

February 1966

Criminal Law--Due Process and the Statute of Limitations

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Recommended Citation

Forrest H. Roles, *Criminal Law--Due Process and the Statute of Limitations*, 68 W. Va. L. Rev. (1966).

Available at: <https://researchrepository.wvu.edu/wvlr/vol68/iss2/28>

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West Virginia is the same as the orthodox rule which was expressly approved in *Jackson v. Denno*. The West Virginia Supreme Court has held that, before admitting a confession into evidence, a trial judge must determine from the evidence that the confession was voluntarily made. *State v. Vance*, 146 W. Va. 925, 124 S.E.2d 252 (1962); *State v. Brady*, 104 W. Va. 523, 140 S.E. 546 (1927).

Menis Elbert Ketchum, II

Criminal Law—Due Process and the Statute of Limitations

D was arrested seven months after he allegedly sold narcotics to an undercover policeman. At the trial *D* was convicted of a narcotic's violation solely upon the testimony of the undercover policeman. *D* denied the sale but was unable to find any other defense as he remembered nothing at all of what he had done on the day the sale allegedly occurred. The undercover policeman needed notes to refresh his memory. The court held that *D* was denied due process because the long delay between the time the prosecution's case was completed and the time *D* was arrested deprived *D* of a fair opportunity to defend even though prosecution commenced before the statute of limitations expired. *Ross v. United States*, 349 F.2d 210 (D. C. Cir. 1965).

The court appears to have set a precedent in rejecting the time set forth in the statute of limitations where constitutional guarantees are involved. The court holds in effect that the maximum time set forth in the statute for commencing prosecution may be diminished where there would be a denial of due process if the statute of limitations were literally applied.

The problems that faced the court in the principal case arise from a method of police investigation into the so-called "victimless" crimes. The crimes are generally narcotics offenses, prostitution, sodomy, liquor sales and gambling. The method often used by police in detecting these crimes involves an undercover man—either a plain clothes policeman or a police informer. The undercover man tries to establish himself in an area where he suspects these crimes are being committed. Once established and trusted, he hopes that someone will invite him to commit one of the crimes, or that he may witness the crimes as they are committed.

As the agent is effective only while he is trusted by potential violators, and as becoming trusted is often a difficult and time-consuming task, it is expedient that he continue gathering evidence on as many defendants as possible for as long as it is safe for him to do so. This fact raises the first problem—that of delay. When a potential defendant is detected early in the period of investigation, a considerable time may elapse between the assimilation of the case against him and his arrest. Because of the interest in maintaining the secrecy of the agent's identity, he usually works alone. This fact raises the second problem—the agent's testimony is generally uncorroborated.

The chief problem in the principal case was that of delay. The case laid great emphasis upon the effect the delay had upon the defendant's memory. The defendant was unable to recall anything he had done on the day the offense occurred. A witness who had previously agreed to testify that the defendant had been caring for her during a sickness on that day declined to do so at the trial because, as she said, "I didn't think I could remember." On the other hand, the officer whose testimony was the basis of the prosecution's case had refreshed his memory with a notebook he had kept during his investigation. He admitted that he could not have been able to testify without referring to his notes. These facts combined to convince the judges that the purposeful delay of the notice before bringing charges denied the defendant due process.

The corroboration problem is illustrated by a relatively recent federal case. In *Kelley v. United States*, 194 F.2d 150 (D. C. Cir. 1952), the defendant appealed a conviction of unlawfully inviting another to accompany the accused for lewd and immoral purposes. The chief evidence of the prosecution was the testimony of a plain clothes officer whom the defendant was accused of inviting. The officer had placed himself in a park for the purpose of being so invited. The conviction was overturned because the testimony of the policeman was uncorroborated by other evidence indicating the defendant's guilt. The decision was based upon the likelihood of false accusation and the difficulty of defense created by the undercover agent method.

The likelihood of false accusation results from two factors inherent in the investigation method. The first is the fact that the officer is placed on duty in the area to which he is assigned solely to make

arrests for one crime. He too readily may misinterpret an innocent action or statement. The second factor is that as the agent deals with a considerable number of defendants over the period of time he is on a particular assignment, he is more likely to mistake the identity of the person he accuses than he would be in other situations.

The difficulty of defense also is a result of the nature of the method of police detection. Faced with the accusing witness, a falsely accused defendant may have no other defense than his character and denial of the charges. These two considerations have caused the Court of Appeals for the District of Columbia Circuit to require corroboration of an agent's testimony in regard to crimes such as the one in the *Kelley* case.

The same dangers appear, although to a lesser extent, in convictions with undercover investigation in other victimless crimes. In *Wilson v. United States*, 335 F.2d 982 (D. C. Cir. 1963), Justices Wright and Bazelon, dissenting from a denial of a hearing of a conviction similar to the one in the principal case, stated that the rule of corroboration might well apply to narcotics cases, as the same method of detection is used. The Justices indicated that an added factor of difficulty of defense was that "the defendant is typically an addict who is prejudiced by the 'common' knowledge that many addicts sell to other addicts in order to support their habit." *Wilson v. United States, supra* at 984-5. It follows from this argument that convictions of other victimless crimes where the sole prosecution evidence is the testimony of an undercover agent may be overturned for lack of corroboration.

Justice Danalar dissented from the decision in the principal case. His reasoning (other than the majority had erroneously weighed the evidence) was based upon two propositions. The first was that the decision was contrary to clear law laid down in a previous federal case that ". . . [a] delay which occurs between the commission of an offense and the commencement of prosecution is controlled exclusively by the applicable statute of limitations" The second was that the decision results in an unwarranted court supervision of police methods of investigation.

Whereas this appears to be the first time an American court has overturned a conviction for excessive delay between detection of

the crime and beginning of the prosecution, this holding has been foreshadowed in prior cases. In *Nickens v. United States*, 323 F.2d 808 (D. C. Cir. 1963), the court considered the question of such a delay. In a footnote to a sentence which stated that the claim of excessive delay related to the applicable statute of limitations was a statement that "[T]his is not to suggest that delay between offense and prosecution would not be so oppressive as to constitute a denial of due process." The holding in the principal case seems to be the result of the ". . . growing apprehension . . ." at the ". . . recurring spectacle of [narcotics] convictions . . ." similar to the one in the principal case. The majority judges admit that as to narcotics cases at least, the statute of limitations is no longer the sole test as to when the prosecution must be initiated.

The dissenting argument in the principal case puts forward the public interest in the effective and efficient enforcement of the criminal law. The undercover agent method seems the best method of detecting the victimless crimes. The nature of the crimes is such that they are committed in private in the absence of any potential complaining witness. Thus, without the presence of undercover agents, there is detection only when the offense is committed flagrantly or in the presence of a witness.

The results obtained by the undercover agent in the principal case illustrate the efficient effectiveness of this sort of investigation. Offenses by fifty-one different people were detected. Thirty-four were indicted; one was a "dealer" or distributor of narcotics. The requirement that an undercover man be revealed by arrests at an early stage in his investigation might cripple the method. The agent would be stopped at a time when he is best able to detect crimes, and perhaps before he had gained enough trust to obtain evidence on "higher-ups."

It is difficult to predict what effect this case will have on police investigation into victimless crimes. Although the decision was limited to narcotics cases, its reasoning applies equally well to other victimless crimes. If it is applied, how soon after the completion of the government case must prosecution begin? Will the courts now extend the holding of this case by reducing the time allotted in a statute of limitations in *any* case where constitutional guarantees are denied? The failure to answer these and other questions makes any attempt to foresee the effect of the holding speculative.

With the increasing judicial review of police detection methods evidenced by the search and seizure and confession cases, these problems of the undercover method of police detection probably will receive more attention. Courts again will have to balance the interest in effective law enforcement and the interest in a fair opportunity for defense for the accused. The courts now seem less likely to allow what Justice Roberts termed "the reprehensible methods" used by the undercover agents. *Sorrels v. United States*, 287 U.S. 435, 453 (1932).

Forrest Hansbury Roles

Damages—The Per Diem Method of Arguing Pain and Suffering

Ps brought an action to recover damages for injuries received in an automobile accident caused by *D's* negligence. The district court allowed *Ps'* counsel to use the per diem basis in his argument to recover damages for pain and suffering. In addition, charts were used to demonstrate the per diem computations. The judgment for *Ps* was reversed on the ground that argument designed to mislead jury into believing that proper award for pain and suffering was a matter of precise determination constituted reversible error. *Johnson v. Colglazier*, 348 F.2d 420 (5th Cir. 1965).

The basic approach of the per diem method is to break down pain and suffering into units of time. The total units are calculated from *P's* expected life span, as computed from an annuity table. In instances where *P* is not expected to incur pain and suffering for the remainder of his lifetime, computations are based upon the expected duration of discomfort.

The majority in the principal case based its opinion on *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958). The New Jersey court held that in using such argument *P's* counsel was basing figures upon mere speculation without supporting evidence. Also, New Jersey courts forbid reference by counsel to the ad damnum clause in the complaint.

West Virginia's Supreme Court of Appeals in *Crum v. Ward*, 146 W.Va. 421, 122 S.E.2d 18 (1961), followed the New Jersey court by holding that counsel's use of the per diem argument constituted reversible error. See 65 W. VA. L. REV. 237, 238 (1962). The controversy concerning use of the per diem method is generally