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Criminal Law--Conspiracy--Consistency Rules

Ralph Charles Dusic Jr.
West Virginia University College of Law

The West Virginia court has held in actions to recover for wrongful death, that the law of the place of the wrong rather than the law of the forum govern the right of action in this state. *Keesee v. Atlantic Grayhound Corp.*, 120 W. Va. 201, 197 S.E. 522 (1938). The West Virginia court later said that the substantive law of the foreign jurisdiction controls the right to recover and that the question of survivability of a cause of action was one of substantive law. *Tice v. E. I. Du Pont De Nemours & Co.* 144 W. Va. 24, 106 S.E.2d 107 (1958). These cases seem to indicate that West Virginia would follow the majority, at least as to the procedural issue, and be contra to the instant case.

By determining that the law of the place of the injury is contrary to public policy of the forum and is procedural rather than substantive, the court in the instant case concluded that the law of the forum must be applied on the issue of damages. This view tends to negate both the rationale of certain conflict of law rules and the reason for their existance—namely, to prevent the outcome of a lawsuit from differing according to the place chosen to institute the suit. While the decision of the instant case is no doubt both popular and benevolent, it seems to be an open invitation to forum shopping. To avoid this, it seems that legislation need be enacted either by New York to give a contract cause of action, or by the Congress under the commerce power to provide that damage limitations in common carrier accidents would be unlawful and void. By these methods it would be possible to achieve the same laudable results as the *Kilberg* and the instant cases without resorting to the legal reasoning found here.

Earl Moss Curry, Jr.

Criminal Law—Conspiracy—Consistency Rule

X and *D* were indicted on several counts, including criminal conspiracy, and were tried jointly. *D* entered a plea of guilty to the charges of conspiracy. He was sentenced on October 20, 1958. Previously, on October 8, 1958, *X* had been tried on the conspiracy charge and acquitted. *D* served one sentence and brought habeas corpus to be released from serving the second consecutive sentence. The lower court granted the writ and *P*, the warden, appealed. *Held,* affirmed. In order for a court to have jurisdiction in a case it

must have jurisdiction of the person, of the subject matter, and to render the particular judgment which was given. In order to meet the latter requirement the court must have the power to pronounce the judgment under the law and the existing facts. The acquittal of *X* deprived the trial court of such jurisdiction over *D* on the charge of criminal conspiracy. *Eyman v. Deutsch,* 373 P.2d 716 (Ariz. 1962).

A conspiracy is a combination between two or more persons to accomplish an unlawful act, or to do a lawful act by unlawful means. *Pettibone v. United States,* 148 U.S. 197 (1893). Because of this definition it is generally assumed that logical consistency would prohibit the conviction of a person for a conspiracy unless there is at least one other conspirator who has not been freed of his implication in the conspiracy, thus establishing a "basis" for the crime. Arising out of this "consistency rule" has come the great volume of cases in which the courts have held that a conspiracy requires two guilty parties, *Gebardi v. United States,* 287 U.S. 112 (1932), and where an indictment for conspiracy names only two parties, an acquittal or reversal as to one is an acquittal or reversal as to the other. *United States v. Weinberg,* 129 F. Supp. 514 (M.D.Pa. 1955). The above rule is not hard and fast, however, and convictions for criminal conspiracy have been upheld when a conspirator's associates were dead, *Alkon v. United States,* 163 Fed. 810 (Mass. 1908), not yet tried or unapprehended, *United States v. Fox,* 130 F.2d 56 (3rd Cir. 1942), unknown, *Grove v. United States,* 3 F.2d 965 (4th Cir. 1925), or because the jury could not agree as to the guilt of a co-conspirator. *Miller v. United States,* 24 F.2d 353 (C.C.A.N.Y. 1928).

A more difficult application of the consistency rule occurs when a plea of guilty is interposed by one of two persons indicted for a conspiracy. Under the normal circumstances a plea of guilty admits all the essential allegations of the indictment, thus relieving the prosecution of the burden of making proof, and a court which has jurisdiction of the defendant and of the subject matter has the power to enter, without conducting an independent hearing to determine so-called jurisdictional facts, a judgment which cannot be assailed by collateral attack. *United States v. Hoyland,* 264 F.2d 346 (7th Cir. 1959); Cf. 62 W. VA. L. REV. 268 (1960). Thus it would appear that the consistency rule, whether based on logic or the sense of a just outcome with respect to the very definition of a conspiracy, would not require the release of *A* where he is one

of two conspirators indicted and has entered a plea of guilty, even though *B* is later tried and acquitted. A case in support of this hypothesis is *Jones v. Commonwealth,* 72 Va. (31 Gratt.) 836 (1878). There *X* had pleaded guilty to a charge of conspiracy and the jury had convicted both *X* and Jones in a joint trial. Jones applied for a new trial on the basis that the evidence did not support his conviction. The new trial was granted and Jones released. *X* continued to serve his sentence for conspiracy on the basis of his plea of guilty. There is authority which is contra to the above hypothesis, however. In *The King v. Plummer,* 2 K.B. 399 (1902), the court held that two persons are required to constitute a conspiracy and this is true even though one defendant "who pleads guilty thought that there was [a conspiracy] and the court which sentenced him accepted that view in lieu of proof."

The time sequence is of the utmost importance in the prosecution for a conspiracy. Thus, in the principal case, *D* was permitted to enter his plea of guilty *after* the court was aware that his co-conspirator had been acquitted of the charge. The time sequence enters the picture in this manner: after the acquittal of *D's* co-conspirator, which arises first; the release of the conspiracy charge against *D* or the acceptance of the guilty plea tendered by *D*? If the acceptance of the guilty plea came first, the Arizona court clearly erred in its holding. A guilty plea differs from a mere admission or extrajudicial confession and of itself constitutes a conviction and is conclusive. *Machibroda v. United States,* 368 U.S. 487 (1962). The commission of the crime and the jurisdiction of the court are admitted by a plea of guilty. *Commonwealth ex rel. Ritchey v. McHugh,* 189 Pa. Super. 515, 151 A.2d 659 (1959). *D* would not have been entitled to raise jurisdictional questions on appeal. However, the situation in the principal case actually was that the duty of the court to dismiss the conspiracy charge against *D* arose *before* he was permitted to enter his plea of guilty. The Arizona court, therefore, had no choice other than to rule as it did. As has been held many times, two persons are necessary to form a conspiracy and therefore, the acquittal of one person indicted *requires* the acquittal of the other person indicted in the absence of evidence implicating another party. *United States v. Gordon,* 242 F.2d 122 (3rd Cir. 1957). (Emphasis added). The inclusion of the word "requires" seems to impose a duty on the courts when the situation in question arises. In view of its holding in the principal

case, the Arizona court would apparently be in accord with the case cited.

It would appear that the principal case presents an area where the consistency rule should not be applied. The failure of the prosecution to satisfy the jury of *A's* guilt in the first trial does not negate the existence of the conspiracy nor logically preclude a finding by the jury in *B's* trial that the offense has been committed. The moral concept of fairness which helped bring about the consistency rule could be as well satisfied if the rule were restricted to cases in which *A* is acquitted either in the same trial in which *B* is convicted or in a prior trial. In *Sherman v. State,* 113 Neb. 173, 302 N.W. 413 (1925), the court held that even though an alleged conspirator had already been tried, convicted, and sentenced in a separate trial, he must be discharged if and when his alleged co-conspirator is later acquitted. To hold otherwise, said the court, would be to rob the judgments of "that sweet aspect of consistency and truth which is one of their most admirable attributes." The practical consequences of such an application of the consistency rule are to allow a defendant the benefits of two different trials—his own and that of his co-conspirator. The verdict of a second jury may prevail over that of the first and even, with the aid of habeas corpus, render the consequences of the previous proceeding a nullity. Thus the prosecution is imposed with the greatly increased burden of proving the guilt of a defendant to twenty-four jurors rather than the normal twelve before the case against either of the defendants may be disposed of with any degree of finality. Granted, the accused should be given the entire benefit of any advantage the law may allow in a criminal proceeding, but when an accused has received a fair trial he seems entitled to no more.

The dissenting opinion in the principal case objects to the dismissal of the charge against *D* after he had made a "bargain with the prosecution and the court." Even though the weight of sympathy may be with the minority opinion, the weight of authority appears to be with the majority. At any rate, the fraud which was practiced upon the court in the principal case could have been avoided and both the majority and minority satisfied by a restriction of the consistency rule in this situation.

Ralph Charles Dusic, Jr.