Criminal Law--Character Evidence--Doubt as to Guilt

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CASE COMMENTS

**Criminal Law—Character Evidence—Doubt as to Guilt.**—

*D* was indicted for income tax evasion. He admitted that he had understated his income and defended solely on lack of willful intent. Trial was before a jury and the court limited the number of character witnesses *D* could present to only one. *D* requested an instruction to the effect that evidence of good character alone, when considered with all other evidence, might create a reasonable doubt as to guilt. The instruction was refused. *D* was convicted and later appealed. *Held*, reversing the conviction, that character evidence alone may create reasonable doubt as to defendant's guilt, and further that it was prejudicial error to refuse the requested instruction that evidence of good character, when considered with all other evidence, might alone create reasonable doubt of guilt. *Peterson v. United States*, 268 F.2d 87 (10th Cir. 1959).

In a criminal trial it is now well settled that the character of the defendant is relevant in resolving probabilities of guilt. 1 Wigmore, Evidence § 56 (3d ed. 1940). The admissibility of evidence concerning the defendant's good character was not always recognized, however, and it was "once thought that character was receivable in doubtful cases only, to turn the balance of the evidence." *Ibid*. Subsequently, the Supreme Court decided in *Edgington v. United States*, 164 U.S. 361 (1896), that, "good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it, the other evidence would be convincing."

In attempting to correct one situation, the *Edgington* language has succeeded in creating a new problem which has not been successfully resolved in all the circuits. *United States v. Antonelli Fireworks Co., Inc.*, 155 F.2d 631 (2d Cir. 1946). Specifically, the problem created is whether or not character evidence alone may create a reasonable doubt as to guilt, and if so, whether such an instruction should be given to the jury. The majority opinion of the principal case represents the minority view among the circuit courts, holding that character evidence alone may create a reasonable doubt as to guilt and that the defendant is entitled to an instruction to that effect. This minority view is shared by the 7th and the 10th circuits. *United States v. Donnelly*, 179 F.2d 227 (7th Cir. 1950); *Greer v.*
United States, 227 F.2d 546 (10th Cir. 1955). The majority of the circuits reject this rule and hold that character evidence should be considered with other probative evidence as tending to create a reasonable doubt of guilt, and that the verdict should rest on all of the evidence being considered without undue emphasis on any particular testimony. Hoback v. United States, 284 Fed. 529 (4th Cir. 1922). The separate opinion of the principal case by Circuit Judge Murrah, concurring specially, is in accord with the majority of the circuits’ view.

It appears that the 7th and the 10th Circuits have seized upon a fine point suggested by the Edgington case, supra, and have enlarged it, finding questionable support in another Supreme Court decision. Michelson v. United States, 375 U.S. 469 (1948). The Michelson case states “that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.”

It is the contention of the separate opinion of the principal case, and also that of the majority of the circuits, that “nothing said in the Edgington case with reference to good character evidence was intended to announce a rule that good character evidence should be emphasized over other evidence.” Petersen v. United States, supra. Judge Learned Hand has written concerning the Edgington case:

“That case held no more than that a judge should not confine the use of such testimony [character evidence] to the event that the jury was already in doubt. There was nothing revolutionary about that, since if once they reached that point, they ought to acquit in any event. . . . [E]vidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly. The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.” Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

Judge Grubb has pinpointed the troublesome root in the Edgington case, upon which the minority of the circuits base their opinion. “What the court said [in the Edgington case] was said by way of argument, and not to announce a rule of law to be given in charge to the jury.” Le More v. United States, 253 Fed. 887 (5th Cir. 1918).
In the principal case the instruction requested by the defendant and refused by the trial court was as follows:

"Testimony has been given herein concerning the good character of the defendant. If you believe a defendant has established his previous good character, you should give that fact due weight. Such evidence of good character, when considered with all the other evidence, may alone create a reasonable doubt."

Refusal to give such instruction amounted to reversible error. The trial court did give the following instruction:

"You are to consider the evidence, all of the evidence, and after such consideration return a verdict here into court. Part of that evidence consists of sworn testimony of witnesses. You take that character witness's testimony into account just as you do any other witness's testimony here, and you decide the case upon the whole of the evidence."

This instruction, which undoubtedly would prove sufficient and proper in the majority of circuit courts, was deemed inadequate.

In a comparison of the two instructions above, it is difficult to see any injustice to the defendant's interests occasioned by the refusal to allow the instruction that character evidence alone may create a reasonable doubt as to guilt. By not allowing such an instruction, the trial court merely refused to place any special significance upon the character testimony over that of other evidence. *Le More v. United States*, supra.

Undeniably, a fine distinction does exist between "character evidence alone may create a reasonable doubt" and "character evidence, when considered with all other evidence, may be sufficient to create a reasonable doubt as to guilt." But, both statements were made with the intent to announce the same rule. *Nash v. United States*, supra. The words used are true enough if read in the sense they were written, merely as general statements with a freedom of range, and not as basic monuments upon which future distinctions might be erected. The minority of the circuit courts base their holdings upon a strict interpretation of dicta found in the *Edgington* and *Michelson* cases, and seem to disregard that this dicta was stated in loose support of the *Edgington* holding, and was never intended as a separate rule of law. *Nash v. United States*, supra.
The holding of the principal case presents a facet of our judicial system which taxes the efficiency of justice and adds unnecessary volumes to an already burdened shelf. By insistence upon unenlightened stare decisis, the Petersen case, supra, stubbornly upholds an outmoded interpretation, which at its best was a misunderstanding. The view expressed by the 7th and 10th circuits appears to be one of fruitless haggling, the continuance of which adds nothing of value to modern jurisprudence. Wigmore, op. cit. supra.

J. Mc K.

Criminal Law—Double Jeopardy—New Trial After Reversal for Insufficient Evidence.—D was convicted of a narcotics violation, and on appeal was granted a new trial which resulted in a mistrial when the jury failed to agree. D then moved for a judgment of acquittal on the grounds that the evidence was insufficient to sustain the conviction. This the court denied, and an order for a new trial was issued. Upon appeal, D contended that such denial would in effect place him in double jeopardy. Held, that the guaranty against double jeopardy did not prohibit a new trial even though reversal of the original conviction was for want of sufficient evidence, nor is the denial of his motion for acquittal of such a final nature as to be appealable. Gilmore v. United States, 264 F.2d 44 (5th Cir. 1959).

This case illustrates a deficiency which has been present in our judicial system from its inception. Under the double jeopardy clause of the federal constitution, a person is protected from being twice placed in jeopardy for the same offense, U. S. Const. amend. V, due however to the technical interpretation placed upon the clause, it is possible for a person to be tried ad infinitum for the same offense. Technically jeopardy attaches to a person when he has been placed on trial in a court of competent jurisdiction, under a valid indictment, after the jury has been impaneled and sworn. Rosser v. Commonwealth, 159 Va. 1028, 167 S.E. 257 (1889). Once jeopardy has attached it follows through all proceedings subsequent to the start of the trial, but in actuality serves only to protect the defendant if his trial ends in acquittal or conviction from which there is no appeal.

The difficulty here is the free use of the power of our courts to order a new trial after reversal. This concept, although not without merit, can, as illustrated by the Gilmore case, work great hard-