Michigan Law Review

Volume 67 | Issue 8

1969

Wright: Federal Practice and Procedure, Criminal Procedure

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RECENT BOOKS

BOOK REVIEWS

FEDERAL PRACTICE AND PROCEDURE, CRIMINAL PROCEDURE.* 3 VOLS. By *Charles Alan Wright.* St. Paul, Minn.: West. 1969. $60.

Review I

Professor Wright's new three-volume treatise on federal criminal practice and procedure is a much needed successor to the one-volume work of Professor William W. Barron published in 1951.[1] Since then, revisions of the Federal Rules of Criminal Procedure, the new Federal Appellate Rules, the enormous increase in decisional law, and the recent enactment of numerous statutes have made compilation of a comprehensive new treatise mandatory. The far-reaching developments in federal criminal procedure—particularly the requirements for appointment of counsel—mean that many lawyers must now educate themselves in the intricacies of the federal criminal justice system. Even those who may think they are at home in that system probably need the refresher course which a reading of these three volumes provides. Fortunately, Professor Wright has an easy style and he gives the reader something to look for by expressing his own opinions about matters both settled and unsettled. By following the Federal Rules of Criminal Procedure in numerical order the author has provided a double index system and, although many of the more important subjects are not explicitly covered in the rules, the scheme does provide a logical place for everything. However, since the work covers a rapidly developing field of law, and since there are sharp divisions of opinion regarding many aspects of criminal procedure, any reader is bound to find statements and methods of treatment with which he could take issue.

In his discussion of rule 5, the provision requiring that the arrested person be taken before a magistrate "without unnecessary delay," Professor Wright reviews *Miranda v. Arizona*[2] and its young progeny which require exclusion of confessions or admissions made while in custody, unless a four-part warning has been given and a proper waiver of rights has been shown. Thus, the application of *Miranda* will frequently turn on whether the defendant was "in custody" at the crucial time. The cases cited would be more helpful

* These three books are the first volumes in a new treatise on the Federal Rules of Criminal, Civil, and Appellate Procedure. The civil rules will be covered by Professor Wright and Professor Arthur R. Miller of the University of Michigan Law School. The appellate rules will be treated by Professor Wright and Eugene Gressman of the District of Columbia Bar.—Ed.

1. 4 W. BARRON, FEDERAL PRACTICE AND PROCEDURE (1951).

2. 384 U.S. 436 (1966).

if the footnote summaries noted more exactly the surroundings of the defendant at the time of the interview by authorities; for example, was the defendant in his own office? Also, the courts have apparently been more ready to find the element of compulsion lacking when FBI agents have done the interviewing.

I do not agree with Professor Wright that the Supreme Court will necessarily exclude the fruits of every statement found to have been taken in violation of *Miranda*. If the fruit is a kidnapped child, a dead body, or stolen bonds, it would seem to be carrying logic beyond all good reason to exclude such evidence, even if the defendant's admissions could not be received in evidence. In practice, I think that within the next few years the courts, with the help of such studies as the American Law Institute proposals for a pre-arraignment code, will find ways to modify the consequences of *Miranda* and perhaps even to permit some relaxation of its requirements in the discretion of the trial judges. Of course the Supreme Court could do this much more effectively by use of its rulemaking power than by piecemeal case-by-case adjudication.

The subject of discovery is rightly given much space. Professor Wright points out that the rule 5 provisions for preliminary examination before the United States Commissioner ("Magistrate" under the 1968 Federal Magistrates Act[3]) were not meant to be the means of affording discovery.[4] This fact seems clear from the function of grand juries in the federal system and from the detailed provisions of rule 16. I agree with the author that increased discovery should be by "carefully considered amendment of the rules, rather than by a novel construction of the existing rule" (vol. 1, pp. 139-40), meaning rule 5. It is true that in England the preliminary hearing is the primary means of discovery,[5] especially since the Crown must produce substantially all its important evidence at the hearing. But even in England this has created problems of prejudicial publicity, and such difficulties would be infinitely harder to control here. In addition, the danger of intimidating witnesses and the risks attendant upon greater delay in bringing cases to trial would make such a requirement unwise in the United States.

Professor Wright is accurate in saying that there is a distinct trend toward broad discovery. It is clearly in the interest of the prosecution—as well as of the defense—to inform the defense of the factual basis for the prosecution. In many cases this leads to earlier disposition by way of plea settlements, especially since defense counsel usually receives more accurate and complete information in this way

3. Pub. L. No. 90-578, 82 Stat. 1107 (Oct. 17, 1968) (codified in 18, 28 U.S.C.).

4. *See* Weinberg & Weinberg, *The Congressional Invitation To Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1390-93 (1969).

5. D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 158-61, 165-66 (1967).

than his client is willing or able to give him. Moreover, full disclosure makes for fairer trials and minimizes the possibility of post-conviction complaints. The main argument for strictly limited disclosure has been that, since many defense counsel are not to be trusted, perjury and intimidation will result from full disclosure. Now that many more attorneys are defending criminal cases by assignment, however, there should be a steady and noticeable improvement in the standards and practices of lawyers representing criminal defendants. If the trial courts are given the power, in appropriate cases, to allow discovery only at stated times and on certain conditions, it seems that broader discovery in the great majority of cases would be highly desirable.

With respect to pleas of guilty, Professor Wright points out the undesirability of permitting a defendant to plead without counsel. In my opinion, recent case law and the enormous increase in the number of habeas corpus petitions by state prisoners on this point underline the importance of never permitting a defendant to plead or stand trial without having an attorney present to advise and assist him, regardless of what the defendant may wish. Moreover, lawyers defending criminal cases must also be prepared to defend their advice and their performance at some later date in one or more post-conviction proceedings. Thus, under recent decisions, the case of client against lawyer has been built into every criminal proceeding in which the result is anything short of acquittal or dismissal. Still, the trial court must do what it can to protect its judgments, and the least it can do is to require lawyers to attend every case no matter how unpleasant and profitless that task may be.

In his discussion of waiver of jury trial, Professor Wright notes a 1930 Supreme Court case,[6] apparently with approval, for the proposition that trial by jury is the preferable mode of disposing of fact issues in serious criminal cases. While a footnote cites some figures for 1964 and 1965 indicating waiver of juries in thirty per cent of criminal trials (vol. 2, p. 8 n.18), the trend is even more pronounced now. In the Southern District of New York, defendants presently waive a jury in one half of the criminal cases that are tried. Since the Government and the trial judge must also consent to dispensing with a jury, it seems that ideas of what is preferable have undergone considerable change.

Professor Wright questions the constitutionality of the 1966 amendment to rule 25, which provides that if the judge presiding at a jury trial is unable to proceed, another judge may be assigned to finish the trial upon certifying that he has familiarized himself with the record. Professor Wright thinks that unless the defendant consents, a mistrial should result. At the same time he does not ques-

6. Patton v. United States, 281 U.S. 276 (1930).

tion the provision allowing another judge to take over *after* the verdict.[7] If another judge can act to impose sentence and pass on all motions after verdict, I see no good reason why he cannot substitute during the trial. Of course if the circumstances make such substitution inadvisable, the substituted judge could declare a mistrial, but in most cases substitution would be feasible and desirable.

The admissibility of confessions and identification evidence and claims of illegal search and seizure, which the Supreme Court dealt with in *Miranda, Jackson v. Denno,*[8] and *United States v. Wade,*[9] now take up considerable time of the trial courts in hearing motions to suppress. I think practicing lawyers will be somewhat disappointed by the absence of a guide or form for the motion papers which should be filed before trial wherever possible. Moreover, it would be helpful to refer to the provisions of the Omnibus Crime Control and Safe Streets Act of 1968[10] regarding motions to suppress.

Professor Wright points out that in *Simmons v. United States,*[11] the Court held that the accused does not, by testifying at an evidentiary hearing, subject himself to cross-examination as to other issues in the case, and that his testimony is not admissible against him at trial on the issue of guilt, although it may be used to impeach him if he later testifies inconsistently at the trial.[12] Thus, in most cases there should be no reason not to call the defendant in order to support a motion to suppress. The *Simmons* holding has been incorporated in the Preliminary Draft of Rules of Evidence for the United States District Courts and Magistrates, circulated in March 1969 by the Committee on Rules of Practice and Procedure of the Judicial Conference. Undoubtedly Professor Wright's first set of supplementary pocket parts will make liberal use of many of these proposed rules and the supporting commentary.

It is gratifying to find Professor Wright quoting generously from the numerous proposed standards issued by the American Bar Association on Minimum Standards for Criminal Justice. But I think it would have been helpful to include more references to the Pleas of Guilty standards which, in paragraph 1.8, state the reasons why the sentencing court may give more lenient sentences to those who plead guilty.

Section 3501(a) of the Omnibus Crime Control and Safe Streets Act of 1968[13] requires that when a motion is made to suppress a con-

7. FED. R. CIV. P. 25(b).
8. 378 U.S. 368 (1964).
9. 388 U.S. 218 (1968).
10. Pub. L. No. 90-351, 82 Stat. 197 (June 19, 1968). *See,* in particular, title III, § 2518(10)(a) and title VIII, § 1301.
11. 390 U.S. 377 (1968).
12. Walder v. United States, 347 U.S. 62 (1954).
13. 18 U.S.C.A. § 3501(a) (1969).

fession on the ground that it was not voluntary, the trial judge, sitting without a jury, shall first determine the issue of voluntariness. In discussing this provision, Professor Wright states that the judge must find beyond a reasonable doubt that the confession is voluntary before he admits it. I find no basis for requiring that the judge must make such a finding. The statute does not say this, nor, so far as I know, is such a test required for any preliminary ruling on matters which are evidentiary. The only authority cited is a decision by the United States Court of Appeals for the District of Columbia,[14] but I doubt that any other federal circuit would agree with the District of Columbia Circuit on the point.

In commenting on the Supreme Court decisions on electronic surveillance, Professor Wright expresses the view that the decisions in *Katz v. United States*[15] and *Berger v. New York*[16] seem to limit the use of recording devices by informers. I do not agree. Although the Seventh Circuit appears to share Professor Wright's interpretation,[17] the Second Circuit recently held that the use of recording devices by informers is not banned by the Supreme Court's earlier decisions.[18] To my mind, *Katz* and *Berger*, which involved electronic surveillance performed without the knowledge of any of the participants in the intercepted conversations, have no application to cases such as *White* and *Kaufer*, in which a conversation is recorded with the consent of one of the parties and the recording merely serves to preserve the consenting party's recollection. In any event, this question is likely to be settled soon, since the Supreme Court has recently granted certiorari in the *White* case.[19]

Admissions to bail before trial and even after trial have become greatly important in the United States because of the longer delays in trying more cases and the inordinate time required to dispose of an increased number of appeals. Not until we are equipped to dispose summarily of frivolous appeals and to expedite all other appeals by appropriate supervision by the appellate courts themselves will we be able to move the appellate traffic with suitable speed. The mere promulgation of rules is futile; there must be a rule for each case, depending on its peculiar circumstances, imposed by the court and enforced by appropriate sanctions.

With respect to appointment of counsel under the Criminal Justice Act,[20] the author fails to point out that no allowance may be

14. Clifton v. United States, 371 F.2d 354, 357 n.7, 362, *cert. denied*, 386 U.S. 995 (1967).

15. 389 U.S. 347 (1967).

16. 388 U.S. 41 (1967).

17. *See* United States v. White, 405 F.2d 838 (7th Cir. 1969).

18. *See* United States v. Kaufer, 406 F.2d 550 (2d Cir.), *aff'd on other grounds*, 394 U.S. 458 (1968) (per curiam).

19. 394 U.S. 920 (1969).

20. 18 U.S.C. § 3006A (1964).

made under the Act for work done on appeals unless an order of appointment of the court of appeals has been made prior to the performance of services for which claim is made. Of course the statute should be amended to allow compensation which at least approximates the cost of services rendered. As it is, counsel almost always are paid far less than the value of their services, and even low-cost, well-organized services such as the Legal Aid Society of New York lose money on every appeal handled.

Professor Wright includes one reference which I think would have been better omitted. In Volume 1, he quotes Dean Pye to support the view that criminal procedures give overwhelming advantage to the prosecution (p. 498). The Dean attempts to demonstrate the illusory nature of any supposed advantages enjoyed by the defendant by citing the percentage of cases in which the Government obtains convictions. The evidence does not support this conclusion. The high percentage of convictions is produced not by unfair advantages possessed by prosecutors, but rather by the careful screening process which occurs prior to the initiation of a prosecution. The exercise of discretion by prosecutors, particularly in selecting for prosecution only those cases in which there is better than an even chance of conviction, and the requirements of probable cause, should and do result in a high percentage of convictions. The same factors account for the fact that in about ninety per cent of serious criminal cases the defendants choose to plead guilty. If these conditions did not exist, the machinery of the courts would be unworkable and our system of criminal justice would fall far short of its purpose. That purpose, which some academic writers seem to lose sight of, is to convict the guilty and acquit the innocent by using procedures fair to both sides; it is not to give defense lawyers a fifty-fifty chance to win acquittal for their clients, whether guilty or innocent, solely in the interest of making it a more even game.

There are several ways in which these volumes could be made more useful to the practitioner. The timetable, instead of being merely an alphabetical index, could list chronologically the steps which defense counsel should consider and the time allowed for each of these steps. Also in the index, references should be to specific pages rather than to sections which may run for many pages. The pocket parts should state the volumes of the reports covered in each annual edition; the current work seems to go through June 1968 judging from cases and statutes cited, but if the exact volumes were given the reader would know just what additional ground to cover. These are at best minuscule imperfections in a treatise of such monumental proportions in a field where the text is somewhat dated the minute it is set in type. There is no scholar who can speak with more authority than Professor Wright. In these three volumes

his unique experience as a member of the Committee on Rules of Practice and Procedure of the Judicial Conference and the informed scholarship which has already given us his one-volume work on the federal courts[21] have produced a work which is the single most useful text for anyone concerned with federal criminal justice.

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Review II

A childhood hymn recites that while strolling in the garden the voice of God disclosed a joy that none other had ever known. Too many judges, especially federal appellate judges, seem to feel that they also possess a special insight that no one else can possibly share. The extent to which this observation is true marks the dimensions of the job attempted by Professor Wright. Each month approximately nine volumes of the Federal Reporter join the shelves. Among these new volumes a great bulk of pages interpret and reinterpret the maxims of federal criminal procedure. Often, no reconciliation of the views expressed in the many opinions is possible. Some seem not to subscribe to the Supreme Court Reporter; others reflect great study of the decisions and remarkable ingenuity in evading the plain precedent of the highest court's decisions.[1] For this reason the practitioner must join the legendary dissatisfied of Dean Pound's famous speech.[2] It is not only the laymen who want some predictability in law; lawyers as well do not respect intermediate appellate courts which disregard the opinions of the highest court. In his three volumes Professor Wright wisely makes no attempt to reconcile the irreconcilable—to tie together the ridiculously divergent opinions of the various circuits. Instead, he relies principally upon the opinions of the Supreme Court in the areas of controversy. His willingness to do so lends credit and authority to the volumes, and that stature, together with Professor Wright's personal renown, will contribute to a more uniform federal procedure.

21. C. WRIGHT, FEDERAL COURTS (1963).

1. *E.g.*, United States v. Vita, 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962) [refusal to apply McNabb-Mallory Rule and FED. R. CRIM. P. 5(a)]. When too many courts refuse to obey, what can the Supreme Court do?

2. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

The volumes do not treat criminal procedure in depth, and consequently it is even more significant that the principal issues are discerningly presented. For example, amid the confusion of *Miranda*[3] and the various attempts to circumvent its principles, one could very easily overlook the crucial fact that the most important result of the decision is to change the factual questions. While the old "totality of the circumstances" test is still relevant, the questions now are essentially: (1) Was the suspect given his *Miranda* warning, and if so, (2) Did he thereafter waive his privilege? Other questions obviously remain, but the critical facts in most cases will now revolve around the issue of "waiver." Professor Wright focuses on this change with precision.

In the same way, the critical nature of discovery is properly emphasized. This is the area of criminal law that is in greatest need of revision. Quite apart from the needless trials which take place because the defense is ignorant of the strength of the government's case, innocent people have been prejudiced by the lack of discovery. For example (ignoring the factual presumption made by many judges and jurors that, because of the "reliable" screening afforded by police and public prosecutors, the accused would not be in court if he were not guilty), if an innocent man is accused of having made a sale of heroin to an undercover agent some five months prior to the date of the complaint, he can hardly develop a legitimate alibi for a date so far in the past. He must know the precise evidence against him if he is to expose the false accusation. Yet most avenues of discovery are closed to him. On the other hand, the absence of discovery does not significantly hinder the guilty defendant because he knows the facts. It is only the innocent who suffer. Until discovery is broadened to minimize such anomalous situations, it cannot be asserted that the dark ages of criminal procedure are past.

Professor Wright wisely avoids some traps for the unwary commentator. The thicket of collateral attacks, for example, and the resulting congestion in appellate dockets do not lend themselves readily to summary evaluation, for their expansion has grown unevenly from a need for reform. Until recently, the evils of trial procedure were almost impossible to disturb on a collateral attack. Even in direct appeals, if the appellant was indigent, the trial judge could remove the ground for his appeal simply by certifying that the case involved no substantial question. A few years ago, for instance, I was appointed counsel for an indigent, and my client's appeal from the trial court's decision against him was certified frivolous by a distinguished trial judge. A three-judge panel of the Circuit Court of Appeals for the District of Columbia agreed, and a petition for rehearing en banc on the question of the frivolity of the appeal was

3. Miranda v. Arizona, 384 U.S. 436 (1966).

unavailing. The Supreme Court reversed,[4] but by the time a panel of the Circuit Court finally heard the case, the appellant was only a few months from his "good time" release date. That panel reversed per curiam without dissent and ordered a judgment of acquittal.[5] When the question involves the prosecutorial suppression of evidence favorable to the accused, the need for a full post-trial hearing and evaluation becomes even more important.[6] Hence the problems posed by the multiplicity of collateral attacks do not lend themselves to easy solutions, and Professor Wright does well to avoid an extended evaluation of those problems.

Nevertheless, the books do not deal adequately with the wealth of decisional authority; indeed, they could not do so without a tenfold expansion of volumes. Their main defects are (1) the use of the same format as that in the former volumes[7]—a format based upon the federal rules which do not furnish a logical organization for the problems of criminal procedure; and (2) treatment of all problems with roughly the same degree of concentration when certain areas justify greater depth of research and citation. In short, for the criminal practitioner the volumes present a good place to start research, but they do not provide the same degree of exhaustive citation that may be found in the companion volumes on civil procedure.[8] This defect is particularly objectionable in view of the broad scope of the work. It would have been more logical either to consider only the basic and most important problems in a few pages or to treat all the problems in considerable detail. Unfortunately, these volumes do neither. But in light of the massive amount of decisional materials and the rapidly changing principles, one must concede the virtual impossibility of such an undertaking.

On the whole, these are books written by an eminent authority, and, as such, they are certain to be read and relied upon by both lawyers and judges. Fortunately for the administration of criminal justice, Professor Wright hits the mark far more frequently than he misses.

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4. Kemp v. United States, 369 U.S. 661 (1962) (per curiam).

5. Kemp v. United States, 311 F.2d 774 (D.C. Cir. 1962).

6. *See, e.g.*, Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961) (over state objection, the subpoena duces tecum was utilized after trial to discover suppressed evidence).

7. 4 W. BARRON, FEDERAL PRACTICE AND PROCEDURE (1951, Supp. 1968); 4 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CUMULATIVE SUPPLEMENT (1964).

8. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (C. Wright ed. 1960, Supp. 1968). One volume of a new treatise on the civil rules, 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1969), which, together with the three volumes on the criminal rules, will replace the older treatise, has been published.