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Recent Trends in the Criminal Law

Court has incorporated the *Cooke* dictum into a procedure for dealing with disruptive contumacious defendants. Yet the *Mayberry* decision did not solve some of the problems that plague the law of contempt, such as the possible constitutional requirement of a jury trial or the excessive length of contempt penalties. In fact, *Mayberry* did not even confront some of the difficulties inherent within its own peculiar fact situation, such as defendants who repeatedly assault any judge in any judicial proceeding and whether warning needs to be given during the trial after contumacious outbursts. Although the "arsenal of authority" in *Allen* provides other alternatives for trial judges dealing with disruptive defendants, courts which face situations similiar to *Mayberry* have not been provided clear guidelines for correctly controlling a contumacious defendant.

RECENT TRENDS IN THE CRIMINAL LAW

TESTIMONIAL IMMUNITY

The Seventh Circuit in *In re Korman*, __F.2d__ (7th Cir. 1971), concluded that a defendant granted immunity while testifying before a federal grand jury is entitled to "transactional" immunity from prosecution of any crimes related to his testimony. In reaching this decision, the court held that the new federal immunity statute, 18 U.S.C. § 6002, was unconstitutional because it encroached upon the rights guaranteed to the defendant by the fifth amendment by providing "use" immunity only.[1]

The case arose from a grand jury investigation in which the defendant was cited for contempt because he refused to testify despite government offers of immunity. The defendant remained silent, contending that the immunity provision in § 6002 did not sufficiently protect him from prosecution to conform to the requirements of the fifth amendment. Agreeing with the defendant's argument, the court cited *Counselman v. Hitchcock*,[2] where the Supreme Court rejected a statute that provided only "use" immunity.

On appeal, the government argued that *Counselman* was overruled *sub silentio* by *Murphy v. New York Waterfront Commission*,[3] where the defendant was granted immunity from state prosecution to testify before a state board of commissioners. Although concluding that the New York immunity provision foreclosed any federal "use" of either the testimony or the fruits of the testimony, the *Murphy* majority implied, nevertheless, that *Counselman* supported the premise that "use" immunity complied with the fifth amendment. This implication was recently followed by *Stewart v. United States*, 440 F.2d 954 (9th Cir. 1971), in holding that 18 U.S.C. § 6002 was constitutional.[4]

In contrast to the Ninth Circuit's decision in *Stewart*, the Seventh Circuit dismissed the *Murphy* implication as dicta since the primary issue there was whether state immunity statutes were applicable to federal prosecutors as well as state officials. Moreover, the court of appeals noted that *Counselman* has been reffirmed since *Murphy* as the leading authority for the rejection of "use" immunity as unconstitutional.[5] The court therefore concluded that *Counselman*, as applied to the facts in the instant case, compelled the result of reversing the defendant's sentence and held 18 U.S.C. § 6002 unconstitutional.

[1] 18 U.S.C. § 6002, effective October 15, 1970, was a part of the Organized Crime Act of 1970, which repealed all of the existing immunity provisions in the federal criminal code. The statute permits federal grand juries, federal district courts, and many administrative agencies to offer only "use" immunity to witnesses. "Use" immunity forbids either the use of the testimony or the fruits of the testimony to be used against the witness in a criminal prosecution. However, if the prosecution can show an independent source of information, then the witness can be prosecuted for the crime connected to his testimony. Adopting "use" immunity as opposed to transactional immunity was the clear intention of Congress. H. R. REP. No. 1549, 91st Cong., 2d sess. (1970).

[2] 142 U.S. 547 (1892).

[3] 378 U.S. 52 (1964).

[4] The facts in *Stewart* paralleled the facts in *Korman*. In both cases, a witness refused to testify before a federal grand jury and was subsequently cited for contempt.

[5] *See* Picirillo v. New York, 400 U.S. 548 (1971); Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965). In *Picirillo*, the majority dismissed certiorari as improvidently granted because the New York Court of Appeals had since reversed itself and held that transactional immunity was constitutionally compelled. Justice Brennan, dissenting, felt that the Court should have heard the case and that if it had, the proper decision would have been to reject "use" immunity as unconstitutional on the basis of *Counselman*.

Search and Seizure

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Supreme Court rearticulated the plain-view exception to the fourth amendment warrant requirement. In the past, the exception validated warrantless search and seizure of items in plain view. *Coolidge* required in addition that the item be come upon "inadvertently." Thus a prior knowledge of an item's location together with the intention to seize it ruled out possible "inadvertency" and required the authorization of a search warrant.

In *United States v. Welsch*, 9 BNA Crim. L. Rptr. 2453 (10th Cir. Aug. 9, 1971), the Tenth Circuit ruled that the plain-view doctrine was satisfied where no appreciable time passed between the formation of prior knowledge and intent to seize, and actual seizure. In *Welsch* an F.B.I. agent, posing as a chemist, was called by another agent, posing as a prospective drug buyer, to test sample tablets produced by the defendant from a suitcase under his motel room bed. The "chemist" assured the defendant that he would return within twenty minutes. After conducting a field test for the presence of LSD and mescaline, he returned, the defendant was arrested, and the suitcase was seized. The court observed that the agents had insufficient time for both testing the sample and securing an arrest or search warrant. The court interpreted the *Coolidge* Court's reference to an "intention to seize" as meaning the "pre-existing knowledge of the identity and location of an item sufficiently in advance of the seizure to permit the warrant to be applied for and issued." Since there was no such time interval in *Welsch*, the court held the seized items as having come within "constructive" plain view, and held the seizure not inconsistent with the *Coolidge* inadvertency doctrine.

Prisoners Rights

In *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), the court of appeals provided the most exhaustive analysis yet on the increasingly controversial subject of prisoners' rights. Under 28 U.S.C. § 1983, prison inmate Sostre sought injunctive and monetary relief for deprivation of his constitutional rights. He alleged that he was placed in solitary confinement without due process of law, that his solitary confinement for over a year constituted cruel and unusual punishment, and that he was being punished for his political beliefs and legal activities.[6] The district court granted the plaintiff his requested relief, including $13,020 in monetary damages.[7]

On appeal the Second Circuit, sitting en banc, upheld the district court's ruling that prisoner Sostre was denied due process of law when he was placed in solitary confinement without any administrative proceeding.[8] The court of appeals further agreed with the district court that the plaintiff had the right to communicate with both his lawyer and a co-defendant with respect to legal matters as well as the right to possess literature concerning his own political beliefs.[9] The court of appeals refused, however, to sustain the district court's finding that solitary confinement for over a year constituted cruel and unusual punishment.[10] The court noted that the plaintiff was afforded the opportunity both to exercise and to communicate with fellow prisoners during his solitary confinement but refused to do so. In light of this refusal, the court did not find the conditions of Sostre's confinement so "barbarous" or "shocking to the conscience" as to constitute an Eighth Amendment violation.[11] Finally, although the court of appeals agreed that § 1983 permitted a monetary award, the court refused to uphold the district court's relief under the facts of the case.[12]

In *Holt v. Sarver*, 442 F. 2d 304 (8th Cir. 1971), the Court of Appeals for the Eighth Circuit held "that imprisonment of inmates at the Cummins and Tucker units [of the Arkansas prison system] constitutes cruel and unusual punishment violative of the Eighth Amendment. . . ."[13] The court, agreeing with the Second Circuit's narrow standard for cruel and unusual punishment, found the conditions of the entire Arkansas prison system to be so "barbarous" as to violate the Eighth Amendment rights of the inmates.[14]

[6] Sostre v. McGinnis, 312 F. Supp. 863, 870–74 (S.D.N.Y. 1970).

[7] *Id.* at 886.

[8] Although the court disagreed that due process required all the procedural elements which the district court had insisted upon, the court did maintain that a prisoner subject to serious disciplinary action must at the least be "confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions." 442 F.2d at 201.

[9] *Id.* at 202.

[10] *Id.* at 193.

[11] *Id.* at 191.

[12] *Id.* at 205. The warden against whom Sostre had a valid monetary claim died and the new warden had not taken part in the decision to place the plaintiff in solitary confinement.

[13] 442 F.2d at 308.

[14] *Id.*