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Constitutional Law—Sufficient Specification of Criminal Acts: "Loitering"; "Barbiturate Prescriptions"

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without changing the New York rule of evidence in any manner,[33] Kiernan's confession may be determined involuntary, as a matter of law.[34]

It is true, as the New York Court of Appeals notes,[35] that Wade testified at the trial while Kiernan did not. Kiernan, having a criminal record, obviously chose to rely upon the evidence of involuntariness illicited from other witnesses rather than place himself in the worst possible light before the jury by having this record revealed through the certain attempt of the district attorney to impeach him. The decision of the federal courts will not rest upon Kiernan's failure to testify, but upon his rebutting the State's evidence of voluntariness, with evidence however adduced.

SUFFICIENT SPECIFICATION OF CRIMINAL ACTS: "LOITERING"; "BARBITUATE PRESCRIPTIONS"

In order to validly impose criminal liability, a statute must, on its face, inform the public of the acts to be avoided.[36] This general standard, laid down in *United States v. Brewer*, has consistently been followed in New York.[37] Twice during the 1958 term, the New York Court of Appeals was called upon to determine the validity of statutes challenged on the ground they were not sufficiently informative as required; one concerned with barbituate prescriptions,[38] the other with loitering.[39]

A provision of the Sanitary Code of the City of New York was attacked in *People v. Caswell-Massey Co.*[40] The challenged section provided in its first subdivision that telephonic barbituate prescriptions could be filled without ever being reduced to writing; in its third subdivision, that prescriptions for barbituates may not be refilled unless the original contains authorization in writing to do so. Reasoning from the impossibility of there being written authorization in an oral prescription, while refill of barbituate prescriptions is allowed under subdivision three generally, the majority (4-3) struck the provision as confusing to the ordinarily intelligent person.

The dissent insists there is no confusion about what is prohibited by the statute. Notwithstanding that a telephonic prescription, never reduced to writing, is valid and lawful, no original prescription not containing express written authorization for refilling, may be refilled.

Conceding the validity of the dissent's argument, there remains the instance of an original prescription, in whatever form, reordered orally by the same physician for the same patient, the instance, in fact, upon which the *Caswell-Massey* case arises. Recognizing that the court is striking this statute

33. That embodied in Section 395, N.Y. CODE CRIM. PROC.
34. Malinski v. New York, *supra*.
35. People v. Kiernan, *supra* at 276, 189 N.Y.S.2d 215, 217.
36. United States v. Brewer, 139 U.S. 278 (1891).
37. People v. Vetri, 309 N.Y. 401, 131 N.E.2d 568 (1955); People v. Firth, 3 N.Y.2d 472, 168 N.Y.S.2d 949 (1957).
38. People v. Caswell-Massey Co., 6 N.Y.2d 497, 190 N.Y.S.2d 649 (1959).
39. People v. Johnson, 6 N.Y.2d 549, 190 N.Y.S.2d 694 (1959).
40. *Supra* note 38.

because of uncertainty upon its face, and not because it was invalidly applied, the majority decision seems to rest, though it is not clearly articulated, upon the fact that the section in question does not proscribe the "refilling" in such circumstances with the sufficiency required by the *Brewer* case.[41]

On the same day it decided the *Caswell-Massey* case, the Court in *People v. Johnson*,[42] upheld Section 722-b,[43] of the New York Penal Law. Defendant argued that the use of the words "loiter," or "loitering," alone, were insufficient to describe the acts made criminal by the statute.

In 1953, the Court, in *People v. Bell*,[44] upheld a provision of the New York Penal Law which provided:

> Any person who loiters about any toilet, station or station platform of a subway or elevated railway or of a railroad, or who is found sleeping therein or thereon and who is unable to give satisfactory explanation of his presence is guilty of an offense.[45]

Both the majority and the dissent in the *Bell* case, agreed that if the section had ended without the proviso, ". . . and who is unable to give satisfactory explanation of his presence . . . ," its validity would be unquestionable for the word "loiter" had taken on a definite meaning by long statutory usage.[46]

In 1958, however, the Court struck the "loitering" ordinance of the City of Dunkirk in the case of *People v. Diaz*,[47] the statute providing simply, "No person shall lounge or loiter about any street or street corner in the City of Dinkirk." In declaring the ordinance void, the Court said, "while the term loiter . . . has by long usage acquired a common and accepted meaning, it does not follow that by itself, and without more, such term is enough to inform a citizen of its criminal implications. . . ." The Court further explained its position by reference to the New York Penal Law, wherein "loiter" was used to "point up" the prohibited act, *viz:* with the intent to commit a breach of the peace or whereby a breach of the peace is committed.[48] Used in this manner, the term becomes significant and convictions will not be reversed for lack of clarity as to the act proscribed.[49] Since "loitering," by definition, may include innocent conduct, the Court concluded that the Dunkirk ordinance,

41. *Supra* note 36.
42. *Supra* note 39.
43. N.Y. PEN. LAW § 722-b:
Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct.
44. People v. Bell, 306 N.Y. 110, 115 N.E.2d 821 (1953).
45. N.Y. PEN. LAW § 1990-a(2).
46. The majority holds the clause beginning ". . . and who is unable . . . ," is merely a procedure for determining whether the suspect is legitimately present, and does not affect the substance of the provision.
47. People v. Diaz, 4 N.Y.2d 469, 176 N.Y.S.2d 313 (1958).
48. N.Y. PEN. LAW § 722.
49. People v. Galpern, 259 N.Y. 279, 181 N.E. 572, 83 A.L.R. 785 (1932); People v. Gaskin, 306 N.Y. 837, 118 N.E.2d 903 (1954).

using the word "loiter" alone, did not establish a sufficiently specific standard of criminality.

From the point of view of the *Diaz* case, it is difficult to see how the Court could uphold Section 722-b attacked in *Johnson,* which similarly proscribes only, "loitering." No other words of Section 722-b purport to further define the act; no distinction between innocent conduct and conduct calculated to harm, both embraced in the term "loiter," is made. If Section 722-b is to be upheld, it must be on the rationale of the *Bell* case, that the nature of the place where loitering is prohibited is such that all, and any, manner of "loitering" may be prohibited. In both *Bell* and *Johnson,* unlike *Diaz,* the legitimate purposes of the place at which loitering was proscribed are limited. The clear intent of the legislature in the former cases is to insure that no other activities are there pursued.[50] In these circumstances, a distinction perhaps not clearly made by the court, statutes which proscribe "loitering" without further definition seem to sufficiently specify that which is made criminal.

Analysis of the *Caswell-Massey* case, and the *Johnson* case, reveals a further following of the principle enunciated in *Brewer.* In each case, the Court faced the question of whether the statute clearly reached the type of activity in which the defendant was engaged, and did so in words which, read in context, leave no doubt that his conduct is proscribed. The Courts' articulation of its reasoning may be open to some criticism, however, particularly in the *Johnson* case. After the *Diaz* case in 1958, it would appear that a "loitering" statute had to distinguish innocent from harmful conduct. Although the Court distinguishes *Johnson* from *Diaz* on grounds of the *locus* of the act, that distinction seems insufficient to vary the result of *Diaz* unless it is further made clear that the manner of loitering is not significant in all situations, *viz: People v. Bell.*[51]

CONSTITUTIONAL RIGHT TO APPELLATE REVIEW IN FORMA PAUPERIS

Appellant was convicted of first degree manslaughter.[52] The minutes of the trial were not filed pursuant to Section 456 of the Code of Criminal Procedure.[53] While incarcerated, defendant prosecuted an appeal to the Appellate Division, *in forma pauperis,* and for assignment of counsel. No record of the trial was available to him, nor to the Appellate Court. The appeal was dismissed, since no record or brief had been filed with the court, and there

50. ". . . and who is unable to give satisfactory explanation of his presence. . . ." N.Y. PEN. LAW § 1990-a(2), *supra;* "Any person not the parent or legal guardian of a pupil . . . ," ". . . without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof. . . ." N.Y. PEN. LAW § 722-b, *supra.*

51. *Supra* note 44.

52. People v. Pitts, 6 N.Y.2d 288, 189 N.Y.S.2d 650 (1959).

53. Section 456 provides;

> that upon a defendant's conviction for a crime, the court clerk, within two days after notice of appeal has been served upon him, shall notify the stenographer that an appeal has been taken. The stenographer shall within ten days of such notice deliver to the clerk a copy of the stenographic minutes of the trial which shall be filed in the clerk's office.