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Criminal Law--Principal in Second Degree--Conviction of Attempt

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rendered, it is apparent that the judge of the Domestic Relations Court of Kanawha County would be peculiarly well qualified to determine what would be the just and proper salaries of the probation officer and the other appointees.

W. R. B., II.

CRIMINAL LAW—PRINCIPAL IN SECOND DEGREE—CONVICTION OF ATTEMPT.—*D* was indicted jointly with another for forcible rape. He was convicted of an attempt to commit rape, although the evidence showed that he was guilty as a principal in the second degree, if guilty of any crime. *Held*, reversing the lower court and ordering a new trial, that the verdict was contrary to the evidence, because one of the elements of an attempt, an ineffectual act taken toward the completion of the crime, was not proved. Two judges dissented. *State v. Franklin*, 79 S.E.2d 692 (W. Va. 1953).

The question whether one indicted as a principal may be convicted of an attempt when the proof shows only guilt as a principal in the second degree had never been specifically answered in this jurisdiction. At common law it was not necessary to distinguish between principals in the indictment. *Adkins v. State*, 187 Ga. 519, 1 S.E.2d 420 (1939). Accordingly, it has been the practice in this jurisdiction not to specify the principal's degree either in the indictment or the verdict. *State v. Wamsley*, 109 W. Va. 570, 156 S.E. 75 (1930). As a general principle the defendant may be convicted of a lesser included offense when the charge and proof sustain a higher crime. *State v. Prater*, 52 W. Va. 132, 43 S.E. 230 (1902); *State v. Collins*, 108 W. Va. 98, 150 S.E. 369 (1929); *Moore v. Lowe*, 116 W. Va. 165, 180 S.E. 1 (1935). W. VA. CODE c. 62, art. 3, § 18 (Michie, 1949) specifically authorizes a conviction for an attempt upon an indictment for a felony. Thus, it would seem that the instant case is drawing a narrow distinction in holding that a principal in the second degree may not be convicted of an attempt. The principal offender may be convicted of the attempt, see *State v. Collins*, *supra*, even though the proof shows the completed crime, because in legal theory the attempt is included in the consummated crime.

The holdings of the cases cited above indicate an effort to bring our law into conformity with other jurisdictions wherein the distinctions between principals and accessories before the fact have been abolished for all purposes. *People v. Ah Gee*, 37 Cal. App. 1.

174 Pac. 371 (1918); *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925); 35 STAT. 1152 (1909), 18 U.S.C. 550 (1946). In the New York case confederacy in crime was assimilated under the statute to the principal-agent relationship. Other authorities have stated that the distinctions between principals in the first and second degrees have almost universally been obliterated. WHARTON, CRIMINAL LAW § 239 (12th ed. 1932). The purpose of the distinctions at common law between principals and accessories was to reduce the number of capital convictions as the number of statutory offenses grew. Accessories before the fact were punishable by death. PERKINS, CASES & MATERIALS ON CRIMINAL LAW & PROCEDURE 288 (1952). In a misdemeanor all were principals. *Uhl v. Commonwealth*, 6 Gratt. 706 (Va. 1849). No significant distinctions were made as between the principals in the first and second degrees. Neither failure to prosecute nor the acquittal of the principal in the first degree barred proceedings against the principal in the second degree. *State v. Phillips*, 24 Mo. 475 (1857). The latter could even be convicted of a higher degree of crime. 1 East P.C. 350 (1803).

By statute in West Virginia it has been provided since 1849 that accessories before the fact shall be punishable as the principal felon, and since 1894 that they may be tried in the county wherein the principal's act occurred. W. VA. CODE c. 61, art. 11, §§ 6, 7 (Michie, 1949). Nothing is said of the indictment and conviction of a principal in the second degree and presumably the common law which made no discrimination between principals has remained intact. *State v. Wamsley*, *supra*. In *State v. Roberts*, 50 W. Va. 422, 40 S.E. 484 (1901), it was asserted that a person indicted as a principal could not be convicted as an accessory. The statute being silent as to the permissible form of indictment and conviction of an accessory, the technical common law requirements were regarded as still persisting. Nevertheless, *Moore v. Lowe*, *supra*, is difficult to reconcile with the *Roberts* case, see Comment, 42 W. VA. L.Q. 67 (1935), and as indicated above follows the trend in other jurisdictions to abolish completely the distinctions between parties to crime.

Aside from the unexpected view of the court in the principal case that real differences between parties to crime persist in West Virginia, the court held that no attempt to commit the crime charged was proved. Thus, the verdict was not consistent with the evidence. While logically this is correct, the holding may be questioned. It amounts to a refusal to recognize the real intention of the jury, and exaggerates the importance of the form of the

verdict. The jury believes the evidence, yet wishes to reduce the punishment for the crime. Admittedly, this is a technical error, see *State v. Prater, supra*, but the appellate court should sustain the verdict, because the defendant has not been prejudiced. The argument that the appellate court is making itself the final arbiter of the facts in resolving the issue of prejudice may be answered. Although the jury either expressly or impliedly acquits the defendant of the higher crime by finding him guilty of the lower offense, there is no true acquittal. At best, a conditional acquittal occurs. That is, the evidence proving guilt of the consummated crime is rejected by the jury on condition, so to speak, that it may be used to sustain the verdict of guilty of the lesser crime.

In *Dunn v. United States*, 284 U.S. 390, 393 (1932), Mr. Justice Holmes stated that consistency in the verdict was not necessary, and quoted from *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925), which said, "The most that can be said in such cases is that . . . the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt."

The instant case does not involve the unwarranted finding of the substantive elements of an attempt to commit crime. By means of a verdict in improper form, the jury has simply reduced the penalty for the crime which the proof shows. The defendant has not been prejudiced and therefore should not be heard to complain.

R. L. DeP.

EVIDENCE—OBTAINED BY UNLAWFUL SEARCH—ADMISSIBILITY TO DISCREDIT DEFENDANT'S TESTIMONY.—*D*, at his trial on a charge for sales of narcotics, testified on direct examination that he had never sold or possessed narcotics. On cross-examination he reiterated these assertions. The government then introduced evidence that in connection with an earlier proceeding a heroin capsule had been found in his possession. Over *D*'s objection that the heroin capsule had been obtained through an unlawful search and seizure, the trial judge admitted this evidence. *Held*, on certiorari, affirming the lower court, that evidence so obtained is admissible to impeach *D*'s testimony given on direct examination. *Walder v. United States*, 74 Sup. Ct. 354 (1954).

The sole issue which was presented in this case was whether the defendant's assertion on direct examination that he had never possessed any narcotics, opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin un-