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Criminal Law

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CRIMINAL LAW

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MURDER

During the thirty month period covered by this survey, the Supreme Court handed down opinions in thirteen murder cases. Six of these decisions affirmed convictions in the first degree.

Commutation of death penalty.—The court refused to commute the death penalty. It held that only the jury or the Board of Pardons may substitute a less severe penalty for one more severe.[1]

Harmless error.—It is harmless error for the prosecutor to remark that the defendant, if convicted, would be released by the Board of Pardons, and would be brought back again.[2] Another error held harmless was a conference, in the absence of the defendant, between the judge, the jury and two attorneys.[3]

Reversible error.—It was error to admit the calier statement of a witness in corroboration.[4] Also, to recall a witness to base an impeachment was an abuse of discretion and error.[5] To refuse to permit the state fingerprint witness to state that the prints on the murder gun were not the defendant's was a reversible error.[6]

A third degree murder conviction, in an abortion case, was reversed and a new trial ordered, because of the vague admission of a dying declaration favorable to the defendant.[7] It is difficult to perceive the error in this admission as the case was tried without a jury. "The Trial Judge heard the witness and did not see fit to disturb the verdict of the jury."[8] However, the court does not seem to follow this wise precept in the cases it reversed.

Preston v. State[9] was reversed because of insufficient evidence of traffic conditions. Defendant drove his car at 50 miles per hour through an intersection in a 25 miles per hour zone, in a city, and killed a passenger in another car. There was testimony to the effect that right after the collision some 3000 persons gathered. This is certainly some

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1. Johnson v. State, 61 So.2d 179 (Fla. 1952).
2. McMann v. State, 55 So.2d 538 (Fla. 1952).
3. Thomas v. State, 65 So.2d 866 (Fla. 1953).
4. Van Gallon v. State, 50 So.2d 882 (Fla. 1950).
5. Holm v. State, 58 So.2d 188 (Fla. 1952).
6. Coco v. State, 62 So.2d 892 (Fla. 1953).
7. Grimes v. State, 64 So.2d 920 (Fla. 1953).
8. Mitchell v. State, 59 So.2d 646 (Fla. 1952).
9. 56 So.2d 543 (Fla. 1952).

evidence upon which the jury could find conditions under which the conduct of the driver would be culpable negligence.

In another killing by car, a manslaughter conviction was reversed on similar grounds.[10] Here the defendant drove fast around a curve, lost control, skidded off the road for 300 feet, rolled an additional 152 feet, then rolled over three times, killing the passenger. The jury was satisfied that this was culpable negligence and manslaughter. The court reversed the judgment on the ground that the evidence was not both consistent with guilt and inconsistent with innocence.

In another case,[11] the defendant was driving 60 to 65 miles per hour at night in the country when he struck and killed a pedestrian. The car skidded 200 feet and rolled 79 feet further. The jury's verdict, and the judgment thereon was reversed because the evidence did not evince a "reckless disregard for human life." This last phrase is close to the definition of murder in the second degree. The Florida Statutes Section 782.04 provides that the unlawful killing of a human being, "When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree . . . ."

These three reversals were not based on errors of law, but on the insufficiency of the evidence to convince the Supreme Court. It is submitted that the test of sufficiency is provided solely for the jury.

RAPE

Inflamatory remarks.—With respect to rape, two out of five convictions were reversed. Inflamatory remarks of the prosecutor secured a new trial for one defendant.[12] The prosecutor called the defendant names and predicted that defendant's wife would stick to him because of her religion. It would seem that remarks in a case like this, where the act was admitted and the only defense was consent, would amount to harmless error only.

Charge to the jury.—The charge against a defendant was breaking and entering with intent to commit the felony of rape. The trial judge failed to instruct that the breaking must have been done with the intent to commit rape. The court seemed to believe that the jury might have overlooked the intent and convicted merely on breaking and entering, and therefore, found the error in the charge to the jury grounds for reversal.[13]

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10. Maxey v. State, 64 So.2d 677 (Fla. 1953).
11. Smith v. State, 65 So.2d 303 (Fla. 1953).
12. Gluck v. State, 62 So.2d 71 (Fla. 1952).
13. Gerds v. State, 64 So.2d 915 (Fla. 1953).

Molesters.—Both of the molester cases to reach the Supreme Court were reversed and new trials granted. One case[14] was reversed because the prosecutor said, "The time to stop a sexual fiend and maniac is in the beginning and not wait until some poor little child or some little girl [has] lost her life . . . or been mutilated."

In another case,[15] a new trial was granted because the jury was confused as to the defendant's mental status.

Miscellaneous

Three out of four convictions of assault were reversed. Seven out of ten convictions of crimes against property also were reversed.

Thirty-seven convictions involving gaming, narcotics, and liquor, were appealed. Twenty-five were reversed.

Illegal search and seizure.—Illegal arrest, illegal search and insufficiency of the evidence constituted a frequent ground for reversal. The driver of a car may of course be arrested for a traffic violation, and his car be searched, but not for an alleged violation.[16] The fact that the search produces illegal fruit will not validate the illegal search.[17]

An interesting reversal is *Scaglione v. State.*[18] The defendant was charged with being "connected" with a lottery, a felony under Florida Statutes Section 844.09. The evidence of the connection came from the defendant's own lips. The police had arrested some men with lottery tickets in their possession and were booking them, when the defendant arrived. He complained that the police were, as he put it, "pickin[g] on my men." Two officers testified to this. The jury believed them and handed down a conviction. This conviction was reversed for insufficient evidence.

Procedure

Juries.—The twenty-three person grand jury in large counties has been validated.[19] Requiring a negro juror to eat in an alcove away from the rest of the jury was reversible error.[20] A juror convicted of a crime, but pardoned, is not disqualified from service on the jury.[21] Tampering with a jury is a sufficient ground for declaring a mistrial, so a subsequent trial for the same offense was not double jeopardy.[22] But it was error to declare

14. Stewart v. State, 51 So.2d 494 (Fla. 1951).
15. 51 So.2d 725 (Fla. 1951).
16. Burley v. State, 59 So.2d 744 (Fla. 1952).
17. Brown v. State, 62 So.2d 348 (Fla. 1953).
18. 62 So.2d 453 (Fla. 1953).
19. Clein v. State, 52 So.2d 117 (Fla. 1950).
20. Cacciatore v. State, 49 So.2d 588 (Fla. 1950).
21. Story v. State, 53 So.2d 920 (Fla. 1951).
22. Larkins v. Lewis, 54 So.2d 199 (Fla. 1951).

a mistrial in a drunken driving case on the ground that the defendant's witnesses were vague, so a new trial constituted jeopardy.[23]

A principal was charged as an accessory in *Weathers v. State*.[24] This was reversible error since the defendant was present at the abortion.

Habitual criminals.—The validity of the sentence for habitual criminals[25] was considered in several cases. A life prisoner complained of improper sentence, since his third and fourth sentences were pronounced on the same day.[26] The court agreed with him, and with three others making the same claim.[27]

LEGISLATION

Subversive activities are penalized up to $20,000 in fine and/or 20 years in prison.[28] Murder in the first degree is enlarged to cover a killing in the attempt or consummation of an abominable crime or kidnapping[29] or as a result of tampering with trains or aircraft.[30]

Larceny has been re-defined to embrace acts which formerly constituted embezzlement.[31] The distinction between armed and unarmed robbery was wiped out.[32] Bribery was enlarged to include the bribing of appointees, and appointees of deputies.[33]

The wearing of masks except under certain circumstances was made a misdemeanor.[34] Both sessions of the legislatures dealt with the passing of worthless checks. Only the later need be noted. In this act,[35] the intent to defraud is not a part of the crime, thus facilitating convictions. To further discourage gambling, if communication facilities are removed from the premises because of gambling, a liquor license, if any, for the premises is suspended.[36] A duty has been imposed on public utilities to report to the Public Utilities Commission any use of their communication facilities in aid of gambling.[37]

The preoccupation of the legislature with the protection of children is evidenced by a number of acts. The irregular adoption of children is now made a felony[38] to curb the "baby-selling racket." Child Molester Acts

23. State *ex rel.* Wilson v. Lewis, 55 So.2d 118 (Fla. 1951).
24. 56 So.2d 536 (Fla. 1952).
25. FLA. STAT. § 775.10 (1951).
26. State *ex rel.* Reed v. Mayo, 61 So.2d 757 (Fla. 1952).
27. Rambo v. Mayo, 65 So.2d 754 (Fla. 1953); Hodges v. Mayo, 65 So.2d 750 (Fla. 1953); Copeland v. Mayo, 65 So.2d 743 (Fla. 1953).
28. Fla. Laws 1953, c. 28221.
29. FLA. STAT. § 782.04 (1953).
30. FLA. STAT. § 782.06 (1953).
31. FLA. STAT. § 811.02(1) (1951).
32. FLA. STAT. § 813 (1951).
33. FLA. STAT. § 838.02 (1953).
34. FLA. STAT. § 876.20 (1951).
35. FLA. STAT. c. 832 (1953).
36. FLA. STAT. § 561.29 (1951).
37. FLA. STAT. § 364.31 (1951).
38. FLA. STAT. § 72.40 (1951).

were passed in 1951[39] and 1953[40] approaching the problem from the curative rather than from the punitive point of view. The juvenile court was set up in 1951.[41] The Act was amended in 1953[42] to require the return of juveniles turned over for trial to the circuit court to the jurisdiction of the juvenile court, in the event of no action being taken there. Acts of non-feasance contributing to the delinquency of a minor are now penalized.[43]

Arrests may now be made without a warrant for acts of cruelty to children or animals.[44]

39. FLA. STAT. § 801.01 (1951).
40. FLA. STAT. § 801.02 (1953).
41. FLA. STAT. § 3901 (1951). See 6 MIAMI L.Q. 1 (1951).
42. FLA. STAT. § 39.02 (1953).
43. FLA. STAT. § 829.19 (1953).
44. FLA. STAT. § 828.17 (1953).