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Limiting the Use of Prior Felony Convictions to Impeach a Defendant—Witness in California Criminal Proceedings

At common law an individual convicted of a felony, a misdemeanor involving dishonesty, or obstruction of justice was incompetent as a witness.¹ The rationale for this disqualification was a belief such persons were so destitute of moral honesty that "truth could not within them dwell."²

In the middle 1800's the common law prohibition was abrogated in most jurisdictions.³ The statutory modifications generally provided a person convicted of a crime could testify but allowed the opponent to introduce the witness' criminal past for the purpose of impeaching his credibility.⁴ Although the type of conviction admissible for impeachment purposes varied widely among jurisdictions,⁵ Wigmore states three general views developed:

1. An individual could be impeached by the same type of conviction which would have led to disqualification at common law.
2. Any criminal conviction could be used to impeach.
3. Only convictions for crimes indicating bad character could be used for impeachment purposes.⁶

Although it is unclear when California first abandoned the common law disqualification,⁷ the enactment of Section 2051 of the Code of Civil Procedure in 1872 clearly marked California's departure from the common law rule.⁸

1. See, 1 GREENLEAF, EVIDENCE § 372 (16th ed. 1899); MCCORMICK, LAW OF EVIDENCE § 43 (2d ed. 1972); 3A WIGMORE, EVIDENCE § 980 (1970).

2. *Williams v. United States*, 3 F.2d 129, 130 (8th Cir. 1924).

3. See, 3A WIGMORE, *supra* note 1 § 985.

4. For a general review of the form statutory modification took, see 98 CORPUS JURIS SECUNDUM 407-410 (1957).

5. See, 3A WIGMORE, *supra* note 1 § 987.

6. *Id.* § 980.

7. Two 1870 cases are typical of the confusion which existed at that time. In both cases the actual issue was what effect the best evidence rule had on proving up the prior conviction. In *People v. Melvane*, 39 Cal. 614 (1870) the prior conviction was to be used to disqualify the witness as incompetent. However, in *People v. McDonald*, 39 Cal. 697 (1870), the prior conviction was to be used for impeachment purposes. Hence confusion exists as to the actual law as of that date.

8. CAL. CODE OF CIV. PROC. § 2051 (West 1965) reads: "A witness may be impeached by the party against whom he was called, by contradictory evidence

A witness convicted of a crime which constitutes a basis of impeachment faces a dilemma. He can testify and risk impeachment by the introduction of his prior criminal convictions or he can refrain from testifying to avoid impeachment, thus losing the opportunity to present his own account. This dilemma, when faced by a defendant in a criminal proceeding, can have great consequences.

In theory, a criminal defendant faces no greater dilemma than a non-party witness since he is entitled to an instruction limiting the jury's use of evidence of prior conviction to the issue of his veracity, but as pointed out in one case, "the naive assumption that prejudicial effects can be overcome by instructions to the jury [is one] all practicing lawyers know to be unmitigated fiction."⁹ Judge Hand pointed out that asking jurors to limit the use of particular evidence to only one issue was requiring "mental gymnastic which is beyond not only their power, but anybody else's."¹⁰

A 1966 study of jury conduct indicated that when the strength of the evidence against defendants was constant, the jury's awareness of a particular defendant's prior conviction almost doubled the likelihood of conviction when compared to cases where the jury was unaware of the defendant's earlier convictions.¹¹

As a result, there is little doubt that many criminal defendants elect not to testify rather than provide the prosecution an opportunity to make the jury aware of their prior criminal conduct. Thus the defendant forbears exercising the right to testify, a right the Supreme Court held "basic in our system of jurisprudence"¹² because he fears the jury will improperly use the evidence of prior conviction.

In light of these considerations the California Supreme Court has followed the lead of other jurisdictions in limiting the circumstances in which a prior conviction may be admitted to impeach a witness.¹³

or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except *that it may be shown by the examination of the witness, or the record of the judgment that he had been convicted of a felony . . .*"(emphasis added).

9. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949).

10. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

11. Kalven & Zeisel, *THE AMERICAN JURY* (1966).

12. *In re Oliver*, 333 U.S. 257, 273 (1948).

13. Among those calling for reform were *The Model Code of Evidence*, rule 106; *The Uniform Rules of Evidence* 21; The federal courts; *see also*, *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965).

Until 1972 the application of Section 2051 of the Code of Civil Procedure and its recodification, Section 788 of the Evidence Code,¹⁴ by the California courts was mechanical. Any witness could be impeached with any prior conviction not too remote in time.¹⁵ As one author charitably stated, it was an approach "at least simple to apply."¹⁶ In 1950 William Hale wrote, "in its application the statute [Section 2051] has presented few problems."¹⁷ The problems that did arise were concerned mainly with cases where conviction was too remote and with the extent to which the prosecution could reveal the details of a prior offense.¹⁸

In 1972 the California Supreme Court decided *People v. Beagle*.¹⁹ Beagle had appealed his conviction for attempted arson and arson. During the trial the prosecution asked Beagle (who had elected to testify) if he had been convicted of a felony in 1965 (issuing a check with sufficient funds). Beagle admitted the conviction; the jury was instructed on the limited impeachment purpose for which the evidence had been admitted.

On appeal Beagle contended that since his prior conviction bore no relationship to either of the offenses charged or his veracity, impeachment by such evidence was a restriction on his right to testify constituting a denial of due process. The court rejected Beagle's challenge stating it misconstrued the law as well as the nature of the prior offense.²⁰

In reaching its decision the court for the first time considered the relationship between Evidence Code Sections 788 and 352.²¹

14. In 1965 California revamped its rules of evidence with the enactment of a comprehensive evidence code. Rules of evidence formerly scattered in several California codes were brought within the new Evidence Code. Section 788 reads in part: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness, or by the record of the judgment that he has been convicted of a felony . . ." The comments to the code state: "Section 788 is based on Section 2051 of the Code of Civil Procedure . . . As Section 788 is, in substance, a recodification of existing law it will have no effect on the case developed rules . . ." CAL. EVID. CODE § 780 (West 1969).

15. See HALE, SPECIFIC ACTS AND RELATED MATTERS AS AFFECTING CREDIBILITY, 1 HASTINGS, L.J. 89 (1950).

16. McCORMICK, *supra* note 1 p. 85.

17. HALE, *supra* note 15, p. 99.

18. *Id.* 102-107. See also, 54 Cal. Jur. 2d 570 (1969).

19. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

20. *Id.* 451, 492 P.2d at 6-7, 89 Cal. Rptr. 318-19.

21. *Id.* 451, 492 P.2d at 7, 99 Cal. Rptr. 319.

Section 788 states a prior felony conviction may be used for the purpose of impeachment.²² Section 352 in fact provides that the court may exclude relevant evidence “if the probative value is substantially outweighed by the probability that its admission will . . . create danger of undue prejudice . . .”²³ Reviewing the relationship between these sections the court held Section 352 was a general provision of the Evidence Code which applies to evidence admissible under other sections of the Code.²⁴ Citing the Code’s use of the permissive “MAY” in Section 788 rather than the mandatory “SHALL,” the court held Section 788 when read in conjunction with Section 352 gave the trial court discretion as to whether a prior conviction should be admitted.²⁵ To assist the trial courts in exercising their discretion the court quoted from *Gordon v. United States*,²⁶ wherein Judge Berger (now Chief Justice) indicated “the more important factors to be considered by the trial court.”

In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man’s honesty and integrity. Acts of violence . . . generally have little or no direct bearing on honesty and veracity. [1] A ‘rule of thumb’ thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not . . . [2] The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness. [Par.] A special and even more difficult problem arises when the prior conviction is for the same or substantially similar conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that ‘if he did it before he probably did so this time.’ [3] As a general guide, those convictions which are for the same crime should be admitted sparingly . . . [4] One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by convictions. Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant’s version of the case than to have the defendant remain silent out of fear of impeachment.²⁷

Adopting this discretionary standard, the court rejected any constitutional challenge to the use of prior convictions. Re-

22. CAL. EVID. CODE § 788 (West 1968).

23. CAL. EVID. CODE § 352 (West 1968).

24. 6 Cal. 3d at 452, 492 P.2d at 8, 99 Cal. Rptr. at 320.

25. *Id.* at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.

26. 383 F.2d 936 (D.C. Cir. 1967).

27. 6 Cal. 3d at 553, 492 P.2d at 8, 99 Cal. Rptr. 320, quoting *Gordon v. United States*, 383 F.2d 936, 940-41.

sponding specifically to *Beagle's* claim that Section 788 was an improper restriction on his right to testify the court stated, "We do not propose to encourage or countenance a form of blackmail by defendants. No witness including a defendant who elects to testify on his own behalf is entitled to a false aura of veracity."²⁸ The court also quoted *People v. Modesto*,²⁹ "[t]he defendant must weigh the danger of impeachment by the introduction of prior convictions for every witness he calls for the defense. 'The fact that the witness may also be the defendant makes the choice more difficult *but a denial of due process does not emerge from the circumstances*' (*Adams v. California*³⁰)."³¹ Hence *Beagle* appears to place California in accord with the federal court's rejection of claims asserting constitutional infirmity of impeachment via prior convictions. Thus *Beagle's* restriction on the use of prior convictions is limited solely to the trial court's discretionary finding of undue prejudice under Section 352.

In 1975 the court again addressed the issue of prior convictions for impeachment purposes in *People v. Lent*.³² The appellant had been convicted of grand theft. During the trial the prosecution was permitted to introduce evidence of the appellant's prior *misdemeanor* convictions for the purpose of impeachment. Reading Section 788 as allowing only the use of felony convictions, the court "declined the invitation to extend its [Section 788] to misdemeanors."³³ Most important was the court's statement: "[T]he current trend is toward refinement and limitation of the use of even prior felonies for impeachment."³⁴

The case which imposed the greatest limitation on the use of prior conviction was the 1976 case of *People v. Rist*.³⁵ *Rist* is interesting for two reasons. First it is perhaps the poorest application of *Beagle* standards yet to be reviewed. Second, ac-

28. *Id.* at 553, 492 P.2d at 8, 99 Cal. Rptr. at 320.

29. 62 Cal. 2d 426, 454, 398 P.2d 753, 42 Cal. Rptr. 417, 427 (1965).

30. 332 U.S. 46, 57-58 (1947).

31. 6 Cal. 3d at 453-54, 492 P.2d at 8, 99 Cal. Rptr. at 320.

32. 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975).

33. *Id.* at 485, 541 P.2d at 547, 124 Cal. Rptr. at 907.

34. *Id.*

35. 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976).

ording to the dissent, the discretion granted to trial courts in *Beagle* was replaced by a rigid standard.

Rist was tried and convicted of first degree robbery. Before taking the stand the defendant moved to exclude his prior convictions under the *Beagle* standards. Three prior convictions were at issue, a 1973 conviction for robbery and 1971 convictions for forgery and possession of marijuana. The trial court ruled although the robbery conviction could be used to impeach the defendant, the 1971 convictions could not.

This ruling seems to disregard the standards set out in *Beagle*. The admission of a prior robbery in the instant robbery trial seemed to ignore *Beagle's* admonishment to use prior convictions for the same offense "sparingly." This is particularly true when another conviction, highly relevant on the issue of honesty, the forgery conviction, was available to impeach the witness. The exclusion of the forgery conviction seems again to ignore the *Beagle* standards as it was relevant on the issue of honesty, dissimilar to the offense charged, and not too remote in time. In its decision the court notes "[i]t appears that the trial court gave only perfunctory consideration to the *Beagle* guidelines."³⁶ In responding to the trial court's decision to admit the robbery conviction, counsel for Rist stated, "Your Honor, it would seem to me that this is exactly what *Beagle* indicates should not happen."³⁷ Having received this unfavorable ruling, Rist decided not to testify.

In reviewing the propriety of using a similar prior conviction the court expanded its *Beagle* guidelines to such a degree that one court later stated *Rist* almost said, "Never use a similar prior."³⁸ In actuality the court stated:

As a general rule, convictions which are assaultive in nature do not weigh as heavily in the balance favoring admissibility as those convictions which are based on dishonesty or some other lack of integrity. Nor do prior convictions which are dissimilar to the crime charged weigh as heavily in the balance favoring exclusion as those which are the same as or similar to the crime charged. The temporal nature of the prior conviction may affect the balance either for or against admissibility—a recent conviction of a dissimilar crime grounded on a dishonest act would add weight in favor of admissibility, but a recent conviction of a similar, assaultive crime would add weight in favor of exclusion as the prejudicial effect would therefore be even greater.³⁹

Thus the court indicated that the balance should be in favor of exclusion of similar prior convictions rather than requiring ab-

36. *Id.* at 219, 545 P.2d at 840, 127 Cal. Rptr. at 453, n.9.

37. *Id.*

38. *People v. Rollo*, 60 Cal. App. 3d 362 (1976) vacated by grant of cert. 4 *Crim.* 7743 (1976).

39. 16 Cal. 3d at 222.

solute exclusion. The dissent apparently believed the balance was tipped so far in favor of exclusion that the prosecution could never meet the burden, hence they believed a rigid standard was imposed.⁴⁰ Complaining that *Beagle* had indicated there was no constitutional bar to the use of convictions to impeach, the dissent indicated the majority, without any legal basis, was attaching to Section 788 a limitation the legislature had not intended.⁴¹

In view of the court's desire to limit the use of prior convictions the court's continued unwillingness to find any constitutional infirmity in their use is one of the most significant aspects of the *Rist* case.

In contrast, at least one state, Hawaii, has held impeachment by prior convictions violates an accused's constitutional rights.⁴² In reaching its decision the Hawaiian court carefully noted its holding was based on both the federal and *state* constitutions.⁴³ Indicative of Hawaii's solitary position is the fact that section of the opinion holding the use of prior convictions unconstitutional is entirely devoid of supportive authority.⁴⁴

Having failed to adopt a conclusive position similar to Hawaii's, the California court has left the area open to piecemeal litigation, similar to *Rist*. In such litigation the court will be asked to review discretionary decisions of trial courts made under uncertain guidelines. The potential for conflicting appellate court decisions is apparent.⁴⁵

Development of a more workable standard would avoid continued uncertainty. A highly workable standard which could be

40. *Id.* at 224, 545 P.2d at 842, 127 Cal. Rptr. at 466.

41. *Id.* at 223, 545 P.2d at 842, 127 Cal. Rptr. at 455. Support for the dissenter's opinion as to the legislative intent is found in a recent article in the Los Angeles Daily Journal, March 4, 1977, at 1 Col. 5, wherein Assemblyman McAlister stated he was introducing a bill to "restore its (Section 788) true and original legislative meaning." McAlister claimed *Beagle* and *Rist* judicially reversed the law as it had stood for a century.

42. See *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971) holding use of prior convictions to impeach violates an accused's constitutional right to testify.

43. *Id.* at 258, 492 P.2d 661.

44. *Id.*

45. Pending before the Supreme Court now is a conflict between the appellate courts as to the right of the prosecution to introduce the actual felony committed rather than simply ask if the defendant had been convicted of a felony.

derived from *Beagle* is a relevancy standard. As the court noted in *People v. Antick*,⁴⁶ “[w]e interpreted the permissive language of the statute [Section 788] to mean that the introduction of other relevant evidence is subject to the exclusionary rule embodied in Section 352.”⁴⁷ This statement assumes a prior conviction is indeed relevant evidence. It may, in fact, be an assumption which is without foundation. The only issue upon which the prior conviction is admitted is the veracity of the witness. When one assumes a conviction is relevant to veracity one assumes a conviction implies impaired veracity. Is the assumption correct? Hale stated: “Until such inquiry can be answered we cannot know whether and to what extent conviction of a crime has an impeaching value.”⁴⁸ Wigmore wrote: “[T]o the psychologist, the common law’s reliance on character as an index of falsehood is crude and childish.”⁴⁹

The California Evidence Code defines relevant evidence as that “having any tendency in reason to prove or disprove any disputed fact . . .”⁵⁰ Thus, prior convictions are relevant only if they have a tendency to prove or disprove the honesty of the witness. Section 350 of the Evidence Code states only relevant evidence is admissible.⁵¹ Section 403 of the Evidence Code places on the proponent of proffered evidence the burden of producing evidence of any preliminary facts when the relevancy of the proffered evidence depends on the existence of the preliminary fact.⁵²

Since *Beagle* held Section 788 is subject to other general provisions of the Evidence Code,⁵³ it follows that this section should also be subject to the relevancy requirement of Section 210. A prerequisite to admission under this procedure would be a showing that the evidence of conviction tends to prove or disprove veracity. Inasmuch as Section 403 places the burden of producing evidence of preliminary facts on the proponent, the prosecution should bear the burden of showing a witness’ prior conviction to be an indication of impaired veracity.

Clearly the relevancy of a specific felony conviction on the issue of veracity is contingent on a showing of a correlation

46. 15 Cal. 3d 79, 539 P.2d 454, 123 Cal. Rptr. 475 (1975).

47. *Id.* at 97, 539 P.2d at 55, 123 Cal. Rptr. at 487.

48. HALE, *supra* note 15, p. 99.

49. 3A WIGMORE, *supra* note 1, S.922.

50. CAL. EVID. CODE § 210 (West 1969).

51. CAL. EVID. CODE § 350 (West 1968).

52. CAL. EVID. CODE § 403 (West 1968).

53. *See* note 24 *supra*.

between the criminal history of the witness and lack of veracity. Certainly the prosecution's burden is greater than "crude, childish" reliance on unproven assumptions. *Beagle* pointed out that "[a]cts of violence . . . generally have little or no direct bearing on honesty or veracity."⁵⁴ If this is true, evidence of such acts should be excluded as irrelevant rather than unduly prejudicial.

Adoption of the relevancy standard need not result in the abandonment of the application of Section 352 to Section 788. However, it would shift the initial focus away from prejudice to relevancy. Once a trial court found a particular conviction relevant on the issue of veracity, the court could then consider the issue of undue prejudice. Thus, a two-level test would evolve from *Beagle*.

At the first level relevancy would be considered. Included in this consideration would be the first two "factors" which were stated in *Beagle*. Does the prior conviction rest on dishonest conduct or violent conduct? How remote is the prior conviction? Under Section 403 the prosecution should bear the burden of showing the relevancy of these factors on the issue of the witness' veracity.

Once the prosecution has met its burden, if the defendant elects, he may then raise the second level of the test, i.e. the admission of the evidence as unduly prejudicial. Here the final two factors of *Beagle* should be considered. Is the prior conviction for the same or a similar offense as the one the accused is presently charged? Will the defendant's failure to testify out of fear of impeachment unduly prejudice the trial? Under Section 352 the defendant should bear the burden of showing undue prejudice.

This proposal retains the elements of the *Beagle* guidelines, by clearly focusing on two considerations, relevancy and undue prejudice, the guidelines become easier to apply. Additionally, the approach places the burden of proof upon the party seeking to benefit from a particular ruling rather than the present catch-all procedure. Finally, under this approach only convictions which actually bear on credibility would be admitted. This, in the author's opinion, will achieve the limitation on the use of

54. 6 Cal. 3d at 553, 492 P.2d at 8, 99 Cal. Rptr. at 320.

prior convictions the court has been seeking while preserving for the People the opportunity to use evidence traditionally admissible for the purpose of impeachment when that evidence has true probative value on credibility.

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