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Edward Walterman

CRIMINAL LAW*

EDWARD WALTERMAN**

HOMICIDE

First degree murder

Two decisions handed down by the Florida Supreme Court sustaining first degree murder convictions applied certain well accepted principles of the felony murder rule. In both *Henderson v. State*[1] and *Hornbeck v. State*,[2] homicides were effected by a confederate of the accused while the two were engaged in a robbery. Both cases involved prosecutions under Section 782.04 of the Florida Statutes, which provides that "the unlawful killing of a human being . . . when committed in the perpetration of or in the attempt to perpetrate . . . any robbery . . . shall be murder in the first degree." It was the accused's contention that under this section, only the principal who fired the fatal shot could be convicted. The court, in rejecting this contention, observed that, if the accused was actually or constructively present, aiding and abetting the robbery, and the "unlawful killing was committed in the perpretration of the robbery, he is equally guilty of the murder with the other principal, even though prior to the robbery there was no premeditated design by either to commit a homicide."

In the *Hornbeck* case, the deceased was a police officer who was killed at a time after the robbery had been completed and while he was attempting to arrest the defendant and his accomplice as they emerged from the building. The defendant contended that Section 782.04 of the Florida Statutes was not applicable because under that statute the person killed must be the person upon whom the robbery is, or is attempted to be, perpetrated. In rejecting this contention, the court observed that when men engage in a scheme of robbery and arm themselves with loaded revolvers, they show that they expect to encounter forcible opposition and that to overcome it they are prepared to kill anyone who stands in their way. If, in the course of their felonious enterprise, they open deadly fire upon policemen or others, and if, in the exchange of shots, someone is killed, the conclusion is inescapable that the proximate cause of the killing was the malicious criminal action of the felons. The further contention of the defendant that the statute was not applicable because the robbery had already been completed and that, therefore, the unlawful killing was not committed "in the perpetration of or in the attempt to perpetrate a robbery," was likewise rejected; the court reasoned that the rule embodied in the statute

*The purpose of this article is to observe and analyze the important developments in the field of criminal law during the period from September 1953 to June 1955 (Volumes 66 through 80 of the Southern Reporter).

**Lecturer, University of Miami School of Law.

1. 77 So.2d 358 (Fla. 1954).
2. 77 So.2d 876 (Fla. 1955).

was broad enough to include homicides committed in an attempt to escape from the scene of the crime, especially when that crime is robbery, since the continuation of the use of arms which was necessary to aid the felon in reducing the property to possession is further necessary to protect him in its possession and in making good his escape.

In *Mayo v. State*,[3] the defendant was convicted of the first degree murder of a constable in a gun duel in which it was established that the constable fired the first shot, at a time when he was not attempting to make an arrest or act in any other official capacity. The prosecution had relied upon a rather fanciful theory buttressed by a number of items of circumstantial evidence to obtain the conviction. The Supreme Court reversed and asserted that when circumstantial evidence is relied upon to convict a person charged with a crime, the evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of his innocence. Circumstantial evidence is never sufficient to support a conviction where, assuming all to be proved which the evidence tends to prove another hypothesis still may be true, because it is the actual exclusion of each other hypothesis which clothes mere circumstances with the force of proof. The court, in reversing the conviction, observed that the theory of the state was not supported by the record and was the product of mere speculation and guess work.

Second degree murder

In *Coco v. State*,[4] in sustaining a conviction of second degree murder, the court, although dealing primarily with problems of evidence, observed that no motive need be proved to justify a verdict and implied that lack of proof of motive would be material only in the event that circumstantial evidence alone was relied upon to sustain the conviction. Since here there was eye witness testimony of the fatal shooting, the element of motive was immaterial.

Manslaughter

In the much publicized case of *Tongay v. State*,[5] involving a prosecution under Section 782.07 of the Florida Statutes concerning manslaughter, it was established that the deceased, Kathy Tongay, five year old daughter of the defendant, died from internal complications induced by traumatic rupture of the small intestine caused when she dived from a board thirty-three and a third feet high while being trained in diving by the defendant. The evidence indicated she did not possess the experience, physical strength, muscular co-ordination and skill to negotiate this kind of dive. The court reasoned that appellant knew or should have known this and should not

3. 71 So.2d 899 (Fla. 1954).
4. 80 So.2d 346 (Fla. 1955).
5. 79 So.2d 573 (Fla. 1955).

have permitted zeal or obsession of making a high diver of his immature child to cause him to lose or forget all sense of hazard and danger to her. Justice Terrell, writing the opinion of the court, in affirming the conviction, reviewed the evidence at some length, and concluded that the appellant's conduct evidenced a reckless disregard of the child's safety in exposing it to such dangerous consequences.

Miller v. State[6] involved a prosecution for manslaughter arising out of an automobile collision. The evidence was conflicting, but taken in the light most favorable to the state, tended to show that the defendant, while driving, had turned out to pass another vehicle and seeing that he couldn't make it, crossed the road attempting to get to the ditch on the other side. He collided with the automobile driven by the deceased, coming from the opposite direction. The conviction was reversed, the court concluding that defendant's conduct was not of such a gross and flagrant nature, evincing a reckless disregard of human life or safety, so as to raise a presumption of "conscious indifference to consequences."

Attempted Kidnapping

Stratton v. State[7] dealt with the propriety of a conviction of the defendant on two charges, one for assault with intent to rape and the other for attempt to kidnap. The facts were that the defendant, who was employed by the parents of the eight year old victim, broke into the house at night and carried the girl from her bed on the second floor to the stairway but dropped the child and ran when the mother was awakened by the child's screams. The court reversed the conviction of assault with intent to commit rape on the grounds of insufficiency of evidence but sustained the conviction of attempted kidnapping, reasoning that in view of the stealth employed by the intruder in his preparations and flight, and his forcible removal of the child under the circumstances described, there was sufficient evidence upon which a jury might lawfully find that the defendant was guilty of an attempt to kidnap.

Forgery

In *Green v. State*,[8] the defendant was convicted of forgery. He had represented to a jeweler that he had organized a baseball team known as the "Gainesville All Stars" and that if the jeweler would contribute funds for the purchase of uniforms, his name would be written across the backs of the uniforms for advertising purposes. The jeweler gave the defendant a check made payable to "Gainsville All Stars", and defendant endorsed the check to "Gainsville All Stars" using the name of a fictitious individual and cashed the check. The Supreme Court held that the defendant was guilty under the forgery statute, Section 831.01, Florida

6. 75 So.2d 312 (Fla. 1954).
7. 77 So.2d 865 (Fla. 1955).
8. 76 So.2d 645 (Fla. 1954).

Statutes. The court admitted that the immediate transaction between the appellant, Green, and the jeweler, whereby Green received the check, could be eliminated from consideration as a basis for forgery, except for its bearing upon the later act of the defendant. The court further indicated that had Green endorsed the check, using his own name, he could not properly be held guilty of forgery. However, since he had used a fictitious name in endorsing the check, the conviction was sustained. The court explained that the intent element requisite in the definition of the crime, to wit: "With intent to injure or defraud any person" was satisfied here since Green, in signing a fictitious name, acted and intended to act to the injury of the jeweler in making his own apprehension more difficult after his deceit was discovered. The reasoning of the court in sustaining the conviction appears to this writer to be extremely tenuous. It would seem that the court would have been better advised to recognize the true intent of the forgery statute, and to have insisted that the defendant be held responsible for his fraud in obtaining the check.

Larceny

In *Cone v. State*,[9] the court applied the rule of "recent possession" to sustain a conviction for larceny of an automobile despite the fact that the automobile was not found at the defendant's home until nine months after its disappearance. The evidence indicated it had been there in the defendant's possession, continuously from the date of its disappearance, and the defendant's explanation that he had purchased it from the owner was substantially contradicted.

Criminal Procedure

Searches and Seizures

In a series of cases decided over the past two years, the Supreme Court sought to clarify the law concerning searches and seizures incident to arrest without a warrant, and to further explain the rules pertinent to the admissibility of evidence seized.

In *Courington v. State*,[10] the facts were as follows: the defendant was involved in an automobile accident, and shortly after the accident a deputy sheriff appeared on the scene. The deputy, after observing the scene and the defendant, placed him under arrest for driving while intoxicated. Shortly thereafter, certain witnesses to the accident advised the deputy that the defendant had placed certain papers in the trunk of the car. The deputy then searched the trunk of the vehicle and found some punch boards, cash money in a paper sack and some tickets or slips of paper which it is claimed, on the basis of expert testimony, were lottery tickets. The defendant was charged and convicted of possession of gambling implements. At the trial, the defendant sought unsuccessfully to suppress

9. 69 So.2d 175 (Fla. 1954).
10. 74 So.2d 652 (Fla. 1954).

the evidence found in the trunk of his car on the grounds that the search and seizure was unlawful. The Supreme Court reversed the conviction observing that the search of the trunk of appellant's car was made without a warrant and hence its legality hinged on whether or not it was incident to a lawful arrest and appropriate to the reasonable requirements of making effective a lawful arrest. The court concluded that under the facts of the case the search of the trunk of defendant's car was not appropriately incident to making effective a lawful arrest for driving while intoxicated.

In two cases involving the same problem, convictions were sustained despite the defendants' contention that certain elements of the evidence offered at the trial had been unlawfully obtained.

In *Baglio v. State*,[11] the defendant was convicted of grand larceny. She had been observed standing in the show window of the prosecuting witness' jewelry store and, when spoken to, ran out of the store followed by the prosecuting witness, whose cries for help caused a policeman to join in the chase. When the defendant was cornered in an alley, she threw her bag at the policeman saying, "You have the bag, let me go." In the response to the question by him, "Is it all here?", she stated, "Yes, let me go now, please." The policeman examined the contents of the bag and found some of the jewelry belonging to the prosecuting witness. The motion to suppress the evidence found in the bag was denied. On appeal, the Supreme Court concluded that the arrest of the defendant, without warrant, was reasonable and the subsequent search of the handbag was not unreasonable and the evidence obtained from it was admissible in evidence. The Court rejected defendant's contention that the policeman did not have proper or reasonable cause to arrest under the circumstances.

The other case, *Irvin v. State*,[12] involved a prosecution for rape. There, the deputy sheriff, having arrested the defendant and taken him to jail, returned to the home of the defendant and asked the defendant's mother for the shoes and trousers he had worn the night before. Without reluctance, she entered the boy's room followed by the officer, secured the clothing and shoes and delivered them to him. It was insisted by the defendant that the occurrence amounted to an unlawful search, particularly since the room occupied by the defendant was one for which he paid his mother a stipulated amount weekly. The court rejected that contention concluding that the facts in this case are devoid of any element of unlawful search or seizure. The defendant had told the officer that the clothes that he had been wearing were at his home. The officer had gone there and, without more display of authority than his presence, "politely" asked the man's mother for the clothes. She produced them without protest and the officer received them without any exploitation whatever. This

11. 75 So.2d 218 (Fla. 1954).
12. 66 So.2d 288 (Fla. 1953).

conduct was held not to violate the constitutional guarantee against unlawful searches and seizures.

However, in two "moonshine" cases decided by the court, convictions were reversed because illegally obtained evidence was employed by the prosecution at the trial. In *Melton v. State*,[13] the arresting officer, having good cause to suspect that the defendant was unlawfully in possession of "moonshine" whiskey in her home, obtained a search warrant (which was subsequently determined to be invalid) and, upon entering the house, discovered the whiskey in a cache under the floor. Whereupon, the defendant was arrested and charged with the unlawful possession. A conviction followed a trial at which, though the search warrant had already been declared invalid, the trial judge admitted the "moonshine" into evidence. The Supreme Court reversed the conviction, observing that since the warrant was invalid, the only way the evidence obtained by the search could properly be used would be if it had been seized pursuant to a lawful arrest. The arresting officer testified that the defendant was arrested *after* he discovered the "moonshine"; the court assumed, therefore, that he did not intend to make an arrest unless he discovered it. The court concluded that the seizure was not *incident to* a lawful arrest.

In *Byrd v. State*,[14] the sheriff, having received a "tip" that the defendant had a truck full of "moonshine", followed the truck as defendant lawfully drove it down the highway, finally stopped the truck and examined defendant's license, and demanded to examine the contents of the vehicle. The sheriff admitted his only reason was to investigate pursuant to the information he had received. The defendant objected but the sheriff persisted and discovered the "moonshine" which was subsequently offered in evidence at the trial at which defendant was convicted. The Supreme Court observed that if halting, searching and seizing are accomplished without a warrant, the officer must be prepared to show that he had "proper cause" for his acts or "reasonable belief" or "trustworthy information" that the vehicle was engaged in the transportation of "moonshine". The showing made in the instant case, as to the state of sheriff's information at the time he stopped the truck, fell short of compliance with the above requirement, and, since the sheriff had no valid independent reason for stopping the truck, the defendant's right to free passage without interruption or search had been violated.

Circumstantial evidence

In a series of cases, *Mosely v. State*,[15] *Raybon v. State*[16] and *Corbin v. State*,[17] the Supreme Court reversed convictions which it found had

13. 75 So.2d 291 (Fla. 1954).
14. 80 So.2d 694 (Fla. 1955).
15. 68 So.2d 375 (Fla. 1953).
16. 75 So.2d 7 (Fla. 1954).
17. 78 So.2d 861 (Fla. 1955).

been obtained on purely circumstantial evidence which was reasonably consistent with some hypothesis other than the guilt of the defendants. However, in *McElveen v. State*,[17a] where the question involved the propriety of admission into evidence of defendant's extra-judicial confession after the state had established the corpus delecti by circumstantial evidence only, the court (5 to 2) sustained the conviction.

Entrapment

In *Lashley v. State*,[18] the facts were that two air force police investigators, both incognito, entered defendant's bar and ordered refreshments. Then one of the police officers inquired of the defendant, "Where were all the women?", in reply to which defendant asserted that a certain female employee "could be had" but the price would have to be "figured out among yourselves." After a conversation between the officer and the woman, they left the establishment by auto going to a previously arranged placed where, after the woman was paid with a marked bill, she was arrested by a deputy sheriff. Under this and other evidence, the defendant was convicted of operating a house of ill-fame. At the trial defendant sought to suppress the evidence of the police officer on the ground of "entrapment." The motion was denied and the defendant was subsequently convicted. The Supreme Court sustained the judgment of conviction, stating that where the evidence shows an intention on the part of the accused to commit the crime charged, evidence obtained by "entrapment" is admissible; this is true even though the witnesses acted as decoys. One who is lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he otherwise had no intention of committing may avail himself of the defense of "entrapment". Such defense is not available, however, where the officer acted in good faith for the purpose of discovering or detecting a crime and *merely furnished the opportunity* for the commission thereof by one who had *the requisite criminal intent.*

Immunity from prosecution

In *State ex rel. Mitchell v. Kelly*,[19] the court in interpreting Florida Statutes Section 932.29 held that where the subject matter of a grand jury investigation was "gambling activities", as to which the statute granting immunity from prosecution to witnesses who testified applied, the fact that a related subordinate offense of conspiracy to violate gambling laws was also involved did not render the statute inapplicable. The witness would have been free from prosecution for *any* offense *substantially* connected with the transaction concerning which he testified, if the testimony so given constituted a link in the chain of evidence needed to prosecute him. *Boynton v. State ex rel. Mincer*[20] involved a suit brought by the

17a. 72 So.2d 785 (Fla. 1954).
18. 67 So.2d 648 (Fla. 1953).
19. 71 So.2d 887 (Fla. 1954).
20. 75 So.2d 211 (Fla. 1954).

state to enjoin as a nuisance the defendant and others from operating a lottery and bookmaking business. The state based its case upon the fact that the defendant had purchased a federal gambling stamp and had paid an excise tax on his gambling income. The court held that to sustain the state's position would violate the constitutional guarantee against self-incrimination; the injunction order was reversed.

Bail

In *State ex rel. Goepel v. Kelly*,[21] the defendant had been indicted for murder in the first degree. In a habeas corpus proceeding to determine if the defendant should be admitted to bail, the trial judge excluded testimony as to the defendant's intoxicated condition. The Supreme Court held that this was in error since it was the duty of the judge to inquire into all essential elements of the crime. Since intoxication affects the intent element evidence concerning intent ought to have been considered.

Former jeopardy

In *McLendon v. State*[22] the trial court had granted the defendant's motion for a mistrial on the ground that the list of witnesses to be used against him, as requested by the defendant and provided by the prosecution, was erroneous. At a later trial, the court denied a motion to quash on grounds of former jeopardy and the Supreme Court affirmed.

Informations

In *McDaniel v. Mayo*,[23] the defendant was sentenced to life imprisonment for a fourth felony conviction. The information charged that the fourth felony for which the defendant had been convicted was "resisting arrest". At the time the information was filed, the defendant had not as yet been sentenced so it could not have been determined whether confinement in the state penitentiary or the county jail was contemplated, nor, whether the offense for which he had been convicted was a felony or a misdemeanor. The fourth felony conviction was held erroneous.

Severances

In *Williams v. State*,[24] the trial court denied a motion for severance made at the beginning of the trial, the date for which had been set several weeks previously. The Supreme Court held that this was not error since there had been no explanation for the delay in making the motion.

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21. 68 So.2d 351 (Fla. 1954).
22. 74 So.2d 656 (Fla. 1954).
23. 79 So.2d 519 (Fla. 1955).
24. 69 So.2d 766 (Fla. 1954).

Withdrawal of plea

The Supreme Court in *Kaminski v. State*[25] held that where a conviction had been reversed for procedural errors and the case remanded for new trial, after which the defendants moved to withdraw their plea of not guilty and to quash the information, refusal to grant the motion was not an abuse of discretion.

Presence of trial judge

In the course of the trial in the case of *McCollum v. State*,[26] wherein the defendant was ultimately convicted of murder, the trial judge ordered a view of the site of the homicide. He was not present at the view. The question then raised was whether the defendant can waive the judge's presence at the view by failing to make seasonable objection. The court held that the voluntary absence of the trial judge at a step in the proceedings when his presence is required by law is not subject to waiver by the defendant and constitutes reversible error.

Right to open and close

Green v. State[27] involved a prosecution and trial of two defendants for armed robbery. Both were convicted, and the Supreme Court held that the refusal of the trial court to permit the one defendant who had offered no testimony on his own behalf, except his own, to make opening and closing arguments to the jury, was reversible error.

Comments of state attorney

At the trial in *Williams v. State*,[28] the state attorney, in his closing statement, observed that if the defendant was found not guilty by reason of insanity, he would be sent to an insane asylum and soon after being confined there would be released to commit another homicide. The Supreme Court held that such an observation was reversible error.

Motion for new trial

In *State v. Ramirez*[29] the Supreme Court reversed a trial judge's order granting a new trial solely on the basis of a juror's affidavit that he had failed to register his objection to the verdict because of his erroneous belief that a majority vote of the jurors was sufficient.

Appeals

Pleger v. State[30] involved a prosecution for the felony of grand larceny. At the opening of the new trial, the county solicitor announced that the state was going to prove petit larceny under the information. Following

25. 72 So.2d 400 (Fla. 1954).
26. 74 So.2d 74 (Fla. 1954).
27. 80 So.2d 676 (Fla. 1955).
28. 68 So.2d 583 (Fla. 1954).
29. 73 So.2d 218 (Fla. 1954).
30. 68 So.2d 371 (Fla. 1954).

conviction, the defendant appealed to the Supreme Court of Florida and the Attorney General moved to dismiss on the ground that the court was without jurisdiction to entertain the appeal. The Supreme Court entered an order of dismissal quoting Section 11, Article V of the Constitution of Florida, which provides that the circuit courts have final appellate jurisdiction of all misdemeanors.

Legislative Changes

The 1955 session of the Florida Legislature enacted several changes in the criminal law.[31]

31.Changed the penalty division for robbery (Section 813.011) omitting the mandatory ten year minimum, so as to permit sentence for imprisonment for lesser periods of time at the discretion of the court (Chapter 29930).

Increased the penalty for aggravated assault under Section 784.04 to a maximum of five years or $3,000.00 (Chapter 29709).

Amended the definition of the offense described in Section 801.02 commonly known as the Child Molestor Act by omitting the word "rape" from the definition of the offense (Chapter 29923).

Chapter 29881, an act defining sexual psychopathic persons and providing for the commitment of such persons and the procedure therefor, is new. Attention is called to that portion of the Act which provides that a person found to be a criminal sexual psychopathic person may not thereafter be tried, or if already tried, convicted for the offense with which he originally stood charged.

Chapter 29668 protects a police officer, merchant or merchant's employee from criminal or civil liability for false arrest or unlawful detention where the detention is pursuant to "proper cause for believing" that the person detained has unlawfully taken goods held for sale by the merchant.

Chapter 29654 was enacted, which makes it a felony, punishable by imprisonment in the State Penitentiary for a period not to exceed five years for any party to an action who in violation of a court order removes a child from the State.

The legislature adopted the Uniform Reciprocal Enforcement of Support Act dealing with the machinery for enforcing the legal duty of any person to support another, whether the obligation arises in this state or another (Chapter 29901).

Chapter 29898 limits the time appeals may be taken by the State in criminal cases to thirty days from the date of order or sentence from which the appeal is taken.