Buffalo Law Review

Volume 4 | Number 1 Article 36

10-1-1954

Criminal Law—Bail

J. A. Guzzetta

more than entertain a motion for inspection, and hence an invocation of the extraordinary remedy of prohibition was unwarranted.[34]

b. Contempt, refusal to answer after immunity: Once a witness before a grand jury is properly apprised of his statutory immunity from prosecution for any crime disclosed by his testimony,[35] even though such witness may suspect that he himself may be one of the targets of the investigative proceedings,[36] he may not refuse to answer questions propounded by that body on the ground of his constitutional protection against self-incrimination.[37]

Defendant, in *People v. Breslin*,[38] was a witness before a grand jury inquiring into the commission of the crimes of bribery, conspiracy and gambling who refused to answer questions by that body after he had been advised of his statutory immunity from prosecution for any crimes his answers might reveal. The Court of Appeals, in a *per curiam* opinion, affirmed the conviction of defendant in the court below of criminal contempt of court, noting that the defendant was not entitled to remain silent even though he feared the implication of himself in criminal matters once adequate immunity had been granted.[39]

Bail

As a general matter, sureties are held to rigid accountability on their bailbond in the event of their principal's disappearance;[40] and this, clearly, is for the purpose of promoting the administration of the criminal law.[41] Although the bondsman's horizon is not, therefore, devoid of the clouds of risk, under certain circumstances the remission of a forfeited bailbond may be warranted.[42]

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34. See *Hogan v. Court of General Sessions of New York County*, 296 N. Y. 1, 68 N. E. 2d 849 (1946).

35. See PENAL LAW §§ 381, 584, 996 (applicable immunity statutes).

36. Such compulsory disclosure is warranted only when the protective purview of the immunity completely obviates the possibility of prosecution for crimes principally or incidentally disclosed. See *Heike v. United States*, 227 U. S. 131, 142 (1913); *Matter of Doyle*, 257 N. Y. 244, 250-251, 177 N. E. 489, 491 (1931).

37. N. Y. CONST. Art. I, § 6 provides that no person ". . . shall be compelled in any criminal case to be a witness against himself."

38. 306 N. Y. 294, 118 N. E. 2d 108 (1954).

39. See, *e. g.*, *Matter of Doyle*, note 36 *supra*; *Matter of Rouss*, 221 N. Y. 81, 116 N. E. 782 (1917); *People v. Reiss*, 255 App. Div. 509, 8 N. Y. S. 2d 209 (1st Dep't 1938), *aff'd*, 280 N. Y. 539, 20 N. E. 2d 8 (1939); *People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728 (2d Dep't 1908), *aff'd*, 193 N. Y. 232, 86 N. E. 39 (1908).

40. See *People v. Parkin*, 263 N. Y. 428, 432, 189 N. E. 480, 482 (1934).

41. *People v. Schwarze*, 168 App. Div. 124, 126, 153 N. Y. Supp. 111, 112 (2d Dep't 1915); *People v. Licenziata*, 230 App. Div. 358, 360, 244 N. Y. Supp. 731, 733 (2d Dep't 1930), *aff'd*, 256 N. Y. 534, 177 N. E. 129 (1931).

42. CODE CRIM. PROC. §§ 597, 598; see *People v. Spear*, 1 N. Y. Cr. Rep. 538 (1883).

People v. Fiannaca et al.,[43] involved a proceeding on motion for the remission of forfeiture on the grounds that sureties were suffering from ill health and had limited incomes. Indicating that their respective means of support were meager, sureties went on to state generally that they received income benefits from real property and capital resources. Absent a revelation by sureties of the extent of their real property holdings and capital resources, the Court of Appeals affirmed a reversal by the Appellate Division[44] of the lower court's order remitting the forfeiture and estreatment of bail, on the ground that hardship had not been sufficiently shown.

In October of 1948, Fiannaca and another were charged with burglary and grand larceny. Fiannaca was admitted to bail, and on numerous occasions in 1948 and 1949 the case was moved for trial, but for some reason not specifically indicated, was not finally noticed for trial until October of 1952. Defendant failed to appear, and bail was forfeited. As it appeared on affidavits of appellants to remit forfeiture, Fiannaca was mentally examined in Rochester County Hospital and committed in July, 1951.[45] He escaped in October, one year before his case was noticed for trial, and has not been heard of since.

It appears well established that where the defendant has been returned within a reasonable time after forfeiture has occurred, a remission is warranted if the People have not been substantially prejudiced in any way by his nonappearance, especially where such does not appear to have been deliberate.[46] Similarly, within certain circumstantial limitations, death, insanity, or imprisonment on another charge will warrant remission.[47] Otherwise, the only case for remission, where the principal disappears, depends on the severity of the hardship surety will suffer by forfeiture.[48]

Additional to its holding that sureties did not adequately demonstrate hardship, the court also commented:

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43. 306 N. Y. 513, 119 N. E. 2d 363 (1954).

44. 282 App. Div. 548, 125 N. Y. S. 2d 396 (4th Dep't 1953).

45. Fiannaca was committed under MENTAL HYGIENE LAW § 74.

46. *People v. Continental Gas Co.*, 301 N. Y. 79, 83, 84, 92 N. E. 2d 898, 900, 901 (1950); see also Note 84 A. L. R. 420 (1933).

47. *E. g., see* Note 40 *supra;* see also Note 7 A. L. R. 392 (1920); Note 26 A. L. R. 412 (1923). *But cf. Taylor v. Taintor*, 16 Wall. 366 (U. S. 1873); *People v. Green*, 36 App. Div. 60, 62, 56 N. Y. Supp. 277, 278 (1st Dep't 1898).

48. *E. g., People v. Spear*, 1 N. Y. Cr. Rep. 538 (1883); *Matter of Pellegrino*, 207 N. Y. 770, 101 N. E. 1113 (1913) *affirming* 152 App. Div. 482, 137 N. Y. Supp. 305 (2d Dep't 1912).

a. that the delay in moving the case for trial did not present mitigating circumstances such that remission should be granted;[49] and

b. that the circumstances of defendant's confinement under the Mental Hygiene Law,[50] which indicates it does not apply to those awaiting criminal trial, and his subsequent escape, do not make out a case for remission, particularly in view of available provision for commitment to a mental institute in the Code of Criminal Procedure insuring adequate safeguards against escape.[51] The court further remarked that sureties had more than adequate time to learn of Fiannaca's mental condition and have him properly committed by the court, or surrender the principal and rid themselves of the obligation to produce him upon trial.[52]

In a dissenting opinion by Judge Froessel, it was denominated a "travesty on justice"[53] that the State should collect a "debt" it created itself by its agents' careless guarding of the defendant who got away.

It is perhaps noteworthy that neither opinion comments specifically on the reasons why four years elapsed before the case was moved for trial, other than to suggest, by way of conjecture, that the incarceration of Fiannaca's codefendant was the cause. It may be deemed unfortunate that a surety is subject to such an elastic expansion of risk where trial is delayed for an inordinate period of time without requiring the People to produce adequate circumstances palliative of the postponement. Under the express dictum of the case, in this regard, the surety's only protective means available is the surrender of his principal whenever the risk of forfeiture impresses him as being imminent.

At the Trial

a. Privileged communications: The right to counsel, inherent in the concept of a fair trial,[54] embraces the right to consult counsel in private, either in the confines of an office or at the

49. CODE CRIM. PROC. § 590 provides for surrender of defendant in exoneration of bondsman.

50. See note 45 *supra;* see also *People on complaint of Scheinberg v. McDermott,* 179 Misc. 89, 37 N. Y. S. 2d 69 (Magistrate Ct. 1942).

51. CODE CRIM. PROC. §§ 658-662-f provides for an inquiry into sanity of defendant, before or during trial, or after conviction; an inquiry into ". . . such state of idiocy, imbecility or insanity that he is incapable of understanding the charge . . . or of making his defense . . .." There was no showing that Fiannaca was of such mental abnormality at the time of his civil commitment.

52. See note 43 *supra* at 518, 519, 119 N. E. 2d 363, 366.

53. *Id.* at 520, 119 N. E. 2d 363, 367.

54. U. S. CONST. AMEND. XIV; *People v. McLaughlin,* 291 N. Y. 480, 482, 53 N. E. 2d 356, 357 (1943); *Williams v. Kaiser,* 323 U. S. 471, 473 (1945).