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Constitutional Law--Cruel and Unusual Punishment Inflicted for Contempt

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CASE COMMENTS

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT INFLICTED FOR CONTEMPT.—*D,* in violation of a court order, took his minor child out of the state and kept her from February 5, 1949, until October 1, 1949.

The trial court held that each day *D* kept the child beyond the jurisdictional limits of the state in violation of the court order was a separate act of contempt and found *D* guilty under an indictment containing 238 counts, one count for each day *D* remained in contempt. Each act of contempt was punished by a fine of fifty dollars and imprisonment of five days, totaling a fine of $11,900 and confinement in jail for over three years. *Held,* on appeal, that the sentence in its cumulative effect was "cruel, unusual and excessive" in violation of the GA. CONST. Art. 1, § 1. Judgment reversed. *Kenimer v. State,* 81 Ga. App. 437, 59 S.E.2d 296 (1950) (3-2 decision).

This case presents two problems: (1) Was a single act of contempt committed, or 238 acts of contempt, and (2) was the punishment inflicted an abuse of judicial discretion and so cruel and unusual as to contravene the GA. CONST. Art. 1, § 1?

As to the first question, the court held that the rulings charging 238 acts of contempt, unexcepted to, became the law of the case, and it was precluded from further consideration of the question, citing *Matthews v. State,* 125 Ga. 248, 54 S.E. 192 (1906), and *Griffin v. Eaves,* 114 Ga. 65, 39 S.E. 913 (1901).

Had the question been before the court, the result would probably have been the same, since a court has the power to assess punishment for more than one act of contempt in a single proceeding and, in such case, the power to assess an aggregate punishment exceeding the punishment which the court is authorized to assess for a single contemptuous act. *Hume v. Superior Court In and For Los Angeles County,* 17 Cal.2d 506, 110 P.2d 669 (1941); *Williams v. Davis,* 27 Cal.2d 746, 167 P.2d 189 (1946); Ex parte *Genecov,* 143 Tex. 476, 186 S.W.2d. 225 (1945). In re *Shuler,* 210 Cal. 277, 292 Pac. 481 (1930), public utterances by an influential minister in radio speeches, regarding investigation of sheriff's office by grand jury, were held to constitute contempt of court. Each utterance was a separate offense, and it was held that courts in contempt cases may impose consecutive sentences for separate contempts.

The second question presents the difficult problem of the case. The GA. CODE, § 24-2615 (5) (1933), provides that the court has

authority to impose for a single contempt a maximum punishment of $200 and twenty days in jail. The court, however, had authority to impose punishment for more than one act of contempt in a single proceeding, even though the aggregate of the fines and sentences imposed exceeded those which the court is authorized to impose for one contemptuous act. Ex parte *Genecov, supra; Brannon v. State,* 21 Ga. App. 328, 94 S.E. 259 (1917).

The majority of the court, viewing the fine of $11,900 and confinement in jail for over three years in its cumulative effect as "cruel, unusual and excessive", held that the sentence was contrary to the spirit of the laws of Georgia. It was decided that the sentence included multiple and cumulative punishment for a single design, and that a sentence of such long confinement in jail would inevitably tend to impair the health of *D.*

In *Scala v. United States,* 54 F.2d 608 (7th Cir. 1931), the court held that where penalties imposed under separate counts were within statutory authority, the court is not concerned with the aggregate duration of imprisonment or amount of fines. Penalties imposed under separate counts of an indictment charging similar offenses, whatever the aggregate, are not cruel and unusual punishments.

Under the VA. CONST., Art. 1, § 9, prohibiting cruel and unusual punishment, only such bodily punishments as involve torture or lingering death were prohibited, such as are inhumane and barbarous, as, for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like. *Hart v. Commonwealth,* 131 Va. 726, 109 S.E. 582 (1921).

The West Virginia court has held that the word "cruel" as used in the constitution, providing that cruel and unusual punishments shall not be inflicted, was intended to prohibit torture and agonizing punishment, but never intended to abridge the selection of the law-making power of such kind of punishment as was deemed most effective in the suppression of crime. *State v. Woodward,* 68 W. Va. 66, 69 S.E. 385 (1910).

In *State v. Robertson,* 124 W. Va. 648, 22 S.E.2d 287 (1942), the court held that the power of the Supreme Court of Appeals to punish for contempt is inherent in the nature of things, and without it the court would be unable to make its orders and decrees effective and to uphold its authority. Statutory provisions assuming to limit courts in punishment of contempt were not intended to apply

to the Supreme Court of Appeals. W. VA. CODE c. 61, art. 5, § 26 (Michie, 1949).

In view of this West Virginia law, if the problem of cruel and unusual punishments as involved in this case would arise in West Virginia, our courts are not likely to follow the principal case.

The two dissenting judges each subscribed an opinion that the sentence was not cruel and unusual punishment, and this is in accord with the rule prevailing in this country. After a diligent search, no case was found in accord with the Georgia case.

The court left no inference as to what punishment the lower court could inflict without being in violation of the constitution. Such a decision seems arbitrary and renders no assistance to the lower court in administering the rules of justice.

J. L. A.

EVIDENCE—TESTIMONIAL IMPEACHMENT—ADMISSIBILITY OF PLEA OF GUILTY AND CONVICTION IN SUBSEQUENT CIVIL ACTION.—In an action for wrongful death resulting from the allegedly negligent operation of an automobile, the defendant was asked on cross-examination if he was by nature a careful driver and if he observed speed limits at all times. The defendant gave affirmative answers. Over objection he was then asked if he had not, on a prior occasion, pleaded guilty to a charge of reckless driving and been convicted for that offense. His answer was in the affirmative. The defendant excepted and moved that the answer be stricken. Motion overruled. *Held,* the plea of guilty was admissible as affecting the credibility of the defendant, but the court says it was not competent for the purpose of establishing his negligence. *Moore v. Skyline Cab, Inc.,* 59 S.E.2d 437 (W. Va. 1950).

The failure of the court to discuss the problems involved or to assign reasons for its decision makes difficult the interpretation and application of the rules evolved. It is a matter for conjecture whether the court was treating this plea of guilty (1) as evidence of a self-contradiction, or (2) as evidence of negligence. Cases cited by the court in support of its ruling are cases holding that evidence of a conviction of a misdemeanor is admissible as evidence of bad character which serves to discredit a defendant-witness. *Cf. State v. Friedman,* 124 W. Va. 4, 18 S.E.2d 653 (1942); *State v. Taylor,* 130 W. Va. 74, 42 S.E.2d 549 (1947). The citation of these cases indicates that the court is treating the plea of guilty as dis-