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Criminal Law and Procedure

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PROFESSIONAL ASSOCIATIONS

State ex rel. Green v. Brown,[30] though decided during 1962, was well-covered in the 1961 survey of Ohio law. In this widely discussed case the Supreme Court of Ohio reiterated the well-established principle that it determines the procedure concerning admission to practice law in Ohio. Under its present rules only natural persons may be admitted to practice law, and unless the court decides to change its rules a corporation cannot be admitted to practice law in Ohio.[31] The American Bar Association has expressed serious doubts as to the wisdom of practicing law as a corporation. However, it has taken the position that it is the professional relationship, not the form, which is of controlling ethical significance, and that the practice of law by a professional association does not in itself constitute a violation of professional ethics.[32]

PHILLIP ALLYN RANNEY

CRIMINAL LAW AND PROCEDURE

INDIGENT DEFENDANTS

Coincident with United States Supreme Court action, the Ohio Supreme Court further insured that the indigent criminal defendant will have equal rights with the more affluent in appellate procedure. In *State ex rel. Wright v. Cohen*[1] a writ of mandamus was issued against a common pleas trial judge requiring him to furnish an indigent defendant a bill of exceptions without cost for the purpose of appeal. The trial court had previously denied a motion requesting the transcript.

In a previous case[2] from the same county,[3] the Ohio Supreme Court had held mandamus to be an inappropriate remedy. The basis for the decision was that a full hearing was had regarding the question of poverty, and the supreme court found that the trial court had exercised its sound discretion in holding that the defendants were not indigent. In the *Wright* case apparently no oral hearing was had regarding the question of poverty, and there was no serious question as to the appellant being indigent. Thus, the writ of mandamus was issued against the trial judge and deemed to be the proper remedy.

In keeping with the liberal national trend, it now seems that in Ohio a convicted defendant need only establish indigency plus the proper steps

30. 173 Ohio St. 114, 180 N.E.2d 157 (1962).

31. Excellent discussions of the Ohio Professional Association Law can be found in CAVITCH, OHIO CORPORATION LAW ch. 18 (1963); Vesely, *The Ohio Professional Association Law*, 13 W. RES. L. REV. 195 (1962).

32. Opinion 303, American Bar Association Committee on Professional Grievances, 1961.

taken toward preparing an appeal to obtain a trial transcript. However, if the statutory time for perfecting an appeal has elapsed and no motion for leave to appeal has been granted, the court need not furnish the bill.[4]

On March 18, 1963, the United States Supreme Court rendered several decisions affecting state treatment of indigent defendants. The Court held that federal due process requires that an indigent appellant in a criminal matter in a state court be assigned counsel to represent him on appeal.[5] The Court also held that a state court's denial of a free trial transcript to an indigent appellant, on the ground that such appeal would be frivolous, constituted a denial of due process.[6] The Court overruled the famous doctrine of *Betts v. Brady*[7] and held that fourteenth amendment due process requires the assignment of free counsel to all indigent defendants charged with crimes in state courts involving substantial jail sentence possibilities.[8] This, of course, has been the law in Ohio for many years.[9]

Ohio is faced with the new problem of providing both free counsel and free trial transcripts to any convicted indigent who desires an appeal. It would seem obvious that new statutes must be passed by the Ohio legislature to effectuate the dictates of the Supreme Court and somehow to limit possible abuses by indigent defendants.

SEARCH AND SEIZURE

In *State v. Vuin*[10] police officers acting under an invalid search warrant (improperly signed) entered defendant's home and found gambling equipment and policy slips. The police gave no notice of their intention to search until they broke in. The trial court granted a motion to

1. 174 Ohio St. 47, 186 N.E.2d 618 (1962).
2. State *ex rel.* Wilson v. McMahon, 172 Ohio St. 438, 178 N.E.2d 239 (1961).
3. Cuyahoga County.
4. State *ex rel.* Vaughn v. Reid, 173 Ohio St. 464, 184 N.E.2d 101 (1962); State *ex rel.* Vitoratos v. Yacobucci, 173 Ohio St. 462, 184 N.E.2d 98 (1962); State *ex rel.* Lightfritz v. Ogle, 172 Ohio St. 236, 175 N.E.2d 75 (1961).

In State *ex rel.* Vitoratos v. Walsh, 173 Ohio St. 467, 183 N.E.2d 917 (1962), it was held that only one copy of a trial transcript is necessary, and an incarcerated indigent appellant need not be furnished an extra copy.

Quaere: If an indigent appellant is incarcerated and without counsel, what good is a trial transcript to him if he cannot see it?

5. Douglas v. California, 83 Sup. Ct. 814 (1963).
6. Draper v. Washington, 83 Sup. Ct. 774 (1963). See also Lane v. Brown, 83 Sup. Ct. 768 (1963), (decided the same day) which held that the determination of appealabity of a case for the purpose of obtaining free records should not be vested in Indiana's Public Defender. The *Lane* case and the *Draper* case point out the great difficulty in formulating methods to prevent abuse of an indigent's rights after conviction.
7. 316 U.S. 455 (1942).
8. Gideon v. Wainright, 83 Sup. Ct. 792 (1963).
9. OHIO REV. CODE § 2941.50.
10. 185 N.E.2d 506 (Ohio C.P. 1962).

suppress the evidence holding that a search of a home under a void warrant is illegal. The court went on to state that even if the warrant were proper, the improper execution by breaking in without notice or service of the warrant would render the entire search invalid.

In *State v. Lett*[11] a defendant failed to object to a search of his home without a warrant until the contraband was found. The court held that the defendant could not now object to the search because he had consented to what would otherwise have been an illegal search. Federal cases have distinguished between voluntary consent and mere acquiescence to authority. The questions of factual "consent" as well as "standing to object" are likely to confront the Ohio Supreme Court in 1963. Some state courts have voluntarily followed the federal rules after claiming not to be bound thereby.[12]

HABEAS CORPUS

As usual, the supreme court as well as certain courts of appeals were crowded with petitions for writs of habeas corpus. In *Weaver v. Sacks*[13] it was determined that double jeopardy is a matter which must be raised by appeal and not by habeas corpus. Also the Ohio Supreme Court held that habeas corpus will not lie for those now imprisoned as a result of illegal searches and seizures.[14] The court pointed out that rules of evidence change from time to time, and a prisoner must appeal such questions rather than sit back and await a more favorable judicial climate.

In *Wells v. Sacks*[15] the court held that the conditions set forth in the Ohio Revised Code which provide for waiver of indictment must be strictly followed.[16] A conviction based on an information obtained by a defective waiver (lack of comprehension) is void and, therefore, subject to attack by a writ of habeas corpus.

CRIMINAL EVIDENCE

The statute[17] requiring a defendant to give the prosecuting attorney notice of an alibi three days prior to trial was held constitutional in

11. 114 Ohio App. 414, 178 N.E.2d 96 (1961).

12. State v. Trumbull, 176 A.2d 887 (Conn. Cir. Ct. 1961); Leveson v. State, 138 So. 2d 361 (Fla. Ct. App. 1962); Belton v. State, 228 Md. 17, 178 A.2d 409 (1962); State v. Long, 177 A.2d 609 (N.J. Super. 1962); People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478 (1961).

13. 173 Ohio St. 415, 183 N.E.2d 373 (1962).

14. State *ex rel.* Spence v. Sacks, 173 Ohio St. 419, 183 N.E.2d 363 (1962).

15. 115 Ohio App. 219, 184 N.E.2d 449 (1962).

16. OHIO REV. CODE § 2941.021. It is interesting to note that although the court of appeals approved in principle the grounds for the writ, when the matter was presented on evidence in the supreme court, the petitioner was unable to maintain the burden of proof as to lack of comprehension and was remanded. Wells v. Maxwell, 174 Ohio St. 198, 188 N.E.2d 160 (1963).

17. OHIO REV. CODE § 2945.58.

State v. Cunningham.[18] The court based its decision on a somewhat questionable prior Ohio Supreme Court case.[19]

In *State v. Gerhardt*[20] the defendant and two others were arrested on the strength of a teletype message from out-of-state police that several "safe men" were "going to pull a job." When arrested certain burglar tools were found in the automobile in which the defendant was a passenger. During trial the message was admitted in evidence over defendant's objection. The appellate court reversed, noting that one element of the crime of possession of burglar's tools is the intent to use such tools burglariously and that the only evidence of such intent was the teletype message which was clearly hearsay.[21]

Two interesting questions of evidence were presented in *State v. Scarberry.*[22] In that case objections were raised to the offering of a confession into evidence on the grounds that it was involuntary and that no corpus delecti had been proven. As to the former contention it was shown that prior to confessing, the defendant was hit several times by a law enforcement officer. Three hours later the defendant confessed to another officer. The court held that there was no evidence that the force used by the officer had any relation whatsoever to the defendant's confession. It seems that the officer hit the defendant because of personal anger at the defendant's alleged acts and not to obtain a confession.[23]

The defendant in this case was charged with murder in the first degree of his two children. It was believed that the defendant drowned his children in a river, but their bodies were never recovered. The court held that corpus delecti need only be shown by some evidence. It was held that (1) the defendant's being seen carrying the children toward the river, (2) his appearing wet several minutes later without the children, (3) his previous threats to drown the children, and (4) the fact that the children were infants and could not fend for themselves, were sufficient facts to establish corpus delecti.

SENTENCE

In *State v. Lieberman*[24] the defendant was convicted of violating sections 2917.06 and 2917.07 of the Ohio Revised Code. Both the former

18. 185 N.E.2d 327 (Ohio Ct. App. 1961).
19. State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931).
20. 115 Ohio App. 83, 184 N.E.2d 516 (1961).
21. The court went on to state, perhaps somewhat naively, that if the legislature would make possession of tools without intent a crime, law enforcement officers would ensure proper enforcement. *Id.* at 92, 184 N.E.2d at 523. However, it should be noted that since any tool *could* be used by a burglar, this proposal would be extremely dangerous.
22. 114 Ohio App. 85, 180 N.E.2d 631 (1961).
23. *Quaere:* If the defendant were charged with petit larceny instead of murdering children, would the confession be deemed voluntary?
24. 114 Ohio App. 339, 179 N.E.2d 108 (1961), *appeal dismissed,* 172 Ohio St. 478, 178 N.E.2d 506 (1962); *cert. denied,* 371 U.S. 925 (1963).

section, a misdemeanor, and the latter section, a felony, deal with bribing or corruptly influencing a witness. The trial court sentenced the defendant on each section even though a single act comprised both offenses. The court of appeals held that although both convictions were proper, only one sentence should have been passed, and consequently the case was remanded for proper sentencing. It is still quite unclear as to when consecutive sentences are proper for one act and when one sentence only is proper. The dissent in this case shows the lack of agreement on this point.

One of the most complete discussions of the habitual offender statute[25] is found in *State v. Shank.*[26] The defendant in this case previously had been convicted on a fourth offense, served a prison term, satisfactorily served out his parole, and obtained a final release. And after his release, he was indicted for being an habitual offender. The court held that the habitual offender statute did not create a new crime but merely increased the punishment for the previous offense. In the instant case, after the defendant had been convicted for his fourth offense, he should have been indicted at that time as an habitual offender. Then, upon conviction, his sentence for grand larceny (one to seven years) would have been vacated and replaced by a life sentence. The court of appeals reversed the trial court and held that it was too late to charge the defendant as an habitual offender. To so charge the defendant while no sentence is pending against him treats the habitual offender statute as a separate and distinct offense, which it is not.

PROXIMATE CAUSE

In a common pleas court decision,[27] two parents were indicted for involuntary manslaughter. It was alleged that the parents violated the statutes[28] relative to the neglect of minor children in that neither parent was at home when apparently one of the children caused a fire which resulted in the children's deaths. Neither parent purchased the matches or placed them near the children. The court held that even if the parents had violated the sections of the Revised Code dealing with neglect of children, this violation was not the proximate cause of the children's death. The court further refused to find the defendants guilty of neglect, holding that neglect of minor children is not a lesser included offense in manslaughter.

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25. OHIO REV. CODE §§ 2961.11-.13.
26. 115 Ohio App. 291, 185 N.E.2d 63 (1962).
27. State v. Ross, 176 N.E.2d 746 (Ohio C.P. 1961).
28. OHIO REV. CODE §§ 2151.42, 3113.01, 3113.03.