Case Western Reserve Law Review

Volume 5 | Issue 3

1954

Criminal Law and Procedure

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fer was viewed as no more than a transfer or assignment for the benefit of creditors, with the assignee receiving no greater rights than the transferor possessed.

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CRIMINAL LAW AND PROCEDURE

Substantive Crimes

1 Burglary

Of the three burglary decisions discussed here, the first deals with the elements which are necessary to constitute the crime. It held insufficient an indictment which charged that the defendant did "unlawfully" attempt to break and enter an uninhabited building in the night season. By statute[1] the breaking and entering must be "maliciously and forcibly" done.[2] The second case[3] was concerned with the burglary of an uninhabited building. The defendants were convicted upon the basis of circumstantial evidence. The court of appeals affirmed the conviction wherein the elements of the crime were established by a showing that the building was burglariously entered, that goods were stolen and that the accused were apprehended with the goods in their possession plus other inculpatory circumstances. The third case[4] concerned a prosecution for the possession of burglar tools. The tools themselves were of a kind commonly used for lawful purposes. It was held that in such cases it is incumbent upon the state to prove that the implements found were in the possession of the accused and that he intended to use them burglariously in as much as intent is an essential element of the offense.

2. Forgery

The one case dealing with the crime of forgery holds that a criminal act may flow from the signing of the accused's own name.[5] This decision was based upon the broad language of the Ohio statute,[6] which uses the phraseology "falsely makes, alters, forges, counterfeits, prints or photographs." It was held that a person is guilty of forgery in the false making of a check

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[1] OHIO REV. CODE § 2907.10 (OHIO GEN. CODE § 12438)

[2] State v. Cimpritz, 158 Ohio St. 490, 110 N.E.2d 416 (1953)

[3] State v. Mumpower, 115 N.E.2d 587 (Ohio App. 1952).

[4] State v. Cimpritz, 93 Ohio App. 407, 113 N.E.2d 662 (1952) This reversal led to another trial at which Cimpritz was again convicted. The trial court was reversed. See note 2 *supra.*

[5] State v. Haven, 91 Ohio App. 578, 109 N.E.2d 48 (1951), 5 WEST. RES. L. REV. 115.

[6] OHIO REV. CODE § 2913.01 (OHIO GEN. CODE § 13083)

drawn upon a bank in which the person has no deposit with the intent that another give credit to it as genuine and authentic, even though the defendant signs his own name. Also a person who utters such a check with intent to defraud is guilty of forgery.[7]

3. Manslaughter

The manslaughter case[8] involved the unlawful killing of a person while in the act of violating two criminal statutes. It appeared that the accused had been tampering with a gas meter in a room where he had equipment which could be used for making intoxicating liquor. Gas escaped from a break in the pipe and killed one person and injured others. One defense was that the "gas tampering" statute, defining a crime against property, was not the kind of a statute the violation of which will furnish the unlawful act necessary to make an unintentional homicide, manslaughter. This defense was rejected, the court pointing out that the offense nevertheless involves the safety of the public and that its violation may result in personal injury or death.

4. Perjury

In *State v. O'Leary*[9] the court of appeals held that false testimony, wilfully and corruptly given by a witness pursuant to an oath administered by an examiner in the Bureau of Inspection and Supervision of Public Offices, Department of the Auditor and also before a grand jury came within the statute on perjury.[10]

5. Gambling

Three cases construed three different sections of the Ohio Revised Code relative to gambling. One common pleas court decision,[11] held that bingo and keno are lotteries within the meaning of the state statute.[12] The action was to restrain the arresting and prosecuting of officers, employees and members of a charitable organization engaging in the business of conducting these games.

A court of appeals decision,[13] in construing the "common gambler"

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[7] See note 4 *supra.*

[8] State v. Thrash, 93 Ohio App. 458, 113 N.E.2d 675 (1952)

[9] 93 Ohio App. 547, 114 N.E.2d 297 (1952).

[10] OHIO REV. CODE § 2917.25 (OHIO GEN. CODE § 12842)

[11] Wishing Well Club, Inc. v. Akron, 112 N.E. 41 (Summit Com. Pl. 1951)

[12] OHIO REV. CODE §§ 2915.10 to 2915.13 (OHIO GEN. CODE §§ 13063 to 13064-1).

[13] State v. Curry, 92 Ohio App. 1, 109 N.E.2d 298 (1952), construing OHIO REV. CODE § 2915.14 (OHIO GEN. CODE § 13065).

statute; held that the offense of being a common gambler may consist of engaging in commercial gambling for a livelihood on a part time basis. The offenses under the criminal laws need not be confined to specific acts of commission or omission, and even a part time livelihood obtained from commercial gambling is a mode of life inimical to the public welfare.

The third decision[14] held that a person who merely owned and possessed gambling devices, though acquiring the devices before the effective date of the prohibitory statutes, was properly convicted. The court held the statute constitutional.[15]

In *State v. Johnson* the trial court's instruction limited the jury in considering the justification for carrying a concealed weapon to evidence of the lawfulness of the business at the time, and the connection of the carrying of the weapon with such lawful business. The court of appeals held this erroneous.[16] Under these statutes[17] it is held that an accused cannot claim justification unless he is engaged in a lawful pursuit, but if he falls within that class he may go further and show circumstances which would justify a prudent man to carry a weapon for the defense of his person, property or family.

6. Rape

From the instructions of the trial court the jury might have found certain acts which did not amount to an assault and yet find the accused guilty of assault with intent to rape. The supreme court held that there may be an attempt to rape without an assault with intent to rape, and that it is erroneous to charge the jury in such a manner that it may find a defendant guilty of an assault with intent to rape if it merely finds the defendant guilty of an attempt to rape.[18]

7. Contributing to the Delinquency of a Minor

Two court of appeals decisions were concerned with convictions of adults for the crime of contributing to the delinquency of a minor. In the first case[19] the court reversed a conviction and directed the defendant's discharge because of insufficient evidence, but stated that the statute[20] is

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[14] Dodson v. Urbana, 49 Ohio Op. 469, 109 N.E.2d 555 (App. 1952), *appeal dis'm*, 158 Ohio St. 550, 110 N.E.2d 424 (1953).

[15] OHIO REV. CODE § 2915.17 (OHIO GEN. CODE § 13066-2)

[16] 64 Ohio L. Abs. 425, 112 N.E.2d 62 (App. 1952).

[17] OHIO REV. CODE § 2945.76 (OHIO GEN. CODE § 13448-4) and OHIO REV. CODE § 2923.01 (OHIO GEN. CODE § 12819).

[18] State v. Hetzel, 159 Ohio St. 350, 112 N.E.2d 369 (1953).

[19] State v. Clark, 92 Ohio App. 382, 110 N.E.2d 433 (1952).

[20] OHIO REV. CODE § 2151.41 (OHIO GEN. CODE § 1639-45).

violated whenever the acts proved are of a nature and character that they constitute within themselves the probability of leading the child into a delinquency, irrespective of whether the delinquency actually develops. The other decision[21] sustained a conviction of an adult who was unaware that the person in question was a minor. The accused was a member of a gambling conspiracy which was using a minor as a "runner." He was convicted under the theory that the acts of one member of a conspiracy toward the accomplishment of the unlawful purpose are imputable to all members.

8. Inferior Degrees

The supreme court[22] had occasion to consider again the doctrine of "inferior degrees" or "included offenses" in an interesting case in which the accused was indicted for assault with intent to kill and convicted of assault with intent to maim. It was held that "assault with intent to maim"[23] was not a lesser included offense. The test for the determination of this problem is whether all the elements of a separate offense are present with others in an offense charged in an indictment. Thus where all the elements of an offense are included among the elements of a charged offense, the former is a lesser included offense. However, to convict for the lesser included offense, there must be evidence tending to support each of the necessary elements of such offense.

Jurisdiction

A considerable variety of questions involving jurisdictional issues were decided. The supreme court,[24] apparently for the first time, decided that a judgment of conviction based on a fatally defective indictment is void for

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[21] State *ex rel.* Sipos v. Davis, 113 N.E.2d 385 (Ohio App. 1953).

[22] State v. Kuchmak, 159 Ohio St. 363, 112 N.E.2d 371 (1953). This decision affirmed in part the judgment of the court of appeals in *State v. Kuchmak*, 93 Ohio App. 289, 113 N.E.2d 643 (1952) and specifically upon the point of the "included offense" doctrine. The court of appeals had said that the doctrine of lesser offenses does not have application where the crimes are inherently and essentially so different in their nature, character and atrocity as to belong to entirely different classes of crime.

[23] OHIO REV. CODE § 2901.19 (OHIO GEN. CODE § 12416). The assault with intent to kill statute is OHIO REV. CODE § 2901.24 (OHIO GEN. CODE § 12421). The "lesser offense" statute is OHIO REV. CODE § 2945.74 (OHIO GEN. CODE § 13448-2).

[24] State v. Cimpritz, 158 Ohio St., 490, 110 N.E.2d 416 (1953). It follows naturally that it could be attacked by a collateral proceeding as indicated by the statement of the supreme court in the sixth paragraph of the syllabus.

lack of jurisdiction over the subject matter and therefore may be successfully attacked on direct appeal.

1. Justice of the Peace and Municipal Courts

A number of decisions concerned the jurisdiction of these lower courts. In *State* ex rel. *Dinella v. Justice of the Peace*[25] the court of appeals determined that a justice of the peace has county wide jurisdiction in all criminal matters where there is no other court with county wide jurisdiction other than the common pleas, police or mayor's courts. It was also determined that the clause "there is no other court" in the jurisdictional statute refers to courts other than that of a justice of the peace. In *State v. Wheelock*[26] it was determined that a municipal court had concurrent jurisdiction within its county with a justice of the peace of offenses which are within the county wide jurisdiction of justices of the peace.[27] A third decision[28] held that a municipal court, being a court of limited jurisdiction, did not have county wide jurisdiction over violations of the Uniform Traffic Act since there is no statute conferring such jurisdiction. The latter decision casts doubt upon the correctness of the holding in the *Wheelock* case.

2. Habeas Corpus to Test Jurisdiction

The writ of habeas corpus is a favorite device for attacking jurisdiction, and that procedure was used to raise jurisdictional questitions in a number of cases. *Beard v. State*[29] raised an interesting question of jurisdiction of a single judge to accept a plea of guilty and pass sentence under an indictment returned at a date prior to the effective date of the Ohio statute requiring the impaneling of a three-judge court to determine such matters. It was held that the finding and filing of the indictment was a "pending prosecution" within the meaning of the saving clause of the more recent statute.[30]

In *State v. Hollingsworth*[31] a justice of the peace had committed the petitioner to jail for 60 days on a charge of assault and battery. After five days he was conditionally released and thereafter recommitted for breach of probation. The court of appeals held that the original committment was sufficient authority for holding petitioner for the balance of the term, without credit for the time he was out; the assumption of authority to admit to probation did not invalidate the original commitment.

In another case[32] the jurisdiction of the common pleas court to commit a person under indictment for crime to the Lima State Hospital for observa-

[25] 64 Ohio L. Abs. 225, 111 N.E.2d 410 (App. 1951).

[26] 64 Ohio L. Abs. 129, 111 N.E.2d 412 (Piqua Mun. Ct. 1951)

[27] The statute describing the general jurisdiction of the justices of the peace is OHIO REV. CODE § 1901.20 (OHIO GEN. CODE § 1598)

[28] State v. McCoy, 94 Ohio App. 165, 114 N.E.2d 624 (1953)

tion, without notice to such person that his sanity is under investigation and without affording a right to be heard and to offer evidence, was questioned. In holding the common pleas court to be without jurisdiction the court of appeals indicated that as to such proceedings the court is of limited or special jurisdiction. Furthermore, in the exercise of such special statutory powers not belonging to the court as such, there is no presumption in favor of jurisdiction. This is, of course, contrary to the normal view that a judgment in a criminal cause is valid until the contrary appears.[33]

Intent or Scienter

Two decisions construed statutes which as such did not include scienter as an element of the offense. In *State v. Williams*[34] the statute made it a penal offense to take, catch or be in possession of undersized fish. Accused, a truck driver who transported the fish, was charged with a violation. He had no knowledge that the shipment contained undersized fish, and it was unreasonable to require him to inspect the shipment. Under these circumstances the court determined that the statute required proof of scienter. The court of appeals attempted to reconcile the leading supreme court decision[35] on the matter of guilty knowledge as follows: "in the case of a statute defining an offense regardless of scienter where the means of knowledge are available to the accused or the act is such as to impose a duty (in the interest of the public weal) upon the offender at his peril to ascertain the fact of violation, knowledge is not an essential element to support conviction
On the other hand, we conclude further that upon a charge of violation of a statute not in terms including scienter, where the means of knowledge are not at hand or the circumstances are such that the accused is not bound at his peril to know the fact and obey the law, knowledge of the fact is essential to support a conviction."[36] Such a position was manifestly adopted in order to save the constitutionality of the statute.

Another decision[37] reemphasized the fact that criminal intent is not an

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[29] 64 Ohio L. Abs. 532, 112 N.E.2d 832 (App. 1951).
[30] OHIO REV. CODE § 2945.06 (OHIO GEN. CODE § 13442-5).
[31] 93 Ohio App. 472, 113 N.E.2d 645 (1952).
[32] State *ex rel.* Smilack v. Bushong, 93 Ohio App. 201, 112 N.E.2d 675 (1952).
[33] Tyack v. Tipton, 65 Ohio L. Abs. 397, 115 N.E.2d 29 (App. 1951).
[34] 94 Ohio App. 249, 115 N.E.2d 36 (App. 1952)
[35] Two of the leading cases which state the necessity for proof of guilty knowledge are *Birney v. State,* 8 Ohio 230 (1837), and *Kilbourne v. State,* 84 Ohio St. 247, 95 N.E. 824 (1911). Two leading cases which held that guilty knowledge was not an element under the circumstances are: *State v. Kelly,* 54 Ohio St. 166, 43 N.E. 163 (1896); *Kendall v. State,* 113 Ohio St. 111, 148 N.E. 367 (1925).
[36] 94 Ohio App. 249, 255, 115 N.E.2d 36, 40 (1952).
[37] Dayton v. Brennan, 64 Ohio L. Abs. 525, 112 N.E.2d 837 (Dayton Mun. Ct. 1952).

element in a criminal prosecution arising under the specific requirements of the Ohio Motor Vehicle Act.

Sufficiency of Indictment or Information

The supreme court[38] again held that a charge of murder in the first degree in the perpetration of robbery may include the lesser offenses of murder in the second degree and manslaughter. A court of appeals decision[39] held that the failure of an indictment to particularize the word "necessities" under a charge of obtaining necessities by false pretenses did not invalidate it but would make it subject to motion to make definite and certain. The right to make the motion was waived by the accused upon the entering of a plea of guilty. Another court of appeals decision reaffirmed its former position that an affidavit charging an adult with contributing to the delinquency of a minor which does not set forth facts showing the minor to be a delinquent and facts showing that the accused has in any way contributed to the delinquency of such minor, does not charge an offense under the law.[40]

Evidence of Experiments Out of Court

One court of appeals[41] considered the admissibility of expert testimony of experiments made to demonstrate that the defendant's claim was physically impossible. The court stated that the conditions need not be identical with those existing at the time of the occurrence in question; it is sufficient if there is substantial similarity, but the probative value of the experiments will depend upon the correspondence of the conditions. If there is an exact correspondence, the experiment will amount to a demonstration and be conclusive upon the issue, but dissimilarity of conditions and experiments goes to the weight of the evidence and even to its admissibility.

Misconduct of the Prosecutor

Two decisions involved the consequences of misconduct of the prosecutor in his remarks to the jury. The supreme court held that statements in the nature of an appeal to the pecuniary interest of the jury were highly improper and that the refusal of the trial court to sustain objections thereto constituted prejudicial error.[42]

A court of appeals decision[43] presented two other facets of this problem. This case involved a number of improper remarks, some of which were ob-

[38] State v. Muskus, 158 Ohio St. 276, 109 N.E.2d 15 (1952).

[39] State *ex rel.* Leichner v. Alvis, 65 Ohio L. Abs. 420, 114 N.E.2d 861 (App. 1952).

[40] State v. Kiessling, 93 Ohio App. 524, 114 N.E.2d 154 (1952).

[41] State v. Farrell, 64 Ohio L. Abs. 481, 112 N.E.2d 408 (App. 1952).

jected to and others not formally noticed by defense counsel. As to those objected to, it was held that an immediate instruction to the jury cured any possible prejudice; the other remarks not noticed, since they were not so flagrantly improper as to prevent a fair trial, could not be the basis of error because no timely objection was made.

Sentence

The defendant was convicted, among other things, of failing to support his four children under an indictment containing a count as to each child. In passing sentence the trial court considered that a separate offense had been committed as to each child. This decision was affirmed, and the authority of the trial court to impose sentences which in some cases ran consecutively was upheld.[44]

Speedy Trial

Defendant, charged with first degree murder, alleged to have occurred 14 years before, was apprehended after the April grand jury had completed its work. He made a motion to cause a grand jury to be called to consider his special case. The motion was overruled,[45] and the trial court in its opinion stated that the guarantee of a speedy trial in the Ohio Constitution does not entitle the accused to an immediate trial; the speedy trial to which an accused is entitled is one conducted according to fixed rules, regulation and proceedings of law, free from vexations, capricious and oppressive delay created by the prosecutor. It does not shield an accused against the consequences of any delay made necessary by the law itself.

Bail

In construing the provisions of the statute[46] authorizing any party required to give a recognizance to deposit cash or bonds in an amount equal to the bond in lieu of a real property bond, one court[47] decided that there is no recognizance when the deposit is made; no notice is required and the deposit is ready to be seized for nonappearance at the day set for trial. There is no need for any notice as required by Ohio Revised Code Section 2937.38 (Ohio General Code Section 13435-18) where a person is under recognizance with a surety and fails to appear and answer.

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[42] State v. Muskus, 158 Ohio St. 276, 109 N.E.2d 15 (1952).

[43] State v. Landrum, 113 N.E.2d 705 (Ohio App. 1953).

[44] State v. Sharier, 93 Ohio App. 191, 112 N.E.2d 551 (1952).

[45] State v. Mango, 114 N.E.2d 499 (Trumbull Com. Pl. 1953).

[46] OHIO REV. CODE § 2937.28 (OHIO GEN. CODE § 13435-8).

[47] State v. Wilson, 65 Ohio L. Abs. 422, 115 N.E.2d 193 (Piqua Mun. Ct. 1950).

Probation and Parole

Three court of appeals cases considered the necessity for and the type of hearing a probationer is entitled to have prior to the revocation of his probation. In *Cleveland v. Hutcherson*[48] it was held that the trial courts must first have made a judicial inquiry to determine whether or not the defendant had broken the terms of his probation before vacating the order of probation and ordering the original sentence into execution. The right to suspend sentence and place a defendant on probation is controlled entirely by statutes in Ohio. After the exercise of the power of suspending sentence and ordering the defendant on probation, any attempt to vacate the order and enforce the original sentence must be done after making a "judicial inquiry" and a finding that the order be set aside.[49] Normally a judgment revoking probation can be set aside only by an appeal on question of law, but where the court ignores the code and engages in no judicial inquiry whatever, the defendant is deprived of his liberty without due process of law, and a writ of habeas corpus may be granted to restore him to such lawful custody as existed prior to unwarranted order revoking the probation.[50] The nature of the "judicial inquiry" will depend upon the individual circumstances. When the defendant is brought before the judge and admits the charges of violation and counsel make their statements, the procedure meets the requirements of the statute.[51]

Upon the revocation of probation and the reimposition of sentence, the defendant cannot object that his probationary period exceeded the duration of his maximum sentence. Under the code[52] the period of probation is discretionary with the court so long as the total period does not exceed five years. The court does not lose jurisdiction because the probationary period was longer than the maximum sentence authorized for the crime.[53]

Criminal Appeals

Several miscellaneous appellate problems were also considered during the year. It was held that the general statute[54] relative to bills of exceptions did not repeal the former statutes[55] relative to bills of exceptions in criminal cases from justice of peace courts.[56] In passing on a motion seeking an

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[48] 114 N.E.2d 611 (Ohio App. 1953).
[49] See OHIO REV. CODE § 2951.09 (OHIO GEN. CODE § 13452-7)
[50] State *ex rel.* Baker v. Tehan, 94 Ohio App. 290, 115 N.E.2d 19 (1953)
[51] State *ex rel.* Crocket v. Alvis, 109 N.E.2d 27 (Ohio App. 1951).
[52] OHIO REV. CODE § 2951.07 (OHIO GEN. CODE § 13452-5)
[53] See note 51 *supra.*
[54] OHIO REV. CODE § 2945.65 (OHIO GEN. CODE § 13445-1)
[55] OHIO REV. CODE §§ 1913.31, .32, .33, .34 (OHIO GEN. CODE §§ 10359, 10360, 10361, 10362)
[56] State v. Steele, 92 Ohio App. 128, 109 N.E.2d 579 (1952)