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Evidence—Indictment Dismissed Where Based On Evidence Illegally Submitted to Grand Jury

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the indictment and to offer proof of such conviction did not constitute reversible error.

The traditional or common law rule permitted establishing a previous conviction of a defendant by alleging it in the indictment and proving it as an element of the People's case. In 1926, Section 1943 of the Penal Law was enacted.[6] This Section enabled attention to be brought to the prior conviction subsequent to sentence or conviction thus differing from the common law rule to that extent.

The Court, in *People v. DeSantis*,[7] held Section 1943 to be only an alternative procedure and therefore the common law method of alleging the prior conviction in the indictment could still be followed. However, when the Legislature, following a suggestion of the dissent in the *DeSantis* case,[8] enacted Section 275(b), the common law rule was limited to a considerable extent. The prior conviction in the *DeSantis* case affected only the punishment, upon conviction for a subsequent felony. Therefore, Section 275(b) did away with the common law practice of alleging prior convictions in the indictment where such past conviction affected only the punishment.

The Court of Appeals distinguished the present case from the *DeSantis* case. It stated that aside from punishment, there are other serious consequences involved where a prior conviction changes the crime from a misdemeanor to a felony (such as punishing accessories) and concluded that the case clearly fell within the exception of Section 275(b).

It appears that the reason for the exception to Section 275(b) is that where, as here, the prior conviction is an element of the crime or offense, in order to enable a person to properly defend the charge against him, it must be alleged in the indictment.

INDICTMENT DISMISSED WHERE BASED ON EVIDENCE ILLEGALLY SUBMITTED TO GRAND JURY

The evidence which may be presented to the Grand Jury is prescribed by law and is strictly limited to legal evidence.[9] In the case of *People v. Peetz*[10] an indictment was issued by the Kings' County Grand Jury charging defendant with the crime of second degree manslaughter in that while in the "heat of passion" defendant threw his infant son into a baby carriage thereby inflicting fatal injuries. The facts presented to the Grand Jury established that when defendant

6. N.Y. Penal Law § 1943:
If at any time, either after sentence or conviction, it should appear that a person convicted of a felony has previously been convicted of crimes as set forth in sections 1940, 1941 and 1942, it shall be the duty of the District Attorney . . . to file an information accusing the said person of such previous convictions.

7. 305 N.Y. 44, 110 N.E.2d 549 (1953).

8. N.Y. State Legis. Annual (1957) at 51-52. The dissent of Judge Fuld in the DeSantis case indicated that the practice of charging prior felony offenses in the indictment is unfair and prejudicial and should be outlawed.

9. N.Y. Code Crim. Proc. § 249.

10. 7 N.Y.2d 147, 196 N.Y.S.2d 83 (1959).

arrived home from work his wife was not dressed in a suitable manner. He was annoyed and a discussion ensued, during which defendant took his two month old child from his wife and dropped the child a foot and a half into the carriage. The child died as a result of a skull fracture suffered when his head struck a baby bottle lying in the carriage. Defendant moved to dismiss the indictment following an inspection by the Court of the Grand Jury minutes and the motion was denied. At the termination of the People's case, he again moved for a dismissal of the indictment based upon a failure of the People to prove a prima facie case; this motion was also denied. Defendant then pleaded guilty to assault in the second degree, and the conviction was affirmed by the Appellate Division.[11] The Court of Appeals, however, reversed the judgment of conviction and dismissed the indictment finding that the legal evidence before the Grand Jury was insufficient, as a matter of law, to establish that defendant acted in the "heat of passion" necessary to support this indictment of manslaughter in the second degree.

If evidence is presented to the Grand Jury which is legally inadmissible, and the remaining legal evidence before the Grand Jury lacks the probative weight necessary for an indictment, then, if an indictment has been found, it shall be dismissed by the courts.[12] Legal evidence alone may be presented to the Grand Jury,[13] and legal evidence shall be that which is admissible in a jury trial.[14] Only where there is sufficient legal evidence upon which the Grand Jury may have based the indictment, after exclusion of the illegal evidence, will an indictment be sustained. The Grand Jury is only warranted in issuing an indictment when the valid legal evidence as presented to it, if unexplained or uncontradicted, would be sufficient for a finding of guilty by a trial jury.[15] The right of an accused to move for the dismissal of an indictment because of the insufficiency of the evidence or the use of illegal evidence before the Grand Jury has been held to be a constitutional one in New York.[16]

The decision of the Court of Appeals was based on the fact that illegal evidence had been presented to the Grand Jury, and with this evidence excluded, the remaining evidence failed to establish the pivotal element of the crime of manslaughter in the second degree, viz., that the homicide be committed "in the heat of passion". The illegal evidence presented to the Grand Jury was a prior statement purported to have been made by defendant's wife, which was unsworn and inconsistent with her direct testimony before the Grand Jury. Through this statement the People sought to establish that defendant had been in a rage and was acting in the heat of passion when he took his child from his wife and placed him in the carriage. This was the only evidence before the

11. 7 A.D.2d 999, 184 N.Y.S.2d 82 (2d Dep't 1959).
12. People v. Sweeney, 213 N.Y. 37, 106 N.E 913 (1913).
13. N.Y. Code Crim. Proc. § 249.
14. Application of Cole, 208 Misc. 697, 145 N.Y.S.2d 748 (Ct. Gen. Sess. 1955).
15. N.Y. Code Crim. Proc. § 251.
16. People v. Sexton, 187 N.Y. 495, 80 N.E. 396 (1907).

Grand Jury from which it could reasonably be found that defendant was acting in the "heat of passion". The statement was not offered in evidence, nor did the People seek to prove the statement by the stenographer who had taken it. It does not appear that the Grand Jury was instructed prior to their deliberations to disregard this statement and it is very probable that the indictment was based upon it. Prior unsworn statements have no substantive weight, are illegal evidence and should not be presented to the Grand Jury.[17] Although it is up to the judgment of the Grand Jury to determine when it should return an indictment,[18] still if the legal evidence before that body does not establish the commission of a crime it would not be justified in finding a true bill.[19]

A homicide when committed without a design to effect death, while in the heat of passion, but not by a dangerous weapon or the use of means either cruel or unusual constitutes manslaughter in the second degree.[20] The "heat of passion" element of the crime has been referred to as ". . . a state of mind where overpowering emotions obscure reason, producing impulsive actions as distinguished from voluntary conduct".[21] In the present case there was evidence before the Grand Jury by the defendant's own statement that he was "annoyed" and that he and his wife had had a "discussion" but it hardly seems plausible that these terms could be construed as acting "in the heat of passion" for this is a far cry from the normal meaning of those words and not within the realm of that state of mind as considered by the cases.[22] It is true that heat of passion as a state of mind must often rest upon inferences made by the jury,[23] but this is not to say that the finding may rest upon suspicions or conjecture. The Court herein held that without the illegal evidence there was clearly not enough to establish "heat of passion."

The remaining arguments of the People, (1) that evidence was produced on trial which would be sufficient to justify a conviction and, (2) that defendant pleaded guilty to assault in the second degree, must be given summary consideration. First, if an indictment is defective because it has been granted upon insufficient or illegal evidence, and a motion to dismiss the indictment has been properly made, then the indictment must be dismissed and the fact that upon

17. People v. Ferrara, 293 N.Y. 51, 55 N.E.2d 861 (1944); Roge v. Valentine, 280 N.Y. 268, 20 N.E.2d 751 (1939).

18. People v. Eckert, 2 N.Y.2d 126, 157 N.Y.S.2d 551 (1956).

19. Ibid; People v. Lewis, 275 N.Y. 33, 9 N.E.2d 765 (1937).

20. N.Y. Penal Law § 1052.

21. People v. Peetz, supra note 10 at 151, 196 N.Y.S.2d 86 (1959). "There was evidence of a quarrel, an assault, a lengthy and exciting chase, and firing of several shots. We are unable to say that there was no evidence of heat of passion . . . ." People v. Nicoll, 3 A.D.2d 64, 78, 158 N.Y.S.2d 279, 290 (4th Dep't 1956).

22. People v. Lewis, 282 App. Div. 267, 123 N.Y.S.2d 81 (3d Dep't 1953). "The heat of passion, in this definition, means something more than anger or irritation. It means that at the time of the act the reason is disturbed or obscured by passion which might render ordinary men of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment." Ryan v. State, 115 Wisc. 488, 492, 92 N.W. 271, 275 (1902).

23. People v. Lewis, supra note 22.

the trial evidence was produced which would have been sufficient for conviction cannot alter this result.[24] Secondly, where defendant properly moves for a dismissal of the indictment which should have been granted, a subsequent plea of guilty to a lesser charge shall be considered as null and void.[25]

ADMISSIBILITY OF PRIOR PLEA OF GUILTY TO TRAFFIC INFRACTION IN SUBSEQUENT CIVIL ACTION.

May a defendant's prior plea of guilt to a traffic offense be introduced as evidence of his carelessness in a civil action for damages?

This was precisely the question the Court of Appeals was faced with in *Ando v. Woodberry*[26] and it was one of first impression in that Court.

Upon the trial plaintiff sought to prove the plea of guilty by the defendant on the ground that such plea was an admission against interest but the trial court excluded the proffered evidence,[27] and such exclusion was upheld by the Appellate Division.[28] However, the Court of Appeals held otherwise, stating that the defendant's prior plea of guilty to the traffic offense should have been received as evidence of his asserted negligence.[29]

It has been held in lower courts of this state that evidence of conviction on a plea of guilty to violation of traffic laws is admissible against the defendant in a civil action. The reasoning is that in such a case the record or proof of the defendant's plea of guilty is received not as a judgment establishing a fact or truth of the facts in support of the charge of negligence, but as a declaration or admission against interest.[30]

"All facts showing rational probative value are admissible unless there is sound reason to exclude them, unless, that is, some specific rule forbids."[31] Is there any justification for excluding the prior plea of guilty to a traffic infraction?

The defendant claimed there was, arguing that there is a public policy which requires the court to treat the admission implicit in pleading guilty to a traffic offense differently from others. He stated that a plea of guilt is entered in traffic court for numerous reasons unrelated to guilt. It was contended that one charged with a traffic violation pleads guilty, even though he believes himself innocent, in order to avoid the expenditure of time and money

24. People v. Nitzberg, 289 N.Y. 523, 47 N.E.2d 37 (1943).
25. People v. Chirieleison, 3 N.Y.2d 170, 164 N.Y.S.2d 726 (1957). Here defendant, indicted for robbery in the first degree, moved for a dismissal of the indictment because of undue delay. It was denied. He pleaded guilty to petty larceny and appealed. The Court of Appeals reversed the conviction and dismissed the indictment.
26. 8 N.Y.2d 165, 203 N.Y.S.2d 74 (1960).
27. 15 Misc. 2d 774, 181 N.Y.S.2d 905 (Sup. Ct. 1958).
28. 9 A.D.2d 125, 192 N.Y.S.2d 414 (1st Dep't 1959).
29. Supra note 26.
30. Stanton v. Major, 274 App. Div. 864, 82 N.Y.S.2d 134 (3d Dep't 1948); Same v. Davison, 253 App. Div. 123, 1 N.Y.S.2d 374 (4th Dep't 1937); McDowell v. Birchett, — Misc. —, 126 N.Y.S.2d 78 (Sup. Ct. 1953).
31. Wigmore, Evidence 293 (3d ed. 1940).