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Criminal Law—Sufficiency of Felony Indictment
Where Word "Feloniely" Is Omitted

Petitioner, who sought a writ of habeas corpus, alleged that his confinement in the state penitentiary was illegal in that the indictment under which he pleaded guilty to assault with intent to rob was insufficient to charge such offense in that it did not allege that the acts were done feloniously. *Held,* with one judge dissenting, that the judgement, sentence, and commitment were void. Robbery, or an attempt to commit robbery, is defined as a felony in W. VA. CODE ch. 61, art. 2, § 12 (Michie 1955), and it is essential to the validity of a felony indictment that there be an allegation that the acts constituting the offense were feloniously committed. The court stated that such a defect in an indictment is not within the curative provisions of the criminal statute of jeofails. *State ex rel. Vandal v. Adams,* 115 S.E.2d 489 (W. Va. 1960).

The dissenting opinion expresses the view that the indictment defined a statutory offense which provides that a violation thereof constitutes a felony, and that "the presence or absence of the word 'feloniously' from the indictment does not determine whether the offense charged therein is or is not a felony." In any event, such an omission or defect should be cured by the criminal statute of jeofails.

The conflict between the majority and dissenting opinions as regards the statute of jeofails gives rise to the issue of whether a defect such as the omission of the word "feloniously" should be within the curative provisions of the statute. This statute states: "Judgement in any criminal case, after a verdict, shall not be . . . reversed upon any exception to the indictment . . . if the offense be charged therein with sufficient certainty for judgement to be given thereon, according to the very right of the case." W. VA. CODE ch. 62, art. 2, § 11 (Michie 1955). In determining the effect of this statute in *State v. Davis,* 87 W. Va. 184, 104 S.E. 484 (1920), the court said that although the statute relaxes the strict common law requirements for an indictment, it is "not to be interpreted as an invitation to laxity or looseness in its averments," but that its only purpose is to cure technical defects which do not tend to the prejudice of either the state or the accused. This construction was followed in *State v. McGinnis,* 116 W. Va. 473, 181 S.E. 820 (1935), where the court stated that the purpose of the statute is to cure inconsequential but not basic defects. Similar statutes of jeofails are held to have the same effect as that given the West Virgin-
ia statute. 42 C.J.S. Indictments § 333 (1944). This source states that such statutes do not permit the omission of essential elements, and that where an offense is not sufficiently described such is not a formal defect. Such statutes while curing defects in form do not abolish the necessity of alleging matters of substance.

The interpretation of the statute of jeofails creates the crux of the problem, that is, is the omission of the word "feloniously" a material defect or one of mere form? The same degree of accord that prevails as regards the effect of statutes of jeofails is not to be found as regards the necessity of the word "feloniously." 16 WORDS & PHRASES, Feloniously 669, 680 (Perm. Ed. 1959).

That the word "feloniously" must be used is the settled law of this state. State v. Whitt, 39 W. Va. 468, 19 S.E. 873 (1894). Here the court held that a felony indictment is insufficient where the acts constituting the offense are not alleged to have been done feloniously. In this case the defendant was before the court on a writ of error, and the court stated that it was immaterial that he had not challenged the sufficiency of the indictment in the trial court for "errors of this character can be taken advantage of for the first time in this court." Other courts, although not applying the rule, recognize that at common law it was necessary to use the word "feloniously" in a felony indictment. Bannon v. United States, 156 U.S. 464, 467 (1895); Hamilton v. State, 133 Fla. 481, 486, 182 So. 854, 856 (1938); Jolly v. Commonwealth, 136 Va. 756, 761, 118 S.E. 109, 111 (1923). See generally 4 WHARTON, CRIMINAL LAW AND PROCEDURE § 1772 (12th ed. 1957). In the Bannon case, the Court noted that in cases of felonies at common law, felonious intent was an essential element and that an indictment failing to allege such intent would be defective even after verdict. Thus, it can be said with certainty, that at common law the failure to allege that the acts were done feloniously would have been a material defect.

In State v. Young, 134 W. Va. 771, 779, 61 S.E.2d 734, 739 (1950), the court stated that the statute dealing with robbery, W. Va. Code ch. 61, art. 2, § 12 (Michie 1955), does not enumerate the necessary elements essential to charge the offense of robbery, but only describes certain aspects of the offense while declaring that it is a felony. Thus, it might well follow that resort must be had to the common law which requires an allegation that the acts constituting the offense were feloniously committed.
However, there are several cases holding that it is not necessary that the word "feloniously" be used in a felony indictment. Bannon v. United States, supra; Hamilton v. State supra; Jolly v. Commonwealth, supra. In the Bannon and Jolly cases the Courts held that the word "feloniously" is not necessary in an indictment for an offense created by statute unless "feloniously" is used in the statute as part of the definition of the crime. In the Hamilton case, the court relied on a statute which expressly stated that it was not necessary to allege that the offense was feloniously committed.

But in State v. Griffin, 79 Iowa 568, 44 N.W. 813 (1890), where the defendant was convicted of larceny, the court on appeal held that it was not essential to the validity of an indictment that there be an allegation that the acts were feloniously committed. While admitting that "under our practice such is usually averred," the court stated that "an averment that the defendant 'took, stole, and carried away' a certain horse, is sufficient to show the animus with which the act was done." Without doubt, the Griffin case is contra to the rule in West Virginia. And, although the Bannon case and like cases do not directly contravene the holding in the principal case they lend support to the theory that the failure to allege that the acts were feloniously done is a defect of form, and not of substance.

Perhaps, in evaluating these conflicting positions, it would not be unfair to say that the foundation upon which the majority opinion in the principal case rests is precedent, while the theory of the dissenting opinion and like authority is that by not allowing such defects to invalidate indictments justice will be facilitated in a large number of criminal cases. A prime factor to be considered is whether an accused would be prejudiced if the statute of jeofails cured such defects as the omission of the word "feloniously." The Bannon, Hamilton, and Jolly cases, supra, would seem to indicate that an accused would not be prejudiced by such an omission. However, a more definite answer is to be found in Wagner v. State, 43 Neb. 1, 61 N.W. 85 (1894). Here, the court, in discussing the statute of jeofails, which in effect provided that no judgment would be deemed invalid for any defects which do not operate to the prejudice of the defendant on the merits, said that "the omission of the purely expletive 'feloniously' could not by any possibility tend to the prejudice of Wagner upon the merits."

All that is required by the West Virginia constitution is that the accused "be fully and plainly informed of the character and cause of the accusation." W. VA. CONST. art. III, § 14. Whether the inclusion
of the word "feloniously" is necessary to "fully and plainly inform" the defendant is open to question in light of the cases cited above holding that its use is not essential. Possibly, a felonious intent could be implied from the acts in themselves, or by a fair construction could be found within the terms of the indictment. In the Griffin case, supra, the court stated that the allegation that the defendant "stole" the horse is as "plain and unmistakable an averment that the act was done 'feloniously' as if that word had been used." In Hagner v. United States, 285 U.S. 427 (1932), the Court in discussing the federal statute of jeofails said that "upon a proceeding, after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." The Court stated that this statute was enacted to the end that, "while the accused must be afforded full protection, the guilty shall not escape through mere imperfection of pleading." From these authorities it might well be concluded that the inclusion of the word "feloniously" does not aid in fully informing the defendant of the charges against him, but that its omission simply works to the benefit of the guilty so that justice may be circumvented.

Admittedly the decision in the Vandal case is correct when considered with respect to the rule established in this state. However, the time is ripe for reconsideration of many of the common law technicalities plaguing the administration of criminal justice. Such rules, which came into existence when the punishment for crime was harsh, were resorted to by the courts to prevent injustice from being done. The cruelty connected with criminal law has passed to a great extent, and with it, the reason for such rules. People v. Cohen, 303 Ill. 523, 525, 135 N.E. 731 (1922). The need for a revision of criminal procedure in West Virginia has been well expressed by a Supreme Court judge. See Calhoun, Suggestions for Simplification of Criminal Procedure, 60 W. Va. L. Rev. 123 (1958). Judge Calhoun expresses the opinion that harmless error and technicalities which have evolved from ancient time should be reconsidered and revised to facilitate the rendering of justice. Quite possibly the state legislature should assume this duty, for until it does something positive to resolve the problem, it may be difficult for the courts to ignore technicalities so that judgement may be rendered according to the merits of the case.

Peter Uriah Hook