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Narcotics Prosecution--Indictments and Bills of Particulars

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NARCOTICS PROSECUTION — INDICTMENTS AND BILLS OF PARTICULARS

Introduction

The vast number of prosecutions under narcotic legislative regulation is appalling, and the large number of these cases which have been appealed upon the insufficiency of the indictment or refusal of a bill of particulars is significant. There are two main federal statutes, the Narcotic Drugs Import and Export Act[1] and the Harrison Narcotic Law.[2] In addition, all of the states have some statutory regulation of the possession or sale of drugs, forty-three of these through the Uniform Narcotic Drug Act.[3]

Those cases appealed upon the insufficiency of the indictment or refusal of a bill of particulars comprise the subject of this discussion. Our purpose is to examine these cases and determine, if possible, the principles controlling this field.

Indictments

The case of *Wong Tai v. United States*,[4] is probably the outstanding case on federal indictments of narcotic offenders. In this case one sees the broad general principles which govern the sufficiency of all such indictments. The court stated therein:[5]

> . . . it is essential to the validity of an indictment under the Federal Constitution [Sixth Amendment] and laws that it shall advise the defendant of the nature and cause of the accusation in order that he may meet it and prepare for trial and, after judgment, be able to plead the record and judgment in bar of a further prosecution for the same offense. . . .

The principles present in federal indictments are also generally followed by the states, both in their indictments and informations. The view of the California court is typical:[6]

> An information is formally sufficient if, in substance, it charges the defendant with the commission of a public offense in words "sufficient to give the accused notice of the offense of which he is accused. . . . [so as

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1 42 STAT. 596, (1922), as amended, 21 U.S.C.A. §§ 171-185 (Cum. Supp. 1953).

2 53 STAT. 269, 382 (1939), as amended, 26 U.S.C.A. §§ 2550-2565, 3220-3228 (Cum. Supp. 1953).

3 Exceptions: Kansas, New Hampshire, California, Massachusetts, and Pennsylvania, the latter three of which seem to have effective regulation of some other sort. Alaska, District of Columbia, Hawaii, and Puerto Rico also follow the Uniform Narcotic Drug Act.

4 273 U.S. 77 (1927).

5 *Id.* at 80-1. *Accord,* United States v. Behrman, 258 U.S. 280, 288 (1922).

6 People v. Braddock, 264 P.2d 521, 524 (Cal. 1953), citing People v. Williams, 27 Cal.2d 220, 163 P.2d 692, 695 (1945).

> not] to mislead the accused in preparing his defense, or . . . likely to place him in second jeopardy for the same offense." [citations omitted]

The object of this investigation is to particularize from this broad demand in order to show how courts have in fact pin-pointed certain specific requisites as they appear in most indictments. These requirements will vary with the cases, depending upon the nature of the crime and the amount of evidence the prosecution has accumulated.

Where the crime charged is the sale of narcotics, time may or may not be of the essence of the offense. If time is of the essence, it must be formally alleged,[7] although a slight variance in the proof will be tolerated.[8] Specification of the time of the offense is therefore the initial general element of an indictment.

Where the indictment charged "on or about" the 28th day of March, 1952, the court sustained the indictment, pointing out that the words "on or about" indicate a certain date with approximate accuracy.[9] All that is necessary is that the time be described in unmistakable terms and under the particular circumstances, to acquaint the defendant with the charge against him.[10] When a witness states a date or dates as those on which the defendant made sales and these dates are within a few weeks of one another and of the indictment dates, the court said such dates were substantially similar and the indictment remained valid despite the variance.[11] In a case where the appellant contended that the count failed to allege the time of the crime, the court denied this objection by saying that questions of this type are no longer open for judicial consideration.[12] However, the court may go to extremes to uphold an indictment which is far from specific as to time. Thus, where the allegation of the date of unlawful importation and sale was stated as July 1, 1913 to June 10, 1931, the court stated that the allegation was cured "if cure be needed," by a bill of particulars. The court intimated that in some circumstances even an indictment charging importation and sale over a period of eighteen years might not be held invalid.[13]

Another element necessary for a valid indictment is an allegation of the place of the offense.[14] However, an indictment alleging the accused concealed narcotics ". . . at the Southern District of New York and within the jurisdiction of this court," was upheld as valid against a

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7 Shiflett v. State, 67 So.2d 284, 285 (Ala. 1953).

8 United States v. Gaag, 237 Fed. 728, 730-1 (D. Mont. 1916).

9 Shiflett v. State, 67 So.2d 284, 286 (Ala. 1953).

10 Hood v. United States, 76 F.2d 275, 276 (10th Cir. 1935).

11 United States v. Tramaglino, 197 F.2d 928, 932 (2d Cir. 1952).

12 Fiddelke v. United States, 47 F.2d 751, 752 (9th Cir. 1931). *Accord,* Parmagani v. United States, 42 F.2d 721, 722 (9th Cir. 1930).

13 Jindra v. United States, 69 F.2d 429, 430 (5th Cir.), *cert. denied,* 292 U.S. 651 (1934).

14 Miller v. United States, 288 Fed. 816, 817 (5th Cir.), *cert. denied,* 262 U.S. 758 (1923).

charge of generality. The court suggested that if the defendant had any doubts, he should seek a bill of particulars.[15] The statement of the place of the sale of narcotics need only be clear and definite enough to put the accused on notice.[16]

A third requirement in many instances is the identity of the purchaser, if known, or if unknown, then a count alleging a sale made to a person unknown.[17] But the requirement is not so stringent as to invalidate an indictment which incorrectly named the party with whom the accused dealt. Passing upon the particular circumstances of the case, the court stated that "the important allegations were those relating to time, place and acts." [18] Where the indictment alleged the violation in general terms and did not name the purchaser nor the person to whom the drugs were delivered, the court nevertheless held the indictment sufficient and stated that if the accused wished more specific information he should seek same by a bill of particulars.[19]

If the statute prohibits dealing in narcotics, the question arises as to who is a dealer. In resolving this query, the United States Court of the Eighth Circuit pointed out:[20] "It is not necessary to set out in the indictment how many sales were made to constitute one a dealer." It is enough that they had sold narcotics indiscriminately and stood ready and willing to sell to anyone applying to purchase.

In a case commenting on all three of the elements discussed so far, the court pointed out that the accused "unlawfully, willfully, knowingly, and feloniously sold a certain quantity . . . of opium to a named person at a designated place, and on a fixed date," whereupon the indictment was held valid as charging in clear, definite, and in unmistakable language the statutory crime.[21] This view, as shown by the cases, is shared by the courts where the accused is not subjected to surprise nor generality in the indictment.

Scienter is another fundamental frequently mentioned as necessary in the indictment, depending upon the nature of the offense. Accordingly, in charging conspiracy to violate a narcotics statute, the Supreme Court set down the principle that "certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that

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15 United States v. Busch, 64 F.2d 27 (2d Cir. 1933). See Dunbar v. United States, 156 U.S. 185 (1895).

16 Hood v. United States, 76 F.2d 275, 276 (10th Cir. 1935).

17 Ong v. United States, 131 F.2d 175, 176 (4th Cir. 1942). *Accord,* United States v. Brandenburg, 155 F.2d 110, 112 (Cir. 1946), *cert. denied,* 332 U.S. 769 (1947), *aff'd,* 162 F.2d 980 (Cir.).

18 Ferrari v. United States, 169 F.2d 353, 354 (9th Cir. 1948).

19 Ong v. United States, 131 F.2d 175, 176 (4th Cir. 1942).

20 Taylor v. United States, 19 F.2d 813, 815-6 (8th Cir. 1927).

21 Hood v. United States, 76 F.2d 275, 276 (10th Cir. 1935).

is requisite. . . ." [22] However, where a statute does not make intent or knowledge an essential factor of the particular crime, it is not necessary to allege such intent in the indictment.[23] From these cases, it may be said that only where the intent is a necessary element of the offense itself, as in the case of conspiracy, will it be essential to allege intent in the indictment.

Another ground upon which an indictment might be attacked concerns a situation where the indictment incorporates the words of the statute into the body of the indictment. Generally, allegations made in the language of the statute are sufficient,[24] but the degree of exactness required in the repetition is not settled. The court does not demand absolute repetition of the terms of the statute. For example, where a statute denounces several acts as a crime and connects them with the disjunctive "or," the pleader in drawing an indictment connected such elements by the conjunctive "and," the indictment so drawn is not bad for duplicity.[25]

By the Harrison Act,[26] a sale of drugs by a person registered to handle narcotics is not a crime even though such sale is made *in* an unstamped package; it is a crime, nevertheless, for a sale to be made *in* and *from* an unstamped package. An indictment was held invalid for the reason that, in addition to charging that the sale was made "in" the original package, it failed to charge that the sale was not made "from" an original package. The court pointed out that "If the negation of an exception in the enacting clause of a statute is essential to accurately describe the offense, then the accusations of the indictment must show that the accused is not within the exception." [27]

According to the same Act,[28] it is an offense to dispense drugs except on order forms. An exception to this requirement is a physician, who is exempt from this regulation while in the course of his professional practice. Where a physician violates his privilege and dispenses drugs outside professional treatment, the indictment must first state the general offense and then must also negate the exception thereto pertaining to physicians. Such was done in *Glatzmayer v. United States*,[29] and the indictment was

22 Wong Tai v. United States, 273 U.S. 77, 81 (1927), citing Williamson v. United States, 207 U.S. 425, 447 (1908).

23 United States v. Balint, 258 U.S. 250, 251-2 (1922). *Accord,* United States v. Behrman, 258 U.S. 280, 288 (1922).

24 Freeman v. United States, 86 F.2d 243, 244 (5th Cir. 1936), *cert. denied,* 299 U.S. 616 (1937). *Ex parte* Keel, 62 Okla. Cr. 277, 71 P.2d 313, 315 (1937) (information held sufficient).

25 O'Neill v. United States, 19 F.2d 322 (8th Cir. 1927). *Accord,* United States v. Lee Foo Yung, 46 F. Supp. 147, 149 (E.D.N.Y. 1942).

26 53 STAT. 269, 271 (1939), as amended, 26 U.S.C.A. § 2553 (Cum. Supp. 1953).

27 Weare v. United States, 1 F.2d 617, 620 (8th Cir. 1924).

28 Harrison Act, 53 STAT. 269, 271 (1939), as amended, 60 STAT. 39, 26 U.S.C. 2551 (a) 1946.

29 84 F.2d 192, 193 (5th Cir. 1936). Ratigan v. United States, 88 F.2d 919, 922 (9th Cir.), *cert. denied,* 301 U.S. 705 (1937).

held valid. Referring to this same point, a district court held that an indictment failing to negate the exception in favor of a physician acting professionally was insufficient because the exception was an essential adjunct of the offense, and therefore, the Government had the burden of negating this exception in the indictment.[30]

Ordinarily, a slight variance between the statute and the indictment is upheld. An example of this proposition is a case where an indictment charging that a sale of narcotics was not made by a written order on a form issued by the Commissioner of Internal Revenue, where the Act[31] required that such form be issued by the Secretary of the Treasury, was held not to be defective.[32] The reason stated was that there was no chance that such allegations would subject the appellant to another trial, nor mislead him in preparing his defense. A further instance where a slight divergence from the terms of the statute did not invalidate the indictment was the use of the words "not in the original stamped package" which satisfied the statutory offense of selling narcotics "except in the original stamped package or from the original stamped package." [33] On the other hand, where the indictment charged the defendant with issuing, writing, or delivering prescriptions as a physician, and the statutory offense prohibited only the sale, barter, or distribution of drugs, the court held this to be a material variance from the words of the statute and that no crime was alleged and the indictment was therefore invalid.[34]

Bills of Particulars

Having discussed somewhat at length the nature of an indictment or information in the prosecution of a narcotic crime, attention is now turned to its counterpart, the bill of particulars. It will be recalled that often in upholding the particular indictment in question, the court suggested that the defendant might petition for a bill of particulars if he considered it necessary for his defense. The survey now centers upon those factors which will determine the probability of such petition being successful.

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30 United States v. Hammers, 241 Fed. 542, 544 (S.D. Fla. 1917). *Accord,* Mitchell v. United States, 3 F.2d 514, 515 (6th Cir. 1925). While acknowledging that it is the usual and better practice where it is alleged that the defendant is a physician, to also allege that he dispensed drugs not in good faith in the course of his professional practice, the Circuit Court of Appeals of the Eighth Circuit, later applying the same statute, held that "in a prosecution under this section of the Act it is unnecessary to plead the exceptions to the statute." Nigro v. United States, 117 F.2d 624, 629 (8th Cir. 1941); Haggerty v. United States, 52 F.2d 11, 12 (8th Cir. 1931); Boehm v. United States, 21 F.2d 283, 284 (8th Cir. 1927).

31 50 STAT. 551, 554 (1937), as amended, 26 U.S.C.A. § 2591 (Cum. Supp. 1953).

32 Kinnison v. United States, 158 F.2d 403 (D.C. Cir. 1946), *cert. denied,* 330 U.S. 834 (1947).

33 Randolph v. United States, 165 F.2d 20 (D.C. Cir. 1947).

34 Aiton v. United States, 3 F.2d 992, (9th Cir. 1925).

A bill of particulars is sought when, although the indictment is sufficient as against a general demurrer, the accused desires more specific information of the charge against him.[35] A bill cannot, however, cure a defective indictment or information.[36] Its purpose is to further apprise the defendant as to the nature of his alleged crime and to guard against the surprise introduction of evidence for which he has not been able to prepare. It has been pointed out:[37]

> Where an indictment . . . cannot be pronounced bad on motion to quash or demurrer, and yet is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, his remedy is a bill of particulars.

The request for the bill must not in itself be too general, too vague, or too broad.[38] The request must be in the form of a sufficient, formal, and timely demand for a bill, and, therefore, a decision will not be overthrown when there has been no formal request made by the defense at the opening of the trial.[39] To constitute a valid motion for a bill, an allegation must be included that the information is needed to breach a void which if not remedied will comprise a handicap in his defense.[40] Conversely, where the indictment makes charges as fully as is necessary to enable the accused to prepare his defense, and surprise is unlikely, the motion for a bill of particulars will be overruled.[41] Since from this, the motion is within the discretion of the trial judge, a denial thereof generally will not be reversed.[42]

The point made that the plea to grant a bill of particulars is addressed to the discretionary powers of the court is the very crux of the matter. The court may consider all the circumstances of the case, and applying the general principles outlined herein, exercise its soundest judgment in granting or refusing the bill.[43] Probably the clearest statement of this proposition is to be found in an early Florida case:[44]

> Such an application or motion [for a bill of particulars in a criminal case], however, is not founded upon a legal right, but is a matter resting within the sound judicial discretion of the court, depending entirely upon the nature and circumstances of each particular case as they appear to the court before whom the trial is had; and the refusal of the trial judge to

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35 Ong v. United States, 131 F.2d 175, 176 (4th Cir. 1942); Nigro v. United States, 117 F.2d 624, 631 (8th Cir. 1941).

36 State v. Pettifield, 210 La. 609, 27 So.2d 424, 427 (1946).

37 O'Neill v. United States, 19 F.2d 322, 324 (8th Cir. 1927).

38 Vogt v. United States, 156 F.2d 308, 309 (5th Cir. 1946).

39 Martin v. United States, 20 F.2d 785, 786 (6th Cir. 1927).

40 Hood v. United States, 76 F.2d 275, 276 (10th Cir. 1935). *Accord,* Vogt v. United States, 156 F.2d 308, 309-310 (5th Cir. 1946).

41 Ginsberg v. United States, 96 F.2d 433, 435 (5th Cir. 1938).

42 Taylor v. United States, 19 F.2d 813, 816 (8th Cir. 1927).

43 Fiddelke v. United States, 47 F.2d 751, 752 (9th Cir. 1931).

44 Mathis v. State, 45 Fla. 46, 34 So. 287, 291 (1903).

> grant said motion will not be disturbed or reversed by an appellate court unless there was an abuse of such discretion.

The appellate courts are most reluctant to reverse a refusal of a bill unless there is a clear abuse of discretion upon the record.[45] The reasoning, as with all similar matters, is that the trial judge is in a much better position to observe the general demeanor of the defendant as well as the genuineness of his surprise or inability to prepare his defense. Therefore, to provide the basis for an appeal, actual surprise on the part of the appellants must be discernible upon the record.[46]

The party defendant may not, moreover, use this protective device as an artifice to garner information by which he might procedurally upset the state's case. Thus, a bill will not be granted when it is the accused's purpose to establish a basis on which he might make a motion to quash or to subsequently raise a question of admissibility of evidence, for example, that such evidence was procured from the residence of the accused without a search warrant.[47]

One of the reasons most consistently given for refusing a bill of particulars is that the prosecution is under no duty to disclose the actual evidence on which it will rely but only its limits.[48] Nor must there be exposure to entrapment into making extended allegations which will be impossible to prove.[49]

Without a doubt the classic case on the subject is the Supreme Court decision, *Wong Tai v. United States,* discussed *supra.* Weighing the scope of the request, the discovery of evidence, the actual surprise of the defendant, and the wide discretion of the trial court, the Court held that a bill was properly refused, and said:[50]

> The defendant also made a motion, supported by affidavit, for a detailed bill of particulars, setting forth with particularity the specific facts in reference to the several overt acts alleged in the indictment, with various specifications as to times, places, names of persons, quantities, prices, containers, buildings, agencies, instrumentalities, *etc.,* and the manner in which and the specific circumstances under which they were committed. This motion — which in effect sought a complete discovery of the Government's case in reference to the overt acts — was denied on the ground that the indictment was sufficiently definite in view of the unknown matters involved and the motion called "for too much details of evidence."
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> The application for the bill of particulars was one addressed to the sound discretian of the court, and, there being no abuse of this discretion, its action thereon should not be disturbed. [citations omitted] And there

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45 Hood v. United States, 78 F.2d 150, 152 (10th Cir. 1935); Hood v. United States, 76 F.2d 275, 276 (10th Cir. 1935).

46 Chadwick v. United States, 117 F.2d 902, 904 (5th Cir.), *cert. denied,* 313 U.S. 585 (1941).

47 State v. Alvarez, 182 La. 908, 162 So. 725, 726 (1935).

48 Hood v. United States, 76 F.2d 275, 276 (10th Cir. 1935).

49 Lett v. United States, 15 F.2d 686, 688-9 (8th Cir. 1926).

50 Wong Tai v. United States, 273 U.S. 77, 82 (1927).

> is nothing in the record indicating that the defendant was taken by surprise in the progress of the trial, or that his substantial rights were prejudiced in any way by the refusal to require the bill of particulars.

From these cases it can be concluded that when the crime charged is the possession or sale of narcotics, both offenses being by their very nature continuing crimes, there arises a particular need for specification of the time of the act charged. The reason for this need is the great possibility of the ultimate prosecution for a separate offense, which offense the defendant might disclose in attempting to muster a defense for the violation actually charged. It seems reasonable that when the circumstances are such that actual doubt beseiges the defendant and the possibility of a second suit for the same act ensues, the bill will be granted.

It is not clear what degree of exactness as to the date or dates of the alleged offense need be given. Approximate dates, within reason, have regularly been upheld in an indictment and it does not appear that judicial discretion would demand a stricter rule in the case of a bill of particulars.[51] In one case, where the original indictment alleged continued sale over a period of eighteen years, the government in their bill chose to specify exactly one particular day of the offense.[52] But on the other hand the prosecution need not offer this precise information when it does not in fact have it or when to do so would disclose its case where in fact the defendant has enough information to prepare his defense.[53]

The same factors apply when determining if the place of the sale or storage need be disclosed upon motion for a bill. Although where information is not known to the prosecution it cannot be tendered, when, however, it does appear from testimony that such knowledge was had by the government, it is error to refuse the bill.[54]

Another area which may occasion requests for a bill is the means of perpetration of the crime, *i.e.*, in what specific manner the alleged sale was made. When there is some actual doubt as to this matter, and when the other general requirements are adequately fulfilled, it is believed that a bill describing the means of commission of the crime should be set out. However, as a practical matter, much of this information is already within the knowledge of the defendant, and it is questionable whether he could be able to show actual surprise.

The cases demonstrate but a single side of the question. Again, as a matter of practice, few appeals are made by the prosecution when a bill

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51 Fiddelke v. United States, 47 F.2d 751, 752 (9th Cir. 1931); O'Neill v. United States, 19 F.2d 322, 324 (8th Cir. 1927).

52 Jindra v. United States, 69 F.2d 429, 430 (5th Cir.), *cert. denied*, 292 U.S. 651 (1934).

53 Lett v. United States, 15 F.2d 686, 688 (8th Cir. 1926). See also Hood v. United States, 76 F.2d 275, 276 (10th Cir. 1935).

54 Lett v. United States, 15 F.2d 690 (8th Cir. 1926).

is ordered, and, therefore, the cases reported are only those appealed by the defendant. It is far more expedient to surrender the information than to spend considerable time and money in appealing from a grant by the court. On the other hand, the defendant will seek even the most insignificant flaw simply to delay, if not to overthrow, conviction.

Conclusion

In a recent case, reversing a conviction based upon a defective indictment, the court ruled:[55]

> The Constitution requires that the accused be informed "of the nature and cause of the accusation" (Amendment VI), and the cases interpret that to mean that he must be so definitely informed as to be enabled to present his defense. The test, say the courts, is whether the accused was misled.

As we have seen, this deception or misunderstanding may be occasioned by any one of several factors. If time should be of the essence of the crime, then the time of the purported offense must be stated, at least approximately. Furthermore, if the crime was the sale of narcotics, the place of the sale and the purchaser should also be alleged when known. In addition, scienter, if an element of the statutory crime, must be alleged. In a given case, any or all of the above allegations may be demanded in an indictment in order to enable the defendant to adequately prepare his defense.

A sufficient description of the offense is usually present when the indictment follows the words of the statute. While the courts are not at all in agreement as to what degree of duplication will be demanded in the repetition of the statutory terms, it is noticeable that the trend is to a more liberal view. What is required in an indictment is that it be a "reasonable, not absolute or impracticable, particularity of statement." Otherwise the rules of pleading would not serve their true purpose — to convict the guilty and to shield the innocent.[56]

In sustaining the indictment in a specific case, the court often may further state that if the accused still has any actual doubt of the charge against him, he may request a bill of particulars. The bill is not intended to cure a defective indictment, but only to give additional information where it is particularly needed to construct a defense. Actual doubt or surprise is necessary and generally this is only present when the crime is of a continuing nature, and when, therefore, there exists the hazard of a prosecution at a later date for a second violation disclosed at the trial. But a bill cannot be employed to ferret out the substantive details of the prosecution's evidence.

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55 Hallman v. United States, 208 F.2d 825, 827 (D.C. Cir. 1953).

56 Lett v. United States, 15 F.2d 686, 689 (1926).