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RECENT TRENDS IN THE CRIMINAL LAW

CONTEMPT

The power of a court to hold an individual in contempt for "misbehavior" which obstructs the smooth functioning of the judicial process is one which grows in significance as courtroom disorders become more common. Several recent decisions attempted to clarify and define this ambiguous concept in meaningful terms. Whether they were successful is open to serious question.

In *United States v. Snider*,[1] the appeals court had before it a classical "political trial" which led to contempt of court charges against the defendant. The defendant was a Quaker war protestor who, along with his wife, quietly refused to rise when the judge entered the courtroom.[2] For this action, Snider and his wife were held in contempt by the trial court judge.

The Court of Appeals for the Fourth Circuit reversed the convictions for contempt, holding that the refusal to rise was not misbehavior which obstructed the administration of justice.[3] In the eyes of the majority, the defendant and his wife did not attempt to make the trial a forum or circus for the expression of their own political beliefs. Their actions were apparently very respectful at all times and no real courtoom disruption occurred.[4] In reversing this conviction, the Fourth Circuit refused to adopt the rule that a simple failure to rise was misbehavior within the meaning of the statute in question.[5] The failure to stand was not regarded as a material obstruction to the functioning of the court; other means than standing could be utilized to mark the beginning and the end of the session.

A dissent by Judge Widener emphasized the fact that the majority's decision would serve to undermine and impair the administration of justice. In the eyes of the dissent, policy dictated that at least the convictions for criminal contempt be upheld. Since the trial attracted significant public attention, Widener felt that the Sniders did indeed make the trial a forum for the expression of their political views. He went on to say that the majority's decision would result in the trial judge's losing any discretion to punish for this type of conduct.

Another limitation upon the trial judge's use of the contempt power can be found in *United States v. Columbia Broadcasting System*.[6] That case involved a ban on courtroom sketches imposed by a district court judge upon the defendant-television network.[7] C.B.S. violated a verbal order of the trial judge and published the drawings made by its artists. The same judge who issued the orders then tried the contempt case himself and found the television network guilty.

The Court of Appeals for the Fifth Circuit reversed the convictions because it was consid-

[1] 502 F.2d 645 (4th Cir. 1974).

[2] Snider was being tried for violation of 26 U.S.C. § 7205, which punishes false or fraudulent withholding from statements on income tax returns. He had claimed three billion dependants on his tax return so as to avoid any tax payments which would support the military establishment. The court of appeals reversed the conviction imposed by the district court because they found no intent to deceive.

[3] 18 U.S.C. § 401 was the statute which the defendants were charged with violating. It reads as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

[4] When ordered to stand, the Sniders responded by saying that they could not, in good conscience, stand. No further disruption of courtroom decorum occurred.

[5] At least one circuit has reached the opposite conclusion. *See* Robson v. Malone, 412 F.2d 848 (7th Cir. 1969). *But see In re* Chase, 468 F.2d 128 (7th Cir. 1972).

[6] 497 F.2d 107 (5th Cir. 1974).

[7] In a companion case, the ban on publication of the courtroom sketches was held unconstitutional. In United States v. Columbia Broadcasting System, 497 F.2d 102 (5th Cir. 1974), the court of appeals held that the publication of these drawings did not pose an imminent threat to the fairness of the trial sufficient to overcome the policy against prior restraints on first amendment rights.

ered improper for the same person who issued the original order to try the resulting contempt action; a trial by another judge was required under these circumstances. The appearance of justice demanded another trier of fact; even the hint or appearance of bias was to be avoided in a criminal contempt proceeding.[8] Since one of the issues to be proven at the contempt proceeding was the content of the judge's own verbal order, the court reasoned that it was improper to allow a person who, in essence, should be a witness at the trial to sit in judgment. The power of a trial judge to pass upon the guilt of a person in a contempt proceeding where the judge himself was a principal actor was restricted severely by this decision.

In contrast to the *Snider* and *C.B.S.* cases, which exhibited a tendency to limit the use of the contempt power, is the case of *In re La Marre*[9] which expressed, in dicta, a desire to expand the powers of a trial court. A conviction for contempt of court was overturned by the Sixth Circuit on the grounds that a "request" for an insurance company manager's presence was not clearly an order. The trial judge wished to compel the attendance of the defendant at a pretrial conference aimed at settlement.[10] Because of a lack of clarity in the verbal orders of the trial judge, the court of appeals held that the defendant could not be held in contempt where he may not have been put on actual notice that his freedom was in jeopardy if he failed to comply.

This holding in itself does not expand the authority of a trial court judge in the contempt area, but a lengthy section of dicta does. The defendant questioned the authority of the district judge to force his appearance at a pretrial conference.[11] The circuit court stated that, although this was apparently a question of first impression, the trial court did possess the power to compel attendance of a non-party at a pre-trial settlement conference. The court said that La Marre could not refuse a lawful order to attend such a conference to discuss the matter of settlement.[12]

The case of *United States v. Profitt*[13] likewise expanded the power of a trial judge in conflict with the trend of *Snider* and *C.B.S.* The Court of Appeals for the Third Circuit upheld a contempt conviction for passive resistance to a court proceeding. The defendant was held in contempt for refusing to take part in any of the criminal proceedings pending against him. Profitt deliberately refused to cooperate in the process of jury selection; evidently he adopted a strategy of obstructionism in order to delay his trial.[14] The defendant "pretended" not to understand simple questions put forth from the bench and refused to cooperate in a court-ordered psychiatric examination.

Although recognizing that the defendant's actions were mild in comparison to more violent episodes of recent years, the circuit court nevertheless upheld the power of the trial judge to punish this conduct by incarceration. The interests of efficient and speedy administration necessarily gave the district judge great discretion in the handling of this type of problem, and the reviewing court was obviously hesitant to ignore the decision of the trial judge who was present during these incidents.[15] Consequently, the court upheld the judge's ruling as within his inherent power to maintain order and dignity within the courtroom.[16]

[8] *Cf.* Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Grizell v. Wainwright, 481 F.2d 405 (5th Cir. 1973). These cases were referred to in the court's opinion.

[9] 494 F.2d 753 (6th Cir. 1974).

[10] It is unclear from the facts given on appeal whether the defendant was only "requested" to attend or whether he was actually ordered to attend.

[11] It should be noted that the company which the defendant represented (the Insurance Company of North America) was not an actual party to the pending litigation; rather, it stood ready to indemnify one of the litigants.

[12] But since the order was not clearly worded, the court reversed the defendant's conviction for contempt.

[13] 498 F.2d 1124 (3d Cir. 1974).

[14] The court of appeals characterized his conduct as passive resistance through non-cooperation.

[15] It was recognized that the record was unresponsive in parts; it did not always indicate truly contemptuous conduct by the defendant (*e.g.*, the repeated statements that he simply "did not understand" the questions asked). The majority reasoned that the record did not always reflect the smirk or the sneer which the trial judge would perceive.

[16] This decision should be contrasted with the holding in *Snider, supra,* which held that a failure to stand could not be punished. Obviously, the *Profitt* court took a more expansive view of the power of the district judge to punish courtroom conduct.

OBSCENITY

As a result of the United States Supreme Court decision in *Miller v. California*[17] a number of state obscenity statutes have recently been challenged for their alleged failure to comply with the standards enunciated in that landmark decision. Four statutes were construed within the last six months; two were voided and two upheld.

Perhaps most noteworthy was the result in *Miranda v. Hicks*,[18] which ruled the California statute in question unconstitutionally vague. The statute involved had previously provided the starting point for the Supreme Court's redefinition of obscenity in *Miller*.

A three judge panel of the central district of California held that the statute[19] did not meet the *Miller* requirement that sexual conduct be specifically defined in the statute itself or by a court which "authoritatively construed" it. Authoritative construction of an obscenity statute which was otherwise overly vague might preserve it. Since the *Miller* decision, the California court had construed the statute in *People v. Enskat*[20] and upheld the statute.

The federal district court held that the California statute, as construed by the local court, still did not accurately define the prohibited sexual conduct as required by *Miller*. Fair notice would not be given to a potential defendant by the *Enskat* ruling or from the statute itself.[21] Even with the additional interpretation of the statute, the court found that there was no "fair notice" of what the state of California permitted or prohibited with regard to obscenity. While the state court's interpretation may have liberalized the statute to a certain extent, it was not adequately construed so as to give fair notice as to what was constitutionally prohibited.

A similar result was reached in Massachusetts. *Commonwealth v. Horton*[22] voided a state statute which outlawed the sale of "obscene and impure" magazines while a companion case, *Commonwealth v. Capri*[23] found unconstitutional a statute which made possession of "obscene" material a crime. The reasoning in both of these cases was similar to that shown in *Hicks*; the statutes failed to meet the specificity standard of *Miller*.

The majority in *Horton* refused to follow the same reasoning used by the California supreme court, in which the statute was authoritatively construed by the local court. Rather, the Massachusetts supreme judicial court felt that new legislation and not judicial rewriting of an obviously infirm statute was demanded by the circumstances.[24] To furnish a judicial interpretation of the state obscenity statutes which would "specifically define" the sexual conduct forbidden by the legislation would, in the opinion of the majority, force the court to legislate. The court plainly wished to avoid a judicial rewriting of an already ambiguous statute. Explicit new legislation was demanded by the court.

Recent decisions in Alabama and New Hampshire ran contrary to the results obtained in California and Massachusetts, and obscenity statutes in those two states were upheld.

In *Pierce v. State*,[25] the Alabama supreme court held that a state obscenity statute conformed with the dictates of *Miller*. The defendant book store owner did indeed have adequate notice that his conduct was violative of the obscenity law. The court accepted the Supreme Court's invitation to "authoritatively construe" the state statute, unlike the Massachusetts court in *Horton* and *Capri*.[26] The Alabama court construed *Miller* as allowing the ban of material

[17] 413 U.S. 15 (1972).

[18] ___ F. Supp.___ (C.D. Cal. 1974).

[19] CAL. PENAL CODE § 311 *et. seq.*, as amended, 1974.

[20] 33 Cal. App. 3d 900 (1973), ___ P.2d ___ (1974), 109 Cal. Rptr. 433 (1973).

[21] The California court in *Enskat* concluded that: (1) only "hard core" pornography is prohibited; (2) nudity absent a sexual activity is not obscene; and (3) the material must contain a "graphic description" of sexual activity. The district court felt that these standards were as vague and ill-defined as the language of the statute, and consequently, the fair notice test of *Miller* was not met.

[22] ___ Mass. ___, 310 N.E.2d 316 (1974).

[23] *Id.*

[24] Justice Braucher, along with two colleagues, dissented in both cases. His position was that the court should construe the statute in such a way as to conform to the *Miller* standard. In his mind, the statutes in question had received the authoritative judicial construction suggested by *Miller* and new legislation was not necessary.

[25] 292 Ala. 473 296 So. 2d 218 (1974).

[26] This task was partially accomplished by an earlier decision of the Alabama judiciary. *See* McKinney v. State, 287 Ala. 648, 254 So. 2d 714 (1971).

which the state proved was lacking in serious literary, artistic, political or scientific value. This view was contrasted with earlier holdings which required that allegedly obscene material be "utterly" without such value.

Any potential vagueness of the statute was held to have been clarified by prior judicial construction.[27] The court further held that the community standards referred to by the Supreme Court in *Miller* meant statewide standards and not just those of the local community where the trial occurred. Any other reading of that term would result in a host of practical problems which the court wished to avoid.[28]

New Hampshire's obscenity statute was authoritatively construed in *State v. Harding*.[29] The state supreme court upheld the constitutionality of the statute[30] but dismissed the conviction of the defendant for selling three allegedly obscene publications. The court recognized that *Miller* demanded that the proscribed depictions or descriptions of sexual conduct had to be defined by applicable state law as written or authoritatively construed. The court proceeded to shade in the statute in areas where ambiguity remained.

However, the court reversed the conviction of the defendant because of the great confusion in this area of the law. The majority reasoned that Harding did not have sufficient notice or warning of the fact that the materials he was selling were in violation of the law as it existed at the time of the alleged sale. The *Roth* test,[31] which was the law until the *Miller* decision was handed down, simply did not provide requisite notice to potential defendants and as a consequence, the court dismissed the complaint against Harding.

[27] The *McKinney* case, *supra* note 26, was cited as defining the obscene nature of photos similar to those sold by the defendant.

[28] It was considered harmless error for the judge at the trial of the defendant to instruct the jury that the standard to be applied was that of Mongomery, Alabama, where the trial was held.

[29] ___ N.H. ___, 320 A.2d 646 (1974).

[30] The New Hampshire statute, R.S.A. § 571 A: 1 (Supp. 1972), was modeled after section 207.10 of the A.L.I. Model Penal Code Consequently, it was much more specific in its definition of obscenity than many less modern statutes dealing with obscenity.

[31] This concept of obscenity was developed in Roth v. United States, 354 U.S. 476 (1957).

Confessions

A growing trend toward admitting confessions made by suspects under unusual or trying circumstances is found in several recent decisions. The apparent justification for an expanded admissibility of such evidence may be that courts are increasingly reluctant to discard what is often very valuable evidence.

Indicative of the shifting attitude of courts towards the voluntariness of confessions is *United States v. Johnson*[32] where the Court of Appeals for the Fourth Circuit dropped its "beyond a reasonable doubt" standard in determining voluntariness and replaced it with a "preponderance of the evidence" test. In so doing, the court affirmed a conviction for bank robbery based at least partially upon a confession which was ruled admissible by the district judge. The Fourth Circuit had previously required the higher degree of proof of voluntariness before a confession was admitted into evidence against a defendant.[33] The court concluded that the recent Supreme Court decision in *Lego v. Twomey*[34] dictated the move to a preponderance standard and an abandonment of the stricter standard.[35] Interpreting the *Lego* decision as one based upon a constitutional footing, the court felt that its own standard had to fall in the interests of uniformity among the federal courts. Consequently, the court affirmed the district judge's decision to admit the defendant's confession even though its voluntariness was proven only by a preponderance of the evidence.

The case of *Commonwealth v. Jones*[36] resulted in the admission of a confession as voluntary even though police deception took place during the interrogation. The defendant was arrested and charged with robbery and murder.

[32] 495 F.2d 378 (4th Cir. 1974).

[33] *See* United States v. Inman, 352 F.2d 954 (4th Cir. 1965), which established the "beyond a reasonable doubt" test in the Fourth Circuit. The standard was not adopted on constitutional grounds, but rather upon the court's supervisory power over district courts within the circuit. Aside from the courts of the District of Columbia, the Fourth Circuit was apparently the only one to require this higher degree of proof.

[34] 404 U.S. 477 (1972).

[35] Specifically, the court read footnote 16 of the *Lego* majority opinion as requiring a simple preponderance test for admissibility of allegedly voluntary confessions.

[36] ___ Pa ___, 322 A.2d 119 (1974).

While in custody, police officers deceived him into believing that one of his cohorts had implicated him in the crime and turned informant.[37] Following this trickery, Jones signed a statement confessing his role in the crime. On appeal, the defendant challenged the voluntariness of his statement.

The Pennsylvania court stated that it would invalidate a confession if it was produced as a result of a subterfuge that would tend to produce an untrustworthy confession. Furthermore, if the trickery was so reprehensible as to offend basic societal notions of fairness, any confession so obtained would not be admissible.[38] Viewing all the facts of this situation, the court characterized the confession as voluntary. The majority said that although it did not condone deliberate misrepresentation of facts, the totality of the circumstances would allow admission of the defendant's written confession.

An examination of the totality of the circumstances surrounding another confession led to its admission in *Castleberry v. State*.[39] The court thus affirmed a murder conviction based at least in part upon the defendant's written statement of confession. On appeal, Castleberry contended that the confession was the product of overwhelming psychological pressures and it was actually induced by the police.[40] He stated that he was psychologically coerced by police actions which relied upon the defendant's obvious susceptibility to suggestions and trust in the two detectives handling the case.

The Oklahoma court of criminal appeals rejected these claims totally. Relying primarily upon *Culombe v. Connecticut*,[41] the court held the confession voluntary. It was admitted that there may have been some psychological inducements, but the majority believed this did not alter the basic voluntary nature of the defendant's statements. In the opinion of the majority, not all confessions made while in custody would be the product of an overborn will; occasionally, remorse would compel one to speak out against his own interests.[42]

Following the apparent trend toward admitting confessions made under unusual circumstances was the decision of the Kentucky court of appeals in *Britt v. Commonwealth*.[43] The court upheld a conviction which resulted from a confession obtained while the defendant was severely intoxicated.[44] The court felt that the concept of voluntariness was not applicable when a confession was made while under the influence of drugs or liquor. Rather, the court believed that the basic question had to be whether or not the confessor was in sufficient possession of his faculties to give a reliable statement.[45]

The truth of the statement made by Britt was not strongly suspected by the court. At the pre-trial suppression hearing, the defendant did not even attempt to show that that he did not understand the meaning of the statements he had made while intoxicated the night before. The court was not willing to hold that the combination of intoxication and police custody must always add up to a violation of due process of law in the admission of an "involuntary" confession.

[37] The record apparently indicated that the co-defendant had never implicated Jones or offered to turn informant.

[38] The court also mentioned that an intelligent waiver of fifth amendment rights was demanded before a confession would be considered truly voluntary.

[39] 522 P.2d 257 (Okla. Ct. Crim. App. 1974).

[40] Evidently, the defendant was questioned a number of times prior to his confession which occurred seven days after the murder of his wife and children. The actual confession took place following a conversation with a minister, arranged by one of the police officers. *Miranda* rights were occasionally given to the defendant.

[41] 367 U.S. 568 (1969).

[42] It should be noted that Justice Brett dissented vigorously. It was his belief that police coercion produced the confession and consequently, it should be excluded under the *Culombe* rationale.

[43] 512 So. 2d 496 (Ky. Ct. of App. 1974).

[44] While in custody at a police station, the defendant confessed that he drove a hit-and-run vehicle. At the time the statements were made, his blood-alcohol content registered at .22 percent.

[45] The court held that the burden was on the prosecution to show that the confessor possessed these attributes at the time of the confession.