Michigan Law Review

Volume 35 | Issue 1

1936

# CRIMINAL LAW AND PROCEDURE - HABITUAL CRIMINAL ACT - PRIOR CONVICTIONS - PLEADING AND TRIAL

CRIMINAL LAW AND PROCEDURE — HABITUAL CRIMINAL ACT — PRIOR CONVICTIONS — PLEADING AND TRIAL — The petitioner was charged with grand larceny and was convicted by a jury. The court thereafter made a finding that the petitioner had previously been convicted of two other felonies, and that he had served a term in the Kansas penitentiary for one felony and a term in the Missouri penitentiary for the other. On that finding and the verdict of the jury, the court sentenced the petitioner to life imprisonment under a Kansas statute [1] which prescribed increased penalties for habitual of-

[1] "Every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction; and if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty, unless the court shall find, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state." Kan. Rev. Stat. (1933 Supp.) c. 21, § 107a.

fenders. *Held*, that the prior convictions need not be charged in the information and that the petitioner was not entitled to a jury trial on the question of prior convictions. *Levell v. Simpson*, 142 Kan. 892, 52 P. (2d) 372 (1935), appeal dismissed, 297 U. S. 695, 56 S. Ct. 503 (1936), rehearing denied, 297 U. S. 728, 56 S. Ct. 592 (1936).

Statutes providing an increased penalty for persons convicted of their second or subsequent offense are not a recent development,[2] and though their validity has been attacked on several constitutional grounds they have been uniformly upheld.[3] A problem of some difficulty confronts the courts and legislatures in fixing the proper procedure to be followed in the pleading and trial of the issue of a prior conviction. Where a statute does not prescribe a different procedure, it is generally held that the fact of a prior conviction must be alleged in the indictment in order to subject the defendant to the increased punishment.[4] In harmony with this rule most jurisdictions require that the issue of prior convictions be tried by the jury, on the ground that it is an essential element of the offense charged.[5] There are obvious disadvantages to this procedure, since it is contrary to the rule that the defendant shall be tried solely on the merits of the principal offense charged and allows the introduction of evidence of bad character which may prejudice the jury. On the other hand, there is the danger that the jury will acquit the defendant because they are not in sympathy with the severity of the sentence.[6] An increasing number of statutes, in recognition of these difficulties, permit the questions of identity and prior conviction to be submitted to the jury only after trial and conviction for the principal offense.[7] There are only a few juris-

[2] 2 Va. Stat. L. (1796-1802), p. 9, § 24; 7 and 8 Geo. 4, c. 28, § 11 (1827).

[3] Graham v. West Virginia, 224 U. S. 616, 32 S. Ct. 583 (1912), the statute makes a reasonable classification and operates equally on all persons in that class, so there is no denial of equal protection of the law; McDonald v. Massachusetts, 180 U. S. 311, 21 S. Ct. 389 (1901), does not put defendant in double jeopardy; State v. Dowden, 137 Iowa 573, 115 N. W. 211 (1908), not cruel and unusual punishment; State v. Zywicki, 175 Minn. 508, 221 N. W. 900 (1928), not an ex post facto law, though prior conviction occurred before statute was enacted; Cross v. State, 96 Fla. 768, 119 So. 380 (1928), does not impose penalty for crimes committed outside the jurisdiction; People v. Wilson, 101 Cal. App. 376, 281 P. 700 (1929), not ipso facto a denial of due process; People v. Mock Don Yuen, 67 Cal. App. 597, 227 P. 948 (1924), not a delegation of legislative powers to the prosecutor; 9 IND. L. J. 534 (1934).

[4] Keeney v. Commonwealth, 147 Va. 678, 137 S. E. 478 (1927); Johnston v. State, 46 Okla. Cr. 431, 287 P. 1068 (1930).

[5] State v. McGee, 207 Iowa 334, 221 N. W. 556 (1928); Massey v. United States, (C. C. A. 8th, 1922) 281 F. 293; State v. Bresse, 326 Mo. 885, 33 S. W. (2d) 919 (1930).

[6] Under most statutes the jury may find the defendant guilty of the primary charge where the prior conviction has not been proved. State v. McBroom, 238 Mo. 495, 141 S. W. 1120 (1911); Commonwealth v. Barney, 258 Mass. 609, 155 N. E. 600 (1927).

[7] State v. Zywicki, 175 Minn. 508, 221 N. W. 900 (1928); State v. Smith, 128 Ore. 515, 273 P. 323 (1929); People v. Gowasky, 244 N. Y. 451, 155 N. E. 737 (1927), discussed in 36 YALE L. J. 1019 (1927).

In one case the court held, in the absence of an express statutory provision, that

dictions in which the finding is made by the court without the aid of a jury.[8] Under the Kansas statute a second offense is not a separate and distinct crime,[9] and the fact to be determined has no relation to the guilt or innocence of the defendant, but simply determines the penalty to be imposed, so that fact may properly be decided by the court.[10] This procedure is desirable, but it would seem that such a statute should expressly prescribe a procedure which will insure to the defendant ample notice that he is to be charged under this act, and afford him an opportunity to appear and contest the claim of prior conviction.[11]

J. L. W.

there should be a separate determination of the issue. State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921), noted in 31 YALE L. J. 440 (1922). The court there said, 96 Conn. 160 at 175:

> "The information should be divided into two parts. In the first, the particular offense with which the accused is charged should be set forth; and this should be upon the first page of the information and signed by the prosecuting officer. In the second part, former convictions should be alleged, and this should be upon the second page of the information, separable from the first page and signed by the prosecuting officer. The entire information should be read to the accused, and his plea taken in the absence of the jurors. When the jury has been impaneled and sworn, the clerk should read to them only that part of the information which sets forth the crime for which the accused is to be tried. The trial should then proceed in every respect as if there were no allegations of former convictions, of which no mention should be made in the evidence, or in the remarks of counsel, or in the charge of the court. When the jury retire to consider their verdict, only the first page of the information, on which the crime charged is set out, should be given to them. If they return a verdict of guilty the second part of the information, in which former convictions are alleged, should be read to them without reswearing them, and they should be charged to inquire on that issue. . . ."

This is the English procedure under 24 and 25 Vict., c. 99, § 37 (1861).

[8] State v. Woodman, 127 Kan. 166, 272 P. 132 (1928); State v. Guidry, 169 La. 215, 124 So. 832 (1929); Lyles v. State, 18 Ala. App. 62, 88 So. 375 (1921).

[9] The court in the principal case distinguished the state prohibitory law which makes persistent violation of the act a distinct felony. Kan. Rev. Stat. (1923), c. 21, § 2146.

[10] In State v. O'Neill, 76 Mont. 526, 248 P. 215 (1926), it was held that since a statute authorized the jury to fix the punishment, the fact of prior convictions must be pleaded and proved to the jury to enable them to exercise that discretion, although defendant had admitted the prior convictions and claimed that such procedure would prejudice the jury.

[11] Previously it had been held that the statute contemplated a judicial finding which would import notice to the defendant of the subject of the inquiry with an opportunity to be heard in his defense. State v. Woodman, 127 Kan. 166, 272 P. 132 (1928).

Model statutes are proposed by the American Law Institute. CODE OF CRIMINAL PROCEDURE (Proposed Final Draft, 1930), §§ 179, 415. They provide that the allegation of prior convictions shall not be contained in the indictment or information and that the finding is to be made by the court.

For discussions of the general problem of treatment of the habitual criminal, see McCuaig, "Modern Tendencies in Habitual Criminal Legislation," 15 CORN. L. Q. 62 (1929); 80 UNIV. PA. L. REV. 565 (1932). Cases are collected in 58 A. L. R. 20 (1929); 82 A. L. R. 345 (1933).