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CASES NOTED

CRIMINAL LAW-PERJURY-ILLEGALLY PROCURED INDICTMENT AS BAR TO SUBSEQUENT TRIAL

Defendant was convicted of perjury committed while testifying in defense to a previous perjury indictment allegedly procured by the illegal conduct of the government. Held, that even if the former trial has been illegally procured, the court had jurisdiction over the crime and the defendant, thus the defendant was under oath to speak the truth and could not lie with impunity, and his perjurious statements could be subsequently prosecuted. United States v. Remington, 208 F.2d 567 (2d Cir.), cert. denied, U.S.L. Week 3209 (U.S. February 9, 1954).

Acquittal upon criminal prosecution is no bar to subsequent perjury prosecution if the falsity of the perjurious statement is not inconsistent with the innocence of the former crime.[1] There is a split of authority however, if a finding of perjury would import a contradiction of the verdict of not guilty. A majority of the courts hold former acquittal no bar to any perjury proceedings based on the former prosecution,[2] although conviction would necessarily import a contradiction of the verdict in the former case.

It has been held that where a court has the power to proceed to a determination of the subject matter on its merits, it is a "competent tribunal" within the meaning of the perjury statute,[3] even though the indictment initiating the action is quashed. Thus, the quashing of such indictment does not preclude subsequent prosecution for perjury at the trial held under the faulty indictment.[4]

Circuit Judge Augustus N. Hand, in the majority opinion,[5] draws the distinction, as does Judge Learned Hand, in the dissent,[6] between United States v. Williams[7] and the instant case, in that here the indictment was not quashed for merely failing to state a cause of action, but rather because the indictment was allegedly procured by official misconduct.[8] The court felt that the perjury was a separate crime, committed after the government's supposed wrong and hence within the purview of the aforementioned rule. Apparently the dissenting opinion took into consideration not only

1. State v. Reynolds, 164 Ore. 441, 100 P.2d 593 (1940).
2. *Contra:* Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944).
3. 18 U.S.C. § 1621 (1948).
4. United States v. Williams, 179 F.2d 644 (5th Cir.), *aff'd.* 341 U.S. 70 (1951).
5. United States v. Remington, 208 F.2d 567, 569 (2d Cir. 1954).
6. *Id.* at 571.
7. 179 F.2d 644 (5th Cir.), *aff'd.* 341 U.S. 70 (1951).
8. In order to examine the contentions of the defendant the court assumes the validity of the allegation without passing on it. The court said, "While we need not decide this question in view of our disposition of the appeal, it should be noted in passing that it is far from clear that the minutes of the first grand jury proceeding support a charge of 'undue influence' sufficient to make the first indictment illegal." See note 9 *infra.*

the wrongful acts in the grand jury proceedings,[9] but also the continued wrongful withholding of information by the government,[10] to conclude that to affirm the conviction would be to allow the government to profit from its own wrong.

It is apparently well settled that the government cannot use evidence illegally obtained from a defendant by the government against such defendant.[11] Judge L. Hand felt that it was therefore only a matter of degree to further hold that evidence wrongfully obtained from defendant's former wife while she was a witness, should not be used against the defendant in the instant case. He went on to say that the case would come under the doctrine promulgated in the Nardone case[12] and the Silverthorne case,[13] where,

9. Some of the wrongful acts contended by the defendant were as follows:
First, the prosecuting witness, Elizabeth Bentley, who had accused defendant of communist ties, depended for much of her income upon the success of a book containing this charge. It was alleged that such success depended in turn upon proving the denials of the defendant to be false. The questionable aspect of these facts concerns the possibility of collaboration between the foreman of the grand jury and the prosecuting witness, with the knowledge of the prosecuting attorney, to obtain an indictment, since the foreman was involved in editorial work for Miss Bentley and was allegedly to profit from the sale of her book, and the prosecuting attorney had been Miss Bentley's attorney in an action to recover $7,200 from the cover job she had held while she was acting as a spy.
Second, the first witness was the attorney who represented Miss Bentley in her defense of a libel action filed as an outcome of her charges by the defendant. Defendant settled out of court for $9,000 in February of 1950.
Third, in the five days of interrogating defendant, questions of a personal nature unrelated to the proceedings, and allegedly intended to prejudice the jury, were repeatedly asked.
Fourth, Ann Remington, defendant's former wife, who came early in the day to the grand jury hearings was questioned for over four hours and denied an opportunity to rest or eat. She stated she was tired and hungry and getting "fuzzy" but the foreman only repeated that she must answer his question and then theycould all go. Justice L. Hand stated the facts as follows, "Brunini [the jury foreman] not only threatened her with contempt proceedings but expressly told her that she had no privilege [i.e. to refuse to discuss confidential communications between herself and her husband]. His language is worth repeating: 'Now, I have already pointed out to you that you have a question from the Special Assistant to the Attorney General: Did your husband or did he not give this money to the Communist Party? *You have no privilege to refuse to answer the question.*' Read literally, that was true; but, read as the witness must have understood it — that is, whether her husband had not told her so — it was altogether false. I do not intimate that Brunini, a layman, thought it false; but Donegan [the Special Assistant to the Attorney General] was present and he did not intervene to correct the mistake."

10. The government had notice of the relationship between the grand jury foreman and the prosecuting witness, yet made no mention of this fact until the defendant learned of it from another source. Further the government opposed the attempts of defendant to prove these facts at the trial. That the United States Attorney was under a duty to state and true facts, rather than assuring the trial court, as he did, that there had been "an utter absence of irregularity" in the grand jury proceedings see Berger v. United States, 295 U.S. 78 (1935) and Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950). The actions of the government seem to be a continuous wrong even after the grand jury hearing.

11. McNabb v. United States, 318 U.S. 332 (1943) (inadmissability of confession, wrongfully induced, from Tennessee moonshiner charged with shooting an Internal Revenue agent of the Alcohol Division).

12. Nardone v. United States, 308 U.S. 338 (1939) (inadmissability of evidence obtained by wire-tapping;) *overruled* Olmstead v. United States, 277 U.S. 438 (1928). See also United States v. Bonanzi, 94 F.2d 570 (2d Cir. 1938); Gouled v. United States, 255 U.S. 298 (1921); Weeks v. United States, 232 U.S. 383 (1914); Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920).

13. Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920). See also Weeks v. United States, 232 U.S. 383 (1914) (cited by Justice Holmes in the Silverthorne case).

in the latter, Justice Holmes stated, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed." Judge L. Hand concluded, "I do not see any difference in principle between obtaining the first indictment by the unlawful extraction of evidence, necessary to its support, and obtaining a document by an unreasonable search."

Another issue raised by the defense and supported by the dissent was that of entrapment. This defense has been defined as follows: "When the criminal design originates, not with the accused, but it is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefore."[14] The point being that the defendant had to repeat the alleged perjurious statements made in the grand jury hearings or else admit the charge against him. Thus the government induced the defendant to perjure himself by securing an indictment for perjury against him by illegal means, when they knew he must inevitably repeat the perjury in his defense, but without the procuration of the indictment there could have been no perjurious statements. The court, however, rejected this rather broad interpretation of entrapment and added that it was inconceivable, to the court at least, that the government would deliberately procure a false indictment in the hope of later obtaining perjurious statements at the trial since such statements could be more easily procured in a new grand jury proceeding.

Although the entrapment argument does not seem very forceful, in the light of the cogency of the argument that the doctrine of the Silverthorne case[15] is applicable, as well as the repugnance to public policy of the perhaps illicit or at least questionable actions of the government, the dissenting opinion seems to contain a more accurate appraisal of the law involved.

Barton S. Udell

JURIES-VERDICTS-AFFIDAVITS NOT PERMITTED TO IMPEACH

The defendant was found guilty of rape. After trial a juror's affidavit revealed that, although convinced of the defendant's innocence, he failed to object to the verdict because of a mistaken belief that a majority vote of

14. Sorrells v. United States, 287 U.S. 435 (1932). See also Butts v. United States, 273 Fed. 35 (8th Cir. 1921).
15. 251 U.S. 385 (1920).