Michigan Law Review

Volume 47 | Issue 6

1949

EVIDENCE--CRIMINAL LAW--CROSS-EXAMINATION OF ACCUSED'S CHARACTER WITNESS CONCERNING ACCUSED'S PRIOR ARREST

C. C. Grunewald S. Ed.
University of Michigan Law School

EVIDENCE—CRIMINAL LAW—CROSS-EXAMINATION OF ACCUSED'S CHARACTER WITNESS CONCERNING ACCUSED'S PRIOR ARREST—On trial in a district court for bribing a federal revenue agent, defendant called five witnesses to testify to his good reputation. During cross-examination by the district attorney, the character witnesses were asked: "Did you ever hear that on October 11, 1920, the defendant was arrested for receiving stolen goods?" The trial judge overruled the objection to the question, and the witnesses answered in the negative. The prosecutor exhibited a paper record of this arrest to the court. The judge instructed the jury that the question was to test the standard of the character evidence only, not to establish the incident of arrest as a fact affecting the probability of defendant's guilt. On certiorari to the United States Supreme Court, following affirmance by the circuit court of appeals[1] *held,* affirmed. *Michelson v. United States,* (U.S. 1948) 69 S.Ct. 213.

It is now well established that the state may not initially attack the accused's character[2] despite the general relevancy of bad character to the commission of crime.[3] Although the defendant may introduce his character in issue, he may do this only by evidence of his reputation, and not by the opinion of witnesses or by showing particular acts.[4] The prosecution may then show the accused's bad character by rebutting witnesses, but is likewise limited to proof of character by reputation alone, and may not use evidence of particular acts.[5] However, in addition, the prosecution may cross-examine defendant's character witness concerning his having heard rumors of specific acts of misconduct by the accused, the theory being that the basis of his opinion as to character may be questioned.[6] The courts approving this rule temper its potentially disastrous effect on the accused by one or more limitations: for example, by confining rumors of particular acts of the accused to the trait of character in issue,[7] or by recognizing the trial judge's discretion to

[1] (C.C.A. 2d, 1948) 165 F. (2d) 732.

[2] "Character" is used in the sense of "disposition," or what the person actually is, while "reputation," one method of proving character, is the estimation in which the person is held in the community in which he lives. 1 WIGMORE, EVIDENCE, 3d ed., § 52 (1940); 1 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 332 (1935).

[3] Greer v. United States, 245 U.S. 559, 38 S.Ct. 209 (1918); 1 WIGMORE, EVIDENCE, 3d ed., §§ 55-7 (1940).

[4] WIGMORE, EVIDENCE, 3d ed., §§ 52-4 (1940); 1 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 331 (1935); 14 L.R.A. (n.s.) 689 (1907); cf. Edgington v. United States, 164 U.S. 361, 17 S.Ct. 72 (1896).

[5] Peightel v. United States, (C.C.A. 8th, 1931) 49 F. (2d) 235; Hosier v. United States, (C.C.A. 5th, 1933) 64 F. (2d) 657; Stewart v. United States, (App. D.C., 1939) 104 F. (2d) 234; Josey v. United States, (App. D.C., 1943) 135 F. (2d) 809; 1 WIGMORE, EVIDENCE, 3d. ed., §§ 193-4 (1940); 1 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 337 (1935).

[6] 71 A.L.R. 1498 (1931); 15 CHI.-KENT REV. 220 (1937); see also: Lawrence v. United States (C.C.A. 7th, 1932) 56 F. (2d) 555; Reuben v. United States, (C.C.A. 7th, 1936) 86 F. (2d) 464.

[7] This is sometimes said to be the Illinois rule. People v. Hannon, 381 Ill. 206, 44 N.E. (2d) 923 (1942); 71 A.L.R. 1498 (1931). But cf. People v. Page, 365 Ill. 524, 6 N.E. (2d) 845 (1937); and 25 ILL. B.J. 335 (1937).

deny the questions or demand good faith in their use,[8] or by requiring the judge to instruct that the answers are a test of the witness' credibility only and do not constitute proof of the rumored acts.[9] Assuming all these limitations are imposed and granting that elimination of the rule would remove the only satisfactory test of credibility of character witness, the jury's tendency is to disregard the theoretical purpose of the question and to remember only the acts which were rumored. The prosecution is thus given an unfair advantage, for the defendant has no chance to explain or deny the rumors.[10] The Supreme Court in the instant case admits the cogency of arguments for abrogating this rule permitting cross-examination of character witnesses as to rumors of particular acts of the accused. Nevertheless, the Court confines itself to the "workable even if clumsy system" on the somewhat questionable ground that a contrary decision would be more likely to ". . . upset [the] present balance between adverse interests than to establish a rational edifice."[11]

C. C. Grunewald, S.Ed.

[8] McBoyle v. United States (C.C.A. 10th, 1930) 43 F. (2d) 273; Mannix v. United States (C.C.A. 4th, 1944) 140 F. (2d) 250; 71 A.L.R. 1541 (1931).

[9] 22 IOWA L. REV. 583 (1937).

[10] 3 WIGMORE, EVIDENCE, 3d ed., § 988 (1940); 15 CHI.-KENT REV. 220 (1937).

[11] Princial case at 223.