Denver Law Review

Volume 37 | Issue 1 Article 5

May 2021

One Year Review of Criminal Law and Procedure

Austin W. Scott Jr.

ONE YEAR REVIEW OF CRIMINAL LAW AND PROCEDURE

BY AUSTIN W. SCOTT, JR.

Professor of Law, University of Colorado School of Law

During 1959[1] the Colorado Supreme Court decided almost fifty cases on criminal law—a considerable increase over the annual number in recent years.

I. SUBSTANTIVE CRIMINAL LAW

Constitutional Limitations

The *Merris* case[2] of 1958 contained two great propositions: (1) The municipal penal ordinance of a home rule city creates a crime, not a civil wrong, if there exists a counterpart state statute punishing the same conduct or if the ordinance authorizes imprisonment as punishment. (2) When a state criminal statute punishes conduct of state-wide concern, the home rule city lacks power to enact a penal ordinance punishing the same conduct (and conversely, when a home rule city has enacted a penal ordinance punishing conduct of local concern, a state statute punishing the same conduct is inapplicable to such conduct committed within the municipal territorial limits).

The first proposition has been generally applauded; its principal effect has been to give municipal violators the same sort of criminal procedural rights in municipal courts which defendants enjoy in comparable state trials. The municipal courts seem to have made the required adjustment from civil to criminal procedure with little difficulty.[3]

The second proposition of the *Merris* case has raised more serious problems. What are matters of state-wide concern, over which the state has exclusive power? What are matters of local concern, over which the municipality has exclusive power? The trouble is that it is very difficult to pigeon-hole most matters into one category or the other, because so many matters partake of some of the qualities of both categories. Thus driving a car in a city after one's license is suspended or revoked, though held predominantly a matter of statewide concern, is also a matter of concern to the city, whose inhabitants are the ones endangered.[4] So too speeding upon the Valley Highway through Denver is held to be a matter primarily of state-wide concern, but to some extent it concerns the city as well.[5]

The question arose in 1959 whether the state, through its legis-

1 The cases discussed herein, including a few late-1958 cases, are found in 332 P.2d No. 3 through 347 P.2d No. 4.

2 Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958), discussed in Scott, *Municipal Penal Ordinances in Colorado*, 30 Rocky Mt. L. Rev. 267 (1958).

3 Zerobnick v. Denver, 337 P.2d 11 (Colo. 1959), held that the *Merris* case authorizes municipal courts to suspend sentence and grant probation in cases of ordinance violations—thus overruling the pre-*Merris* view to the contrary as expressed in Holland v. McAuliffe, 132 Colo. 170, 286 P.2d 1107 (1955).

4 Davis v. Denver, 342 P.2d 674 (Colo. 1959) ("the city, of course, is interested in preventing unlicensed drivers on its streets").

5 Denver v. Pike, 342 P.2d 688 (Colo. 1959). On the other hand, municipal power to punish vagrancy and keeping a gambling house was assumed to exist in Zerobnick v. Denver, 337 P.2d 11 (Colo. 1959), discussed at note 3 *supra*, and Reed v. Denver, 342 P.2d 642 (Colo. 1959).

lature, could constitutionally delegate to home rule cities concurrent power to enact penal ordinances dealing with matters which are of both state-wide and local concern. At first the Colorado Supreme Court answered with a loud no,[6] but a few months later it answered the same question with a somewhat quieter yes.[7]

> To hold that matters which are general are the exclusive preserve of the state, just as matters local and municipal can be regulated only by the city (once the city has acted), would create a highly inflexible system and would require the state or city to obtain a continuous stream of rulings from this Court as to whether a subject is local or state-wide. This kind of 'straight-jacket' rule is inappropriate to the changing society in which we live and [the *Merris* case] should not be construed as so holding.[8]

This statesmanlike point of view brings Colorado more in line with the majority of states, which recognize that municialities may possess concurrent power with the state to punish harmful conduct which is of both state-wide and local concern, so long as the city ordinance does not conflict with the state statute.[9] Of course, one who by a single act violates both a state statue and a local ordinance should not be tried twice for the same conduct—once by the state and once by the municipality. But this sort of unfairness can be prevented by recognizing that the municipality is not, for double jeopardy purposes, an entity separate from its creator the state.[10]

Another 1959 constitutional problem of criminal law concerned what is sometimes called the "administrative crime": the legislature enacts a statute delegating to an administrative body power to issue regulations dealing with a certain area of conduct, the statute providing that whoever violates any such regulation is guilty of a crime, punishable by a stated punishment.[11] Although the weight of authority permits this sort of delegation,[12] the Colorado Supreme Court held it to be unconstitutional, on the ground that only the legislature has the power to declare what conduct is criminal.[13]

---

6 *In re* Senate Bill No. 72, 339 P.2d 501 (Colo. 1959).

7 Davis v. Denver, 342 P.2d 674 (Colo. 1959), holding a Denver ordinance punishing driving after license suspended to be void in view of the state criminal statute on the subject, but going on to say that the state might delegate to cities police powers "in those areas where the subject matter, although predominantly general, is also to some extent municipal." 342 P.2d at 677. In Denver v. Pike, 342 P.2d 688 (Colo. 1959), the city was held to have power to regulate speed upon the Valley Highway within the city limits because the state (through the state highway engineer) had contracted with the city to this effect.

8 Davis v. Denver, 342 P.2d 674, 679 (Colo. 1959).

9 See Scott, *One Year Review of Criminal Law and Procedure*, 36 DICTA 34, 35 (1959).

10 See Kneier, *Prosecution under State Law and Municipal Ordinance as Double Jeopardy*, 16 Cornell L.Q. 201 (1931), pointing out that, though the cases disagree, the better view is that double jeopardy forbids prosecution by both state and city for the same conduct.

11 A variation of the administrative crime is found in statutes delegating to an administrative agency not only power to issue regulations but power also to declare violations to be criminal and sometimes even to fix the punishment. This type of statute is generally held unconstitutional. See Schwenk, *The Administrative Crime*, 42 Mich. L. Rev. 51 (1943).

12 The leading case is United States v. Grimaud, 220 U.S. 506 (1911), upholding an indictment charging defendant with a violation of a regulation of the Secretary of Agriculture on the use of national forests, where Congress properly delegated power to regulate and where the statute itself set forth the punishment for violation of regulations.

13 Casey v. People, 336 P.2d 308 (Colo. 1959), involving a state statute authorizing local boards of health to issue health regulations and providing that violations of regulations are misdemeanors punishable by a maximum of $1000 fine and one year confinement in county jail. The board's regulation provided that trailer court operators must be licensed. Defendant's conviction for operating a trailer court without a license was reversed.

Olinger v. People, 344 P.2d 689 (Colo. 1959), involved a similar sort of statutory delegation to a local soil conservation district. The statute authorized the district to promulgate a land use ordinance, and provided that a violation of the ordinance constituted a misdemeanor, punishable by a $100 fine. This delegation was also held to be unconstitutional.

One case raised the issue of the scope of the protection afforded by the constitutional right of free speech to a newspaper editor who commented editorially upon a case pending in the Colorado Supreme Court. It was held that the newspaperman was not guilty of criminal contempt, because his editorial—though containing unfair and false implications concerning the integrity of the justices of the court—did not constitute an "imminent peril" to the administration of justice; the justices considered themselves strong-minded enough not to be influenced by the editorial.[14]

In other cases, a criminal statute punishing the sale of fireworks was upheld against the contention that the statutory definition of fireworks was violative of due process in that it was "void for vagueness";[15] and the Colorado statutory test for insanity as a defense to crime (the "right and wrong" test plus the "irresistible impulse" test) was upheld against the contention that the only test which satisfies due process is the *Durham* "product" test enunciated in the District of Columbia in 1954.[16]

Particular Crimes

Embezzlement: The defendant was employed by a newspaper to sell advertising to customers; it was not entirely clear whether the defendant was authorized to collect the advertising fee from the customer for transmittal to his employer. At all events, the defendant did, over a period of time, collect $3400 in cash from one customer in this way, turning over $2400 to his employer and pocketing the other $1000. The defendant, convicted of embezzlement of his employer's $1000, urged the Supreme Court to reverse his conviction on the ground that, although he had committed a crime, his crime was larceny from the customer rather than embezzlement from the newspaper. He argued that, as he was not expressly authorized to collect money from customers, he acquired only custody, not possession, of the money which he collected; thus he could not be guilty of embezzlement, which is limited to fraudulent conver-

14 *In re* Jameson, 340 P.2d 423 (Colo. 1959) (two dissenters believing that free speech does not forbid punishment, as criminal contempt, of improper but unsuccessful attempts to influence courts in pending cases). Here the editor suggested that the Supreme Court had announced the bare result of a case before filing its written opinion as a "trial balloon" to see how it would go over with the public, leaving itself free to later change the decision if the public should oppose it.

15 People v. Young, 339 P.2d 672 (Colo. 1959).

16 Castro v. People, 346 P.2d 1020 (Colo. 1959). Although Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954) (the product test: "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect"), has caused a great deal of discussion and re-evaluation of insanity tests, it has not caused other jurisdictions to alter their established tests for insanity.

sions of another's property (including money) already in one's possession.

The court affirmed his conviction for embezzlement.[17] The Colorado statute dealing with embezzlement by employees[18] covers an employee who either takes possession of or assumes the "care" of another's property or money which he collects; and under the statute it does not matter whether the ownership of the property or money collected passes to the employer or remains in the customer.[19]

Larceny: One does not commit larceny of another's property if the possessor of the property delivers possession to him; there is no "trespass in the taking," which larceny requires. The same rule applies to Colorado's special statute on larceny of an automobile.[20]

Receiving: One case assumed — probably correctly — that the Colorado statute on receiving stolen property covers property acquired by embezzlement as well as property acquired by larceny, robbery or burglary.[21]

Forgery: In some states forgery (making a false instrument with intent to defraud) and uttering (offering what is known to be a forged instrument) are two separate crimes. Two Colorado cases pointed out that, under the Colorado forgery statute, uttering is not separate from forgery; it is but one way to commit forgery.[22]

Confidence game: In three Colorado cases the defendant obtained money from another by telling him lies in a manner involving something more tangible than spoken words; in each case the defendant did something additional to worm his way into the confidence of his victim. Each case held that the evidence supported a conviction for confidence game.[23]

Aggravated assault: One case pointed out that, for assault with intent to rape, the two elements of (1) assault and (2) an intent to rape must coexist; and "intent to rape" requires that the defendant intend not only to have sexual intercourse with the lady but also to use whatever force is necessary to overcome her resistance.[24]

Parties to Crime

One Colorado case dealt with the criminal liability of one who is present, aiding and abetting another to commit a crime.[25] In this

17 Gill v. People, 339 P.2d 1000 (Colo. 1959).

18 Colo. Rev. Stat. § 40-5-16 (1953) (embezzlement, by an employee, of another's money or property which he collects "which has come into his possession *or under his care*").

19 The court pointed out that the list of the six elements of embezzlement contained in Phenneger v. People, 85 Colo. 442, 454, 276 Pac. 983, 987 (1929), is not accurate so far as Colorado embezzlement by an employee is concerned. The list there set forth says (item number 4) that the accused must occupy the designated fiduciary relation and the property must come into his "possession" and be held by him by virtue of his employment. This is erroneous today in that the employee need not take into his possession; "under his care" will do.

20 Lee v. People, 138 Colo. 321, 332 P.2d 992 (1958), construing Colo. Rev. Stat. § 40-5-10 (1953) (larceny of a motor vehicle) to require a trespass in the "taking" as much as Colo. Rev. Stat. § 40-5-2 (1953) (the general larceny statute).

21 Stull v. People, 344 P.2d 455 (Colo. 1959), dealing with Colo. Rev. Stat. § 40-5-12 (1953), punishing the conscious reception of "anything the *stealing* of which is declared to be larceny." Though one who embezzles is "deemed guilty of larceny", Colo. Rev. Stat. § 40-5-16 (1953), perhaps strictly speaking embezzlement is not "stealing". At all events, receiving property acquired by false pretenses (one who obtains property by false pretenses is not "deemed guilty of larceny") seems to be no crime in Colorado.

22 Anderson v. People, 337 P.2d 10 (Colo. 1959); Davenport v. People, 138 Colo. 291, 332 P.2d 485 (1958) (evidence of uttering supports verdict of forgery)—both cases construing Colo. Rev. Stat. § 40-6-1 (1953). In Little v. People, 138 Colo. 572, 335 P.2d 863 (1959), it was held forgery to write the signature of a fictitious person on a check.

23 Fischer v. People, 138 Colo. 559, 335 P.2d 871 (1959); Bledsoe v. People, 138 Colo. 490, 335 P.2d 284 (1959); Patterson v. People, 138 Colo. 368, 333 P.2d 1047 (1959).

24 Barnhisel v. People, 347 P.2d 915 (Colo. 1959) (error to refuse instruction to that effect).

25 Harris v. People, 335 P.2d 550 (Colo. 1959).

case *A* and *B*, stealing hubcaps from *X*'s car, were surprised by *X* and *X*'s companion, *Y*. *A* attacked *X* and *B* attacked *Y*. *A* was charged with committing battery with a deadly weapon upon *Y* (rather than upon *X*, his special victim). *A* was held guilty of aggravated battery upon *Y*, because by attacking *X* he aided and abetted *B* in *B*'s attack on *Y*, the two attackers having a common purpose of frustrating detection and avoiding capture.

II. CRIMINAL PROCEDURE

The Information

One defendant, charged by information with embezzling various sums of money belonging to the same victim over a period of time, urged that the information was bad because it charged one $1000 embezzlement in one count, instead (say) of charging ten $100 embezzlements in ten counts.[26] Conversely, another defendant, accused of stealing six calves belonging to six different owners at the same time and place, complained that the information was bad because it charged six one-calf larcenies in six counts instead of one six-calves larceny in one count.[27] In each case the court stated that only one crime was committed—one $1000 embezzlement pursuant to a single criminal plan in the first case; one six-calves larceny constituting a single transaction in the second case.

Two cases dealt with the law concerning the lesser included offense, under which an information which charges a greater offense necessarily charges also a lesser included offense. In one case a charge of rape was held to include a charge of assault with intent to rape.[28] Descending the ladder still further, the court held in another case that a charge of assult with intent to rape includes a charge of simple assault.[29]

The Trial

Several cases involved the defendant's right to a speedy — though not too speedy—trial. In one case the defendant was charged in one 1956 information with a burglary in *X* county and, in another 1956 information, with another burglary in *Y* county. He was tried and sentenced in 1956 to the penitentiary for the *X* burglary, but was released in 1958, because the sentence was illegal. Upon his release he was arrested in order to be tried for the *Y* burglary, for which, though accused, he had never stood trial. Upon his application for habeas corpus, he was held entitled to his release; it was too late to try him in 1958 for the burglary of which he was accused in 1956, in view of the Colorado constitutional provision for a speedy trial as implemented by the Colorado statutory rule requiring trial of accused persons not on bail within two terms of court. It was held to be no excuse for delaying trial for a Colorado burglary that the accused was incarcerated in a Colorado prison on

---

26 Gill v. People, 339 P.2d 1000 (Colo. 1959).

27 Gray v. People, 342 P.2d 627 (Colo. 1959) (holding that defendant was not prejudiced by being wrongly charged with six separate larcenies, since he was sentenced as if he had committed a single larceny).

28 People v. Futamata, 343 P.2d 1058 (Colo. 1959), 32 Rocky Mt. L. Rev. 95, giving these other examples as dicta: assault with a deadly weapon includes simple assault; larceny includes joyriding; murder includes manslaughter; battery includes assault.

29 Barnhisel v. People, 347 P.2d 915 (Colo. 1959).

a conviction for another Colorado crime.[30] In another case, however, where the two-term delay was at the request of the defendant himself, the defendant was required to stand trial.[31] In another case, the trial court's denial of the defendant's motion for a continuance was held, under the facts of the case, to be no abuse of discretion.[32]

An accused who is told that he may have counsel appointed for him if he is indigent, but who does not request counsel and proceeds to plead guilty, thereby waives his right to appointed counsel.[33]

One Colorado case makes it clear that, in guilty-plea cases, under the statute[34] requiring the trial judge to hear evidence in aggravation and mitigation of the offense in order to enable him to fix the punishment, the judge is not required to find that the evidence is strong enough to sustain the defendant's guilt.[35] The same case holds that the statute[36] which requires the trial court to explain the consequences of a guilty plea to an accused who has pleaded guilty is satisfied by an explanation addressed to the accused's counsel who is standing next to the accused.[37]

The Colorado statutory procedure in insanity cases—calling for a special plea of "not guilty by reason of insanity" and giving the trial judge discretion as to whether to hold one trial or two when the defendant also pleads "not guilty"—was upheld when attacked by one who received a joint trial on the two issues.[38]

A defendant who expects to offer no evidence in his own behalf is properly denied a right to make an opening statement, since the function of such a statement is to give information as to what a party expects to prove.[39]

In an important case the defendant, of Spanish-American descent, charged with robbery, moved to quash the jury panel because of systematic exclusion of Spanish-American persons from the panel. It was shown that, though the county in question had a substantial Spanish-American population, many members of which were qualified for jury service, no person with a Spanish-American name had served on a jury for the past eight years. Though the county's jury commissioners denied practicing any discrimination in selecting juries, the Colorado Supreme Court found that the statistics proved discrimination, thus constituting a violation of the defendant's rights under the equal protection clause of the fourteenth amendment to the United States Constitution. The case was remanded for a new trial before a jury selected without racial discrimination.[40]

30 Rader v. People, 138 Colo. 397, 334 P.2d 437 (1959), giving effect to Colo. Const., art. II, § 16 (speedy trial), and to Colo. Rev. Stat. § 39-7-12 (1953) (one committed for crime and not admitted to bail to be set free if not tried before the end of the second term of court, unless the delay is requested by the defendant).

31 Gallegos v. People, 337 P.2d 961 (Colo. 1959).

32 Baca v. People, 336 P.2d 712 (Colo. 1959).

33 Little v. People, 138 Colo. 572, 335 P.2d 863 (1959).

34 Colo. Rev. Stat. § 39-7-8 (1953).

35 Marler v. People, 336 P.2d 101 (Colo. 1959). Little v. People, 138 Colo. 572, 335 P.2d 863 (1959), holds that the probation officer's pre-sentence report will satisfy the requirement of evidence in aggravation and mitigation.

36 Colo. Rev. Stat. § 39-7-8 (1953).

37 Marler v. People, 336 P.2d 101 (Colo. 1959). The case also holds that counsel may enter a guilty plea for the defendant.

38 Castro v. People, 346 P.2d 1020 (Colo. 1959). The court also pointed out that the prosecution has the burden of proving beyond a reasonable doubt that the defendant is sane, when the defendant raises the issue by his insanity plea.

39 Thompson v. People, 336 P.2d 93 (Colo. 1959).

40 Montoya v. People, 345 P.2d 1062 (Colo. 1959), following Hernandez v. Texas, 347 U.S. 475 (1954).

The same case held that defendant's motion for a mistrial should have been granted when the defendant was exhibited in handcuffs to the jury panel, assembled for its *voir dire* examination, when there was no need for handcuffs.[41]

Several cases dealt with instructions to the jury. Two held that instructions should be given on lesser included offenses if there is some evidence to support a conviction of the lesser offense.[42] One made it plain that an instruction which assumes the existence of evidence not in the record must not be given, though it may state the law in an impeccable fashion.[43]

Several cases concerned alleged misconduct by district attorneys in closing arguments. One case warned against over-prosecution by the district attorney.[44] Another found his remarks (he said something was a fact, though he had not been permitted to introduce evidence of the fact) to be improper, but not reversible error because made in retaliation to defense remarks and because the jury was told to disregard the improper statement.[45] Improper remarks cannot be complained of on error if not in the record.[46]

Evidence at the Trial

A number of Colorado criminal cases naturally involved problems of evidence,[47] but since matters of evidence are treated in a separate article,[48] they are not discussed here.

---

41 *Ibid.*

42 Barnhisel v. People, 347 P.2d 915 (Colo. 1959); People v. Futamata, 343 P.2d 1058 (Colo. 1959), 32 Rocky Mt. L. Rev. 95.

43 Barnhisel v. People, note 42 *supra.*

44 Mills v. People, 339 P.2d 998 (Colo. 1959).

45 Burress v. People, 338 P.2d 1030 (Colo. 1959).

46 Bolden v. People, 341 P.2d 466 (Colo. 1959).

47 Castro v. People, 346 P.2d 1020 (Colo. 1959) (defendant's confession to police not coerced just because defendant not warned he need not answer questions); Stull v. People, 344 P.2d 455 (Colo. 1959) (contains some directives as to admissibility and use of evidence of similar offenses); People v. Futamata, 343 P.2d 1058 (Colo. 1959) (trial court has broad discretion in granting or denying cross-examination of character witnesses for defendant as to rumors or reports of particular unlawful conduct by defendant); Gill v. People, 339 P.2d 1000 (Colo. 1959) (evidence of defendant's bad character inadmissible); Mills v. People, 339 P.2d 998 (Colo. 1959) (reversible error to admit prosecution's evidence that defendant refused to take lie detector test); Brooke v. People, 339 P.2d 993 (Colo. 1959) (paraffin test, to show whether person recently fired a gun, is scientifically unreliable; hence reversible error to admit prosecution's evidence that defendant refused to take the test); Trujillo v. People, 338 P.2d 102 (Colo. 1959) (use of deposition of witness unavailable at trial); Lowry v. People, 337 P.2d 599 (Colo. 1959) (use of former testimony to impeach own witness); Baca v. People, 336 P.2d 712 (Colo. 1959) (admissibility of gun found near burglar, as relevant to intent); Thompson v. People, 336 P.2d 93 (Colo. 1959) (evidence admissible against one defendant but not against co-defendants; latter must request the evidence be limited to former); Davenport v. People, 138 Colo. 291, 332 P.2d 485 (1958) (evidence of similar offenses admissible to show *modus operandi*); Brown v. People, 138 Colo. 354, 332 P.2d 996 (1958) (recent unexplained possession of property taken in a burglary is evidence of guilt of burglary).

48 See *One Year Review of Evidence*, p. 61 *infra.*

Sentence — Probation

It was held improper for a trial judge, in placing a convicted defendant upon probation, to require, as one of the terms of probation, that the defendant furnish a bond to appear in court at stated times and whenever his presence should be required. It was considered that probation should not hinge upon whether or not the defendant has the ability to furnish a bond.[49]

Appellate Review

On April 1, 1955, the Colorado legislature invited the Colorado Supreme Court to promulgate a rule placing a time limit on bringing a writ of error in criminal cases. In response to this statutory invitation the court in June, 1956, issued the following rule, effective July 1, 1956: "A writ of error in criminal cases shall not be brought after the expiration of six months from the rendition of the judgment and sentence complained of."[50]

The United States Supreme Court in 1956 held in *Griffin v. Illinois*[51] that the due process and equal protection clauses of the United States Constitution's fourteenth amendment require states to furnish indigent criminal defendants who wish to appeal their convictions with free transcripts of the trial record or some satisfactory substitute. The Colorado courts have apparently been flooded with requests from prison inmates for free transcripts. The Colorado Supreme Court held that a defendant convicted after April 1, 1955, who has let the six months period go by cannot obtain a writ of error and so cannot use a free transcript.[52] The court suggested that, as to those convicted before April 1, 1955, there is no effective time limit on the writ of error,[53] so that a free transcript might be appropriate. But a later Colorado case, involving a defendant convicted in January, 1955, who asked for a free transcript in 1958, held that the request for the transcript came too late.[54] Thus it seems clear that *Griffin v. Illinois* has no great retroactive application so far as Colorado convicts are concerned.

A 1958 Colorado case held that a trial judge need not order a free transcript for an indigent convict who seeks appellate review, if furnishing the transcript would be a "vain and useless thing."[55] Insofar as supplying a transcript may be vain and useless because the trial court "knows" that no errors would appear in the transcript if furnished, a recent United States Supreme Court case is relevant. That case holds that an indigent convict may not be denied his free transcript just because the trial court is convinced that the trial was free of error and that therefore there is no ground on which to appeal; for, since the rich can appeal their convictions

49 Logan v. People, 138 Colo. 304, 332 P.2d 897 (1958). The rule was passed pursuant to Colo. Rev. Stat. § 39-7-27 (Supp. 1957).

50 Quoted in Johnson v. People, 344 P.2d 181 (Colo. 1959).

51 351 U.S. 12 (1956).

52 Johnson v. People, 344 P.2d 181 (Colo. 1959).

53 Though there was a pre-1955 Supreme Court rule limiting the time to one year, the court suggested that the rule was invalid in view of the fact that the legislature had not, till 1955, authorized a rule.

54 McKenna v. Tinsley, 346 P.2d 584 (Colo. 1959) (holding in the alternative, that the question of denial of a free transcript, if the request for the transcript was timely made, could not be raised on habeas corpus).

55 Kirkendoll v. People, 138 Colo. 267, 331 P.2d 809 (1958), 36 *DICTA* 34, 44 (1959).

even though the trial court believes there is no error, the poor are equally entitled to appeal.[56]

Habeas Corpus after Conviction

Colorado's post-conviction remedy of habeas corpus is so limited in scope as to deny relief to convicted prisoners except in cases where the trial court had no jurisdiction over the crime or the accused or where its sentence was beyond the limits allowed by statute.[57] The Colorado courts have consistently held that habeas corpus is not an available remedy even where the defendant's federal and state constitutional rights are violated and yet the situation is such that the writ of error does not afford appropriate relief. This narrow view of habeas corpus was re-emphasized in 1959. A Colorado defendant coerced by the police into pleading guilty has no right to habeas corpus,[58] though use at trial of a coerced guilty plea, like use of a coerced confession, violates the due process clause of the fourteenth amendment to the United States Constitution.[59] The writ of error is not an effective remedy because (1) the coercion which produced the guilty plea may continue after trial to prevent application for the writ of error within the six months period, and (2) the fact of coercion does not appear on the record and so cannot be reviewed on writ of error.[60] So too an indigent convict who makes timely request for a free transcript for purposes of appellate review, and whose request is wrongly refused, cannot secure relief by Colorado habeas corpus,[61] though the United States Constitution requires the state to furnish the transcript,[62] and though without the transcript he can hardly secure an appellate review on writ of error. (Of course, in neither case is the prisoner entitled to be released even if he can prove his allegations of constitutional violations. If he was actually coerced into pleading guilty, he should be ordered held for a new arraignment and trial. If he was improperly denied the transcript, the proper remedy is to furnish him with one.)

The narrow scope of Colorado habeas corpus would not be so bad if there were some other Colorado remedy available to the convicted defendant whose constitutional rights have been denied and whose remedy by writ of error is not effective to right the constitutional wrong. The possibility of filling the gap with the old writ of error coram nobis, or with a modern remedy "in the nature of" the writ of error coram nobis, has apparently been denied by the Colorado Supreme Court, though other states with a narrow view of habeas corpus have taken a broader viewpoint concerning coram nobis.[63]

---

56 Eskridge v. Washington State Board, 357 U.S. 214 (1958); see also Trinkle v. Hand, 337 P.2d 665 (Kan. 1959).

57 See Scott, *Post-Conviction Remedies in Colorado Criminal Cases*, 31 Rocky Mt. L. Rev. 249 (1959); Scott, *One Year Review of Criminal Law and Procedure*, 36 DICTA 34, 44-46 (1959). Compare Rader v. People, 138 Colo. 397, 334 P.2d 437 (1959), where habeas corpus was allowed for a prisoner *before trial* whose constitutional and statutory right to a speedy trial had been denied.

58 Lowe v. People, 342 P.2d 631 (Colo. 1959). The case also held—and properly so—that habeas corpus is not available to one who was improperly extradited from another state.

59 *Cf.* Waley v. Johnston, 316 U.S. 101 (1941) (coerced plea of guilty to federal crime; habeas corpus available).

60 Bolden v. People, 341 P.2d 466 (Colo. 1959); Marler v. People, 336 P.2d 101 (Colo. 1959) (letters attached to defendant's brief, from doctors stating defendant's mental state when he pleaded guilty, cannot be considered on writ of error; then court went on to consider them anyway).

61 McKenna v. Tinsley, 346 P.2d 584 (Colo. 1959).

62 Eskridge v. Washington State Board, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956).

63 See Scott, note 57 *supra*. Also coram nobis is not available after writ of error has been issued by the Supreme Court. Brooke v. People, 339 P.2d 993 (Colo. 1959).

The end result of Colorado's position denying the availability of either habeas corpus or coram nobis to Colorado convicts whose *federal* constitutional rights have been denied was inevitable. In *Garton v. Tinsley*[64] the United States District Court for Colorado, on a petition for federal habeas corpus, upset the Colorado kidnaping conviction of a Colorado state prisoner on account of the state's denial of his federal right to counsel secured to him by the fourteenth amendment. It had taken the prisoner several years of futile floundering about in the state courts—trying both state habeas corpus and state coram nobis—before he had exhausted all possible state remedies, as a preliminary to applying for federal habeas corpus.

It seems clear that Colorado should provide some effective post-conviction remedy for prisoners whose constitutional rights are violated and who cannot effectively secure an appellate review of the violation by writ of error. Perhaps the best place to make provision for such a remedy would be in the new Colorado Rules of Criminal Procedure, when they are promulgated by the Colorado Supreme Court after legislative authorization.[65]

Strangely enough, although Colorado often refuses habeas corpus relief to one who deserves relief, in one 1959 case the court granted habeas corpus relief to one who surely did not deserve it—all because of a slip of the tongue of a trial judge.[66] The whole matter seems badly out of balance.

Execution of Death Penalty

One convicted of a capital crime and sentenced to death must not be executed if, subsequent to his trial, he has become so insane as not to be able to realize what is happening to him when the executioner performs his lethal task. Colorado's statutory scheme for determining this sort of subsequent insanity—a civil trial by jury at which the doomed prisoner has the burden of proving insanity—was upheld in the last one of a series of cases concerning the wife-murderer Leick to reach the Colorado Supreme Court.[67] Leick was finally executed, several years after he was first convicted, in early 1960.

64 171 F. Supp. 387 (D. Colo. 1959).

65 A precedent exists in Del. R. Crim. P. 35 (1953), based upon the post-conviction remedy afforded federal prisoners by 28 U.S.C. § 2255 (1958). See also Uniform Rules of Criminal Procedure, rule 44 (1952) (motion to vacate, set aside or correct sentence). The Colorado Bar Association's Committee on Criminal Law, working under the direction of Hon. William L. Gobin, is presently preparing a draft set of Colorado Rules of Criminal Procedure. A bill authorizing the Supreme Court to issue Rules is before the 1960 Colorado legislature.

66 In Mendez v. Tinsley, 336 P.2d 706 (Colo. 1959), after a trial and conviction upon an information charging robbery, the trial court by mistake sentenced defendant to the penitentiary for the crime of assault with intent to rob. Defendant later petitioned the trial court for habeas corpus (claiming that, as he was under 21 when convicted, he should have been sentenced on the assault conviction to the reformatory). The trial court, denying habeas corpus, corrected the sentence to read "robbery" (a crime for which those under 21 may be sentenced to the penitentiary), but unfortunately, in so doing, ordered that "the information . . . be set aside and held for naught." The Colorado Supreme Court, on error to review the denial of habeas corpus, reversed and ordered petitioner's release, holding that, by mistakenly quashing the information, the trial court thereby caused the judgment of conviction to become void. Justice Doyle's dissent points out that, in view of all the circumstances, the trial court was not really quashing the *information;* it was merely setting aside the erroneous *sentence* and substituting a correct sentence.

67 Leick v. People, 345 P.2d 1054 (Colo. 1959), upholding Colo. Rev. Stat. § 39-8-6 (1953). The court assumed, without mention, that a prisoner who loses in the trial court on the issue of subsequent insanity can have a Supreme Court review on writ of error. Bulger v. People, 61 Colo. 187, 156 Pac. 800 (1916), however, had held to the contrary.