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Criminal Law--West Virginia Kidnapping Stature-- Single Offence

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prosecution to overcome the presumption of the accused's innocence.

The questions of burden of proof and presumptions are bound up with the substantive law. This means the risk of not persuading the jury is upon the prosecution. It also means that there is a duty upon the prosecution of going forward with evidence on which the jury can reasonably find that the facts were proved.

In capturing the truth, convenience of form should not be used to deny rights in substance.

Frank Cuomo, Jr.

Criminal Law—West Virginia Kidnapping Statute—Single Offense

P, petitioner, was indicted under state statutory provisions for the crime of kidnapping. The indictment charged that *P* kidnapped *X* and transported him without his consent and against his will with the intent of taking advantage of him to the county where this indictment was rendered. The jury found *P* guilty as charged, and the court sentenced him to imprisonment for sixty years. *P* urged that the indictment was void on the basis that it did not specify under which offense of the statute he was being charged and was awarded a writ of habeas corpus. *Held*, reversed. The statute prescribing kidnapping creates a single capital offense and not three separate and distinct offenses even though it provides for varying degrees of punishment depending upon the treatment accorded the victim. Consequently, the indictment was not insufficient because it failed to make reference to the punishment sought or to the treatment of the victim. *Pyles v. Boles*, 135 S.E.2d 692 (W. Va. 1964).

The West Virginia statute makes kidnapping a felony and provides for the imposition of three different penalties. Conviction under the statute is punishable by death unless the jury recommends life imprisonment. If the victim is permitted to return unharmed after ransom has been paid, the minimum sentence is twenty years, but if no ransom has been paid, the minimum penalty is ten years. W. VA. CODE ch. 61, art. 2, § 14(a) (Michie 1961).

In interpreting the statute to create a single capital offense, the

majority of the court in the principal case held that the various punishments which may be imposed are governed by the evidence introduced at the trial and do not prescribe any element of the offense. The dissenting judge took the position that a single offense, without any grades or degrees, cannot have various penalties.

In reaching its decision, the majority of the court in the principal case relied upon the interpretation given a similar federal kidnapping statute by the federal courts. The federal act provides that punishment shall be by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury shall so recommend, or by imprisonment for any term of years or for life if the death penalty is not imposed. 18 U.S.C. § 1201 (1940). In *Smith v. United States*, 360 U.S. 1 (1959), petitioner was charged by information, which did not allege whether the victim had been released harmed or unharmed. By a six to three decision the Court held that indictment was required because the statutory offense is sufficiently broad to justify a capital verdict. The majority based its decision on the premise that kidnapping under the statute is a capital offense whether or not there is an allegation that the kidnapped person has not been liberated unharmed.

Prior to the *Smith* case, the Third Circuit Court of Appeals had held that kidnapping was not a capital offense when the indictment failed to allege that the victim was not released unharmed. *United States v. Parker*, 103 F.2d 857 (3d Cir. 1939). However, the decisions of the second circuit were in conflict with this view, and the Supreme Court cited with apparent approval the dictum in *United States v. Parrino*, 180 F.2d 613 (2d Cir. 1950), to the effect that the allegation that the victim was not released unharmed is not part of the offense and that a defendant has no right to be informed before-hand of the punishment the Government seeks. In endorsing the holding of the *Smith* case, the position of the West Virginia Supreme Court appears to be that an allegation in the indictment that the victim was released harmed is not necessary to allow either the introduction of evidence of harm or the imposition of the death penalty. The majority of the court found that such a position does not violate the West Virginia constitutional provision that in all criminal trials the accused shall be fully and plainly informed of the character and cause of the accusation, W. VA. CONST. art. III, § 14, because *P* could have moved the court to require the state to furnish a bill of particulars. *State v. Jarrett*,

119 W. Va. 432, 194 S.E. 1 (1937). The dissent states that the availability of such a motion does not relax the constitutional rule relating to the sufficiency of the accusation.

There would seem to be some doubt that a bill of particulars can be obtained in this situation, *United States v. Parker*, 19 F. Supp. 450 (D. N.J. 1937), and even if such relief is available, it is questionable whether it would benefit the defendant in the preparation of his defense. It has been held that a bill of particulars is for the purpose of informing the accused concerning the accusation of which he stands charged and not of the particularity of the evidence which the state expects to introduce. *State v. Greer*, 130 W. Va. 159, 42 S.E.2d 719 (1947). Under the court's view in the principal case of the nature and elements of kidnapping, the specific information the defendant seeks is not an element of the offense but of the degree of punishment. If the matter of harm goes only to the punishment, it may be that the state would not be required, in a bill of particulars, to set forth the punishment it intends to seek or the requirements for such punishment that it intends to prove. 38 N.C.L. REV. 84 (1959). The dissenting judge, in *Smith v. United States*, supra, argued that unless capital kidnapping cases are required to be prosecuted by indictment charging specifically that the victim is not liberated unharmed, the defendant must await the conclusion of the evidence to determine whether he is being prosecuted for a capital offense.

In arriving at its decision in the principal case, the court stressed the language of the statute relating to the minimum penalties to be imposed as a significant indication of legislative intent to create a single capital offense of kidnapping. The pertinent part of the statute which was quoted by the court is as follows: "[I]n all cases where the person against whom *the offense* is committed is returned, or permitted to return, alive, without serious bodily harm having been inflicted. . . ." W. VA. CODE ch. 61, art 2, § 14(a) (Michie 1961). (Emphasis added.)

Conversely, because three different factual situations are involved, the dissent argued that three different offenses were created by the statute, including a "primary offense" defined as a felony, punishable by death or life imprisonment, and two additional offenses provided for by minimum sentences of twenty and ten years.

In support of its contention that the legislature intended to create a single capital offense of kidnapping, the majority of the court cited *State v. Perry*, 101 W. Va. 123, 132 S.E. 368 (1926), which held sufficient a charge in a single count of both forgery and uttering. The court in that case, however, pointed out that the statute under which the indictment was brought, makes forgery and uttering two distinct felonies. In addition, the majority opinion in the principal case cited with approval *State v. Joseph*, 100 W. Va. 213, 130 S.E. 451 (1925), sustaining a count charging that the defendant owned, operated and possessed a moonshine still, under a statute which created a single offense, and *State v. Wetzel*, 75 W. Va. 7, 83 S.E. 68 (1914), involving a charge that the accused embezzled money at various times for a period of three years. The court in the *Wetzel* case held that the indictment charged but a single act of embezzlement under a statute which created a single offense. When statutes define various ways in which a single offense or different offenses may be committed, indictments frequently have been assailed on the ground of duplicity. However, in none of the cases relied upon by the majority of the court in the principal case was an indictment held bad for duplicity, and the court likewise concluded that the indictment in the instant case was not challengeable because of duplicity.

Duplicity consists of stating for one purpose two or more distinct grounds of complaint when one of them would be as effectual in law as both or all of them. *State v. Vaughn*, 93 W. Va. 419, 117 S.E. 127 (1923). Although the court has recognized that the West Virginia law as to duplicity in indictments is somewhat confused, *State v. Howard*, 137 W. Va. 519, 73 S.E.2d 18 (1952), it would appear that the court now views duplicity as a technical defect, whether the joinder be of misdemeanors or of felonies, and that such a defect cannot be reached by a demurrer or motion to quash. *State v. Hudson*, 93 W. Va. 435, 117 S.E. 122 (1923); *State v. Jarrell*, 76 W. Va. 263, 85 S.E. 525 (1915); Lugar, *Duplicitious Allegations in Indictments*, 58 W. VA. L. REV. 18 (1956). If a duplicitious allegation is viewed as a mere technical defect, it would seem that the sufficiency of an indictment charging kidnapping would be sustained whether the statute is construed to create a single offense or a number of distinct offenses.

On the other hand, it is sometimes stated that offenses created by different statutes, or those to which different punishments are

annexed, cannot be included in the same count. 5 WHARTON, CRIMINAL LAW AND PROCEDURE § 1932 (12th ed. 1957). However, it would appear that such joinder is improper not because the offenses arise under different statutes or because they are differently punished, but because they are really distinct offenses. *Hamilton v. State*, 129 Fla. 219, 176 So. 89 (1956). If this interpretation be given, the sufficiency of the indictment could well turn upon the court's construction of the statute. That is, if the statute creates three distinct offenses, conceivably a count could be held bad for duplicity.

Having examined the court's reasoning in the principal case, it may be well to consider the effect of its decision. The indictment in the principal case did not allege harm to the person kidnapped, nor did the prosecution request the death penalty. As the statute imposes no maximum penalties, it is difficult to see how *P* was prejudiced in any way by the court's decision because he could have been sentenced for any term of years in excess of ten. On the other hand, the dissent points out that the jury returned a general verdict without recommending confinement in the penitentiary and questions how the trial court avoided imposing the death penalty on the principle that a general verdict results in a conviction of the highest grade of the offense charged. At any rate, it is probable that the application of the court's construction of the statute could impose hardships upon one accused of kidnapping, particularly in the preparation of his defense.

While the controversy as to the number of offenses the kidnapping statute creates may involve a certain amount of quibbling over terminology, it could more appropriately be said to reflect an unsatisfactory statute.

Thus, as the dissenting opinion in the principal case suggests, reappraisal by the legislature might be in order. A more desirable solution is proposed by the American Law Institute's Model Penal Code, which defines kidnapping as the unlawful removing of another from his place of residence or business and as unlawful confinement for any of a number of specified purposes. MODEL PENAL CODE § 212, (Tent. Draft No. 11, 1960). Kidnapping is made a felony of the first degree unless the victim is released alive in a safe place; otherwise, it is a felony in the second degree. The basic reason for grading ordinary kidnapping as a second degree felony,

despite the much higher level of punishment currently provided, is to avoid disproportion in penalties between this offense and such felonies as robbery, rape and burglary, especially where the removal or confinement is a relatively minor incident to the other offense. Note, *A Rationale of the Law of Kidnapping*, 53 COLUM. L. REV. 540 (1953).

The Model Penal Code justifies treating kidnapping as seriously as murder or rape on the likelihood of a victim disappearing permanently during a kidnapping, without the possibility of proving murder. Thus, to encourage the kidnapper to return the victim alive, first degree penalties apply only when the victim is not released alive in a safe place. Although the reasons for the inclusion of minimum penalties in the West Virginia statute are apparent, the failure to provide maximum penalties, coupled with the court's interpretation of the statute, have rendered them practically meaningless.

Ralph Judy Bean, Jr.

Federal Courts—Application of Federal or State Law to Federal Agency Litigation

In an action by the United States on a note executed by husband and wife under a contract with the Small Business Loan Agency, judgment was rendered against both defendants, and the wife appealed asserting the common law defense of coverture. *Held*, reversed. The court of appeals found that the law of the state (Texas) where the contract was formed controlled. In Texas a married woman is protected by coverture from personal liability. The fact that the transaction was with the federal government did not nullify or abrogate the law of that state. The dissent contended that a loan from the federal government was a federal matter and should be governed by federal, rather than state, law as the use of state law would frustrate a multitude of federal programs and result in varied treatment to the residents of the various states. *United States v. Yazell*, 334 F.2d 454 (5th Cir. 1964).

The Small Business Act, 72 Stat. 384 (1958), 15 U.S.C. § 631 (1958), represents one of many federal programs undertaken within the last several decades that have led to frequent legal contact be-