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Criminal Law—At the Trial

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was directed at proper punishment of a prior offender, where there was no knowledge of the prior offense at the time of the trial.¹²

The practice presently allowed prejudices the jury against the defendant, without serving any useful function. The knowledge of a prior conviction is necessary only after the conviction and then merely to enable the trial judge to impose the proper punishment. If the court does not see fit to eliminate this prejudicial practice the legislature should act.

At The Trial

a. Evidentiary Ruling: The evidence allowed or denied admission at a trial is in many cases the determining factor in defendant's acquittal or conviction. His right to a fair trial is protected against prejudicial error by the appellate court's careful scrutiny of the evidentiary rulings objected to. Such a decision, however, is usually of little precedent value.

In *People v. Feld*,¹³ the trial court admitted into evidence imperfect recordings of a telephone conversation¹⁴ incriminating defendant. The recording was marred by many interruptions and contained defendant's name only once. The defendant contended that the recordings were mutilated or fabrications, and tried to introduce testimony by a wire tap expert to this effect. This testimony was denied admission, after evidence was admitted to the effect that the expert could not tell if the records were duplicates or originals.

The Court of Appeals in a 4-3 decision, ruled that failure to allow defendant a chance to disprove the authenticity of the recordings was not prejudicial error. Since the expert had already stated he could not tell if the recording were originals or duplicates his further testimony would have been valueless.

The dissent vigorously claims that the destruction of the authenticity of the recordings would have gone a long way in destroying the People's case and failure to admit testimony on this vital question should compel reversal and a new trial.

b. Testimony of Previous Identification: At common law it was a well settled rule that an identification by a witness, of a defendant at a trial, could not be further supported by testimony

12. See N. Y. LEGIS. DOC. No. 84 at 22 (1926).

13. 305 N. Y. 322, 113 N. E. 2d 440 (1953).

14. CODE CRIM. PROC. § 813(a). The wire taps were made pursuant to an order of the court.

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that the witness had previously made a similar identification.¹⁵ The rationale for this rule lies in the belief that repetitive testimony to the effect that defendant had been previously identified has no probative value in proving defendant's identity, but is likely to influence a jury on that issue.

The legislature has provided in § 393-b of the Code of Criminal Procedure for "Testimony of Previous Identification. When identification of any person is in issue, a witness who has on a previous occasion identified such person may testify to such previous identification." A recent case¹⁶ decided by the Court of Appeals interpreted this section to be an exception to the common law prohibition, insofar as the person who made the previous identification may testify thereto at the trial as a means of substantive proof of identification.

On appeal the defendant in *People v. Trowbridge*,¹⁷ raised the question of whether other persons¹⁸ may testify to a previous identification by the identifying witness. All the judges concluded that such testimony by other persons was inadmissible, since the legislative exception to the general prohibition at common law, is expressly limited to the person who made the previous identification. The majority believed that due to the nature of the case, the allowance of the inadmissible testimony was reversible error. The dissent disagreed on this point.

The legislative provision¹⁹ follows a theory *contra* to the common law belief, to the effect that testimony to a previous identification, usually made close, in point of time, to the crime carries considerable evidentiary force.²⁰ In a few instances²¹ this theory has been mentioned for the basis of going one step further, and allowing others to testify to the previous identification on the basis that such testimony is primary evidence to show that a previous identification had been made. The decision in the instant case reaffirms the New York stand as to the merit of the common law rule. This indicates that the court will limit testimony of previous identification to that of the identifying witness and no others.

15. *People v. Jung Hing*, 212 N. Y. 393, 106 N. E. 105 (1914); This rule was subject to exceptions where testimony was permissible as proof of credibility of the witness, not substantive or affirmative proof of identity, after the witness had been discredited or impeached.

16. *People v. Spinello*, 303 N. Y. 193, 101 N. E. 2d 457 (1951).

17. 305 N. Y. 471, 113 N. E. 2d 841 (1953).

18. E. g., a detective or clerk present at the time of identification.

19. CODE CRIM. PROC. § 393 (b) (quoted in text).

20. 4 WIGMORE, EVIDENCE § 1130 (3d ed. 1940).

21. *Ibid*; see *DiCarlo v. United States*, 6 F. 2d 364 (2d Cir. 1925) (concurring opinion).

c. *Coerced Confessions*: In *People v. Leyra*,²² the defendant had been previously tried and found guilty of murder.²³ The Court of Appeals reversed and ordered a new trial on the ground that defendant's confession to a doctor summoned by the District Attorney's office, was obtained by mental coercion and therefore inadmissible.²⁴ The court did not rule on the validity of three subsequent confessions, but instructed that these should be a jury question, considered in the light of whether the mental coercion, and a promise of leniency also contended to have been made by the doctor, had influenced the defendant.²⁵

At the second trial the Judge stated as a part of his charge "that as a matter of law a promise of leniency had been made by the doctor." The defendant contended that under this charge which becomes the "law of the case" the subsequent confessions were inadmissible and no longer a jury question.

Three of the four members of the Court of Appeals who voted to affirm the conviction, held that even after the finding of a promise as a matter of law, it still remained a jury question to decide if this promise and the mental coercion had induced the defendant to make his subsequent confessions. The fourth member of the court affirmed the conviction under § 542 of the Code of Criminal Procedure²⁶ without indicating any one "technical error."

A strongly worded dissent concluded that once the promise was charged, as a matter of law, to have been used in inducing the previously declared invalid confession, the subsequent confessions to the police and assistant district attorneys, just two hours later, must be deemed to have been induced by the same promise and therefore inadmissible. Instructing the jury they might find otherwise was opposed to logic and incompatible with the "law of the case".

Another issue raised was the propriety of admitting the original coerced confession into evidence at the second trial. This was held to be proper, upon finding that the confession was introduced only for consideration in determining whether the sub-

22. 304 N. Y. 468, 108 N. E. 2d 673 (1953), *cert. denied*, 345 U. S. 918 (1953), *rehearing denied*, 345 U. S. 946 (1953).

23. *People v. Leyra*, 302 N. Y. 353, 98 N. E. 2d 553 (1951).

24. U. S. Const. Amend. XIV, § 1; N. Y. CODE CRIM. PROC. § 395.

25. See *Lyons v. State of Oklahoma*, 322 U. S. 596 (1943); *Malinski v. People of State of New York*, 324 U. S. 401 (1944); *Stein v. New York*, 346 U. S. 156 (1953).

26. "After hearing the appeal, the court must give judgments, without regard to technical errors or defects to exceptions which do not affect the substantial rights of the parties."

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sequent confessions were coerced and that the jury had been effectively instructed that the first confession was not to be considered on the issue of guilt.²⁷

The decisions on the two issues involved in this case are in line with present due process standards.²⁸ However, there is a pregnant danger in stating that coercive confessions are invalid, but subsequent confessions are not, depending on a jury determination of continuing influence. This may encourage law enforcement officials to obtain confessions by means of coercion and inducement, with the hope that subsequent confessions obtained before the influence has sufficiently worn off, may be permitted into evidence.

d. Misconduct of Jurors: The defendant in *People v. Cocco*²⁹ was convicted of grand larceny. At the trial, the defendant had put his character in issue by being sworn in as a witness on his own behalf. After the case had been submitted to the jury for deliberation, one of the alternate jurors who had been discharged at the end of the trial met and informed one of the women jurors, as she was proceeding to dinner with the other members of the jury, that Cocco ran a "sporting house". After the verdict the informed juror made an affidavit stating she had not at anytime mentioned this conversation to the other jurors.

Defendant's motion for a new trial³⁰ was denied by the trial court and the Appellate Division.³¹ On appeal, the majority and dissent agreed that the informed juror had done no wrong but that the discharged alternate juror had.

The majority reversed and granted a new trial, finding that they could not say that the information given the juror, at the time the jury was deliberating the issues of fact, including the defendant's character, did not prejudice the defendant's substantial rights.

The dissent reasoned that the misconduct had not been shown to have any influence on any jurors, so no substantial right of the defendant had been prejudiced.

This case is another illustration of the court striving to protect the defendant's right to a fair trial where it is difficult to ascertain the seriousness of the error committed.

27. See *Malinski v. People of State of New York*, *supra* note 25.

28. See note 25 *supra*; 19 BROOKLYN L. REV. 316 (1953); 3 B'LO. L. REV. 146 (1953).

29. 305 N. Y. 282, 113 N. E. 2d 422 (1953).

30. CODE CRIM. PROC. §465 (3) (misconduct of jurors).

31. *People v. Cocco*, 280 App. Div. 960, 117 N. Y. S. 2d 668 (4th Dep't 1952).

e. *Charge*: In *People v. Lupo*,³² the defendant was found guilty on all counts for which he was indicted. On appeal the defendant contended that the judge's charge was inadequate, in that it failed to clearly point out to the understanding of the jurors all the necessary elements of each crime and the possible verdicts. The conviction was unanimously reversed and a new trial ordered, upon finding that repeated questioning by the jurors directed at clarification of the charge failed, thereby leaving the jurors without a clear understanding of the questions presented. The judge's charge, a means of guiding laymen in carrying out their important responsibility, must be something more than a collection of accurate statements of the law; it must present clearly to the jury the issues involved or it will be deemed inadequate.

f. *Conviction under Wrong Statute*: In *People v. Costello*,³³ there was a conviction for damaging a tire on an automobile, under one of the so called "catch-all" sections of the Penal Law³⁴ which provides punishment for injury to personal property where it is not otherwise specifically prescribed. On appeal the conviction was reversed and the information dismissed upon a finding that a Penal Law Section³⁵ expressly provides for punishment of defendant's act. The court concluded that the provision under which defendant was convicted was not applicable since by its terms it was intended to cover situations not provided for by any other penal section.

g. *Imposition of Sentence*: In *Hogan v. Bohan*,³⁶ the District Attorney obtained an order under C.P.A. §1283³⁷ directing Judge Bohan to pronounce sentence upon a defendant. The necessity for the order arose when the defendant was found guilty of a felony, committed while on parole, thereby subjecting himself to § 219 of the Correction Law,³⁸ which requires defendant to serve the balance of his previous unexpired prison term before beginning his new sentence. To avoid this seemingly harsh treatment, the judge deferred defendant's sentence on the assumption defendant might thus avoid being subjected to this section.³⁹ This case

32. 305 N. Y. 448, 113 N. E. 2d 793 (1953).

33. 304 N. Y. 63, 110 N. E. 2d 880 (1953).

34. PENAL LAW § 1433 (2).

35. PENAL LAW § 1425 (11a).

36. 305 N. Y. 110, 111 N. E. 2d 233 (1953).

37. Provides for relief by means of obtaining an order compelling performance of a duty just as a writ of mandamus did at common law.

38. CORRECTION LAW § 219; recites that, if any prisoner is "convicted in this state of a felony committed while on parole . . . he shall, in addition to the sentence which may be imposed for such felony, and before beginning to serve such sentence, be compelled to serve in state's prison the portion remaining of the maximum term of the sentence on which he was released on parole from the time of such release on parole until the expiration."

39. *Ibid.*

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states the self-evident proposition that following an adjudication of guilt, judgment must be imposed and may not be deferred or postponed indefinitely.⁴⁰

Right of Appeal

It is a well established rule that appeal is not a matter of constitutional right, and in non-capital criminal cases an appeal lies only by statutory authorization.⁴¹ In the case of *In re Ryan*,⁴² petitioner's motion to dismiss four subpoenas duces tecum returnable before the Grand Jury was denied by the Court of General Sessions, which had only criminal jurisdiction.⁴³ The Code of Criminal Procedure⁴⁴ makes no provision for the review of an order denying a motion to vacate a subpoena.⁴⁵

The petitioner appealed under C.P.A. § 631 (2).⁴⁶ The Appellate Division held⁴⁷ that the order was appealable under this C.P.A. section but upon reviewing the merits, refused to vacate all the subpoenas.

The Court of Appeals in reviewing, after cross appeals, denied the petitioner any standing to appeal under the C. P. A. and thereby refused to review the merits of the case. The Court stated that the C. P. A. applies only to civil actions and civil proceedings except where otherwise specified. The petitioner chose to proceed in a court which had only criminal jurisdiction, in a matter somewhat related to criminal law, and thereby is deemed to have instituted a criminal proceeding, where the right to appeal is regulated by criminal procedure.

It is implied that the petitioner could have instituted his motion to dismiss the subpoena in a court of both civil and criminal jurisdiction, and by so doing may have been able to appeal under the applicable C. P. A. sections. The rule, though unclear, would seem to be that the right of appeal on a proceeding either civil or criminal in nature is dependent on the jurisdiction of the court in which the proceeding is originally brought.⁴⁸

40. The judge must pronounce judgment, either to sentence defendant to a term in prison or to suspend sentence, or to impose a sentence and suspend its execution.

41. *People v. Reed*, 276 N. Y. 5, 11 N. E. 2d 330 (1937); *People v. Zerillo*, 200 N. Y. 443, 93 N. E. 1108 (1911).

42. 306 N. Y. 11, 114 N. E. 2d 183 (1953).

43. CODE CRIM. PROC. § 51; *People ex rel Jerome v. Court of General Sessions*, 185 N. Y. 504, 78 N. E. 149 (1906).

44. CODE CRIM. PROC. § 517-520.

45. *Matter of Turcarno Contracting Co.*, 260 App. Div. 253, 21 N. Y. S. 2d 270 (2d Dep't 1940).

46. An appeal may be taken in special proceedings: "From an order, affecting a substantial right, made by a court of record possessing original jurisdiction, or a judge thereof in a special proceeding instituted in that court . . ."

47. *In re Ryan*, 281 App. Div. 953, 120 N. Y. S. 2d 110 (1st Dep't 1953).

48. See *Matter of Cluusi*, 296 N. Y. 354, 73 N. E. 2d 548 (1947).