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Criminal Law--Effect of Pardon on Habitual Criminal Statute

E. W. K.
West Virginia University College of Law

Thus, the right of privacy at best is very limited, and the court jealously guards against its invocation to the prejudice of the rights of others as indicated by *Martin v. Struthers, supra.* Applying the doctrine of abatement of noise as a nuisance, we may constructively state that only where the infringement is excessive and unreasonable to a man of ordinary sensibilities will the court consider bringing into play right of privacy. Here, the programs were not unreasonable, and the great majority of passengers found them inoffensive and favored their continuance; *D* does not represent the ordinary man. The holding of the court appears just, considering the rights of all persons involved. In answering Mr. Justice Douglas's objection, if ever control of the mind were threatened, then such would be clearly unreasonable and a valid basis for objection.

G. D. H. S.

CRIMINAL LAW—EFFECT OF PARDON ON HABITUAL CRIMINAL STATUTE.—Habeas corpus proceeding by *P* to obtain release from imprisonment for life for third offense under the habitual criminal statute [W. VA. CODE c. 61, art. 11, §§ 18 and 19 (Michie, 1949)]. *P* claimed that the statute did not apply since, after commission and conviction of first two offenses punishable by confinement in the penitentiary, he was given a pardon by the governor. The circuit court overruled *D*'s demurrer to the petition and, on joint motion of the parties, certified the question to the supreme court. *Held,* that a pardon by the governor of convictions for offenses punishable by confinement in the penitentiary does not exempt the prisoner from increased punishment under the habitual criminal statute. Reversed and remanded. *Dean v. Skeen,* 70 S.E.2d 256 (W. Va. 1952).

This is the first case in West Virginia determining the effect of a *full* pardon on the application of the habitual criminal statute.

In *State v. Fisher,* 123 W. Va. 745, 18 S.E.2d 649 (1941), the court, in dealing with a *conditional* pardon, held that it had no effect upon prior convictions and that the habitual criminal statute applied. The court also expressed the opinion that an unconditional

pardon of a prior offense would not serve to destroy the historical effect of the conviction thereof.

In *State* ex rel. *Coole v. Sims,* 133 W. Va. 619, 629, 58 S.E.2d 784, 790 (1950), it was said: "It will not do to say, nor do any of the authorities say, that the granting of a pardon wipes out the conviction and renders the party innocent dating back to the time he was convicted . . . . Neither the Governor of this State, nor the Court of Claims, nor the Legislature, has any constitutional power to pass upon the guilt or innocence of a person charged with a crime. That power rests, under our Constitution, in the judicial department of the State government."

Executive clemency, while being a constitutional power, not subject to legislative control, is however, subject to legislative regulation which prescribes that a second conviction, without excepting pardon or parole from the first, shall incur the penalty prescribed in the habitual criminal statute. *State v. Fisher, supra.*

In making the decision in the instant case, our court goes along with the weight of authority. See *People* ex rel. *Prisament v. Brophy,* 317 U.S. 625 (1942). The minority view is based upon the theory that an unconditional pardon serves to wipe out all the effects of the prior conviction and makes the offender a "new man", just as though he had never committed the crime. *State v. Childers,* 197 La. 715, 2 So.2d 189 (1941). The instant case discredits such a position by pointing out that the criminal character or habits of the individual, the chief postulate of habitual criminal statutes, is often as clearly disclosed by a pardoned conviction as by one never condoned.

E. W. K.

CRIMINAL LAW—INSTRUCTION INCOMPLETE AS TO FACT.—On trial for murder, *D* relied on self-defense. He was being treated in a hostile and threatening manner by two persons acting in concert, which led to the fatal shooting of one of them. *D* was convicted of second degree murder. One point of error assigned in the appellate court was the giving of an instruction which stated his right of self-defense against the deceased only, omitting any mention of the fact that there were two parties acting hostilely toward him.