Spring 1961

Abstracts of Recent Cases

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc
Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.
Thus the injunctions were denied; the wiretaps were held admissible, and the federal courts again refused to tamper with state proceedings.

State prosecutors were cheered, things seemed to be going well—but their cheer was to be short lived. Five days later, the state court judge, in the O'Rourke case, reversed his position. This surprising turnabout was based, ironically, on the federal court's language in refusing to enjoin the use of the evidence now held inadmissible. Thus it appears that the federal courts may finally be meeting with some success in attempting to persuade state tribunals against the admission of wiretap evidence by strength of reason rather than by direct intervention. Meanwhile, the Supreme Court has granted Pugach certiorari from the decision of the Court of Appeals for the Second Circuit.

The position of the state court witness asked to testify to the contents of a wiretap is another area confused by the decisions in Schwartz and N.Y. Times, April 20, 1960. County Court Judge Widlitz refused to admit the challenged wiretap evidence, relying on the opinion of Judge Waterman of the Court of Appeals for the Second Circuit in Pugach v. Dollinger, supra note 41, and on the fact that: “the Court [of Appeals for the Second Circuit in the Pugach decision] is unanimous and unequivocal in its opinion that the introduction of wiretap evidence would constitute a violation of a federal criminal statute.”

Thus it seems that the federal courts may finally be meeting with some success in attempting to persuade state tribunals against the admission of wiretap evidence by strength of reason rather than by direct intervention. Meanwhile, the Supreme Court has granted Pugach certiorari from the decision of the Court of Appeals for the Second Circuit.

The position of the state court witness asked to testify to the contents of a wiretap is another area confused by the decisions in Schwartz and N.Y. Times, April 20, 1960. County Court Judge Widlitz refused to admit the challenged wiretap evidence, relying on the opinion of Judge Waterman of the Court of Appeals for the Second Circuit in Pugach v. Dollinger, supra note 41, and on the fact that: “the Court [of Appeals for the Second Circuit in the Pugach decision] is unanimous and unequivocal in its opinion that the introduction of wiretap evidence would constitute a violation of a federal criminal statute.”

*LAWRENCE M. DUBIN

4 See notes 10, 11, and 15-17 supra and accompanying text.
4 Schwartz v. Texas, supra note 18.
46 Nardone v. United States, supra note 2; Benanti v. United States, supra note 5.

**ABSTRACTS OF RECENT CASES**

Abstractors

Richard K. Janger* and Alan H. Swanson*

Arrest, Search, and Seizure—Elkins v. United States, 364 U.S. 206 (1960). Defendants were convicted in federal court of wiretapping in violation of the Federal Communications Act. On certiorari, they contended that the trial court erred in admitting as evidence recordings illegally seized by state officers acting without involvement of federal officers. In reversing and remanding, the Supreme Court overruled the “silver platter” doctrine and held that evidence seized by state officers without federal participation must be excluded in a federal criminal trial if the search and seizure would have been unreasonable under the Fourth Amendment if conducted by federal officers. Mr. Justice Frankfurter, with Justices Clark, Harlan, and Whittaker concurring in part, dissented. See also Rios v. United States, 364 U.S. 253 (1960).

Arrest, Search, and Seizure—United States v. Vasquez, 183 F.Supp. 190 (E.D.N.Y. 1960). Defendant was indicted for unlawfully purchasing and importing narcotics. He moved to suppress the

*Senior Law Students, Northwestern University School of Law.
heroin found in his possession because custom officers, although authorized by 26 U.S.C.A. §7607 to arrest without a warrant in certain situations, here had the duty to obtain a warrant since one day prior to the arrest they were informed of the plan to deliver the narcotics to defendant. The District Court held that the officers here did not have sufficient information to support an application for a search warrant until the drugs came into defendant's possession and, in any case, the statute was not limited to situations where officers have insufficient time to procure a warrant but may be invoked whenever there is reasonable cause to believe that a violation has been or is being committed.

Arrest, Search, and Seizure—People v. Mayo, 166 N.E.2d 440 (Ill. 1960). Defendant was convicted of the unlawful possession of papers and documents used in playing "policy." On appeal, he contended that the trial court erred in denying his motion to suppress the use in evidence of certain policy slips found by a police officer in searching defendant's car after arresting him for a mere parking violation. The Supreme Court reversed, holding that since the arrest for a mere parking violation did not justify a search of defendant's car the policy slips were procured by an illegal search and therefore were not admissible in evidence notwithstanding the fact that the "policy" slips constituted contraband material. One judge dissented. Compare People v. Watkins, infra.

Arrest, Search, and Seizure—People v. Watkins, 166 N.E.2d 433 (Ill. 1960). Defendant was convicted of the possession of "policy" slips. On appeal, he contended that police officers, who had arrested him on previous occasions and who, after noting his car illegally parked and seeing him emerge from a building only to run back in upon realizing that they were watching him, arrested and searched him, violated his constitutional right against unreasonable searches and seizures and that policy tickets obtained by the search were improperly admitted in evidence. The Supreme Court reversed, holding that since the arrest for a mere parking violation did not justify a search of defendant's car the policy slips were procured by an illegal search and therefore were not admissible in evidence notwithstanding the fact that the "policy" slips constituted contraband material. One judge dissented. Compare People v. Watkins, infra.

Arrest, Search, and Seizure—State v. Wolf, 164 A.2d 865 (Del. 1960). Defendant was charged with operating a motor vehicle while intoxicated. He filed a motion in the trial court to suppress the results of an analysis of a blood sample on the ground that the taking of the blood sample was an illegal search and seizure. Upon acceptance of the trial court's certification of the question as to the admissibility of this evidence, the Supreme Court held that evidence as to intoxication based on a blood sample taken by a qualified physician from a person who is unconscious is not admissible under the Delaware Constitution in a criminal proceeding against such person even though the person's unconsciousness was not the result of any action on the part of the state authorities.

Arrest, Search, and Seizure—Martell v. Klingman, 105 N.W.2d 446 (Wis. 1960). Defendant and his insurer were held liable in a civil action arising out of an automobile accident. On appeal, the insurer contended that a urine specimen, obtained within two hours after the collision, as well as testimony as to its analysis, were erroneously admitted into evidence, on the ground that the specimen was obtained as a result of an unreasonable search and seizure. The Supreme Court affirmed, holding that the evidence was not obtained as a result of an unreasonable search and seizure and was therefore admissible even though defendant, while in a semiconscious state and not under arrest, had voluntarily urinated in a bottle held by a police officer without knowledge that the officers attending him were intent upon obtaining evidence as to the alcoholic content of his blood.

Arrest, Search, and Seizure—Schepps v. City of El Paso, 338 S.W.2d 955 (Tex. 1960). A district court gave judgment confiscating dice, a blanket, and money taken in a police raid on a crap game. On appeal, Schepps, one of the participants in the game, contended that the Texas Penal Code only authorizes the confiscation of gambling paraphernalia, which includes money found in gambling devices such as slot machines and pin-ball machines but not money whose title and possession are undisputed and which is used as a medium of exchange in paying off bets already consummated. The Court of Civil Appeals reversed and remanded,
ABSTRACTS OF RECENT CASES

holding that money is not gambling equipment per se and in the absence of evidence showing that the money confiscated was part of the gambling equipment or paraphernalia, the money would have to be returned to the appellant.

Arrest, Search, and Seizure—Moody v. United States, 163 A.2d 337 (D.C. 1960). Defendant was convicted of unlawful entry and petit larceny. On appeal, he contended that the trial court erred in denying his motion to suppress certain evidence on the ground that it had been secured by search and seizure in contravention of the Fourth Amendment. The Municipal Court of Appeals reversed, holding that, where the complaining witness, a private citizen, went into defendant's apartment and gathered up the articles claimed to have been stolen from him by the defendant and then handed them to an officer who had remained in the hallway, there was a participation in the search and seizure by the arresting officer, the complaining witness acting as an arm of the police in reducing the articles to their possession, and therefore the evidence so obtained had been improperly admitted.

Attorney-Client Privilege—Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). Defendant, an attorney, was adjudged to be in civil contempt. On appeal, he contended that he could not be compelled to give the Internal Revenue Service names of clients who employed him to voluntarily pay unassessed sums of income tax because such information was a privileged communication between an attorney and his client. The Court of Appeals reversed, holding that in applying the law of the forum state (California), an attorney cannot be compelled to identify his client when the only purpose in doing so is to show the client's recognition of his own guilt, and here the clients' names were material to the government only to ascertain which taxpayers believed themselves to be delinquent in their taxes.

Concealed Weapons—State v. Bordeaux, 337 S.W.2d 47 (Mo. 1960). Defendant was convicted of carrying a concealed weapon. On appeal, he contended that the evidence was insufficient to support the judgment that he had violated the Missouri statute prohibiting the carrying of a dangerous or deadly weapon concealed "upon or about" one's person. The Supreme Court affirmed, holding that where police officers testified that they "saw no weapon" as they drove alongside defendant's automobile but that a gun was in such a place in the automobile that the driver was able to reach it while driving, there was sufficient evidence to support a finding of concealment "upon or about" the person.

Confessions—United States v. Coppola, 281 F.2d 340 (2d Cir. 1960). Defendant was convicted of bank robbery. On appeal, he contended that admissions made by him to federal officers during a period of illegal detention by local police having a working agreement with the F.B.I. should not have been received in evidence by the trial court. The Court of Appeals affirmed, holding that the facts showed that defendant was arrested and detained by the local police on their own initiative and that the legality of the detention under state law has no bearing on the admissibility of the evidence in a federal proceeding where federal agents neither caused nor contributed to the illegal delay by the local officers.

Confessions—Muldrow v. United States, 281 F.2d 903 (9th Cir. 1960). Defendant was convicted of taking and opening mail left for collection. On ap-
peal, he contended that the trial court erred in admitting his confession because there had been an unnecessary delay in his arraignment. Local police had held defendant in custody over a two day weekend before federal authorities were notified. After unsuccessfully attempting to contact the nearest Commissioner, the federal agent questioned defendant for six hours, after which he was arraigned. The Court of Appeals affirmed the conviction, holding that the only delay to be considered is that occurring while defendant was in federal custody. The six hour delay was held reasonable since the federal officer acted immediately, although unsuccessfully, to contact the nearest Commissioner, and therefore the defendant's confession, though given before arraignment, was admissible.

Confessions—*Griffith v. Rhay*, 282 F.2d 711 (9th Cir. 1960). After being convicted of murder in a state court, defendant applied for a writ of habeas corpus in federal court, but it was denied. On appeal, defendant claimed that his confession should not have been admitted at the trial as he had given it without assistance from counsel and while in a hospital under medication with a narcotic. The Court of Appeals reversed the conviction and remanded, holding that the admission of defendant's confession deprived him of due process under the fourteenth amendment because it was unreasonable to infer that he knew of his right to remain silent during questioning or to have legal assistance when his youth and background were considered, and that even if aware of his rights, his failure to request counsel while under medication with a narcotic could not constitute a waiver of his right to counsel.

Confessions—*State v. Hodge*, 105 N.W.2d 613 (Iowa 1960). Defendant was convicted of murder in the first degree. On appeal, he contended that since he had been held for some 24 hours without a charge filed or an arraignment held, during which time he did not have the advice of counsel or, assertedly, the opportunity to procure counsel or to communicate with his wife, the trial court erred in admitting into evidence a purported confession obtained during this period of detention. The Supreme Court affirmed, holding that these facts in and of themselves did not make the obtaining of the confession violative of defendant's constitutional rights or of due process since it did not appear that the confession was involuntary or that defendant was held solely for the purpose of obtaining a confession but rather for the purpose of investigating all the circumstances and other facts connecting defendant with the crime, and, therefore, the admission of the confession into evidence was proper, the Court explicitly refusing to follow the practice of the federal courts which excludes from evidence those confessions obtained during a period of illegal detention.

Conspiracy—*United States v. Dege*, 364 U.S. 51 (1960). Defendants, who were husband and wife, were indicted for conspiring to illicitly bring goods into the United States. The District Court dismissed the indictment holding that a husband and wife are legally incapable of conspiring. On direct appeal, the government contended that a husband and wife are within the scope of 18 U.S.C.A. §371 which makes it an offense for two persons to conspire to commit an offense against the United States. The Supreme Court reversed and remanded holding that a husband and wife are legally capable of conspiracy because the medieval concept of a husband and wife being one person in law no longer applies, marital harmony must yield to Congress' unqualified prohibition of a conspiracy between two persons, and a woman should not be presumed to act under the coercive influence of her husband as such a presumption is contrary to modern realities. Chief Justice Warren, with whom Justices Black and Whittaker joined, dissented.

Discovery—*People v. Wolff*, 167 N.E.2d 197 (Ill. 1960). Defendant was convicted of armed robbery. On appeal, he contended that he was wrongfully denied the right to examine certain documents allegedly possessed by the prosecution which contained statements made by a witness for the prosecution. Although the Supreme Court judicially adopted the federal Jencks Act formula, it nevertheless affirmed the conviction on the ground that the denial of discovery in the instant case was harmless error.

Discovery—*State v. Lavallee*, 163 A.2d 856 (Vt. 1960). Defendant was convicted of assault and robbery. On appeal, he contended that the trial court erred in denying his petition for pre-trial inspection of certain statements and records in the State's possession. Although the Supreme Court, in its opinion, apparently adopted a restricted version of
the Jencks Act formula, stating that such statements and records should under no circumstances be turned over to defendant until the court has determined their relevancy, the Court affirmed on the narrower ground that defendant's petition was premature and improper in that it did not request an in camera determination by the trial judge of the relevancy of the statements and that even under the Jencks Act formula such statements would not be turned over to a defendant until after the witness had testified on direct examination.

**Embezzlement—State v. Harris,** 164 A.2d 399 (Conn. 1960). Defendant was convicted of theft and embezzlement. On appeal, he contended that the trial court erred in failing to instruct the jury that if it found that he was the owner of one hundred per cent of the stock of the corporation from which he had taken funds, then he could not be guilty of embezzlement. The Supreme Court affirmed, holding that even though defendant owned all the capital stock of the corporation, he could nevertheless be held guilty of the statutory crime of embezzlement by agent upon a finding that he had misappropriated the funds of such corporation with the intent to defraud it.

**Exclusion from Courtroom—California v. Elliot,** 354 P.2d 225 (Cal. 1960). Defendant was convicted of sex perversion. On appeal, she contended that the committing magistrate, by permitting a newspaper reporter to remain in the courtroom during a preliminary examination over defendant's objection, violated **California Penal Code §868** which compels the exclusion of unauthorized persons from the preliminary examination upon defendant's request. The California Supreme Court reversed and remanded, holding that because the defendant's statutory right to exclude persons from the courtroom during the preliminary examination had been violated, the information gained at the preliminary examination must be set aside and that therefore the trial court was without jurisdiction to proceed.

**Habeas Corpus—Parker v. Ellis,** 80 Sup. Ct. 909 (1960). After being convicted of check forgery by a state court, defendant, seeking exoneration, applied for a writ of habeas corpus in federal district court, but it was denied. On certiorari, defendant contended that the state court's refusal to appoint counsel constituted a denial of defendant's right to due process of law under the fourteenth amendment. The Supreme Court held that it lacked jurisdiction because defendant's contention was rendered moot since he had been released from state prison, having satisfied his sentence. The Chief Justice, with whom Justices Black, Douglas, and Brennan concurred, dissented on the ground that the conviction was in flagrant violation of defendant's constitutional rights and that defendant's desire for exoneration would ensure an adverse proceeding, the lack of which was the basis for refusing to decide the controversy because of mootness.

**Husband-Wife Privilege—Wyatt v. United States,** 80 Sup. Ct. 901 (1960). Defendant was convicted of knowingly transporting his wife in interstate commerce for the purpose of prostitution in violation of the Mann Act. On appeal, he contended that the trial court erred in forcing his wife to testify against him when both he and his wife invoked the husband-wife privilege. The Supreme Court affirmed, holding that one who commits a shameful crime against his wife and the marital relationship should not then be able to invoke the husband-wife privilege nor should the wife be permitted to invoke it in a Mann Act prosecution because if the wife can be induced to be a prostitute, she can also be induced to invoke her privilege. Justices Warren, Black, and Douglas dissented.

**Insanity—Ragsdale v. Overholser,** 281 F.2d 943 (D.C. Cir. 1960). Defendant, committed to a mental hospital because he had been acquitted of robbery by reason of insanity, moved for a writ of habeas corpus to secure his release, but it was denied. On appeal, defendant contended that a District of Columbia statute which requires one to be confined in a mental hospital if found not guilty by reason of insanity at the time he committed the crime is unconstitutional because it requires a mandatory commitment without requiring a subsequent hearing or trial to determine the defendant's present mental status. The Court of Appeals affirmed, holding the statute constitutional because the defendant may test the legality of his confinement by habeas corpus proceedings which will permit the court to decide if he has sufficiently recovered to be released.

**Insanity—Young v. State,** 123 So.2d 311 (Miss. 1960). Defendant was convicted of rape. On appeal, he contended that the trial court erred in denying a motion to require the state to furnish him the
services of a psychiatrist. The Supreme Court affirmed, holding that there was no showing of lack of due process or unfairness to defendant where the only evidence offered during the hearing on the motion was the testimony of defendant’s counsel that in a ten minute interview some of defendant’s conversation was not rational and that defendant had not been able to furnish sufficient facts to prove either that he did or did not commit the crime.

Insanity—Commonwealth v. Woodhouse, 164 A.2d 98 (Pa. 1960). Defendant was convicted of first-degree murder. On appeal, he contended that the rule laid down in M’Naghten’s case is unsound, confusing, antiquated, and based on notions of mental disorders which are discredited by modern science and that therefore the trial judge committed prejudicial error by instructing the jury to decide the case in terms of the M’Naghten rule, instead of adopting a broader test of insanity and instructing the jury in its terms. The Supreme Court affirmed, holding that, since the M’Naghten rule has become firmly established in Pennsylvania law, the Supreme Court would not, by blindly following the criticisms of psychiatric and medical experts, substitute for such rule, which had been proven durable and practical for decades, vague rules which provided no positive standards. Three justices dissented.

Interstate Transportation of “Stolen” Property —Lyda v. United States, 279 F.2d 461 (5th Cir. 1960). Defendant was convicted of transporting stolen pecans in interstate commerce in violation of 18 U.S.C.A. §2314. On appeal, defendant claimed that “stolen” as used in the statute means common law larceny and thus requires an unlawful taking and that since he had been entrusted with the pecans, he had committed embezzlement which did not violate the statute. The Supreme Court affirmed that the conviction holding that “stolen” is not a word of art but was intended by Congress to have a broad meaning and to encompass embezzlement as well as larceny.

Juries—Briggs v. State, 338 S.W.2d 625 (Tenn. 1960). Defendant was convicted of voluntary manslaughter. On appeal, he contended that the making of a statement by a juror to the other jurors during their deliberations to the effect that defendant had a bad temper and would kill if he got mad, and in fact had killed his brother, was reversible error since it violated defendant’s constitutional right to meet his opposing witnesses face to face. The Supreme Court reversed, upholding the defendant’s contention that the making of the statement was not harmless error, even though each of the jurors, when examined on the motion for a new trial, said that the statement had no influence on his verdict.

Mail Fraud—Parr v. United States, 80 Sup. Ct. 1171 (1960). Defendants, school board members and banks which they controlled, were convicted in federal court of mail fraud. On certiorari, they contended that they did not commit the federal offense but only a state offense, i.e., embezzlement of state funds. The Supreme Court reversed, holding there was no mail fraud since defendants did not use the mails for the particular purpose of executing the crime but only because the law required the Board to collect taxes and the mails were the only logical means to fulfill this duty. Mr. Justice Frankfurter, with Justices Harlan and Stewart concurring, dissented, stating that embezzlement and the process of collection were inseparable elements of the same fraudulent scheme.

Mann Act—United States v. McClung, 187 F.Supp. 254 (E.D. La. 1960). Defendant was indicted for knowingly transporting a woman in interstate commerce for the purpose of sexual intercourse in violation of the Mann Act. Defendant moved to dismiss the indictment claiming that bringing a willing and unmarried woman across state lines for a casual affair where she did not suffer from the experience does not violate the Act. The District Court held that the indictment
failed to charge a violation because the Act was clearly intended to condemn habitual immoral conduct and not single acts of sexual intercourse with willing women.

Murder—Evans v. United States, 277 F.2d 354 (D.C. Cir. 1960). Defendant was convicted of second-degree murder. On appeal, she contended that on a plea of self-defense, evidence of deceased's character is admissible to corroborate defendant's testimony, and thus the trial court erred in rejecting testimony by the deceased's wife that deceased was mentally ill and when intoxicated tended to be aggressive. The Court of Appeals reversed and remanded, holding that on a plea of self-defense, character evidence is relevant to establish the possibility that deceased was the aggressor even though deceased's character was unknown to defendant. Since the deceased was drunk when killed, his wife's testimony was relevant in corroborating defendant's contention that she had killed deceased in self-defense when he attacked her.

Parole—Doherty v. United States, 280 F.2d 35 (9th Cir. 1960). Petitioner filed a writ of habeas corpus after being arrested for parole violation. Appealing dismissal of his petition, petitioner claimed that although on parole, he was nevertheless within the custody of the attorney general and was therefore entitled to have the balance of his sentence credited with the period during which he was on parole. The Court of Appeals, affirming the dismissal, held that under 18 U.S.C.A. §4205 which states that 

Peremptory Challenges—Utah v. Rivenburgh, 355 P.2d 689 (Utah 1960). Defendant, with another, was convicted of murder in the first degree. On appeal, defendant contended that U.C.A. §77-30-2 (1953), which requires joint defendants to join in their ten collective peremptory challenges, violates the equal protection clause of the fourteenth amendment because it discriminates against any joint defendant who cannot agree with his co-defendant in their collective right to challenge jurors. The Utah Supreme Court, affirming the conviction, held that the statute was constitutional since it applies equally to all defendants tried jointly and does not discriminate against any individual defendant.

Principals—State v. Burbank, 163 A.2d 639 (Me. 1960). Defendant was tried for murder but convicted of manslaughter. On appeal, she contended that since she had contributed no physical effort to bring about the injuries to her child which eventually resulted in its death, having been in another room at the time of the killing, she could not be held as a principal to the crime of manslaughter. The Supreme Judicial Court affirmed, holding that, by being "constructively" present at the time of the killing, and by predetermining that if the child was abnormal "something would have to be done with it" and, upon its birth, encouraging her father to "hit it in the head," defendant participated in the crime to an extent which the law recognizes as sufficient to bring her within the category of a principal to the crime of manslaughter.

Robbery—Hermann v. State, 123 So.2d 846 (Miss. 1960). Defendants were convicted of armed robbery. On appeal, they contended that the state failed to prove them guilty of the crime of robbery in that the "taking" of the tankful of gasoline from the filling station came after the station attendant had filled their gasoline tank but before they put the attendant "in fear" by pointing a rifle at him in a threatening manner. The Supreme Court affirmed, holding that even though the defendants did not point their rifle at the attendant until after their gasoline tank was filled, the taking of complete control and dominion over the gasoline and the actual "taking" and asportation of it was contemporaneous with the pointing of the rifle at the attendant and, therefore, the crime of robbery was committed.

Scientific Evidence—Washington v. Baker, 355 P.2d 806 (Wash. 1960). Defendant was convicted of negligent homicide arising out of a fatal automobile accident. On appeal, he contended that admitting the results of a voluntary breathalyzer test showing the alcoholic content in his blood was error because he had drunk cough syrup containing forty-five per cent alcohol less than fifteen minutes before the test. The Washington Supreme Court reversed and remanded, holding that before the results of a breathalyzer test may be admitted, the prosecution must produce prima facie evidence