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CASE COMMENTS

Criminal Law—Accessory Before the Fact to Misdemeanor— A Legal Impossibility?

Defendant was indicted as an accessory before the fact to larceny of a walnut log valued at \$600. At trial conflicting evidence was presented concerning defendant's knowledge of and willful participation in the larceny. The jury found defendant guilty of being an accessory before the fact to *petit* larceny. Defendant appealed, alleging *inter alia*, that the verdict of accessory before the fact to a misdemeanor was void and a legal impossibility because the common law crime of accessory before the fact existed only in relation to felonies. *Held*, Judgment affirmed. The defendant invited any error by requesting an instruction that he could be found guilty of grand larceny, *petit* larceny, or not guilty; or alternatively, "[i]n any event, a lesser verdict than accessory before the fact to grand larceny could be properly returned by the jury." *State v. Woods*, 184 S.E.2d 130 (W. Va. 1971).

The defendant's contention that his conviction as accessory before the fact to a misdemeanor was void has some plausibility. First, no crime of accessory to a misdemeanor was recognized at common law. At common law an accessory before the fact was a person who conspired with the actual perpetrator, or who procured, instigated, encouraged, or advised him to commit a felony, but who was absent from its commission.¹ A person who stood in the same relation to a misdemeanor was liable as a principal² and could be so convicted on proof that the offense was committed at his command or inducement.³ Thus, no distinct crime of accessory before the fact to a misdemeanor existed at common law, since an act that would constitute accessory before the fact to a felony was included within the crime of principal to a misdemeanor. The second possible basis for holding the conviction void is that West Virginia clings to the common law pleading distinction that an indictment as an accessory before the fact to a felony will not support a verdict of guilty as a principal.⁴

¹ R. PERKINS, CRIMINAL LAW 663-64 (2d ed. 1969); I. WHARTON'S CRIMINAL LAW § 263 (12th ed. 1932).

² Commonwealth v. Bitler, 133 Pa. Super 268, 2A.2d 493 (1938); *State v. Anhrom*, 86 W. Va. 570, 103 S.E. 925 (1920); *Dominus Rex v. Bear*, 2 Salkeld 417, 91 Eng. Rep. 363 (K. B. 1699).

³ *United States v. Gooding*, 25 U.S. 460 (1827).

⁴ *Brown v. Thompson*, 149 W. Va. 649, 142 S.E.2d 711 (1965); *State v. Powers*, 91 W. Va. 737, 113 S.E. 912 (1922); *State v. Cremeans*, 62 W.

This pleading requirement is ignored; it can be argued, if the words "accessory before the fact" in the indictment are treated as mere verbiage and the conviction as principal to the misdemeanor is upheld. This pleading distinction, however, has been recognized only in cases in which defendant was convicted of the felony, on indictment as accessory before the fact to the felony.⁵ The *Woods* court refuses to extend the pleading distinction to preclude conviction as principal to a misdemeanor on an indictment as accessory before the fact to a felony.

One reason advanced by the court to justify affirming the conviction was the West Virginia statute concerning compromise verdicts in larceny trials.⁶ This provision says nothing of accessories and misdemeanors. It deals with the general rule that a verdict of guilty to petty larceny may be returned upon an indictment for grand larceny. The historic mission of this statute seems relatively clear. First, the statute offsets, at least for larceny crimes, the common law doctrine of merger which precluded conviction for a misdemeanor upon an indictment for a felony.⁷ This doctrine at English common law merged the misdemeanor into the felony⁸ because a defendant in a felony trial was deprived of important rights which would have been available to him in a misdemeanor trial.⁹ This disparity in rights

Va. 134, 57 S.E. 405 (1907); *State v. Roberts*, 50 W. Va. 422, 40 S.E. 484 (1901); *State v. Lilly*, 47 W. Va. 496, 35 S.E. 837 (1900). *But see* *Weil v. Black*, 76 W. Va. 685, 86 S.E. 666 (1916), for the proposition that the common law distinction was, in effect, abolished by Acts of the 31st W. Va. Leg. ch. 152, Reg. Sess. (1913).

⁵ *Id.*

⁶ W. VA. CODE ch. 62, art 3, § 17 (Michie 1966), provides:

In a prosecution for grand larceny, if it be found that the thing stolen is of less value than fifty dollars, the jury may find the accused guilty of petit larceny, and in a prosecution for petit larceny, though the thing stolen be of the value of fifty dollars or more, the jury may find the accused guilty; and in either case he shall be sentenced for petit larceny.

⁷ At early common law, if an act resulted in both a misdemeanor and a felony, the misdemeanor was merged into the felony and no conviction could be had for the misdemeanor. In *Isaac's Case*, 2 East P.C. 1031 (1799), defendant was indicted for the misdemeanor of houseburning. The court directed a verdict for defendant when evidence showed the fire destroyed other buildings. This constituted the felony of arson and merger precluded conviction of the misdemeanor. For a discussion *see* R. Perkins, *Criminal Law* 554 (2d ed. 1969): *See* *Hanna v. People*, 19 Mich. 316 (1869).

⁸ England, however, by statute granted the right to convict defendant for an attempt to commit the offense charged, even though the attempt was a misdemeanor and the offense a felony. Criminal Procedure Act, 1851, 14 & 15 Vict. C. 100, § 19.

⁹ At early common law, a defendant in a felony trial did not have the same procedural rights he had in a misdemeanor trial, such as representation by counsel, a copy of the indictment and a special jury. *Rex v. Westbeer*, 1 Leach 12, 168 Eng. Rep. 108 (1730).

necessitating the doctrine of merger was not present in the United States and complete merger was never recognized.¹⁰ The statutory abolition of the merger rule for larceny offenses should have had no bearing upon the problem of accessories posed in *Woods*. Second, the West Virginia statute allows the jury to compromise the gravity of larceny offenses; it permits the jury to return a verdict of guilty to petit larceny on an indictment for grand larceny. There is no apparent legislative intent to include accessories within the statute. In a felony trial in West Virginia, a verdict of guilty to a lesser offense will not be reversed if there is sufficient evidence to warrant conviction of the graver crime. A conviction of manslaughter on an indictment for murder¹¹ or a conviction of the misdemeanor of attempted rape on an indictment for rape¹² will not be set aside as unresponsive to the indictment. One who is charged as accessory before the fact to a felony can be convicted as accessory before the fact to a lesser included felony in light of the general policy toward compromise verdicts in West Virginia. If the pleading distinction between accessories and principals were extended to misdemeanors,¹³ the conviction as principal to a misdemeanor on an indictment as accessory before the fact to a felony would be void.¹⁴ However the court has refused to extend the pleading distinction. The fact that no accessories are recognized with respect to misdemeanors should not prohibit conviction for a lesser included misdemeanor, of a defendant indicted as accessory before the fact.

Another authority cited to support the rejection of *Woods'* claim is somewhat puzzling. The court cited *State v. Smith*¹⁵ which held that an indictment, invalid as a felony indictment because it failed to allege that the acts were done "feloniously," adequately charged and sufficiently supported a conviction for a misdemeanor. The court in *Smith* noted that had it not been for the fatal indictment, the trial court could have properly instructed the jury as to a misdemeanor in a felony trial, and approved a misdemeanor conviction.

¹⁰ *Guzik v. United States*, 54 F.2d 618 (7th cir. 1932), cert. denied, 285 U.S. 545 (1932).

¹¹ *State v. Prater*, 52 W. Va. 132, 43 S.E. 230 (1903).

¹² *State v. Collins*, 108 W. Va. 98, 150 S.E. 369 (1929); W. VA. CODE ch. 62, art 3, § 18 (Michie 1966) specifically allows an attempt conviction on a felony indictment.

¹³ See text accompanying notes 4 and 5 *supra*.

¹⁴ *State ex rel. Muldrew v. Boles*, 151 W. Va. 1033, 159 S.E.2d 36 (1967), held that an indictment as accessory would not support a subsequent plea conviction and sentence as principal.

¹⁵ 130 W. Va. 183, 43 S.E.2d 802 (1947).

tion.¹⁶ The implication from the *Woods* court citing *Smith* and the West Virginia statute concerning compromise verdicts in a larceny trial seems to be that the misdemeanor of petit larceny committed in any capacity is always a lesser included offense in the felony charge of accessory before the fact to grand larceny; and that the jury can always compromise the verdict to the lesser crime.¹⁷

The problem of finding a defendant guilty as principal to a lesser included crime within a felony, for which the defendant was indicted as accessory before the fact, arose in *Moore v. Lowe*.¹⁸ In *Lowe*, the defendant was convicted of voluntary manslaughter on an indictment charging him with being an accessory before the fact to murder. This conviction was upheld. At common law there was no crime of accessory before the fact to voluntary manslaughter,¹⁹ but the court in *Lowe* held that a verdict against the principal for voluntary manslaughter should be upheld when "logically, he should have been convicted of murder or acquitted," and the accessory should be entitled to the same consideration.²⁰ Replying to the defendant's argument that voluntary manslaughter was a lesser included offense in an indictment for murder but not for accessory before the fact, the court stated:

Inasmuch as under W. Va. law the guilt of an accessory before the fact is not contingent on the conviction of the principal, and the accessory is punishable as a principal, the distinction between indictment for the two offenses, respectively, in large measure loses significance The difference between the two is theoretical rather than real.²¹

¹⁶ W. VA. CODE ch. 62, art. 3, § 14 (Michie 1966) provides:
If a person indicted for a felony be by the jury acquitted of part and convicted of part of the offense charged, he shall be sentenced by the court for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor.

¹⁷ W. VA. CODE, ch. 62, art. 3, § 17 (Michie 1966)

¹⁸ 116 W. Va. 165, 180 S.E. 1 (1935)

¹⁹ See *Bibithe's Case* (1597), 76 Eng. Reports (Reprint) 991. Defendant charged as an accessory before the fact was released because the principal was convicted of manslaughter instead of murder. However, this rule was not adopted by all American courts which recognized that accessory before the fact could be acting in hot blood and be guilty of manslaughter, while the perpetrator was acting with deliberation and be guilty of murder, and *vice versa*. I. WHARTON'S CRIMINAL LAW §276 (12th ed. 1932).

²⁰ 116 W. Va. at 170, 180 S.E. at 3.

²¹ *Id.* at 170-71, 180 S.E. at 3.

The court noted further that even though logically the conviction of manslaughter could perhaps not be justified where the evidence showed malice and excluded passion, the issue was not one of strict logic, but rather of the practical administration of criminal law.²² This rationale, while denoting the improvidence of the pleading distinction between accessory and principal, was strongly opposed in a dissent by Judge Kenna. Besides ignoring established distinctions between accessory before the fact and principal he stated that the court had approved the defendant's conviction of a crime for which he could not have been indicted under the facts.²³

The *Lowe* decision was expressly overruled in 1967. The West Virginia Supreme Court of Appeals in *Muldrew v. Boles*,²⁴ again acknowledged the pleading distinction between an accessory before the fact and a principal, rejecting the *Lowe* rationale that justice demanded the same consideration in compromising the verdict be given an accessory as is given the principal. In *Woods*, the court apparently resurrected the *Lowe* rationale by allowing defendant to be convicted as accessory before the fact to a lesser included crime within the felony indictment. The *Woods* court did not attempt to reconcile this verdict with the common law pleading distinction between accessory before the fact and principal, but merely held that the defendant's instruction invited the error and he could not complain on appeal.

Employing the doctrine of invited error as justification for dismissal of the appeal from an allegedly void verdict of accessory before the fact to petit larceny, the *Woods* court avoided the necessity of ruling on either: (1) the correctness of defendant's instruction that stated the possible verdicts the jury could return or (2) the sufficiency of the felony indictment to include the crime for which the defendant was convicted.²⁵ Since a void judgment may be appealed in West Virginia,²⁶ the question arises whether an alleged void judgment based on a defendant's requested instruction comes within the scope of the invited error rule thereby precluding reversal. The West Virginia Supreme Court of Appeals has consistently held

²² *Id.* at 170, 180 S.E. at 3.

²³ *Id.* at 176, 180 S.E. at 6.

²⁴ 151 W. Va. 1033, 159 S.E.2d 36 (1967)

²⁵ *See, e.g.,* Perkins v. State, 229 Miss. 299, 90 So. 2d 650 (1956).

²⁶ *Hibner v. Belcher*, 115 W. Va. 387, 176 S.E. 422 (1934); *Simmons v. Yoho*, 92 W. Va. 703, 115 S.E. 851 (1923); *Johnson v. Wheeler Lumber Co.*, 69 W. Va. 539, 72 S. E. 470 (1911).

that a judgment will not be reversed for an error introduced into the record or invited by the party seeking reversal.²⁷ Consequently, a defendant cannot subsequently complain of an erroneous instruction given at his request.²⁸ In West Virginia an appellate court may notice plain error in order to avoid manifest injustice or clear prejudice to a party.²⁹ Though a defendant in a criminal case generally cannot complain of an instruction which he requested, a Wisconsin court held that if there was grave doubt as to the defendant's guilt, the court could properly reverse the judgment notwithstanding the invited error.³⁰ Assuming the defendant's contention that the verdict was purely a compromise verdict with no basis in law, clearly this could constitute a manifest injustice and entitle the defendant to review by appeal. West Virginia recognizes that an indictment charging a defendant as an accessory before the fact to a felony will not support a subsequent plea, conviction, and sentence as principal.³¹ Such a conviction is void, entitling a defendant to habeas corpus release.³² Review by appeal should be the broader remedy and be available to challenge a void verdict, rather than requiring submittal of the same issues to the court by writ of habeas corpus. The court, by relying on invited error to support the verdict, was drawing in an irrelevancy that should not have precluded adjudication of the defendant's contention.

Defendant's conviction in *Woods* as accessory before the fact to petit larceny on an indictment as accessory before the fact to grand larceny was a just result, but one that is not expressly authorized by statute or at common law. To avoid a verdict constancy rule (which requires defendant be found guilty as charged or not guilty) for the crime of accessory before the fact to a felony, the jury must be permitted to compromise the gravity of the felony to a lesser included offense. However, when the lesser offense is a misdemeanor, the effect of the verdict of accessory before the fact to the lesser offense is to find the defendant guilty as principal to a

²⁷ *Lambert v. Goodman*, 147 W. Va. 513, 129 S.E.2d 138 (1963); *State v. Ruble*, 119 W. Va. 356, 193 S.E. 567 (1937); *James Sons Co. v. Hutchinson*, 79 W. Va. 389, 90 S.E. 1047 (1916).

²⁸ *See, e.g., Nesbitt v. Flaccus*, 149 W. Va. 65, 138 S.E.2d 859 (1964); *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959); *Toler v. Cassinelli*, 129 W. Va. 591, 41 S.E.2d 672 (1946); *State v. Calhoun*, 67 W. Va. 666, 69, S.E. 1098 (1910).

²⁹ W. VA. T.C.R. VI(c).

³⁰ *Karakutza v. State*, 163 Wis. 293, 156 N.W. 965 (1916).

³¹ *State ex rel. Muldew v. Boles*, 151 W. Va. 1033, 159 S.E.2d 36 (1968).

³² *Id.* at 1045, 159 S.E. at 43.

misdemeanor. This is contrary to the established principal that an indictment as accessory before the fact will not support a conviction of the principal offense. This inconsistency accentuates the difficulty caused by retention of the pleading distinction between accessory before the fact and principal. As early as 1916, maintaining accessory before the fact as a separate substantive offense was recognized as an undesirable fiction whose only purpose was to abrogate common law procedural difficulties.³³ However, West Virginia retains this distinction even though it provides for equal punishment³⁴ and has abolished the common law technicality that the principal must be tried and convicted prior to the trial of the accessory before the fact to the same crime.³⁵ Legislative enactment to permit indictment and trial of accessories before the facts as principals should be forthcoming, as further recognition of the common law distinction will only continue to confuse and frustrate the criminal system of justice in West Virginia.

Charles C. Wehner

**Negligence—Intoxicating Liquors—Vendor’s Liability for
 Damages by Intoxicated Patrons**

Plaintiff was injured when the car he was driving collided with one driven by defendant O’Connell. Alleging that O’Connell was intoxicated as a result of being served alcoholic beverages in defendant Sager’s tavern, plaintiff brought a common-law action for negligence against O’Connell, Sager, and the owner of the car O’Connell was driving. The sale to O’Connell by Sager had been in violation of a statute prohibiting sale of alcoholic beverages to any intoxicated person. The trial court sustained defendant Sager’s demurrer without leave to amend and dismissed the complaint against him. *Held*, reversed by the California Supreme Court. The plaintiff had brought himself within that class of persons for whose protection the statute was designed. The harm occasioned plaintiff was the type contemplated by the statute thereby fastening liability on the tavern owner, Sager. *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

³³ *Karakutza v. State*, 163 Wis. 293, 156 N.W. 965 (1916).

³⁴ W. VA. CODE ch. 61, art. 11, § 6 (Michie 1966).

³⁵ W. VA. CODE ch. 61, art. 11, § 7 (Michie 1966).