-trial personal recognizance. The conditions in the bail bond were that the defendant "shall personally appear [On the opening day of the trial] . . . and thereafter as ordered by the court until discharged . . . and shall submit himself to the orders and processes of the court. . . . "

On appeal, defendant contended that since the indictment alleged only his absence from the hearing, it was insufficient to state an offense, and the conviction and sentence thereunder must be reversed.

In reversing the conviction, the Illinois appellate court held that unless the court had ordered the defendant to be present, absence from a hearing on a motion for new trial was not a violation of the conditions of a bail bond or a personal recognizance.

The court reasoned that if the defendant has no constitutional right to be present at the argument on a motion for new trial [see *Bonardo v. People*, 182 Ill. 411, 55 N.E. 519 (1899)], then certainly the defendant may waive his appearance. The court also found that previous cases had held that the absence of the defendant from the hearing on motions did not vitiate any action taken at the hearing. In light of these principles, the court concluded that since the trial court had not ordered the defendant to appear at the hearing, his absence from the hearing was not a violation of the conditions of the bail bond or the personal recognizance, but merely a voluntary absence amounting to a waiver of his right to be present.

Curfew Ordinances and Parental Responsibility—*City of Westlake v. Ruggiero*, 220 N.E. 2d 126 (Ohio App. 1966). Defendant was convicted of violating a municipal curfew ordinance forbidding a parent

> "of any child between the ages of twelve (12) years and sixteen (16) years to allow such child to be upon the streets or sidewalks between the hours of 11:00 o'clock p.m. and 6:00 o'clock a.m., unless accompanied by his parent . . . or unless such child has a legitimate excuse therefor."

On appeal, the defendant contended that the ordinance was unconstitutional since (1) it unduly restricted the personal freedoms of the child and (2) it made the parent absolutely liable for the conduct of his child.

Although the opinion does not indicate that the defendant claimed the decision was against the manifest weight of the evidence, that was the ground upon which the Ohio Court of Appeals reversed the conviction and discharged the defendant. The court reached this conclusion by interpreting the word "allow," as used in the ordinance, to mean "permit or neglect to restrain or prevent. It requires actual or constructive knowledge on the part of the parent. . . . " Since the undisputed evidence indicated the defendant neither knew nor had reason to know his son was violating the curfew, the conviction was reversed and the defendant discharged.

By interpreting "allow" in this manner the court also rebutted the second claim to unconstitutionality.

The court disposed of the defendant's first claim of unconstitutionality (that the ordinance was an undue restriction of personal freedom) by holding that the ordinance was a reasonable exercise of the police power, designed to protect the peace and good morals of the community by "reducing the incidence of juvenile criminal activity."

Comment: The Court's discussion of the constitutionality of the ordinance is *dictum*, since the conviction was reversed on evidentiary grounds. In addition, upon a careful consideration of the ordinance, one is led to the conclusion that it is unconstitutional.

The portion of the ordinance set out above subjects a child between the ages of twelve and sixteen to criminal prosecution if he is found on the streets or sidewalks of the municipality between the hours of 11:00 p.m. and 6:00 a.m. unless he is accompanied by his parent or unless he has "a legitimate excuse therefor." This language is very similar to the words "lawful purpose" which were held to be too general and too vague to afford, to the ordinary person, notice of what acts the ordinance proscribed. *People v. Munoz*, 9 N.Y. 2d 51, 172 N.E. 2d 535 (1961). Since there is no moral guilt attached to being on the street after 11:00 p.m., the need to properly inform children as to what acts they should avoid is all the more necessary.

The court, by interpreting "allow" to mean knowing acquiescence, did not escape this problem, since the parent may know he is permitting his child to be "on the street" after curfew time, but he may not know the child's excuse is not legitimate.

That the presumption underlying the ordinance

is reasonable (that children on the streets of the city after a certain hour in the evening are bent on mischief), as well as rational, *Barrett v. United States*, 322 F. 2d 292 (5th Cir. 1963), is doubtful. The legislature expressed this doubt by excluding children with legitimate excuses from the ambit of the ordinance. Then, in effect, the ordinance says act "X" is bad unless it is good, and places the burden on the accused to show the act is good. Clearly, such an ordinance deprives one of the presumption of innocence. The proscription adopts the inquisitional rather than the accusatorial approach, thus placing the burden on the defendant to prove his innocence before the prosecution has carried out its burden to show him guilty.

Aside from the constitutional issue, the ordinance may have a grave repercussion upon the family relationship. It penalizes the parent for an error in judgment. A parent may, in good faith, consider an excuse to be "legitimate," and subsequently the excuse may be held not to be legitimate by the court. Then the child, relying upon his father's permission, can be penalized by the court. This is certainly not going to foster parental respect. In addition, the child is burdened with a criminal record for the rest of his life.

The ordinance also suffers from poor draftsmanship. The portion of the ordinance set out above is followed by a section which forbids similar actions on the part of a child between the ages of sixteen and eighteen between the hours of 12:00 midnight and 6:00 a.m. Thus, a child sixteen and his parent might be subjected to penalty under two different sections of the ordinance.

On the whole, it seems that the gratuitous *dictum* set out in the court's opinion conferred no benefits to the public, the bar, or the child.

Appointed Counsel and the Frivolous Appeal—*Johnson v. United States*, 360 F. 2d 844 (D.C. Cir. 1966). Defendant, an indigent, was convicted of an undisclosed criminal offense. Subsequently, he told his attorney, whom the District Court had appointed to act as an advocate on his behalf, that he wished to appeal *in forma pauperis*. The attorney, apparently feeling that there were no grounds for an appeal, moved the Court of Appeals for leave to withdraw from the case, contending that the appeal was frivolous and lacked merit.

In a *per curiam* opinion, the Court of Appeals denied the motion on the ground that it could not be determined whether the appeal was frivolous, since counsel had not filed a fully documented memorandum supporting his contention.

The court stated that *Ellis v. United States*, 365 U.S. 674 (1958), held appointed counsel's motion to withdraw could be granted only if the court was satisfied that counsel had conscientiously investigated the possible grounds for appeal, and if the court agreed that the appeal was frivolous. Pursuant to the duty *Ellis* had cast on it, the court thereafter issued a document to be given to all appointed counsel which stipulated that, if appointed counsel filed a motion to withdraw because an appeal was frivolous and without merit, he must file a supporting memorandum analyzing the case's legal aspects and citing any relevant holdings. Statement to be Handed by the Clerk to Appointed Counsel (Dec. 13, 1963). Since the petitioner had not filed the memorandum, the court could not determine whether he had diligently investigated, nor whether the appeal was, in its opinion, frivolous.

Judge Burger concurred, but did not base his decision on the failure to file the memorandum. He began by noting that it was the usual practice of the court, when it granted such motions, not to appoint new counsel, but to tell the defendant that if he wishes to continue his appeal he will have to do so *pro se*. This, Judge Burger says, is unrealistic; no one can possibly act as an advocate for himself in an appellate proceeding, unless he has had legal training. An attorney is not the "mouthpiece" of his client, but a professional advocate whose function in an appellate proceeding, even when he feels the appeal is "hopeless," consists of "making sure that the reviewing court understands all the salient facts and all the relevant legal authorities." He must call the court's attention to "the critical issues and bring to the court all the facts and law and [be] prepared to respond to questions . . . , under our adversary system an appellate court can not function efficiently without lawyers. . . . "

Judge Burger commented on the great number of motions to withdraw from frivolous claims and served notice that he would deny all applications by counsel to withdraw from a "hopeless" case, since an attorney's professional assistance is essential, both to the appellant and to the court.

In summary, Judge Burger said:

> "I do not suggest we *compel* any lawyer, by judicial order, to act contrary to conscience; rather, I urge lawyers to approach the de-

cision to withdraw in light of the purposes of appellate review, the need for assistance of professional advocates, and the role counsel should perform, conscious that he serves well his client, his profession, and the court when he has made certain the final judicial action is based on complete and accurate knowledge of the record and the law."

Comment: An appeal *in forma pauperis* must be made in good faith, 28 U.S.C. §1916(*a*), which has been interpreted to mean seeking review of any issue not plainly frivolous, *Coppage v. United States*, 369 U.S. 438 (1962). The legislature enacted Section 1915(*a*) as an advance screening device, since *in forma pauperis proceedings* have no built-in pecuniary brake to restrain frivolous appellants.

If the term "hopeless" is used in the concurring opinion to indicate that the advocate should bring to the court's attention any issue upon which a factual or legal argument could conceivably be made in favor of the defendant's cause, then this borders on the frivolous but it is not plainly so, thus it satisfies the *Coppage* test.

This verbiage aside, the concurring opinion illustrates the questionable conduct of a large number of the bar, who have utilized an *ex parte* proceeding (which, by its nature, has few enough legal and procedural safeguards to insure that the entire matter is given a fair hearing) to their own self-interest, and in derogation of the best interests of those they have been appointed to protect. Every defense attorney should read Judge Burger's opinion, and then read it again.

Optional Tests of Insanity—*State v. Shoffner*, 143 N.W. 2d 458 (Wis. 1966). The defendant was convicted of burglary, arson, and armed robbery. At the trial he had pleaded not guilty by reason of insanity and the trial judge had instructed the jury under the *M'Naghten* test as required in Wisconsin (*State v. Esser*, 115 N.W. 2d 515).

The defendant had requested the use of one of four alternative tests including the A.L.I. formulation.

The Wisconsin Supreme court, in reversing Shoffner's conviction, upheld the *Esser* test, requiring that the insanity defense be based on "capacity to understand the nature and quality of the act and capacity to distinguish between right and wrong as to it," as the only test the defendant is entitled to as a matter of right. The court felt that the *Esser* rule when coupled with a statute placing the burden of proving sanity beyond a reasonable doubt on the prosecution did not produce unjust results and should not be changed.

However, the court decided Shoffner or any future defendant raising an insanity defense may now, at his option, elect to be tried under the more liberal American Law Institute definition, providing that he is willing to assume the burden of proof on the issue of insanity.

Additionally, the court stated that it would not be improper, indeed it would be advisable, to instruct the jury that the effect of a "not guilty by reason of insanity" verdict would result in the commitment of the defendant to a mental hospital, although, ordinarily, "a jury is not to be informed of the effect of its answers upon the rights or liabilities of the parties."

Warning Must Precede Consent to Search—*United States v. Blalock*, 255 F. Supp. 268 (D.C. 1966). This case involved a motion to suppress 21 twenty dollar bills seized by the FBI in a search of the defendant's hotel room. The original motion was denied, but thereafter the trial judge granted a new trial and suppressed the evidence.

The defendant was suspected of bank robbery and was questioned by the FBI in the lobby of his hotel. He then allowed the agents to search his room without a warrant, and the money was found during that search.

The issue involved here is whether a voluntary consent to a warrantless search of a defendant's premises, without proof in the record of the defendant's knowledge of his right to resist such a search, can operate as a waiver of defendant's constitutional protection against unreasonable searches and seizures. The prosecution maintained that the protection was waived by voluntarily allowing the agents to search the room. However, the court, in granting the motion to suppress, said that ". . . rights given by the constitution are too fundamental and too precious for waiver lightly to be found."

The court reiterated the rule laid down in *Johnson v. Zerbst*, 304 U.S. 458 (1938), that a waiver of a defendant's constitutional rights can only be found where there is "an intentional relinquishment of a known right or privilege." To establish such a waiver, the prosecution must prove that the consent was both intelligent and voluntary. The court went on to say that "obvi-