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while real evidence such as a blood test would seem to speak for itself.

From the foregoing, it appears that real evidence obtained by an invasion of bodily integrity may be found inadmissible in state criminal prosecutions as a violation of due process only if the obtaining of the evidence is accompanied by brutality and coercion.[28] However, this exclusionary principle will be limited to evidence acquired from the body and will not be extended to evidence procured by an unreasonable search and seizure no matter how great the trespass of the close.[29] Moreover, the Court, in determining whether such conduct "shocks the conscience," apparently will consider the importance of detection and deterrence of the particular crime as against the degree of the invasion of bodily integrity.[30]

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Criminal Law—Trial De Novo—Power of Superior Court to Amend Warrant

In a recent case[1] the North Carolina Supreme Court held that when warrants upon which defendants were convicted in a municipal county court were amended in the superior court so as to charge a trespass on property of a person other than the person named in the original warrant, the court substituted one criminal charge for another. Since on the appeal the defendants could only be tried for the crime for which they were convicted in the lower court, the judgment on the amended warrant was arrested.

The decision in this case raises the question of the power of the superior court to allow amendments to warrants upon which defendants were convicted in a lower court. As a general rule, upon appeal from a court of inferior jurisdiction, the defendant is granted a trial de novo in the superior court.[2] The state may then try the defendant on the original warrant[3] or by indictment charging the same offense of which he was convicted in the lower court.[4]

As to the power of the superior court to allow amendments to proceedings begun before an inferior court, it is provided by statute that "the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms

[28] Rochin v. California, 342 U. S. 165 (1952), as limited by Breithaupt v. Abram, 352 U. S. 432 (1957).
[29] Irvine v. California, 347 U. S. 128 (1954).
[30] Breithaupt v. Abram, 352 U. S. 432 (1957).

[1] State v. Cooke, 246 N. C. 518, 98 S. E. 2d 885 (1957).
[2] State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934).
[3] State v. Thomas, 236 N. C. 454, 73 S. E. 2d 283 (1952).
[4] State v. Wilson, 227 N. C. 43, 40 S. E. 2d 449 (1946).

as shall be deemed just, at any time either before or after judgment."[5] The court has liberally translated the broad terms of the statute into specific, workable rules for its application in criminal cases. It is held that the amendment must not change the character of the action or the nature of the offense intended to be charged in the original warrant.[6] The amendment may be allowed before or after verdict, but should be allowed after verdict only where the evidence was sufficient to prove the offense as if properly and sufficiently charged in the first instance.[7] The warrant as amended may not charge an offense not cognizable before the inferior court in which the case originated.[8] The power of the court to allow an amendment is discretionary with the trial judge and his refusal to allow an amendment is not reviewable.[9] An amendment will not be allowed which charges a completely new and different offense from the one of which the defendant was convicted in the lower court.[10]

The cases in which the question of the power to amend arises may be divided into four general classes:[11] (1) where the original warrant fails to charge a criminal offense,[12] (2) where the original warrant charges the offense "inartfully,"[13] (3) where the original warrant charges an offense not cognizable before the inferior court in which defendant was convicted,[14] and (4) where the original warrant adequately charges the crime but there is a variance between the charge as

[5] N. C. GEN. STAT. § 7-146 Rule 12 (1953). While the statute in terms applies only to proceedings begun before a justice of the peace, the court has construed it to apply to proceedings begun before other inferior courts when the action is re-tried in the superior court. State v. Brown, 225 N. C. 22, 33 S. E. 2d 121 (1945).

[6] State v. McHone, 243 N. C. 231, 90 S. E. 2d 536 (1955); State v. Brown, 225 N. C. 22, 33 S. E. 2d 121 (1945); State v. Norman, 110 N. C. 484, 14 S. E. 968 (1892); State v. Vaughan, 91 N. C. 532 (1884).

[7] State v. Brown, *supra* note 6; State v. Baker, 106 N. C. 758, 11 S. E. 360 (1890).

[8] State v. Clegg, 214 N. C. 675, 200 S. E. 371 (1939).

[9] State v. Taylor, 118 N. C. 1262, 24 S. E. 526 (1896). In State v. Vaughan, 91 N. C. 532, 535 (1884), the court said: "His Honor in the court below might have refused, as a matter of discretion, to allow the amendment, but where his refusal was put upon the ground of his not having power to allow it, there was error."

[10] State v. Hall, 240 N. C. 109, 81 S. E. 2d 189 (1954); State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934); State v. Taylor, *supra* note 9.

[11] The Court has made no attempt to classify the cases. This general classification is used by the writer in an attempt to separate the cases for purposes of understanding when an amendment may be allowed and the effects of the amendment on the case in question.

[12] State v. Morgan, 226 N. C. 414, 38 S. E. 2d 166 (1946); State v. Johnson, 188 N. C. 591, 125 S. E. 183 (1924); State v. Smith, 103 N. C. 410, 9 S. E. 200 (1889); State v. Smith, 98 N. C. 747, 4 S. E. 517 (1887).

[13] State v. Stone, 231 N. C. 324, 56 S. E. 2d 675 (1949); State v. Bowser, 230 N. C. 330, 53 S. E. 2d 282 (1949); State v. Mills, 181 N. C. 530, 106 S. E. 677 (1921).

[14] State v. Clegg, 214 N. C. 675, 200 S. E. 371 (1939); State v. Myrick, 202 N. C. 688, 163 S. E. 803 (1932).

stated in the warrant and the evidence adduced at the trial in the superior court.[15]

Where the original warrant upon which defendant was tried and convicted in the inferior court fails to charge a criminal offense because of the omission of some essential element of the crime, it may be amended in the superior court so as to charge the offense originally intended to be charged. But this is subject to the general rule that the effect of the amendment must not be to change the nature of the offense.[16] Thus, where the defendant is convicted upon a warrant charging him with going upon the land of another without a license, having first been forbidden to do so, it is proper for the court to allow an amendment so as to show that the entry upon the land was "wilful and unlawful."[17] If the essentials of the crime are not set forth in the warrant, and no amendment is made, the warrant is fatally defective, and on motion of the defendant the judgment rendered thereon will be arrested.[18]

In the second group of cases, where the warrant charges a crime, but the statement of the offense is defective in form, an amendment will be allowed in order to clearly and accurately set forth the offense or in order that the warrant may conform to the language of the statute.[19] In *State v. Grimes*,[20] the defendant was convicted in recorder's court on a warrant charging him with "assault on . . . a female."[21] In the superior court, a jury found the defendant "guilty of an assault on a female as charged in the warrant."[22] After verdict and before judgment the warrant was amended so as to charge an assault on a female by a *male over eighteen years of age*. The court said that there was no error in allowing the amendment, but remanded the case for another hearing on other grounds.[23]

[15] State v. Holt, 195 N. C. 240, 141 S. E. 585 (1928); State v. Poythress, 174 N. C. 809, 93 S. E. 919 (1917); State v. Baker, 106 N. C. 758, 11 S. E. 360 (1890).

[16] See note 12 *supra*.

[17] State v. Smith, 103 N. C. 410, 9 S. E. 200 (1889).

[18] State v. Coppedge, 244 N. C. 590, 94 S. E. 2d 569 (1956); State v. Morgan, 226 N. C. 414, 38 S. E. 2d 166 (1946); State v. Johnson, 188 N. C. 591, 125 S. E. 183 (1924); State v. Smith, 98 N. C. 747, 4 S. E. 517 (1887).

[19] See note 13 *supra*.

[20] 226 N. C. 523, 39 S. E. 2d 394 (1946).

[21] *Id.* at 524, 39 S. E. 2d at 395.

[22] *Ibid.*

[23] The warrant adequately charged a simple assault on a female and was sufficient to raise a presumption that the defendant was a male over eighteen years of age. But it was necessary for the jury to find as a fact, either specifically or by reference to the warrant, that the assault was committed by a male over eighteen years of age. This is true because a simple assault committed by anyone other than a male over eighteen years of age is punishable only by fine of not more than fifty dollars ($50.00) or thirty days. The defendant was given eighteen months, both in the lower court and the superior court. The amendment, coming after the jury verdict, was ineffectual to supply the deficiency of the jury's finding. It would appear that had the warrant been amended prior to the jury verdict, it would have been sufficient to sustain the conviction. In that event, the jury verdict of

Where the original warrant charges an offense not within the jurisdiction of the inferior court, the superior court may not allow an amendment which would bring the case within the jurisdiction of the inferior court. Since the jurisdiction of the superior court on appeal from a lower court is derivative, and since the lower court had no jurisdiction, none can vest in the superior court.[24]

Where the crime is adequately charged, but there is a variance between the charge as stated in the warrant and the evidence presented at the trial, the court may allow an amendment of the warrant so that it may conform to the evidence presented.[25] However, the warrant and any amendments thereto must relate to the charge and the facts supporting it as they existed at the time the warrant was orginally presented in court. Therefore an amendment may not charge the defendant with an offense committed after issuance of the warrant.[26]

It will be observed that once the power of the court to allow an amendment has been established, the problem then becomes one of determining when the amendment charges a different crime or changes the nature of the offense intended to be charged. For example, where the original warrant charges the defendant with "transporting illegal tax paid liquor," it may be amended so as to charge "illegally transporting taxpaid liquor" since the amendment does not change the nature of the offense intended to be charged.[27] In *State v. Carpenter*[28] the original warrant on which defendant was tried in the county court charged an "assault attended with cruel and unusual punishment."[29] In the superior court the warrant was amended to charge "inflicting serious injury." The defendant objected to the amendment as changing the nature of the crime. It was held that the amendment was properly allowed.

On the other hand, where the defendant is convicted in the lower court on a warrant charging possession of whiskey for the purpose of sale, the warrant may not be amended so as to charge possession of nontax paid liquor, because these are different crimes—"specific misdemeanors of equal dignity created by separate statutory provisions."[30] Also,

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guilty *as charged in the warrant* could only mean guilty of an assault on a female by a *man or boy over eighteen years of age.*

For a similar amendment made after a plea of guilty, see State v. Terry, 236 N. C. 222, 72 S. E. 2d 423 (1952).

[24] See note 14 *supra.*

[25] See note 15 *supra.* This is subject to the general rule that the amendment must not change the nature of the crime or charge a different crime. See note 6 *supra.*

[26] State v. Thompson, 233 N. C. 345, 64 S. E. 2d 157 (1951).

[27] See State v. McHone, 243 N. C. 231, 90 S. E. 2d 536 (1955).

[28] 231 N. C. 229, 56 S. E. 2d 713 (1949).

[29] *Id.* at 241, 56 S. E. 2d at 722.

[30] State v. Hall, 240 N. C. 109, 111, 81 S. E. 2d 189, 191 (1954); State v. Mills,

where the warrant charges assault and battery on a female, it may not be amended so as to charge assault and battery on a female inflicting serious injury.[31]

In the principal case[32] the original warrants charged that the defendants "did unlawfully and willfully trespass upon the property of *Gillespie Park Golf Course,* Greensboro, North Carolina, after having been forbidden to do so."[33] (Emphasis added.) In the superior court the warrants were amended to read: "Did unlawfully and willfully enter and trespass upon the premises of *Gillespie Park Golf Club, Inc.,* after having been forbidden to enter said premises and not having a license to enter said premises . . . ."[34] (Emphasis added.)

The court might have treated the amendment as merely curing a defect in form as in the second group of cases where the warrant charges the crime "inartfully."[35] This view would have been in conformance with previous liberal decisions of the court.[36]

The somewhat narrower view which the court took was based on the nature of the law of criminal trespass, that possession is an essential element of the crime.[37] Treating *Gillespie Park Golf Course* and *Gillespie Park Golf Club, Inc.* as separate entities and different "persons,"[38] the court found that the amended warrants charged a different crime from that charged in the original warrants. It could only follow that such an amendment was improperly allowed.

HENRY E. FRYE

Criminal Procedure—General Verdict Rendered on Indictment Charging Mutually Exclusive Crimes

By statute in North Carolina separate counts may be used in the indictment to charge separate offenses.[1] This Note is concerned with the practice of using several counts to charge separate and distinct

242 N. C. 604, 89 S. E. 2d 141 (1955).
See also, *Second Annual Survey of North Carolina Case Law,* 33 N. C. L. REV. 157, 182 (1955).
[31] State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934).
[32] State v. Cooke, 246 N. C. 518, 98 S. E. 2d 885 (1957).
[33] *Id.* at 519, 98 S. E. 2d at 886.
[34] *Ibid.*
[35] See note 13 *supra.*
[36] *Ibid.* See also State v. Brown, 225 N. C. 22, 33 S. E. 2d 121 (1945).
[37] State v. Cooke, 246 N. C. 518, 520, 98 S. E. 2d 885, 887 (1957).
[38] *Id.* at 521, 98 S. E. 2d at 888.

[1] N. C. GEN. STAT. § 15-152 (1953). The statute provides: "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated . . . ."