Michigan Law Review

Volume 34 | Issue 7

1936

CRIMINAL LAW-MISCONDUCT OF ATTORNEYS DURING TRIAL-POSSIBLE REMEDIES

CRIMINAL LAW—MISCONDUCT OF ATTORNEYS DURING TRIAL—POSSIBLE REMEDIES—Petitioner was indicted in a federal district court charged with having conspired with others to utter counterfeit Federal Reserve Bank notes. The case against the accused was weak. The prosecuting attorney in his arguments to the jury and in the examination of witnesses persisted over defendant's objections in making improper suggestions, insinuations and unproved assertions of personal knowledge, all highly unfavorable to defendant's case. The district court sustained objections to some of the questions but the case was submitted to the jury and defendant found guilty. Defendant appealed. *Held,* the misconduct of the prosecuting attorney being prejudicial to defendant constituted reversible error. Judgment reversed and new trial ordered. *Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629 (1935).[1]

[1] *Accord,* Johnson v. United States, (C. C. A. 7th, 1914) 215 F. 679; People v. Mullings, 83 Cal. 138, 23 P. 229 (1890); Gale v. People, 26 Mich. 157 (1872); Anderson v. State, 209 Ala. 36, 95 So. 171 (1923); People v. McGeoghegn, 325 Ill. 337, 156 N. E. 378 (1927); and see 75 A. L. R. 53 (1931).

Whether or not misconduct by the prosecuting attorney will be held ground for reversal depends upon whether under all the circumstances of the particular case prejudice to the cause of the accused is probable, deciding factors being the strength or weakness of the case against defendant[2] and the measures taken by the trial court to avert the prejudicial effect of such misconduct.[3] Sustaining defendant's objections, and instructions to the jury, to disregard improper matters, will in most cases be held sufficient to avoid a reversal. But where the misconduct is in its nature exceedingly prejudicial, a new trial will be granted regardless of such corrective measures by the lower court.[4] While it can be said that the cases involving misconduct by prosecuting attorneys have been correctly decided in that they secure to one accused of crime the right to a fair and impartial trial, in contrast the remedies available in case of misconduct by defense counsel, equally prejudicial to the state, seems highly unsatisfactory. In this situation a new element, the "twice in jeopardy"[5] clause of the Federal Constitution and similar provisions in state constitutions, arises to distort the natural course of justice. Connecticut is the only state not holding that this clause forbids the granting of an appeal by the state from an erroneous acquittal where the effect of the reversal would be to allow a retrial.[6] There is some doubt whether the common-law maxim of "twice in jeopardy" ever stood for the proposition that an erroneous acquittal was final as a matter of right;[7] and as to the conse-

[2] It was said in the principal case, 295 U. S. 78 at 89 (1934): "Under the circumstances prejudice to the accused was so highly probable that we are not justified in assuming its nonexistence. If the case against Berger had been strong or, as some courts say, overwhelming, a different conclusion might be reached." Accord, State v. Roscum, 119 Iowa 330, 93 N. W. 295 (1903); Porter v. State, 84 Fla. 552, 94 So. 680 (1922); Anderson v. State, 209 Ala. 36, 95 So. 171 (1923). Misconduct held not ground for reversal because other evidence was overwhelming in Fitter v. United States, (C. C. A. 2d, 1919) 258 F. 567; People v. Curran, 207 Ill. App. 264 (1917).

[3] Prejudicial effect of improper remarks held cured by court's instruction to jury to disregard. State v. Hayes, 109 W. Va. 296, 153 S. E. 496 (1930). That error was in court's refusing to discipline attorney was held in People v. Saylor, 319 Ill. 205, 149 N. E. 767 (1925).

[4] But prejudical effect was held not cured by court's instruction for jury to disregard in P. Lorillard Co. v. Clay, 127 Va. 734, 104 S. E. 384 (1920). Or by court sustaining objections to improper questions. Gale v. People, 26 Mich. 157 (1872); People v. Wells, 100 Cal. 459, 34 P. 1078 (1893).

[5] Fifth Amendment to United States Constitution and similar provisions in state constitutions. 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 6th ed., 399 (1890). For an exhaustive outline and collection of cases for each jurisdiction on "twice in jeopardy clause," see ADMINISTRATION OF CRIMINAL LAW RESTATEMENT, Tentative Draft No. 2 (1932).

[6] State v. Lee, 65 Conn. 265 at 273, 30 A. 1110 (1894): "Putting in jeopardy means a jeopardy which is real and has continued through every stage of the prosecution as fixed by existing laws of procedure, while such prosecution remains undetermined, the one jeopardy has not been exhausted." Similar language was used in a dissenting opinion by Holmes, J., in Kepner v. United States, 195 U. S. 100, 24 S. Ct. 797 (1904), White and McKenna, JJ., concurring.

[7] To the effect that the doctrine of double jeopardy was a matter of practice: Winsor v. Queen, L. R. 1 Q. B. 289 (1866). See also Kirk, "Jeopardy During the Period of the Year Books," 82 UNIV. PA. L. REV. 602 (1934).

quences of this interpretation, namely that one being tried for crime has the right to an unfair trial, not even the popular American "duello" or sporting concept of justice will go to the extent of lending it support. There is much to be said in favor of the Connecticut stand that the "twice in jeopardy" clause intended to incorporate into criminal law the ordinary principles of res judicata and that only a judgment arrived at in accordance with law is final.[8] While it appears settled beyond hope of change that the right of the state to a fair trial is lost, once there is an erroneous acquittal, there still seems to be a possible way for alert counsel, with the cooperation of an enlightened judiciary, to avoid some of the miscarriage of justice resulting from studied prejudicial misconduct on the part of defense attorneys. This possibility lies in the power of the court under certain circumstances upon motion of one of the parties to withdraw the jury and declare a mistrial before verdict without giving rise to any defense of double jeopardy. While the general rule, in most jurisdictions, is that jeopardy begins when the jury is sworn,[9] as early as Blackstone there have been a number of exceptions based on "evident necessity."[10] The early cases were limited to physical necessity such as the death or illness of a juror, but the exception has now been generally extended to include "moral and legal necessity." The result is that at present the trial court has a broad discretionary power to declare a mistrial whenever, taking all the circumstances of the case into consideration, in the opinion of the court there is a manifest necessity to prevent defeat of the ends of justice. Such discharge constitutes no bar to another trial on the same indictment.[11] While a review of the authorities has failed to reveal any instance in which the court exercised this power because of misconduct in court by defense counsel, some of the cases in which a mistrial was ordered do involve prejudicial misconduct by the accused or his attorney during the course of trial but outside the presence of the court. The misconduct was in each case the basis for declaring a mistrial.[12] In these cases the court sets forth the proposi-

[8] State v. Lee, 65 Conn. 265, 30 A. 1110 (1894). Even the following language of Blackstone lends weight to this interpretation: "when a man is once *fairly* found not guilty upon an indictment . . . he may plead such acquittal in bar of any subsequent accusation of the same crime." 4 BLACKSTONE, COMMENTARIES 355 (1765). (Italics the writer's.)

[9] 2 BISHOP, CRIMINAL LAW, §§ 1014, 1015 (1923). 74 A. L. R. 803 (1931). Some courts have held no jeopardy attaches until verdict: Maryland, Mississippi, Nebraska, New York, South Carolina; also the federal and English courts. For cases see ADMINISTRATION OF CRIMINAL LAW RESTATEMENT, Tentative Draft No. 2, p. 91 (1932).

[10] 4 BLACKSTONE, COMMENTARIES, Wendell ed., 360 (1854).

[11] Thompson v. United States, 155 U. S. 271, 15 S. Ct. 73 (1894); Commonwealth v. McCormick, 130 Mass. 61 (1881); State v. Hansford, 76 Kan. 678, 92 A. 551 (1907). Federal courts have held that a discharge of the jury *for any cause* is no bar to further prosecution: United States v. Bigelow, 3 Mack. (14 D. C.) 393 (1884); Bens v. United States, (C. C. A. 2d, 1920) 266 F. 152.

[12] In State v. Slorah, 118 Me. 203, 106 A. 768 (1919), when approaching the scene of the crime with the jury defendant exclaimed, "Take me away from here or I will be insane again." *Held*, ground for mistrial, the court pointing out that the state as well as the respondent was entitled to a trial by a jury free from all bias, prejudice or improper influence. In Simmons v. United States, 142 U. S. 148, 12

tion that the state as well as the accused has the right to a fair and impartial trial and that an occurrence which prevents the jury from standing impartially between the state and the accused is ground for mistrial. The reasons for declaring a mistrial in instances of misconduct outside court are equally applicable to prejudicial misconduct by attorneys in court. It is clear that the ends of justice can be defeated in either case. The situations are so closely analogous that it should be a natural and logical step for the courts to order a mistrial whenever there is grossly prejudical misconduct by an attorney either in or out of court. A fortiori this should apply whether the offending party be a prosecuting or defense attorney. Apart from its effect on the case it is certain that studied misconduct by attorneys in a criminal trial is highly unethical, and such unprofessional conduct should be checked with all available disciplinary devises. If after a warning by the court, counsel persists in his misconduct, the court has the summary power to punish him for contempt; suspension or disbarment is a fitting and usual method of punishing such contempt.[13] The bar associations should also use their disciplinary powers as in other cases of unprofessional conduct.[14] There is a moral obligation upon both branches of the legal profession to use their inherent powers more frequently to further justice and to preserve the self-respect of the calling.

W. F. F.

S. Ct. 171 (1891), defense counsel published comments on the evidence which were read by members of the jury. Mistrial declared.

[13] Courts have summary power to punish attorneys as officers of the same for gross misconduct in the practice of the profession. See 7 FLA. S. B. L. J. 183 (1933).

[14] For discussion of problems of self discipline by the bar, see Turrentine, "May the Bar Set Its Own House in Order?" 34 MICH. L. REV. 200 (1936).