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Criminal Law—Extortion Without Direct Assertion of Force

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"carved out an area of refusal" such that the District Attorney necessarily knew, ahead of time, that the refusal would be reiterated after each question.

The holding in this case serves as an effective shield for a witness who would otherwise find himself charged with criminal contempt just as often as an ingenious prosecutor was able to think of a new way of approaching the object of his questioning.

Similarly in *Yates v. United States*,[43] where the defendant refused to answer eleven questions about the membership of her friends in the Communist Party on the ground that to do so would hurt them and their families, the U. S. Supreme Court held that a prosecutor might not multiply contempts by repeated questioning on the same subject of inquiry about which a recalcitrant witness had already refused answers.

The Court in the instant case distinguished the refusal of a witness to answer questions in a certain area which the prosecutor knows will go unanswered, from the bonafide interrogation of the District Attorney in *People v. Saperstein*,[44] wherein the defendant refused to tell who were the persons with whom he had spoken in five different telephone conversations. According to the Court in the instant case, the prosecutor in the *Saperstein* case had to continue questioning in order to find the limits of the defendant's refusal to answer. After a witness's refusal to answer an initial question we are thus left with the anomaly that the criminality of his subsequent refusal to answer depends not on the witness's intent but upon that of the prosecutor. Of course a witness may avoid this simply by spelling out after his first refusal the precise extent to which he is in contempt of court, but such a course of action might reveal precisely what he is attempting to conceal.

A better rule, perhaps implicit though unarticulated in the instant case, is that a witness may be adjudged guilty of contempt only once for each general subject concerning which he refuses to testify.

Extortion Without Direct Assertion of Force

In *People v. Dioguardi*[45] the defendants were convicted upon a jury verdict for extortion and conspiracy to extort. The Appellate Division reversed the judgments of conviction on the facts and on the law and dismissed the indictment.[46] On appeal to the Court of Appeals,[47] the Court, examining the testimony from the point of view most favorable to the people, had to determine as a question of law whether there was a question of fact regarding defendants' guilt which should have been let to the jury and not been disposed of by the Appellate Division.[48] The Court of Appeals held that such a question of fact

43. 355 U.S. 66 (1957).
44. 2 N.Y.2d 210, 159 N.Y.S.2d 160 (1957).
45. 8 N.Y.2d 260, 203 N.Y.S.2d 870 (1960).
46. 8 A.D.2d 426, 188 N.Y.S.2d 84 (1st Dep't 1959).
47. N.Y. Code of Crim. Proc. § 519.
48. People v. Bellows, 281 N.Y. 67, 22 N.E.2d 238 (1939).

existed and reversed the judgment of the Appellate Division, reinstated the indictment, and ordered a new trial.

Four unions were attempting to organize the Kerin corporations, and a picket line was established across the entrance of the company. Since the wholesale stationery and office supply business, in which the Kerins were engaged, was highly competitive, and any cessation of deliveries would force them out of business, Mr. Kerin instructed his attorney, Coogan, to attempt to solve the labor problem. Coogan met with one McNamara, a defendant in the present action, who agreed to do something about the pickets at a cost of between five and ten thousand dollars. Although infuriated at the exorbitant price tag, Kerin agreed to talk to McNamara in order to prevent the closing of his business. At that meeting McNamara promised these problems would cease if Kerin would instruct his employees to join McNamara's Local 295, pay to Equitable Research Associates, Inc., a "front" organization for the activities of Defendant Dioguardi, $3500 to defray the expenses the various unions had incurred in trying to organize the company, and retain Equitable as a labor consultant at $200 per month. Kerin objected strenuously to the payment of $3500, but was told to pay it or be harassed by constant picket lines. On the following work day, no pickets appeared, and Kerin signed the agreements with McNamara and Equitable. The evidence showed that all the Kerin payments were deposited by Equitable and withdrawn immediately after deposit by Dioguardi as "salary."

Extortion is the obtaining of property of another, with his consent, through a wrongful use of fear which is induced by an oral or written threat to do an unlawful injury to the person or property of the individual threatened.[49] Clearly present in this action were the fear, the unlawful device to inflict injury, and the property threatened, all necessary to prove extortion. Kerin was fearful of having to close his business because of the picketing. The picketing, which may have been completely legal in the beginning, even though it could have caused the ruination of the business, became unlawful when it was employed as a means to extort money from Kerin. The profits of a business are property within the meaning of Section 851 of the New York Penal Law.[50] The only question remaining was whether the defendants actually "threatened" the victim. The Appellate Court, relying on *People v. Rollek*,[51] found that in order to constitute extortion the evidence must show a threat by the extortionist which creates fear in the person threatened. In the present case, the prosecution failed to show that the defendants threatened Kerin so as to create the fear in his mind. No express evidence of the defendants' placing the pickets at the company or their controlling them was offered.

49. N.Y. Penal Law §§ 850, 851.

50. People v. Weinseimer, 190 N.Y. 537, 83 N.E. 1129 (1907), affirming 117 App. Div. 603, 102 N.Y. Supp. 579 (1st Dep't 1907); People v. Hughes, 137 N.Y. 29, 32 N.E. 1105 (1893); People v. Barondess, 133 N.Y. 649, 31 N.E. 240 (1891).

51. 280 App. Div. 437, 114 N.Y.S.2d 85 (4th Dep't 1952), aff'd 304 N.Y. 905, 110 N.E.2d 735 (1953).

The Court of Appeals rejected this theory of the extortionist having to create the fear. So long as a fear existed in the minds of the prospective victims, and the defendants used that pre-existing fear to extort tribute, the jury could find the necessary ingredients of extortion. Whether these defendants were in fact union officials, and whether they did in fact form and control the pickets were immaterial, as long as the jury was warranted in finding that the defendants professed to the employer of their control over the picketing, and that the employer was reasonable in believing the defendants.[52] It is true that in this action, if necessary, the jury could have found actual control over the picketing by the defendants, for before any money was paid, the picketing ceased, and such control to end the picketing indicates the power to continue it.

The defendants also argued that the crime committed was not extortion, but bribery of a labor representative, which is a felony under New York law.[53] The essence of bribery is voluntary giving, and the essence of extortion is giving under duress.[54] The two crimes are mutually exclusive, for succumbing to extortion is not a crime; whereas, succumbing to bribery is. The jury was charged that if it believed, as the defendants argued, that Kerin was guilty of bribery, then the defendants could not be guilty of extortion.[55] The determination of this isuue is solely a question of fact, and it cannot be said that, as a matter of law, the jury could not possibly find the defendants guilty of extortion.

ALCOHOLIC CONTENT OF DRINK SUBJECT OF CIRCUMSTANTIAL PROOF

In *People v. Leonard*[56] the State charged defendant, the proprietor of a tavern, with causing an alcoholic beverage to be served to a boy under eighteen.[57] Defendant was convicted by a Court of Special Sessions, after a jury trial, but such conviction was reversed by the County Court. The Court of Appeals reversed the County Court.

Defendant's employee took the boy's order which was for rye and ginger ale. Defendant, who was tending bar, made a drink and defendant's employee then served it to the boy. He tasted the drink but did not testify as to what it contained. The boy had with him three companions, all under eighteen, who also allegedly ordered alcoholic beverages but their presence was not of significance because the crime charged was for serving only the one boy.

52. United States v. Varlack, 225 F.2d 665 (2d Cir. 1955); Callahan v. United States, 223 F.2d 171 (8th Cir. 1955), cert. denied 350 U.S. 862 (1955).

53. N.Y. Penal Law § 380.

54. Horstein v. Paramount Pictures, 22 Misc. 2d 996, 37 N.Y.S.2d 404 (Sup. Ct. 1942), aff'd 226 App. Div. 659, 41 N.Y.S.2d 210 (1st Dep't 1943), aff'd 292 N.Y. 468, 55 N.E.2d 740 (1942).

55. People v. Feld, 262 App. Div. 909, 28 N.Y.S.2d 796 (2d Dep't 1941).

56. 8 N.Y.2d 60, 201 N.Y.S.2d 509 (1960).

57. N.Y. Alcoholic Beverage Control Law § 65(1):
No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to (1). Any minor actually or apparently, under the age of eighteen years; . . . .