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Kentucky Law Survey: Criminal Procedure

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Criminal Procedure

By ALBERT T. QUICK*

INTRODUCTION

The Kentucky Supreme Court handed down a number of decisions in the area of criminal procedure during the past year.¹ This article will examine those decisions which had a significant impact in the areas of search and seizure, harmless error, and the evidentiary use of similar criminal acts against the same victim.²

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¹ The total number of decisions was 58, 40 of which were unpublished opinions.

² In addition to the decisions discussed in the text, four other decisions deserve notice. In *Riley v. Commonwealth*, 539 S.W.2d 285 (Ky. 1976), the Court decided an issue of first impression. The appeal was from an order denying a petition for a writ of habeas corpus. The defendant had been indicted, tried and convicted of breaking and entering. It was his undenied contention that he was kidnapped from the State of Michigan without any sort of extradition papers by Graves County authorities to stand trial in Kentucky. The Court relied on *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbee v. Collins*, 342 U.S. 519 (1952), in holding that "a writ of habeas corpus will not lie to challenge the conviction or imprisonment of one who was brought by unlawful means into the jurisdiction where he was convicted." 539 S.W.2d at 286.

In *Hamilton v. Commonwealth*, 534 S.W.2d 802 (Ky. 1976) the Court looked at the impact of an improper waiver of juvenile jurisdiction to the circuit court. In 1974 Hamilton was charged in a two count indictment with storehouse breaking and being a habitual criminal. His claim on appeal was that the habitual criminal charge based on a 1971 conviction in Kenton Circuit Court was invalid because there was an improper waiver of juvenile jurisdiction to the circuit court. The Court examined the waiver and found that it was based on the conclusion that it was in the best interest of Hamilton and the public. Thus the waiver order did not meet the Kentucky requirements that it show that the juvenile had a hearing and was represented by counsel, and that it list the reasons for the transfer. Since the waiver was invalid, the Court held that the circuit court had no jurisdiction to try Hamilton on the charge, and that the waiver could not serve as the basis for a habitual criminal charge.

The United States Supreme Court recently decided in *Estelle v. Williams*, 425 U.S. 501 (1976), that upon timely objection an accused may not be compelled to stand trial before a jury while dressed in identifiable prison clothing. In *Scrivener v. Commonwealth*, 539 S.W.2d 291 (Ky. 1976), the Kentucky Court followed the *Williams* decision, holding it was reversible error not to grant a continuance so that the defendant could be tried in street clothing rather than in identifiable prison clothing.

The final case, *Stephens v. Bonding Association of Kentucky*, 538 S.W.2d 580 (1976), fits best under the heading of Constitutional Law, but it has a significant impact on the criminal justice system. The appellees were able to persuade a Jefferson County Circuit Court that House Bill No. 254, relating to the prohibition or abolition

I. SEARCH AND SEIZURE

A. *Automobile Searches*

Various legal theories have been developed by courts to determine the validity of warrantless automobile searches.³ Recently the Kentucky Supreme Court was called upon to decide the applicability of two of these theories in *Patrick v. Commonwealth*.⁴ The facts established that at approximately 2:30 a.m., a patrolman for the City of Danville saw the defendant, Patrick, walk away from the front of a store in a shopping center, enter a car, and drive away. The patrolman followed the car for a short distance and then signaled Patrick to stop.⁵ Also in the car with the defendant was a passenger, Alvin Ferguson, Jr. While asking Patrick for his registration, the officer observed a pair of gloves on the floor of the left front side of the car. Patrick could not furnish proof of registration and was asked to drive the car to the police station, where all three went inside. While waiting for the registration verification, the officer made a "character" check of Patrick and Ferguson which disclosed that Ferguson had been charged previously with possession of stolen property. The officer then went back to the car to get the gloves. He opened the left front door and saw a lug wrench and a tire tool protruding from under the front seat along with the handle of a hammer, which he spotted with the

of the bail bondsmen business, was unconstitutional. The Supreme Court of Kentucky reversed, finding no violation of the fourteenth amendment of the United States Constitution or Section I of the Kentucky Consitution. The Court justified the prohibition as being within the police power of the legislature and as not being a taking of property without due process of law. This decision by the Court would appear to rest on solid ground in light of the United States Supreme Court holding in *New Orleans v. Duke*, 427 U.S. 297 (1976).

³ See, *United States v. Watson*, 423 U.S. 411 (1976)(consent search); *Cady v. Dombrowski*, 413 U.S. 433 (1973)(caretaker search); *Chambers v. Maroney*, 399 U.S. 42 (1970), *rehearing denied* 400 U.S. 856 (1970)(probable cause that contents offend the law); *Harris v. United States*, 390 U.S. 234 (1968)(plain view seizure); *Application of Kiser*, 419 F.2d 1134 (8th Cir. 1969)(search incident to a valid arrest).

⁴ 535 S.W.2d 88 (Ky. 1976).

⁵ Apparently no issue was raised concerning the legality of the stop. In *Commonwealth v. Hagan*, 464 S.W.2d 261 (Ky. 1971) the Court held:

The stopping of an automobile on the highway does not involve a search nor does it involve an arrest. It is nothing more than the initial stopping. We know of no reason why a peace officer should not be permitted to stop any vehicle on the highway at any time for any reasonable purpose. *Id.* at 263.

aid of a flashlight. The officer then opened the right door and discovered a chisel lying beside the front seat. These tools were seized and became the basis for the charge of possession of burglary tools.

The two theories⁶ presented by the Commonwealth to justify this warrantless search and seizure were the plain view doctrine⁷ and probable cause that the car contained the instruments or fruits of the crime.⁸ The Court held that the Commonwealth was not entitled to invoke the plain view doctrine and stated:

[T]he tools here were not in plain view before the car doors were opened, nor were they inadvertently come across during the course of opening the car doors for a legitimate custodial purpose There was no valid reason for the officer to take the gloves from the car, so his opening of the door for the purpose cannot justify the subsequent observing of the tools.⁹

In holding as it did, the Court was following federal guidelines. The issue of the constitutional application of the plain view doctrine was considered in the case of *Coolidge v. New Hampshire*,¹⁰ in which the United States Supreme Court set down criteria for determining the validity of a plain view¹¹ seizure.¹² A plurality of the Court instructed that the police must have a prior justification for an intrusion¹³ which leads to the inadvertant discovery¹⁴ by observation of an article of incriminating character.¹⁵ The *Patrick* decision turned on the Com-

⁶ It should be noted that in the decision the Court also determined that the search could not be justified as one made incidental to an arrest, and that it would be difficult to sustain as an inventory of the car's contents under the holding in *City of Danville v. Dawson*, 528 S.W.2d 687 (Ky. 1975).

⁷ Seizures under this doctrine are generally considered to be simply seizures without a search, in that the police have a prior justification for the intrusion. See Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047 (1975).

⁸ This exception can be traced to *Carroll v. United States*, 267 U.S. 132 (1925).

⁹ *Patrick v. Commonwealth*, 535 S.W.2d 88, 89-90 (Ky. 1976).

¹⁰ 403 U.S. 443 (1971).

¹¹ The plain view doctrine is generally regarded as originating in *Marron v. United States*, 275 U.S. 192 (1927).

¹² *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

¹³ *Id.* at 469.

¹⁴ *Id.* at 466.

¹⁵ In discussing the plain view doctrine, the Court also mentioned the lack of

monwealth's inability to establish a prior justification for the intrusion of opening of the doors to the automobile.¹⁶ The Court concluded that "[t]here was no valid reason for the officer to take the gloves from the car, so his opening of the door for that purpose cannot justify the subsequent observing of the tools."¹⁷

In *Patrick* the Court has taken a much needed first step in establishing the elements for the application of the plain view doctrine, since prior to this case the Court had spoken only generally in regard to the legal application of a plain view seizure of evidence from automobiles.¹⁸ Because this type of seizure is an exception to the warrant requirement, it is important that the application be delineated, so as not to interfere with the legitimate use of a warrant.¹⁹ However, this case did not present a situation for the Court to decide the basis for determining when it is immediately apparent²⁰ to the police that they have incriminating evidence before them and the measure of determining inadvertence.²¹ Unfortunately, these issues will have to await a future determination by the Court.

The second theory advanced by the Commonwealth to justify the search and seizure fared no better than the first. The prosecution hoped to bring the search and seizure within the framework of the so-called "Carroll Doctrine,"²² which sanctions a search and seizure if the police have probable cause to believe that "the contents of the automobile offend against the law."²³ This probable cause belief²⁴ must exist prior to the

probable cause in this case, but it is clear from an entire reading that prior justification was the missing element.

¹⁶ *Patrick v. Commonwealth*, 535 S.W.2d 88, 90 (Ky. 1976).

¹⁷ *Hollowell v. Commonwealth*, 492 S.W.2d 884, 886 (Ky. 1973).

¹⁸ Kentucky law appears to recognize this point in the case of *Caine v. Commonwealth*, 491 S.W.2d 824, 828 (Ky. 1973).

¹⁹ See generally *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

²⁰ See *State v. Elkins*, 422 P.2d 350 (1966), wherein a conviction was reversed because the arresting officer did not have reasonable grounds to believe confiscated pills were contraband.

²¹ For a general discussion on this point see *The Supreme Court 1970 Term*, 85 HARV. L. REV. 3, 244-46 (1971).

²² See generally *Carroll v. United States*, 267 U.S. 132 (1925).

²³ *Id.* at 159.

²⁴ Probable cause was defined in *Carroll v. United States*, 267 U.S. 132, (1925) as "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction . . ." *Id.* at 149.

search of the automobile. The Court held in *Patrick* that the facts known to the officer did not give rise to probable cause. The facts present were that Patrick and Ferguson were in the vicinity of a store at an unusual hour, that Patrick had no registration receipt for the car, and that Ferguson had on a prior occasion been charged with possession of stolen property.²⁵

The interesting aspect about this part of the decision is that the Court was confronted with a similar situation in 1974 and found that probable cause existed for the search. In *Scillion v. Commonwealth*,²⁶ the officer observed a pair of gloves in plain view in the automobile, and had heard²⁷ that Scillion had dangerous propensities and had carried a weapon in his car on a prior occasion. Apparently the only significant difference was that in *Scillion*, the facts known to the officer related to weapons, a factual difference in nature but not in degree. The Court felt the need to distinguish the two cases but merely commented that in *Scillion* "the search was for a weapon or weapons which the arresting officer had cause to believe might then and there be used against him."²⁸

In holding as it did, the Court may be taking the first step toward establishing a justification for a warrantless search based on a reasonable belief by the officer that weapons could be used against him. This theory would apparently be an extension of the "stop and frisk" principle in two respects: first, it would allow a search as opposed to a frisk,²⁹ and second, it would allow the intrusion to extend beyond the person, in this case to an automobile.³⁰ Although appealing from the standpoint of safeguarding the law enforcement officer, this theory creates yet another exception to the warrant requirement. However, this exception is not without support. In 1976 the District of Columbia Court of Appeals decided that a seizure

²⁵ *Patrick v. Commonwealth*, 535 S.W.2d 88, 90 (Ky. 1976).

²⁶ 508 S.W.2d 307 (Ky. 1974).

²⁷ The facts reported do not indicate how the police officer gained this information. This would seem to be essential in determining whether it could be the basis for probable cause. See *Spinelli v. United States*, 393 U.S. 410 (1969).

²⁸ *Patrick v. Commonwealth*, 535 S.W.2d 88, 90 (Ky. 1976).

²⁹ A "frisk" is defined in *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

³⁰ See *Adams v. Williams*, 407 U.S. 143 (1972) for a case involving the frisk of an individual seated in an automobile.

of marijuana from a sack in an automobile was justified where the officer reasonably considered his safety in jeopardy.³¹ The officer had stopped the accused for a traffic violation. As he was preparing to examine the individual's driver's license, he flashed his light into the car and saw a closed, partially filled grocery bag on the floor between the driver's legs. Having found weapons in bags before, the officer feared for his safety which led to his examination of the bag and the seizure of evidence.³² Thus, careful attention should be paid to the Court's statement in *Patrick* to determine if it is a precursor of an extension of the stop and frisk principle.

B. *Third Party Consent*³³

The legal principle of third party consent as developed by Kentucky courts can generally be traced³⁴ from a legal concept, which has lent itself to a relatively broad application.³⁵ This concept focuses primarily on the identification of an individual who is "the owner or person in charge of a house at the time a search is made . . . ,"³⁶ who is then allowed to consent to a search against another.³⁷ Initially this concept was narrowly applied to include only those individuals who held an ownership interest in the place to be searched or were accorded the status of head of the household to be searched. A resident owner could consent on behalf of co-resident,³⁸ for example, while a mother who was either owner or in control of household could consent on behalf of resident son,³⁹ and a wife with equal

³¹ *Johnson v. United States*, No. 9330 (D.C. Cir., January 22, 1976).

³² *Id.* at 2.

³³ For an interesting discussion of this issue see Comment, *Third-Party Consent Searches: An Alternative Analysis*, 41 *CHI. L. REV.* 121 (1973) [hereinafter cited as Comment].

³⁴ An exception to this statement may be found in the case of *Banks v. Commonwealth*, 227 S.W. 455 (Ky. 1921) wherein the facts do not indicate whether the interest of the party against whom the search is directed was a greater or equal interest.

³⁵ However, as noted in this section, the facts of a particular case strain the application.

³⁶ *Combs v. Commonwealth*, 341 S.W.2d 774, 775 (Ky. 1961).

³⁷ The decision did not appear to turn on any analysis of the relative interest between the party giving consent and the party against whom the search was directed.

³⁸ *Banks v. Commonwealth*, 227 S.W. 455, 458 (Ky. 1921).

³⁹ *Gray v. Commonwealth*, 249 S.W. 769 (Ky. 1923).

control over the home could consent on behalf of husband.⁴⁰

In 1971 the application of this concept was significantly extended in *Garr v. Commonwealth*.⁴¹ In *Garr* the sister of the appellant was recognized as legally able to give consent when she was neither the owner of the property nor the recognized head of the household. The Court reasoned that the sister was temporarily in charge of her parents' premises during their absence, and, as a full-time temporary resident, her possessory interest was at least coextensive with the appellant's interest. Thus the Court recognized that interests less than ownership or status as head of the household could serve as a basis for third party consent. However, in order to determine if such consent was legally sufficient, the Court had to assess the relative interests of each party. If the interest of the consenting party was greater than⁴² or equal to⁴³ the interest of the aggrieved party, the consent would be upheld. In *Garr*, the Court found that the appellant's interest was based on the fact that he occasionally slept on the premises when in the area and had not established any exclusive possession or control over any portion of the house. This interest was not determined to be superior or equal to that of the consenting party, a point the Court viewed as essential to its decision.⁴⁴

Recently, the Court was again faced with a question of third party consent in *Butler v. Commonwealth*.⁴⁵ In that case, the search took place at the apartment of a woman who had lived with the appellant⁴⁶ for several years and who was the mother of his child. Some weeks prior to the search, however, she had put appellant out of the apartment and placed him under a peace bond. On the night before the search, she permitted him to return to the apartment, and he had spent the night. The next night, her babysitter⁴⁷ admitted the police into the

⁴⁰ *Commonwealth v. Sebastian*, 500 S.W.2d 417 (Ky. 1973).

⁴¹ 463 S.W.2d 109 (Ky. 1971).

⁴² *Id.* at 113.

⁴³ *Id.* citing *Frazier v. Cupp*, 394 U.S. 731 (1969).

⁴⁴ *Id.*

⁴⁵ 536 S.W.2d 139 (Ky. 1976).

⁴⁶ *Id.* The Court recognized that the appellant had standing to challenge the legality of the search, based on the holding in *Jones v. United States*, 362 U.S. 257 (1960).

⁴⁷ Since the record on appeal did not expressly reflect who employed the babysitter, the Court assumed that the mother had done so.

apartment while she was away. The officers told the babysitter they were looking for the appellant and asked if they could look inside, to which she replied, "Sure."⁴⁸ Once inside, they found and arrested the appellant and seized incriminating evidence. The Court upheld the search⁴⁹ and seizure based on the consent given by the babysitter. In deciding this case, the Court again found that an assessment of the parties' possessory interest was crucial. The Court stated: "In this instance we think the status of Butler relative to that of the babysitter was even more tenuous, and that, as between the two, the babysitter had the superior right of dominion and control, and the right to permit the search."⁵⁰

In basing this decision on who had the superior right of dominion and control, the Court was faced with a close set of facts, in contrast to the situation in *Garr*, where factors were present upon which the judgment could more easily be made. Here the Court's use of the label "casual"⁵¹ to denote the appellant's interest seems to discount his having lived with the woman for several years and the uncertainty of whether his return to her apartment was casual or permanent. The babysitter was apparently judged to have the superior interest solely because of her position.⁵² There was no evidence that she was given any special control from which consent could be imputed⁵³ or that she was granted any actual authority to consent.⁵⁴

This case reflects the weakness in relying exclusively on one set of criteria in determining the superior interest. Since the recognition of a valid consent can turn aside the protection of the fourth amendment, the Court may in the future want to

⁴⁸ *Butler v. Commonwealth*, 536 S.W.2d 139, 140 (Ky. 1976).

⁴⁹ The Court for sake of argument found that the arrest was unlawful, and no attempt was made to justify the seizure on the theory that it was incident to a lawful arrest.

⁵⁰ *Butler v. Commonwealth*, 536 S.W.2d 139, 140-41 (Ky. 1976).

⁵¹ *Id.* at 140.

⁵² *Id.*

⁵³ Such additional evidence of control might be found, for example, if the babysitter was given some special right of access like a key to the apartment. See *People v. Misquez*, 313 P.2d 206 (Cal. App. 1957) which was cited by the Court.

⁵⁴ If actual authority had been granted, it might have been subject to scrutiny under the estrangement doctrine. See *United States ex rel. Cabey v. Mazurkiewicz*, 431 F.2d 839 (3d Cir. 1970).

assess relative interests based on the concept of privacy. It is certainly well established that an individual's right to privacy is protected by the fourth amendment if reliance on the right is justified.⁵⁵ This right should not be subject to waiver by a third person who has less justification to assert a claim of privacy.⁵⁶ The application of this principal to the *Butler* case may cast a different light on the Court's decision.⁵⁷

Other issues seem to call for decision by the Court in *Butler* that were not considered, including the voluntariness of the consent and the scope of its application. The Court has a long tradition of scrutinizing consent to ascertain if it is voluntary,⁵⁸ but in this case, no such inquiry was made. Also, the scope of the consent, as it relates to the area searched, did not generate any discussion in *Butler*, although in previous cases the Court has recognized that consent can be limited, as opposed to general.⁵⁹ Finally, the Court could have asked if the area or items searched were in *Butler's* exclusive use.⁶⁰ The doctrine of exclusive use has support in Kentucky law, and its effect is to limit the extent of a general consent to search.⁶¹

II. HARMLESS ERROR

A. *Restrictions on the Assistance of Counsel*⁶²

The Kentucky Supreme Court applied the doctrine of harmless error in *Taylor v. Commonwealth*,⁶³ concerning effective assistance of counsel. The opinion focused on whether it was reversible error for the trial judge to refuse a continuance, based on defendant's motion for additional time to prepare a

⁵⁵ See *Katz v. United States*, 389 U.S. 347 (1967).

⁵⁶ Such would be the nature of the relative interests instead of property interests.

⁵⁷ For a case using this approach see *People v. Miller*, 310 N.E.2d 808 (Ill. App. 1974); see also Comment, *supra* note 33.

⁵⁸ See *Manning v. Commonwealth*, 328 S.W.2d 421 (Ky. 1959).

⁵⁹ See *Adams v. Commonwealth*, 231 S.W.2d 55, 56 (Ky. 1950).

⁶⁰ *Butler v. Commonwealth*, 536 S.W.2d 139 (Ky. 1976). The items seized were discovered under a pile of clothing and in a coat. The ownership of these items was never established in the record. If they were owned by the defendant, however, it would seem that he had the superior interest in possession.

⁶¹ See *Commonwealth v. Sebastian*, 500 S.W.2d 417, 419 (Ky. 1973).

⁶² This term is used so as not to imply that counsel because of his own action or inaction was ineffective.

⁶³ *Taylor v. Commonwealth*, No. 75-340 (Ky. April 16, 1976) (per curiam).

defense. The defendant was indicted on July 25, 1974, and a warrant for his arrest was issued on July 29, 1974. He was not formally arrested, however, until he was returned from federal prison on December 2, 1974. He was then assigned counsel and arraigned on December 3, 1974 with trial set for December 5, 1974. On the date set for trial, defense counsel's oral motion for continuance so that he could prepare a defense and subpoena possible witnesses was denied. On appeal the Court conceded error, but nevertheless held that it was harmless.⁶⁴

This case brings into focus the Court's analysis of the nature of the error and the appropriate test to determine whether the error is harmless. The Court had the choice of classifying the error as a violation of state procedural law, or as a violation of the federal constitution. It chose to classify it as a violation of state procedure without inquiring whether a federal right was involved, and based on Kentucky Rule of Criminal Procedure 9.04, it held:

[T]he granting of a continuance is within the sound discretion of the trial court and a conviction will not be reversed for failure to grant a continuance unless that discretion has been plainly abused and manifest injustice has resulted.⁶⁵

In arriving at this conclusion, the Court placed the burden on the appellant to demonstrate that he had additional evidence which might have been presented if a continuance had been granted. The majority felt that the appellant had failed to meet this burden.⁶⁶

However, it is not clear that this was simply a case involving a violation of a state procedural rule, and in light of certain recent United States Supreme Court decisions, the Court should arguably have explored the question of whether the violation placed restrictions on counsel which are prohibited by the sixth and fourteenth amendments.⁶⁷ The implicit right found in the due process clause of the fourteenth amendment guarantees the defendant "the guiding hand of counsel at every

⁶⁴ *Id.*

⁶⁵ *Id.* at 3.

⁶⁶ *Id.*

⁶⁷ *Herring v. New York*, 422 U.S. 853 (1975); *Brook v. Tennessee*, 406 U.S. 605 (1972).

stage in the proceedings against him.”⁶⁸ This right not only requires the presence of counsel, but also requires that certain undue restrictions not be placed on him. In the 1972 decision of *Brooks v. Tennessee*,⁶⁹ the U.S. Supreme Court invalidated a statute that required the defendant desiring to testify to do so before any other testimony was offered by the defense.⁷⁰ One of the basic reasons behind this decision was that, “the statute restricts the defense—*particularly counsel in the planning of its case.*”⁷¹ Implicit in this opinion is the idea that counsel should not be restricted in his ability to gain knowledge before reaching a critical area of a criminal defense. In *Brooks*, it was not the right to testify per se that was involved, but that a decision to testify had to be made without an opportunity to know the value of defendant’s evidence.

In 1975, the Supreme Court struck down a state restriction denying defense counsel a closing argument in *Herring v. New York*.⁷² The Court spelled out what was meant by the constitutional right to the assistance of counsel:

[T]he right to assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.⁷³

Although these cases do not specifically deal with a restriction imposed by the denial of a continuance, the basic thrust of the opinions are aimed at protecting counsel in preparing a defense for the accused. It is arguable that the facts and circumstances in the *Taylor* case fit within the holdings of these Supreme Court cases. As the dissenting Justice in *Taylor*

⁶⁸ *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

⁶⁹ 406 U.S. 605 (1972).

⁷⁰ TENN. CODE ANN. § 40-2403 (1955).

⁷¹ *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972)(emphasis added).

⁷² 422 U.S. 853 (1975).

⁷³ *Id.* at 857-58.

pointed out, counsel had one day to investigate a crime occurring several months earlier, consult fully with the accused, seek discovery, interview prospective witnesses, examine and study medical and laboratory reports obtained by the prosecutor, research the applicable law, and prepare jury instructions.⁷⁴ All of this information would appear to be necessary before counsel could effectively carry on the adversary fact finding process⁷⁵ and plan a defense strategy.⁷⁶ If this is a reasonable reflection of the circumstances facing the defense counsel in *Taylor*, it would appear that the Kentucky Supreme Court should have addressed the issue of constitutional error before making its final decision.

The doctrine of harmless error would have been available to the Court even if it found a constitutional violation of due process.⁷⁷ The significance of finding constitutional error as opposed to an error in the application of state procedure, however, lies in the test used to determine whether the error is harmless. In *Chapman v. California*,⁷⁸ the Supreme Court defined the tests as "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."⁷⁹ The key element of this test is that burden of proof beyond a reasonable doubt is placed upon the State. This is in stark contrast to the test applied by the majority in the *Taylor* case.⁸⁰ In addition, if the violation went to the constitutional right of assistance of counsel, there is strong support for the proposition that the harmless error doctrine should *not* apply to such a fundamental right. In *Chapman*, after citing the sixth amendment right of assistance of counsel the Court said, "our prior cases have indicated that there are some constitutional rights

⁷⁴ *Taylor v. Commonwealth*, No. 75-340 at 1-2 of dissent (Ky. April 26, 1976) (per curiam).

⁷⁵ This, in general, was the reason for counsel advanced in *Herring v. New York*, 422 U.S. 853 (1975).

⁷⁶ This, in general, was the reason for counsel advanced in *Brooks v. Tennessee*, 406 U.S. 605 (1972).

⁷⁷ *Id.* at 613.

⁷⁸ 386 U.S. 18 (1967).

⁷⁹ *Id.* at 24.

⁸⁰ In *Taylor* the Court placed the burden on the defendant to show prejudice.

so basic to a fair trial that their infraction can never be treated as harmless error."⁸¹

B. *Fifth Amendment Right of Silence*

In *Niemeyer v. Commonwealth*⁸² the Kentucky Supreme Court found the improper use by the prosecution of the defendants' failure to deny guilt at the time of arrest and identification to be a violation of the fifth amendment, but nonetheless held the error to be harmless. The defendants, Niemeyer and Tolbert, were arrested for rape and given their *Miranda* rights. They acknowledged their presence at the scene of the crime but denied any participation in the rape because they were "too drunk or something."⁸³ At trial the prosecutor questioned both the prosecutrix and the arresting officer on direct examination about the defendants' failure to deny their guilt, similarly questioned both defendants on cross examination, and made reference to this in his closing argument.⁸⁴ Both defendants were convicted of rape. On appeal, the Court held that the prosecutor's improper use of the defendants' silence protected under *Miranda* was an error of constitutional dimension. The Court stated:

The efforts of the prosecution to *impeach* each appellant by reference to his silence at the time of identification and at the time of arrest plainly violates his *Fifth Amendment right to remain silent*.⁸⁵

The Kentucky decision pre-dated the United States Supreme Court's decision in *Doyle v. Ohio*,⁸⁶ wherein the Court reached substantially the same conclusion, but based the infirmity on the fourteenth amendment rather than the fifth.⁸⁷ Both Courts relied heavily on the case of *Miranda v. Arizona*,⁸⁸ but differing views as to the meaning of that decision led each court to a different opinion of which provision in the Constitu-

⁸¹ 386 U.S. 18, 23 (1967).

⁸² 533 S.W.2d 218 (Ky. 1976).

⁸³ *Id.* at 219.

⁸⁴ *Id.* at 221.

⁸⁵ *Niemeyer v. Commonwealth*, 533 S.W.2d 218, 221 (Ky. 1976) (emphasis added).

⁸⁶ 426 U.S. 610 (1976).

⁸⁷ *Id.* at 619.

⁸⁸ 384 U.S. 436 (1966).

tion had been violated. In *Doyle*, the Court relied on the due process clause, recognizing that the *Miranda* decision did not specifically hold that a violation of the fifth amendment would occur if a defendant's silence were used for impeachment,⁸⁹ or if evidence obtained in violation of *Miranda* were used to show perjury.⁹⁰ Thus, the Court turned to the due process clause of the fourteenth amendment to hold that silence could not be used for impeachment after the *Miranda* warnings had been given. The Court reasoned that although the use of silence may have some relevancy, it was implicit in the warnings that silence will carry no penalty, and it is therefore, fundamentally unfair to allow silence to be used in light of this implicit assurance.⁹¹

On the other hand, the Kentucky Court found that *Miranda* did not require a defendant to make any statement concerning his guilt or innocence.⁹² The Court reasoned that to allow impeachment by the use of one's silence after receiving the *Miranda* warning was a plain violation of the fifth amendment.⁹³ This approach is not theoretically strong since the prohibition of the prosecution's use of a defendant's silence is merely supported by dicta in *Miranda*. In any event, its significance appears slight in light of the *Doyle* decision's applicability to the states.

The holding of the Kentucky Supreme Court in *Niemeyer* that the error was nonetheless harmless presents a significant question concerning the application of the harmless error doctrine: should the doctrine be applied only to those errors which are without prejudice and accidental as opposed to intentional? If the Court wishes to deter intentional error, especially of a constitutional magnitude, then it may be beneficial not to apply the doctrine where the prosecutor has demonstrated inexcusable abuse. One cannot help but question why the State should be the beneficiary of an intentional disregard of a constitutional right by holding the error harmless.⁹⁴ In *Niemeyer*

⁸⁹ *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

⁹⁰ See *Harris v. New York*, 401 U.S. 222 (1972); and *Oregon v. Hass*, 420 U.S. 714 (1975).

⁹¹ *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

⁹² *Niemeyer v. Commonwealth*, 533 S.W.2d 218, 221 (Ky. 1976).

⁹³ *Id.*

⁹⁴ This reasoning has been used as part of the justification for the application of

the Court apparently felt that the prosecutor's actions amounted to an inexcusable abuse, and it would appear that one could deter that behavior more effectively by reversal than by a simple admonishment.

III. THE EVIDENTIARY USE OF SIMILAR CRIMINAL ACTS⁹⁵

The Supreme Court of Kentucky took a bold step in changing the law in regard to the evidentiary use of similar criminal acts against the same victim in *Ware v. Commonwealth*.⁹⁶ In *Ware*, the defendant was indicted, tried, and convicted of forceable rape.⁹⁷ At the trial, evidence was introduced showing that the defendant had committed several rapes upon the same victim during the course of one night. The trial court required the Commonwealth to elect which act was to be the basis of the prosecution, holding that in default of election it would be the act about which substantive proof was first introduced.⁹⁸ The defense then requested that the jury be admonished to the effect that evidence of other acts of intercourse by appellant following the first of such incidents could be considered only for the limited purpose of corroboration. The trial court failed to admonish the jury on this point. On appeal the Court chose not to decide the narrow issue of whether the error was prejudicial, but instead took this opportunity to point the law in a new direction regarding the evidentiary use of similar criminal acts. The Court stated:

If the state seeks but one conviction out of a series of similar criminal acts against the same victim, all of the evidence of all of the acts might as well be treated as and called substantive evidence.⁹⁹

This holding will profoundly affect the law in Kentucky that previously required the prosecutor to make an election among

the exclusionary rule to fourth amendment violations. See *United States v. Calandra*, 414 U.S. 338 (1974).

⁹⁵ See 1 WHARTONS CRIMINAL EVIDENCE §§ 240-264 (13th ed. 1972) for a discussion of this issue.

⁹⁶ 537 S.W.2d 174 (Ky. 1976).

⁹⁷ *Id.* at 175-176.

⁹⁸ *Id.* at 178.

⁹⁹ *Id.* at 179.

similar acts to determine which one was to be the basis of the prosecution. It also directly affects the evidentiary rule that a series of similar acts against the same victim, although admissible, are to be viewed by the fact finder as only corroborative evidence.¹⁰⁰

Once the Court held that all similar acts against the same victim could be used as substantive evidence, thus eliminating the need to elect, they had to address the purpose of previously requiring an election in order to justify a change in the law. The Court found that there were two reasons for requiring the prosecutor to make an election: to enable the defendant to defend himself by specifying the act; and to protect the defendant from double jeopardy.¹⁰¹ Justice Palmore spoke directly to the issue of double jeopardy and disposed of it as an impediment to the Court's holding by limiting the prosecution in this way:

We think it would have been perfectly proper and fair for the jury to find him guilty of a single rape . . . on the basis of any one or more of the several separate acts proved. As a consequence, however, he could not thereafter be tried and convicted for a second offense of rape based on the same series of events proved in the first case.¹⁰²

Thus, although the Commonwealth may take advantage of the evidentiary rule, it may only seek one conviction.

The concept of notice as a reason for election was not discussed in the same forthright manner. The Court seemed to infer that since the acts had to have taken place at some time during the date alleged in the indictment¹⁰³ and to have been without substantial interruption, the defendant should not be surprised by evidence of similar criminal acts.

Dispensing with notice as to the specific criminal act that will form the basis of the prosecution raises several questions. The first focuses on the ability of the accused to prepare a defense against a vindictive victim who manufacturers testi-

¹⁰⁰ See *Bowen v. Commonwealth*, 156 S.W.2d 870, 872 (Ky. 1941).

¹⁰¹ *Ware v. Commonwealth*, 537 S.W.2d 174, 178 (Ky. 1976).

¹⁰² *Id.*

¹⁰³ Official form no. 15 contained in the Rules of Criminal Procedure, sets forth the language of an indictment: "On or about the ____ day of ____, 19____." Thus, the indictment itself does not have to state a date, only that the offense occurred on or about a certain date.

mony concerning criminal acts.¹⁰⁴ For example, suppose person X has been indicted for forcible rape occurring on a certain date. The defendant admits to his counsel that he was with the victim on the evening in question, and that a single act of intercourse took place which defendant claims was consensual. Defendant also indicates that a witness can be produced who will testify to the consensual nature of the act. At the trial, however, the victim testified not only about the act that defendant claims was consensual, but also about subsequent acts of rape that allegedly occurred later that same evening without any witnesses.¹⁰⁵

The second concerns the right to notice concerning the acts upon which the prosecution will be based¹⁰⁶ sufficient to allow counsel to prepare an effective defense.¹⁰⁷ It appears that a situation might arise wherein the lack of notice concerning the act upon which prosecution is to be predicated could encroach upon the right of the defendant.¹⁰⁸

A third question concerns the burden on a defense attorney in preparing to defend against a series of criminal acts in one trial and the impact the evidence will have upon the jury. One way to relieve the burden and reduce the impact is to have separate trials for each act. While there are both advantages and disadvantages to separate trials for a series of similar criminal acts,¹⁰⁹ the *Ware* decision provides for the automatic

¹⁰⁴ See Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1373 (1972) for a general discussion on false accusation.

¹⁰⁵ This deficiency in notice would not always be cured by a bill of particulars, in that defense counsel would not necessarily feel any need to request a more specific statement.

¹⁰⁶ See *In re Gault*, 387 U.S. 1 (1967) holding:

Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity." *Id.* at 33.

¹⁰⁷ See *supra* note 72.

¹⁰⁸ Incidental to the issue of notice is the potential problem of whether a defendant could be convicted for a criminal act of which he was neither indicted nor informed. The decision in *Ware* does not seem to mandate that all criminal acts which may be introduced at trial must be passed upon by the grand jury or be made a part of an information. It would appear that one criminal act may be a sufficient basis for an indictment or information although several acts will be introduced into evidence. However, such a practice may be a violation of the court's own rules.

¹⁰⁹ See 3 TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 263 (Amsterdam reporter 1975) [hereinafter cited as TRIAL MANUAL].

“joinder of offenses” without opportunity to challenge that joinder.¹¹⁰ It is a recognized fact that the courts are not inclined to grant separate trials when the offenses are either of the same or similar character or are based on connected transactions,¹¹¹ but this is not to say that the defendant should be foreclosed from demonstrating to the court that the joinder is prejudicial. For example, in a case involving forcible rape in which two acts are alleged, the defendant may have a defense to both acts which would be believable separately, but unbelievable together, such as alibi to the first and consent to the second.¹¹² Other factors may compel separate trials. Joinder may place a heavy burden upon defense counsel, particularly when the various acts occur under entirely different circumstances requiring investigation and preparation of each.¹¹³ In addition, the more acts a defendant is charged with, the more suspect he becomes in the eyes of the jury.¹¹⁴ Another factor is that prejudice could arise from the probable impact the evidence of several criminal acts has on a jury in recommending the appropriate punishment.

The decision to allow the evidence to be introduced for substantive purposes instead of corroboration turned on two factors. First, the Court found that the admonition to the jury was of little value and that the jury would treat all the criminal acts as substantive evidence anyway. The Court stated that this was beneficial in:

[T]hus eliminating the fatuous song and dance in which the jury is permitted to hear about all of the different criminal acts but is admonished (uselessly, we suggest) not to consider them as “substantive” evidence against the defendant, but only insofar as they may tend to show motive or design, or a lustful disposition on his part, or the relationship of the parties, or to corroborate the witness’s testimony with respect to the offense for which the defendant is being tried.¹¹⁵

¹¹⁰ See *Ware v. Commonwealth*, 537 S.W.2d 174 (Ky. 1976).

¹¹¹ See *Rigsby v. Commonwealth*, 495 S.W.2d 795, 798 (Ky. 1973).

¹¹² TRIAL MANUAL at 1-272.

¹¹³ The American Bar Association’s standards relating to the defense function require that the defense attorney investigate all the facts relevant to guilt. Query if this standard could be met if the attorney was faced with multiple criminal acts.

¹¹⁴ TRIAL MANUAL at 1-272.

¹¹⁵ *Ware v. Commonwealth*, 537 S.W.2d 174, 178-79 (Ky. 1976).

The reason for the admonition is, of course, to defuse the possibility of prejudice that the defendant may suffer by the introduction of a series of criminal acts. An admonition may or may not in any given case have a great deal of impact on the jury, but surely it provides some measure of protection that should not have been removed without a greater showing that it is ineffective.¹¹⁶

Second, the Court indicated that since the criminal acts were in effect a single or inseparable transaction, they fell within the *res gestae* exception, defined by Wigmore as "other criminal acts which are an inseparable part of the whole deed,"¹¹⁷ which may be introduced without an admonition. The question therefore becomes what is meant by acts that are an inseparable part of the whole deed? Wigmore, who was cited by the Court in *Ware*, gave this example:

Suppose that A is charged with stealing the tools of X; the evidence shows that a box of carpenter's tools was taken, and that in it were the tools of Y and Z as well as of X; here we are incidentally proving the commission of two additional crimes, because they are necessarily interwoven with the stealing charged, and together form one deed.¹¹⁸

It is clear that this class of criminal acts is an inseparable element of the crime charged. But, do the criminal acts in *Ware* reasonably fall within this class? The evidence showed that Ware committed several acts of rape against the victim during the same evening, two other individuals raped her, and then, Ware and the victim went with others to the city of Somerset. The *res gestae* rule was apparently unduly stretched to find that Ware's criminal acts were inseparable from one another. This decision, therefore, is certain to cause controversy not only on a theoretical level, but also at the practical level in defining terms such as transactions and similar offenses.

¹¹⁶ The only evidence to support this reasoning appeared to be the Justice's own beliefs. *Id.*

¹¹⁷ I WIGMORE ON EVIDENCE § 218 at 719 (3d ed. 1940).

¹¹⁸ *Id.*