7-1-1958

Criminal Law

Edward Walterman

CRIMINAL LAW

*EDWARD WALTERMAN

Indictment and Information

In the case of *Gibbs v. Mayo*,[1] the defendant pleaded guilty to an information which charged that he unlawfully broke and entered "a motor vehicle" with the intent to commit grand larceny. The defendant was in due course adjudged guilty of the offense of breaking and entering a motor vehicle and sentenced to the state prison. The matter was reviewed by a writ of habeas corpus filed on behalf of Gibbs. The information had been based on Florida Statutes, section 860.12,[2] which refers to breaking and entering "any automobile, truck, trailer, etc." The question before the supreme court was whether the language of the information was sufficient to charge a crime under that statute. The court concluded that it was not, observing that to charge one with an offense defined by statute, the offense must be charged "in the very language of the statute, or in language of equivalent import" and "nothing can be taken by intendment." The court stated that the words "motor vehicle" used in the information were not the equivalent of, nor necessarily within the meaning of, any of the words describing the various vehicles mentioned in this statute. Therefore, a plea of guilty to an information charging that one unlawfully broke and entered into a motor vehicle, does not constitute a crime under the laws of Florida.

Search and Seizure

The case of *State v. Simmons*[3] involved an appeal by the state from an adverse judgment in proceedings instituted by it under Florida Statutes, section 849.12, for the forfeiture of $545.00 seized from the defendant, Simmons, which was allegedly used in conducting a lottery. The cause was tried by the trial judge without a jury. The state's witnesses testified that they had had Simmons under surveillance for alleged bolita activities after receiving information from an unknown source. On the afternoon in question they followed him for some time, saw him get into his car, start off at a terrific rate of speed, and after weaving in and out of traffic, make a sharp turn to the left without giving a turn signal, which caused other cars to come to a sudden halt. The witnesses, deputy sheriffs, then stopped the defendant and told him he was under arrest for reckless driving. One witness testified that he observed some bolita tickets on the front seat and a paper bag containing bolita pads and envelopes. The defendant was taken to the sheriff's office and charged with reckless driving and possession of bolita

*Lecturer in Law, University of Miami.

1. 81 So.2d 739 (Fla. 1955).
2. This statute has now been changed to Fla. Stat. § 810.051 (1957).
3. 85 So.2d 879 (Fla. 1956).

tickets. A "pay-off" sheet, several bolita tickets and $334.00 were found in the paper bag. The trial judge found that "both the arrest and the search of the person and property of Simmons was unlawful" and dismissed the complaint for forfeiture. The principal question on appeal was whether the trial judge erred in refusing to admit into evidence the bolita tickets, money, and other items seized from the defendant's car and person. The defendant contended that he was not guilty of reckless driving and that stopping his car at gun point and charging him with "reckless driving" was merely a subterfuge to search his car without a search warrant, in violation of his constitutional rights. The supreme court observed that the defendant was not only arrested for "reckless driving," but he was also arrested for possession of bolita tickets. The search of his person was made as an incident to his possession of bolita tickets and not as an incident to his arrest for a violation of traffic laws. The court concluded that the search of the defendant's person and the seizure of the gambling material found in his car and on his person was "a reasonable search" and that the lower court erred in refusing to admit the material into evidence.

Evidence

In *Albano v. State*,[4] appellant sought reversal of a judgment entered pursuant to the verdict of the jury finding him guilty of violations of the lottery laws. Two questions were involved: (1) Did the trial judge properly admit evidence of appellant's silence while in custody to accusations of witnesses who were alleged accomplices; (2) Did the trial judge properly charge the jury as to the weight to be given to the failure of the accused to deny his guilt? The two accusing witnesses had been apprehended and a search disclosed their possesison of bolita tickets and substantial sums of money. They informed the deputy sheriffs that they worked for Albano, who was thereafter arrested and taken to the county jail. There the two witnesses in Albano's presence again admitted their activities as salesmen, working for Albano, in the bolita business. Albano remained silent, although he had consistently denied any connection with the bolita activities. At the trial, testimony as to the defendant's silence to the accusations of the witnesses was admitted. In addition, both witnesses testified at great length about their activities as salesmen and pickup men for the defendant. There was other evidence tending to establish the guilt of the appellant. He offered no evidence in his own defense. Appellant contended that it was error to allow the evidence of his failure to deny his guilt when accused by witnesses in his presence, and that the trial judge should have instructed the jury that such evidence should be received with great caution. The supreme court, in sustaining the conviction, observed that it was committed to the rule that when one in custody is accused of a crime, and has full liberty to

4. 89 So.2d 342 (Fla. 1956).

speak or to remain silent in the presence of accusations, evidence of such silence may be considered with other facts and circumstances, as tending to prove his guilt. While silence alone raises no legal presumption of guilt, the jury, under proper instructions, may consider it in connection with other facts and circumstances as evidence of guilt. The trial court's refusal to charge on the probative force of this kind of evidence was error. The court observed that the defendant was entitled to such a charge and that if the state had relied for a conviction entirely, or even primarily, on the failure of the defendant to deny the accusations, it would have been inclined to reverse the judgment of conviction. However, the supreme court stated that the defendant's guilt had been conclusively established by other competent evidence; therefore, the error was harmless.[5]

The same rule received further consideration in the case of *Douglas v. State*.[6] The defendant had been convicted of murder in the first degree. One of the assignments of error related to the admission, into evidence over the defendant's objections, of statements made by the accused's father in the presence of the accused. A witness testified on behalf of the state about a conversation between the defendant and the defendant's father, Tom Douglas. This conversation occurred after the disappearance of deceased, but before discovery of his body. The witness testified as follows:

> Tom asked him, said, "Lamar, what did you do with Jack Johnson?" Lamar told him that he was still around and he said, "No, he ain't, you killed him, didn't you?" And Lamar said, "No he's around," and he took off.

The court after considering the rule of *Autrey v. State*,[7] concluded that the admission of this testimony clearly violated the *Autrey* rule. The court observed that there could not be a more definite and positive denial of guilt in answer to the question, "You killed him, didn't you?", than the reply given by the defendant, "No." The addition of the words, "He's around," was a further denial of guilt. The state relied upon the proposition that the rule admitting evidence of charges made to the defendant is applicable, notwithstanding the accused's prompt denial of guilt, if, in an attempt to avoid the effect of the accusation, the accused makes a statement calculated to deceive, or subsequently show to be false.

The court held that this interpretation had no application in the present case. The words, "he's around" were too vague an explanation of the rule.

---

5. This writer is impressed with the dissenting opinion of Associate Justice Milledge. He objected to the charge given by the trial judge, insofar as he instructed the jury to consider the defendant's silence as evidence of guilt, the weight thereof being for them to decide. The dissenting judge was of the opinion that the defendant was entitled to an instruction that silence alone raises no legal presumption of guilt, that such evidence must be received with great caution, for its probative force is not great, and that the jury should have been instructed that for such evidence to be given weight they would have to find that the defendant reasonably would be expected to deny the accusatory statements.

6. 89 So.2d 659 (Fla. 1956).

7. 94 Fla. 229, 114 So. 244 (1927).

That is to say the only way to prove the falsity of this statement was to prove the defendant guilty of the crime. The court observed that the accused's father apparently believed him guilty and accused him of the crime and that this was a circumstance of such a highly prejudicial nature that under the circumstances the harmless error rule could not be applied.

Right To Jury Trial

In *Floyd v. State*,[8] the record reflected that the defendant, under advice of counsel, waived his constitutional right to trial by jury. This counsel withdrew and other counsel was obtained by defendant. The latter counsel moved the court to withdraw the waiver of jury trial. The trial court denied the motion. Thereafter the cause proceeded to trial without a jury and the defendant was found guilt. In reversing the judgment, the supreme court said that the right of an accused to trial by jury is a fundamental right. The court conceded that the right to jury trial may be waived in all cases except where the penalty provided for the crime is death, and that the general rule is that a waiver of jury trial, once validly made, may be withdrawn only in the discretion of the trial court. But the court went on to say that the discretion to be exercised by the court in granting or denying such withdrawal is not an unbridled one, and it should be exercised liberally in all cases in favor of granting an accused the right to trial by jury. The rule is that the withdrawal of the waiver to a jury trial should be refused by a court only when it is not seasonably made in good faith or is made to obtain a delay. Where it appears that a harm will be done to the public, such as an unreasonable delay or interruption of the administration of justice, a waiver may also be denied. None of these reasons appeared in this case and the supreme court concluded that the denial of the motion to withdraw the waiver was an abuse of discretion.

Confessions

In *Rowe v. State*,[9] the defendant was convicted of a violation of the lottery laws.[10] The defendant objected to the introduction of his alleged confession on the ground that the state had not sufficiently established the corpus delicti so as to render the alleged confession admissible. The trial court overruled this objection, and admitted the alleged confession in evidence. The only evidence offered by the state to establish the corpus delicti was the testimony by an employee of the Bureau of Internal Revenue of defendant's payments of the federal wagering tax and the issuance to him of a stamp. The supreme court reiterated the established doctrine that the corpus delicti may be established by circumstantial, as well as direct evidence. There must, however, be sufficient evidence to establish it directly,

8. 90 So.2d 105 (Fla. 1956).
9. 84 So.2d 709 (Fla. 1955).
10. Fla. Stat. § 849.051 (1957).

or at least evidence from which a reasonable inference may be drawn that the violation has occurred. The court found that there was nothing in the testimony of the witnesses inferring a violation of the lottery law under which the defendant was charged, and that the most that could be inferred from the testimony was that the defendant must have been engaged in some form of wagering, in view of the fact that the federal tax had been paid. The payment of the tax by the defendant did not establish even prima facie, the operation of a lottery. The judgment of conviction was therefore reversed and the matter remanded for a new trial.

RIGHT TO OPEN AND CLOSE

In the course of the trial in *Birge v. State*,[11] the defense counsel during cross-examination of one of the state's witnesses, exhibited to the jury several shirts that had been taken from the defendant; however, the counsel did not offer the shirts into evidence. This was the only testimony adduced in behalf of the defendant. The trial court ruled that the defendant had, by the exhibition of the shirts, offered testimony in his behalf and had lost his right to open and close.[12] The supreme court reversed, stating that the mere exhibition by the defense counsel did not constitute introduction of testimony. The court pointed out that the counsel specifically stated he had no intention of offering the shirts into evidence and he could not properly have done so while the witness was under cross-examination. Consequently, there was no justification for denying appellant the right to have his counsel close the argument.

BAIL

In *Younghans v. State*,[13] the trial court had entered judgment of conviction, denied defendant release on bail pending appeal, and the defendant made application to the supreme court for bail. The court stated that admission to bail after conviction is not a matter of right, but rests in the judicial discretion of the trial court. However, the court went on to say that that determination ought to be predicated upon a given standard of judicial action. If the trial court is of the opinion that the appeal is taken merely for delay, then bail should be refused; but, if the appeal is taken in good faith, on grounds not frivolous but fairly debatable, then the petitioner should be admitted to bail. The purpose of bail is to secure the attendance of accused to answer the charge against him. When there are circumstances to indicate that if the accused were freed he would evade punishment if his conviction were affirmed, the trial judge may properly decide against the allowance of bail. Thus, in addition to the question of

---

11. 92 So.2d 819 (Fla. 1957).
12. FLA. STAT. § 918.09 (1957).
13. 90 So.2d 307 (Fla. 1956).

whether the appeal is taken "in good faith, on grounds not frivolous but fairly debatable," the trial judge ought to consider (1) the habits of the individual as to respect for the law, (2) his local attachments to the community by way of family ties, business or investments, (3) the severity of the punishment imposed for the offense and any other circumstances relevant to the question of whether the person would be tempted to remove himself from the jurisdiction of the court. The court suggested that in each instance the trial judge should state his reasons for denying bail. The cause was remanded to the trial court with directions to reconsider the application for bail in the light of these legal concepts.

Computation of Term

State ex rel Sitamore v. Kelly,[14] presented the following factual situation. On January 24, 1955, while serving a one year term in the state penitentiary, the appellant was transferred to the custody of the sheriff of Palm Beach County to await trial on the charge, of obtaining money under false pretenses, then pending against him in that county. He was held in county jail from January 24, 1955 to July 20, 1955, when he was released on bail.

The issue was whether the time spent in the county jail awaiting trial should be credited to the 1954 one-year sentence. The supreme court held that it should have been. It observed that a convict has a right to pay his debt to society by one continuous period of imprisonment. The court distinguished those cases in which the convict had agreed or acquiesced in the interruption of sentence.

Motion For New Trial

In *Russ v. State*,[15] the defendant had been convicted of first degree murder without recommendation of mercy. The judgment had been affirmed by the supreme court. Thereafter, the defendant presented a petition to the supreme court, seeking permission to apply to the trial court for the writ of error coram nobis. The petition was supported by an affidavit of petitioner's attorney. The petition alleged that after the jury had retired to the jury room for consideration of its verdict, and after the jury voted eight to four for a finding of guilty of murder in the first degree, with a recommendation of mercy, a member then stated openly to the entire jury that he could never accept such a verdict because he had personal knowledge that appellant has severly beaten the deceased victim on numerous occasions, and had threatened to kill the deceased victim a number of times. The juror further stated that deceased's father had shot the appellant because the appellant had beaten the deceased victim unmercifully on the day preceding the shooting. The petition stated that a second ballot following

14. 94 So.2d 726 (Fla. 1957).
15. 95 So.2d 594 (Fla. 1957).

that statement, and other questions and answers given by the jurymen, resulted in an unanimous verdict of guilty of murder in the first degree without a recommendation of mercy. The court stated that it was impressed with the good faith of the petitioner and that evidence to prove guilt may not be supplied by what a juror knows or believes independent of the evidence properly received in the course of the trial. If the facts, as alleged in the petition, were of such a character as to raise a presumption of prejudice, they showed that the jury in its deliberation considered statements of fact not properly before it. The court concluded that the proper remedy of the petitioner was by writ of error coram nobis and granted permission to apply to the trial court for the writ.

BURGLARY

In *Jalbert v. State*,[16] the defendant was convicted of breaking and entering a dwelling with intent to commit grand larceny. The evidence indicated that the defendant broke and entered a dwelling and took a small metal tray and a microphone. The supreme court in applying the rule that the unexplained possession of recently stolen goods raises a presumption that the possessor is the thief, concluded that there was sufficient evidence to sustain the finding of the lower court that defendant broke and entered the dwelling and took the tray and microphone. The state argued that the value of the stolen property was immaterial. It was the state's contention that the evidence established an intention on the part of the defendant to take anything of value that he could find in the dwelling. The supreme court observed that it was unable to determine why the defendant limited his thievery. However, the court was unwilling to state that because there was personal property worth in excess of $50.00 in the dwelling that the defendant intended to steal more than he did. Under the circumstances the best evidence of what he intended to steal was what he did steal. Consequently, the court concluded that the defendant had not been properly convicted of the charge of breaking and entering with intent to commit grand larceny; the court indicated that the evidence did warrant entry of a judgment for breaking and entering with intent to commit petit larceny.

LEGISLATIVE ENACTMENTS

The 1957 session of the Florida Legislature enacted a number of statutes dealing with the criminal law. Of most interest to attorneys, perhaps, is the enactment abolishing the distinctions between criminal principals in the first and second degrees and accessories before the fact, making them all responsible as principals in the first degree.[17]

---

16. 95 So.2d 589 (Fla. 1957).
17. FLA. STAT. § 776.011 (1957).

The legislature also greatly extended the definition of the crime of extortion to include therein threats to reputation and threats to expose another's secrets or to impute deformity or lack of chastity to other persons.[18]

The following statutes were also enacted: (1) A registration requirement for all persons convicted of a felony in any court of this state, in the federal courts, or in the courts of foreign states or countries;[19] (2) an amendment to the Florida food, drug, and cosmetic law to provide that it is unlawful to possess a habit forming, toxic, harmful or new drug, with exceptions;[20] (3) an amendment to the uniform narcotic drug law to strengthen state control over narcotics;[21] (4) a change in the value of property involved in the crime of petit larceny from fifty to one hundred dollars;[22] (5) an amendment to the traffic regulations, insofar as speed limits are concerned, on the streets and highways in the state of Florida, making the maximum legal speed on the highway sixty-five miles per hour.[23]

18. FLA. STAT. § 836.05 (1957).
19. FLA. STAT. § 775.13 (1957).
20. FLA. STAT. § 500.04(12) (1957).
21. FLA. STAT. c. 398 (1957).
22. FLA. STAT. § 811.021(3) (1957).
23. FLA. STAT. § 317.22 (1957).