Buffalo Law Review

Volume 4 | Number 1 Article 33

10-1-1954

Criminal Law—Statutes

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Recommended Citation
J. A. Guzzetta, *Criminal Law—Statutes*, 4 Buff. L. Rev. 64 (1954).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol4/iss1/33

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ness or other obligation owed by the drawer to the agency, there was no intent to confer a proprietary interest in the agency. The bank did in fact intend that the check be used for a specific purpose, but the existence of such a condition could not effect the rights of an innocent third party.[62] When the agency refused to accept the check, the endorsement to the agency no longer had any legal signifiance.[63] Hence, there was no basis for an assertion of forgery, since an unauthorized signature is significant only if the person seeking to enforce payment has acquired title "through or under such signature."[64]

The court then found that having the power to negotiate, the payees had in fact done so. After the agency refused to accept the check, the payees elected to treat the endorsement as "fictitious" and thus transformed the instrument into bearer paper.[65] The court noted that while this is known as the "fictitious payee doctrine" it applies as well to indorsees. The only operative factor is the intent of the indorser or drawer,[66] and since he could easily have made the check payable "to bearer," the law regards him as having done so.

The case may well be regarded as a caveat to those who issue negotiable paper to choose carefully the form in which that paper is issued. If, as the court pointed out, the car agency had been made the payee, either the limited purpose for which the check was issued would have been fulfilled or the attempted further negotiation of the check could have been effected by a signature of the agency that would, in such circumstances, be a forgery.

V. Criminal Law

Statutes

a. Purview of Vagrancy Statute: Some broad language in the New York vagrancy statute[1] centered the attention of the Court of Appeals in *People v. Gould,*[2] wherein defendant was convicted under that statute, having suggested in vain to a policewoman in

62. *Supra,* note 58.

63. *Id.* §78; *McNeill v. Shellito,* 185 App. Div. 857, 173 N. Y. Supp. 810 (1st Dep't 1919).

64. *Supra,* note 59; *Britton, Bills and Notes,* 697 (1943).

65. *Negotiable Instruments Law* §28 (3).

66. *Phillip v. Mercantile Nat. Bank,* 140 N. Y. 556, 35 N. E. 982 (1894); *Cohen v. Lincoln Sav. Bank of Brooklyn,* 250 App. Div. 702, 274 N. Y. Supp. 488 (1st Dept 1937), aff'd 275 N. Y. 399, 10 N. E. 2d 457 (1937).

1. Code Crim. Proc. §887 (4) (b) defines a vagrant as "A person . . . who offers or offers to secure another for the purpose of prostitution, or for any other lewd or indecent act . . .."

2. 306 N. Y. 352, 118 N. E. 2d 553 (1954).

disguise that she become a prostitute under his management. The majority opinion of the court, by Judge Desmond, although deploring the lubricity of defendant's conduct, reversed the conviction and dismissed the complaint on the ground that the defendant, futile in his meretricious endeavors, had not conducted himself in such a manner as to come within the purview of the statute defining vagrants. More must be shown than mere tentative steps toward an entrance into such illicit enterprise before proof of conviction, even under the broad language of the vagrancy statute, may be had.[3]

A persuasive dissenting opinion by Judge Conway, in which Chief Judge Lewis and Judge Froessel concurred, pointed out that sexual immorality conceived of as a form of vagrancy is peculiar to quite recent statutory law, and that it was not until subdivision 4 of Section 887 of the Code of Criminal Procedure was enacted in 1915 that specific acts related to prostitution were subsumed under the criminal category of vagrancy.[4] A comparison of clause (b) of subdivision 4 as originally enacted with its state as amended in 1919[5] evidences an indication of legislative intent to broaden the scope of the statutory definition of "vagrants", not circumscribe it. The insertion of the amendatory word "another", and the broad implication of the word "person" were thought by the dissent to be so all-embracing as to prevent an exclusion therefrom of an unsuccessful attempt. Upon this analysis, it appears that the conclusion by the majority to the effect that an unsuccessful panderer is no panderer at all is questionable.[6]

b. Constitutionality of loitering statute: The constitutionality of the New York loitering statute[7] was questioned before the Court of Appeals in *People v. Bell et al.*,[8] where defendant's conviction of loitering in a railroad station was reversed by County Court,[9] which reversal was affirmed by the Court of Appeals. The Court affirmed not on the ground that the statute was unconstitu-

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3. *Ibid.*

4. CODE CRIM. PROC. § 887 (4), L. 1915, c. 285, § 1 (1915).

5. Before the amendment, the statute limited the definition of vagrancy to one who offered a female person or offered to secure a female person for the commission of prostitution. The subdivision after amendment, however, deleted the words "female person" and substituted "another" therefor. L. 1919, c. 502, § 1. That the legislature has power to define terms used in its enactments, see *Matter of Bronson's Estate*, 150 N. Y. 1, 44 N. E. 707 (1896); McK. STATUTES § 75.

6. That it is not necessary it be shown that defendant was habitually engaged in this or like conduct, see *People v. Vantides*, 284 N. Y. 731, 31 N. E. 2d 201 (1940).

7. PENAL LAW § 1990-a (2) provides: "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."

8. 306 N. Y. 110, 115 N. E. 2d 821 (1953).

9. 204 Misc. 117, 125 N. Y. S. 2d 117 (County Ct. 1953).

tional for reasons of vagueness and indefiniteness, but that the evidence was insufficient to sustain the conviction.

The question concerning the constitutionality of the statute arose from the last phrase " . . . and who is unable to give satisfactory explanation of his presence is guilty of an offense." The phrase was attacked on the ground that the wording was so vague and indefinite that it did not sufficiently indicate a standard which could be known in advance. Noting, however, the construction policy that language ambiguities are to be resolved in favor of sustaining the presumptive constitutionality of statutes,[10] if such construction can be fairly deduced from the perceptible legislative intent supporting its enactment and inherent within its provisions,[11] as well as the contextual effect on the quality of the phrase as contrasted with its state isolated from the general structure,[12] the court concluded that the words in question merely outlined a method of procedure for purposes of ascertaining whether a violation had occurred, and hence did not invalidate the statute. It was held, however, that the evidence adduced was insufficient to sustain the conviction in that the arresting officer did not pursue his inquiry to the extent of excluding the possibility that defendants remained on the premises for some legitimate purpose as implied invitees or licensees.

In a concurring opinion by Judge Desmond, joined in by Judge Fuld, it was stated that affirmance of the court below should be based on the ground of the unconstitutionality of the statute in that the ambiguous wording in question was an essential part of the criminal statute which could not be deleted therefrom,[13] and which does not provide a clearly indicated standard of conduct sufficient to constitutionality.[14]

c. Double parking defined: A very narrow question pertaining to the interpretation and application of a section of the Traffic Regulations of the City of New York, relating to double parking, was presented to the Court of Appeals in *People v. Ressanen.*[15]

10. *Devoy v. Craig*, 231 N. Y. 186, 131 N. E. 884 (1921); *Stubbe v. Adamson*, 220 N. Y. 459. 116 N. E. 372 (1917); *cf. Metropolitan Life Ins. Co. v. Durkin*, 301 N. Y. 376, 93 N. E. 2d 897 (1950).

11. See *People ex rel. Parker Mills v. Commissioners of Taxes of City of N. Y.*, 23 N. Y. 242, 244 (1861).

12. See *People v. Richards*, 108 N. Y. 137, 15 N. E. 371 (1888); *People v. Lamphere*, 219 App. Div. 422, 219 N. Y. Supp. 390 (4th Dep't 1927).

13. See, *e. g., People v. Teal*, 196 N. Y. 372, 378, 89 N. E. 1086, 1088 (1909); *People ex rel. Collins v. McLaughlin*, 60 Misc. 306, 308, 113 N. Y. Supp. 306, 307 (Sup. Ct. 1908).

14. See, *e. g., Winters v. People of the State of New York*, 333 U. S. 507 (1948); *People v. Adamkiewicz*, 298 N. Y. 176, 179, 81 N. E. 2d 76, 77 (1948).

15. 306 N. Y. 267, 117 N. E. 2d 547 (1954).

Defendant concededly parked his Mack truck on the roadway side of another automobile for the purpose of unloading merchandise in the course of a delivery. There was no charge of traffic obstruction, but only that of a double parking violation.[16] The Court of Appeals reversed the conviction on the ground that an article of the Traffic Regulations entitled "Definitions" excludes vehicles "when actually or expeditiously engaged in loading or unloading merchandise"[17] from the applicable purview of the word "park." Since the contextual reading of the word, as "double park," does not require an inclusion of a vehicle stopped or standing, even though loading or unloading merchandise, and the phrase "double parking" appears only parenthetically in the article, the modifier "double" in no way changes the definitive meaning of the word "park"; and since defendant was not "parked" within the meaning of the Regulations, he was not "double parked".

A dissenting opinion by Chief Judge Lewis, concurred in by Judge Desmond and Judge Dye, expressed the view that the word "double" changed the word it modified, "park", and therefore the defendant was not excluded by the definition exception, section 1 (17) (a).

Amendment of Information

It has been a firm rule that an amendment to an indictment which supplies an omission altering the substance and not merely the form thereof is improper.[18] The reason which bases such a rule is that an indictment requires the action and intervention of a grand jury, and therefore an amendment thereto which affects its substantial character would amount to a usurpation of a function of the grand jury by the court.[19] An information, however, which does not require the action of a grand jury or any particular agency or body has been held to be the proper subject of amendment, even though such amendment goes to the substance of the charge.[20]

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16. Traffic Regulations of City of New York, Art. 2, § 10 (o).

17. *Id.* Art. 1, § 1 (17) (a) provides that park, parking or parked means the stopping or standing of a vehicle, occupied or not, except "when actually and expeditiously engaged in loading or unloading merchandise." The article indicates that the definitions it sets forth are applicable to terms in the Regulations, "unless the context or subject matter otherwise requires."

18. *People v. Van Every,* 222 N. Y. 74, 78, 118 N. E. 244, 245 (1917); see Code Crim. Proc. §§ 280, 284 (5).

19. *E. g., People v. Bromwich,* 200 N. Y. 385, 93 N. E. 933 (1911); *People v. Geyer,* 196 N. Y. 364, 90 N. E. 48 (1909). See also Code Crim. Proc. § 293 which provides that a court may amend an indictment to conform with the proof in respect to time . . . if the defendant cannot be thereby prejudiced in his defense on the merits.

20. *See, e. g., State v. Pritchard,* 35 Conn. 319, 326 (1868); *State v. Jensen,* 83 Utah 452, 454-455, 30 P. 2d 203, 204 (1934); *State v. Barrell,* 75 Vt. 202, 204, 54 A. 183 (1903); see also 1 Wharton, Criminal Procedure §§ 128, 132 (10th ed. 1918); *see Ex Parte Bain,* 121 U. S. 1, 6 (1887).