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Criminal Law--Habeus Corpus--Lack of Jurisdiction Resulting from Failure to Comply with Habitual Criminal Statute

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accomplished. To agree to discuss the desirability of the destruction of the government is not an illegal conspiracy. *Yates v. United States*, 77 Sup. Ct. 1064 (1957).

It is submitted that those doubts raised in *Dennis* are thus resolved: (1) the speech must bear a causal relationship to the danger; (2) the court, considering all the surrounding circumstances, determines that speech of a certain character creates a "clear and present" danger; (3) the jury determines the character of the speech.

"Every idea is an incitement", *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (dissenting opinion of Justice Holmes), "but there is an underlying validity in the distinction between advocacy and interchange of ideas, and we do not discard a useful tool because it may be misused." *Dennis v. United States*, 341 U.S. 494, 546 (1951) (concurring opinion of Justice Frankfurter). The exercise of the right of free speech lies at the foundation of free government by free men. *Schneider v. State*, 308 U.S. 147 (1939).

It is believed that the ruling in the principal case, though tending to allow the formation and continued existence of certain groups which harbor contempt for our form of government and our religious and social values, assures us that one of our most cherished freedoms, the right to express one's views without fear of censure, has not been encroached upon.

"When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilization apart." *Dennis v. United States*, 341 U.S. 494, 584 (1951) (dissenting opinion of Justice Douglas).

When the fears and excitement caused by the present day world conflict have died away, this decision will be viewed as one stating but well recognized legal principles.

J. McD.

CRIMINAL LAW—HABEAS CORPUS—LACK OF JURISDICTION RESULTING FROM FAILURE TO COMPLY WITH HABITUAL CRIMINAL STATUTE.—*P*, convicted of a felony for the third time, was sentenced to life

imprisonment under the West Virginia habitual criminal statute. In a habeas corpus proceeding, *P* contended the life sentence was void because of the court's failure to comply with the habitual criminal statute then in effect, which required that it be alleged in the indictment for the third offense, and admitted, or by the jury found, that *P* had twice previously been sentenced to the penitentiary. From the trial court record, it appears that *P* pleaded not guilty to an indictment charging malicious wounding and alleging his previous convictions. The jury found *P* guilty of malicious wounding, and the trial court imposed a life sentence. Taking original jurisdiction under the writ, the supreme court *held,* that a sentence rendered under the habitual criminal statute is void if from the record it affirmatively appears *P* did not admit his prior convictions, or that the jury did not find that *P* had previously been twice convicted. Writ granted, Browning, J. dissenting. *State ex rel. Browning v. Tucker,* 98 S.E.2d 740 (W. Va. 1957).

In granting the writ releasing *P*, the court concluded that the record affirmatively showed that the statute then in effect had not been complied with, thus leaving the court without jurisdiction to impose a life sentence. W. VA. REV. CODE c. 61, art. 11, § 19 (1931).

A somewhat similar fact situation, in which the court refused to grant the writ, is found in *State ex rel. Lovejoy v. Skeen,* 138 W. Va. 901, 78 S.E.2d 456 (1953). Here *P* was found guilty of his third felony, and sentenced under the amended habitual criminal statute. W. VA. CODE c. 61, art. 11, § 19 (Michie 1955). The statute requires that upon conviction, but before sentence is imposed, defendant be brought before the court and given an opportunity to acknowledge his previous convictions. If he fails to so acknowledge, a jury is impaneled to ascertain the question of prior convictions.

The record in *State ex rel. Lovejoy v. Skeen, supra,* is silent as to whether this procedure was followed, but neither does it show affirmatively that the court did not comply with the statute. In denying the writ the court held that, in the absence of a showing to the contrary, the presumption is that the trial court followed the statute in pronouncing sentence, but omitted through inadvertence, a statement of such action.

It is a generally accepted rule of law, that when a judgment is collaterally attacked by way of habeas corpus proceedings, the court will presume that statutory requirements as to jurisdictional matters were fully met, unless *P* can show of record a positive lack

of compliance with the statute. *State ex rel. Vascovich v. Skeen,* 138 W. Va. 417, 76 S.E. 2d 283 (1953); *State v. Cannon,* 244 N.C. 399, 94 S.E.2d 339 (1956); *cf. Pack v. Pemberton,* 240 Mo. App. 758, 218 S.W.2d 125 (1949);*Olivia v. Suglio,* 139 Cal. App. 2d 7, 293 P.2d 63 (1956).

Regardless of how erroneous or improper a sentence might be, a habeas corpus proceeding is not applicable unless *P* can affirmatively show from the record that the court was without jurisdiction, thus partially or wholly voiding the sentence. *State ex rel. Hall v. Skeen,* 136 W. Va. 805, 68 S.E.2d 683 (1952); *State ex rel. Vascovich v. Skeen, supra.*

The record in the principal case shows affirmatively a not guilty plea, a verdict of guilty, and the imposition of a life sentence. The fact that the jury did not specifically find as to the alleged prior convictions would be controlling in some jurisdictions. *People v. Langford,* 392 Ill. 584, 65 N.E.2d 440 (1946); *People v. Peppers,* 75 Cal. App. 2d 672, 171 P.2d 54 (1946). However, in West Virginia, while such a specific finding is advisable, it is not indispensable. *Anderson v. McClintic,* 115 W. Va. 329, 175 S.E. 857 (1934).

It might be contended that the above recitals of record negatively imply a failure to conform to the prescribed statutory procedure, but it is questionable whether they constitute such a positive showing of non-compliance as will support a habeas corpus proceeding. *State v. Cannon, supra; cf. Pack v. Pemberton, supra.*

As a practical matter, the court could have complied with the statute after the jury returned its verdict, but before sentence was imposed. The record does not affirmatively show that during this time the court did not ask, and *P* not acknowledge, his prior convictions, or that the court did not retire the jury to consider the question. A mere absence of a recital to this effect in the final judgment would not void the sentence. *Cf. Olivia v. Suglio, supra.*

In reviewing the *silent* record presented in *State ex rel. Lovejoy v. Skeen, supra,* the court presumed that whatever ought to have been done was not only done, but that it was rightly done. Since the record in the principal case is, in effect, equally silent on the matter of statutory compliance, it would seem that the court could have applied the same presumption here.

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