Journal of Criminal Law and Criminology

Volume 63 | Issue 4 Article 11

1973

Recent Trends in the Criminal Law

verified by discovery of the gun, it could be argued that the arrest meets the degree of informer credibility needed for establishing probable cause. Chief Justice Burger, writing for the Court in *United States v. Harris*,[28] stated:

> [T]he inquiry is, as it always must be in determining probable cause, whether the informant's *present* information is truthful or reliable. . . .[29]

The informant in *Adams* had given the officer two present facts concerning Williams;[30] the first proved true and thereby established probable cause for believing that the second was correct.[31]

Therefore, Marshall's argument that, even if the stop and frisk were legal there was no probable cause, does not seem justified.

Adams v. Williams has extended stop and frisk by holding that an informant who has previously given unsubstantiated information, may, under certain circumstances, provide sufficient information to legitimize a stop and frisk. It is, therefore, necessary that the courts carefully scrutinize stop and frisk cases, to insure that the stop and frisk was properly motivated.

[28] 403 U.S. 573 (1971).
[29] *Id.* at 582.
[30] One, that Williams had a pistol in his waistband and two, that he possessed narcotics. 407 U.S. at 145.
[31] *Cf.* Draper v. United States, 358 U.S. 307 (1959). An informant told police that a man would get off a train at a certain time, carrying heroin. The informant provided police with a detailed description of the suspect. The police observed a man meeting the precise description at the specified time, and arrested him. The Court held that the informant's information, which had been corroborated before the arrest, constituted reasonable grounds to believe that the suspect did possess heroin.

RECENT TRENDS IN THE CRIMINAL LAW

DURHAM RULE DISCARDED

The United States Court of Appeals for the District of Columbia unanimously discarded the *Durham* rule[1] for the definition of mental responsibility in criminal cases and adopted in its place the standard of the American Law Institute's Model Penal Code. In *United States v. Brawner*, __ F.2d __ (D. C. Cir. 1972), the court reversed a murder conviction that was decided under the *Durham* rule and remanded the case to the trial court to consider whether the defendant should be retried under the ALI test. The District of Columbia Circuit, which promulgated the *Durham* rule, thus joined the other federal courts of appeals in adopting the ALI test.

The *Durham* rule absolved defendants of responsibility for any crime "committed as a product of a mental defect or disease." [2] The court felt that the Durham rule had not worked because of the opportunity it gave expert witnesses to influence the jury. Section 4.01 of the Model Penal Code states:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.
> (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The second paragraph excludes a defense for the psychopathic personality.

Judge Leventhal, writing for the court, stated that experts will be permitted to testify as to the existence of mental disease and will be requested to present the reasons for their conclusions. The court expressly retained the definition adopted in *McDonald v. United States*[3] that a mental disease or defect is any abnormal condition of the mind which substantially affects mental or emotional processes and substantially affects behavior controls. The *Brawner* opinion also includes jury instructions which incorporate the ALI test.

The court rejected alternative proposals advanced in amici curiae briefs by the American Psychiatric Association, the American Civil Liberties Union, the National District Attorneys Association, and the National Legal Aid and Defenders Associates. Among the suggestions considered and discarded was the possibility that the insanity defense be abolished altogether.

Chief Judge Bazelon, author of the *Durham* opinion, concurred in the result, although he felt

[1] *See* Durham v. United States, 214 F.2d 862 (D C. Cir. 1954).
[2] *Id.* at 875.
[3] 312 F.2d 847 (D.C. Cir. 1962).

that the change was one of form rather than substance. He agreed that the *Durham* rule had failed to alter what he termed "a musty doctrine."[4] He believed that the practical operation of the defense is controlled by the quality of counsel, the attitude of the judge, the ability of expert witnesses, and the adequacy of the pre-trial mental examination.[5]

Right of Self Representation

Courts are still divided on the question of whether there is a constitutional right to defend charges pro se. The United States Supreme Court has never decided the issue.

The California Supreme Court, in *People v. Sharp*, 499 P.2d 489, 103 Cal. Rptr. 233 (1972), refused to reverse the larceny conviction of a defendant who was not allowed to conduct his own defense. The unanimous court suggested that there might be cases in which denial of the right to do without counsel would deprive a defendant of a fair trial or due process, but this was not one of those cases.

The court pointed out that in American colonial times self representation was commonplace, the concern being with the right not to be compelled to employ and pay counsel. However, the court felt that social and judicial changes during the last 200 years require greater limitation on the right of self representation. The court reasoned that the guarantee of competent counsel and supervision of the quality of counsel in California have largely rendered any right of self representation unnecessary.

The court ruled that due process does not foreclose waiver of right to counsel in certain cases, and that the sixth amendment does not prohibit the right of self representation.[6] The court held that there was no constitutional right to proceed pro se at trial.

In *United States v. Dougherty*, __ F.2d __ (D.C. Cir. 1972), the United States Court of Appeals for the District of Columbia stated that the right to no counsel is almost as important as the right to counsel. The court reversed the burglary and property destruction convictions of several activist clerics who were not permitted to present their own defense to charges of raiding a napalm manufacture's office. Basing its holding on the federal statutory right to represent oneself,[7] the court did not reach the question of whether the right is constitutionally protected.

The court stated that the right to self representation must be recognized if it is timely asserted, if there is a valid waiver of counsel and if it is not accompanied by disruptive courtroom behavior. The court pointed out that most of the minor disruptions during this trial occurred when the defendants were verbally asserting their rights. The court was willing to tolerate some measure of confusion in the proceedings in view of the inexperience of the defendants in legal matters and felt that this disadvantage may have been offset by the greater intensity and sincerity of a defendant's own presentation.

The majority also ruled that it was proper to deny the defendant's request for an instruction on the jury's sovereign power to reject the law as it stands and to acquit the defendants despite evidence establishing guilt. Although the jury has this power, the majority said there was no duty to let juries know this because this might alter the way a jury operates.

Chief Judge Bazelon, in a concurring opinion, argued that the sixth amendment guarantees a criminal defendant the right to act on his own behalf. He disagreed with the majority opinion on the issue of jury instructions. He pointed out that the trial judge not only failed to disclose to the jury this power to reject the law, but effectively directed a verdict of conviction by instructing the jury that there could be no legal defense based on religious belief. Judge Bazelon thought that this was not consistent with the theory of jury nullification and that the impact of the instruction was to discourage the jury from measuring the defendant's action against community standards of blameworthiness.

[4] __ F.2d at __.
[5] *Id.* at __.
[6] 499 P.2d at 496.
[7] 28 U.S.C. §1654 (1970).

The preceding notes were prepared by members of the *Journal* staff and editorial board. Contributors to this issue are Patricia A. Brandin, Lawrence D. Walker, Leonard R. Benjamin and Arnold A. Pagniucci, Charles R. McKirdy, Stanley A. Hirtle, Robert N. Sodikoff, Frank S. Stachyra, Ralph I. Hubley III, Jo Anne M. Ganobcik, David G. Umbaugh, and Mary Helen Robertson.