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Criminal Law–Double Jeopardy–Waiver Theory Disapproved

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CASE COMMENTS


In the foregoing presentation, it has appeared that (1) historically speaking, the privilege against self-incrimination has been present for not less than four hundred years; (2) despite criticism, the privilege has not been subjected to narrow interpretation in the United States; (3) cases similar on the surface which have been decided in what would appear to be a contra fashion have not been decided on the same rationale, but rely on waiver of the privilege; and (4) even the strictest interpretation in favor of those invoking the privilege in such instances as are presented in the principal case will not preclude prosecution for failure to produce the records, but merely removes the additional penalty for the witness's refusal to convict himself from his own mouth.

In view of the above comments, it would appear that the case as presented is novel only as to facts; the basic problem present is still conviction of a person through his own statements. This is precisely the situation obviously intended to be prevented, by the very language of the self-incrimination clause of the fifth amendment. When regarded as such, it further appears that the provision is not broadened by this decision, but is only affirmed as to effect. It may be true that some guilty party may escape conviction, but this was considered by the founders of the United States to be preferable to a system wherein the likelihood of the guilty and innocent being convicted was greater. Ullmann v. United States, supra at 428. The decision of the principal case, although admittedly allowing a freedom of action—or inaction—which may render conviction more difficult, seems consistent when seen as a part of a legal system wherein the scales are deliberately weighted in favor of the defendant in any criminal action.

C. R. S.

Criminal Law—Double Jeopardy—Waiver Theory Disapproved.—D was tried under an indictment charging arson in the first count and first degree murder in the second count. As to the second count, the trial judge instructed the jury as to both first and second degree murder. The jury returned a verdict finding D guilty of arson under the first count and second degree murder under the
second count, being entirely silent on the charge of first degree murder. The verdict was accepted and the jury dismissed. Upon D's appeal from his conviction of second degree murder, the court reversed and remanded the case for new trial. On remand D was tried again for first degree murder under the original indictment. He was found guilty of first degree murder and sentenced to death. Held, reversing the lower court, that the second trial placed D in jeopardy twice for the same offense in violation of the fifth amendment to the Federal Constitution. Green v. United States, 78 Sup. Ct. 221 (1957).

That no one shall be twice put in jeopardy for the same offense is an ancient and well established doctrine. It is part of the universal law of reason, justice, and conscience. 22 C.J.S., Criminal Law § 238 (1940). This protection is said to be based on the policy favoring finality of judicial proceedings, but it has been generally held that the guaranty against being twice put in jeopardy is waived by the defendant when a verdict against him has been set aside and a new trial granted on his motion in the trial or on appeal. 15 Am. Jur., Criminal Law § 427 (1938).

The principal case poses a more troublesome problem, that is, whether a conviction of a lower degree of a crime is a complete acquittal of the higher degree in the sense of putting the defendant twice in jeopardy if he seeks and is granted a new trial. Of the thirty-six states that have considered this problem, nineteen follow the view that on a new trial the defendant may be tried again for the crime as charged in the original indictment and he may be convicted of any degree of such crime just as if there had been no previous trial. See, e.g., State v. Palko, 122 Conn. 529, 191 Atl. 320 (1937); Brantley v. State, 132 Ga. 573, 64 S.E. 676 (1909); Annot., 59 A.L.R. 1160 (1929). However eight of these states effect this result, to some extent, by statutes. Cf. State v. Gordon, 87 Ohio App. 8, 92 N.E.2d 305 (1948); People v. McGrath, 202 N.Y. 445, 96 N.E. 92 (1911).

The other view, which was followed in the principal case, is that a conviction of a lesser degree of a crime involves a complete acquittal of the higher degree and that a new trial is not to be considered as a new trial for the greater offense, but confined to the lesser offense from which the defendant appealed. Also see, Thomas v. State, 255 Ala. 632, 53 So. 2d 340 (1951); People v.

It is interesting to note that the Model Penal Code § 1.09 (1956) takes a somewhat narrower view than either of the above. It advocates that an acquittal or conviction, not jeopardy of conviction or punishment, is a bar to prosecution for the same offense. See, A.L.I., Double Jeopardy § 14 (1935).

The holding of the principal case appears to be a complete reversal by the Court of the previous case of Trono v. United States, 199 U.S. 521 (1905), which arose in the Philippine Islands. In the Trono case the defendants were tried for murder but convicted of a lesser offense. The defendants appealed to the Supreme Court of the Philippine Islands which reversed the judgment and convicted the defendants of murder. The United States Supreme Court upheld the Philippine court saying the appeal in such case amounts to a waiver of the plea of former jeopardy by the defendant.

The Court in the Green case attempts to distinguish the Trono case on the basis that the Trono decision was influenced by the prevailing law of the Philippines, which allowed conviction of the higher offense on retrial even though the defendants had previously been acquitted. Green v. United States, supra at 228.

Mr. Justice Holmes who concurred in result of the Trono case had in the earlier case of Kepner v. United States, 195 U.S. 100 (1904), in a dissent at page 135, renounced the “waiver” theory saying: “It cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.” Justice Holmes advocated that a new trial was only a continuation of the jeopardy which began with the trial below. Kepner v. United States, supra.

The dissent in the Green case contended that the Trono case was not distinguishable, and supported the Holmes theory as a more feasible view. The majority also intimated that Holmes' theory was an improvement over the “waiver” theory but refused to apply it.

In a recent case, State v. Franklin, 139 W. Va. 43, 79 S.E.2d 629 (1953), the West Virginia court was faced with a situation similar to the principal case. The defendant was indicted for rape, but was convicted of attempted rape although the evidence showed
that if the defendant participated in the crime he did so as a principal in the second degree. The court held that under the evidence the defendant could not properly be found guilty of attempted rape, but only as a principal in the second degree because attempted rape is not a lesser included offense of a principal in the second degree. Also on a new trial he could not be found guilty of rape as charged in the original indictment because the jury had in effect acquitted him of that offense. Therefore the defendant could not be tried for a crime higher than that of attempted rape. See also, *State v. Foley*, 131 W. Va. 326, 47 S.E.2d 40 (1948).

The jurisdictions which hold that on retrial a defendant may be convicted of the higher offense under the original indictment may have some merit in their contention that equality of justice both to the defendant and society results. Cf. *Palko v. United States*, supra; *United States v. Ball*, 163 U.S. 662 (1896). It is, however, submitted that the principal case followed the view that is most consistent with the philosophy of the criminal law in not subjecting the defendant to repeated expense and embarrassment, and compelling him to live in a continuing state of insecurity and anxiety. *Green v. United States*, supra at 223. For regardless of the theory which allows conviction of the higher degree of the offense upon retrial after appeal from conviction of the lower degree of the offense, whether it be "waiver" or "continuing jeopardy," the defendant gives up a right already adjudicated in order to secure justice on another. Such right should not be restricted by consideration of the danger that on retrial he may be convicted of a more serious crime. Comment, 14 *Wash. & Lee L. Rev.* 228 (1957).

J. E. J.

**Criminal Law—Effect of Order Setting Aside Sentence After Imprisonment Under First Judgment Begun.**—Petitioner, after pleading guilty to charge of armed robbery, was sentenced to ten years in the penitentiary. After a few hours of confinement, petitioner escaped from county jail where he was being held, was captured, and was brought before the court a few days later. The earlier sentence was set aside and petitioner was given a thirty-year sentence. The only commitment issued and sent to the warden of the penitentiary was on the second judgment. Petitioner brings habeas corpus proceeding for release from penitentiary. *Held*, that