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Evidence

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section 2705.01 which reads as follows: "A court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." The judge had issued an order that no photographs were to be taken in the courtroom while court was in session. The photographer stood in the hall outside the courtroom and took a picture of the court session through a glass panel in the door. The court of appeals found that no contempt had been committed in that the order given had not been violated because the pictures were taken outside the courtroom. It was held that there was no disturbance of the courtroom proceedings by the photographer's action.

EDGAR I. KING

EVIDENCE

WHO PARKED THIS CAR?

It is 5:00 o'clock of a busy afternoon and there is a shiny new 1961 automobile parked at the curb, blocking completely one lane of pavement, despite large and clear signs which forbid parking from 4 to 6 p. m. Officer O'Tooligan, his eyes gleaming and his face yellow with choler, writes out and affixes a traffic ticket for violation of the city's ordinances regulating street parking.

A check of registration shows the offending vehicle to be owned by Simeon Scofflaw. It is not the first such violation charged to automobiles registered to him. As in the previous cases he appears for trial and pleads "not guilty." The officer who observed the violation testifies as to the facts of it, but is unable to state who parked the car. Mr. Scofflaw remains silent, upon advice of his counsel, who, at the close of the prosecutor's case moves for a finding of "not guilty." In all previous such cases his ploy has succeeded, but this time things are not the same. This fair city has, since the last case, amended its traffic code ordinance by adding the following short paragraph thereto:

> If any vehicle is found upon a street, highway, alley, park or other public grounds of the city in violation of any provision of this chapter, or any ordinance of this city, regarding the stopping or standing or parking of vehicles, and the identity of the driver cannot be determined, the owner, or person in whose name such vehicle is registered shall be held prima facie responsible for such violation.[1]

On this basis the accused is found guilty, despite his contentions (1) that this section constitutes a rule of evidence, which municipal

1. COLUMBUS, OHIO, TRAFFIC CODE § 2151.06.

corporations have no power to create, and (2) that the section is invalid because it is in direct conflict with the defendant's presumption of innocence.

The Ohio Supreme Court[2] unanimously upheld the ordinance, and affirmed the court of appeals.[3] A number of similar ordinances have been enacted in other cities. Usually they have been sustained. In other cases courts have ruled that even without such an ordinance proof of the violation and ownership are sufficient to make out a prima facie case of guilt against the owner.[4]

The Ohio Supreme Court, however, chose to base its ruling upon a holding that the ordinance "creates no rule of evidence."[5] Nor does it affect the defendant's presumption of innocence since it does not require him to testify, nor does it deny him his right to make out his defense or to testify.

The court referred to the peculiar nature of the problem of traffic enforcement and made the analogy of state statutes which fix liability upon an owner for certain uses of his automobile by another.

Failure to Swear Jurors on Voir Dire

In 1957 the legislature amended section 2945.27 of the Revised Code to require the examination of prospective jurors in criminal cases under oath or upon affirmation.[6]

In a trial for aiding and abetting an embezzler, commenced more than one year after the effective date of the amendment, the trial judge conducted a voir dire examination and permitted both prosecuting attorney and defense counsel to take part therein. No one mentioned the fact that there had been no compliance with the new statute. The jury was chosen and sworn in compliance with section 2945.28, whereupon opening statements were made and a substantial portion of the State's case presented before the omission was finally noticed. Defense counsel refused formally to waive the requirement; the court refused to discharge the jury without prejudice under the first three subsections of section 2945.36 and counsel for defendant refused consent to a discharge of the jury under the fourth subsection. The trial then continued to a conviction. The defendant appealed.

2. City of Columbus v. Webster, 170 Ohio St. 327, 164 N.E.2d 734 (1960). See also discussion in *Criminal Law and Procedure* section, p. 498 *supra.*

3. 159 N.E.2d 466 (Ohio Ct. App. 1958).

4. Annot., 49 A.L.R.2d 456, 458 (1956).

5. City of Columbus v. Webster, 170 Ohio St. 327, 331, 164 N.E.2d 734, 737 (1960). Wigmore would seem to disagree. He refers to it as a proper inference in a chain of two or more, commencing from a proven fact and ending in a finding as to guilt or liability. WIGMORE, EVIDENCE § 150(a) (1940). The cases in Annot. 49 A.L.R.2d 456 (1956) certainly treat it as a matter of evidence.

6. 127 Ohio Laws 419, 420 (1957).

The supreme court upheld the action of the trial court.[7] First, the majority opinion relied on a well established rule that an appellate court will not consider an error which a complaining party could have called to the attention of the trial court in time to remedy, but failed to do so. A defendant is not entitled to *more than one* fair trial. Second, the court considered the rule that a judgment of conviction is not to be reversed for error unless the accused was prejudiced by the error or was prevented from having a fair trial. The court reviewed a number of its prior decisions in which failure to abide by various statutory directions had been held not to have prejudiced the accused or to have prevented a fair trial. It concluded that accused had not been denied a fair trial in this respect.

Three judges vigorously dissented, stating that in their opinion the legislature had clearly intended that no jury could be legally impaneled without such an examination having been conducted under oath. In other words, a jurisdictional defect was present. The dissenting majority would have held that a discharge of the jury without prejudice to the prosecution should have occurred at the point of discovery.

SEARCH AND SEIZURE

By a sharply divided court, the principle that evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution was reaffirmed in *State v. Mapp.*[8] First enunicated in *State v. Lindway,*[9] the rule remains controversial.

Actually, had not there been a failure of a sufficient majority of the court to agree upon the unconstitutionality of the section of the Code under which accused was convicted, the case would have turned on that point.

PRIVILEGE

Two-thirds of the states in this country have established the physician-patient privilege. Ohio's statute,[10] while not unique, differs from the provisions in many of the states recognizing the privilege, in that it allows a waiver by the surviving spouse or executor or administrator of the patient and by the patient himself testifying. On the other hand, if there

7. State v. Glaros, 170 Ohio St. 471, 166 N.E.2d 379 (1960). See also discussion in *Criminal Law and Procedure* section, p. 496 *supra.*

8. 170 Ohio St. 427, 166 N.E.2d 387, *prob. juris. noted,* 364 U.S. 686 (1960). See also discussion in *Constitutional Law* section, p. 471 *supra* and in *Criminal Law and Procedure* section, p. 488 *supra.*

9. 131 Ohio St. 166, 2 N.E.2d 490, *appeal dismissed* and *cert. denied,* 299 U.S. 506 (1936). See also discussion in *Constitutional Law* section, p. 471 *supra.*

10. OHIO REV. CODE § 2317.02.

is to be a waiver by other means, the *"express consent"* of the patient must be shown.

What constitutes "express consent"? There is a conflict on construction of the statute. Some courts hold for strict construction, others for a liberal construction. Ohio has held[11] that merely answering questions as to treatment from physicians in response to questions on cross-examination does not waive the privilege. Such testimony is not "voluntary" within the purview of the statute.

In *Jenkins v. Metropolitan Life Insurance Company*[12] an insured had died of a coronary occlusion. His surviving spouse made a claim for payments on a policy issued on his life by defendant company and, at that time, she executed before a notary an instrument addressed "to any physician . . . [by whom] the deceased named below has been treated within three years," which instrument authorized the bearer "to make or obtain a copy in whole or in part or an abstract of any records you may have concerning the above named decedent" and "to submit such copy or abstract directly to the . . . life insurance company as part of the proof of said claim."

The Court of Appeals for Hamilton County held that "an expressed waiver" could "be implied from the conduct" of the plaintiff's personal representative.

In *Neff v. Hall*[13] a fee appraiser, hired by the Department of Highways to make an appraisal of the value of land taken in an appropriation proceeding, refused to divulge his appraisal findings at a deposition being taken by the landowner.

The Court of Appeals for Franklin County held the matter privileged, for the reasons (1) that the Director of Highways occupies the position of a defendant in any lawsuit, since he is defending his determination of the value of the land taken, and (2) that the report had been turned over to the Highway Department's counsel.

City of Dayton v. Smith[14] involved a civil action by plaintiff city for damage to one of its police cruisers alleged to have been caused by the negligence of defendant in colliding with it. The police officers who were driving and occupying the cruiser had made a report of the accident. The nature of this report does not clearly appear from a reading of the court's opinion, but it seems to have been assumed by the court of appeals that it was of an ordinary and routine nature and that it was not made with a view to litigation, nor for the use of the city's legal coun-

11. Harpman v. Devine, 133 Ohio St. 1, 10 N.E.2d 776 (1937).
12. 168 N.E.2d 625 (Ohio Ct. App. 1960).
13. 110 Ohio App. 519, 170 N.E.2d 77 (1959).
14. 109 Ohio App. 383, 166 N.E.2d 256 (1959).