Michigan Law Review

Volume 59 | Issue 2

1960

Constitutional Law- Due Process- Conviction Without Evidence of Guilt

Donald A. Slichter
University of Michigan Law School

RECENT DECISIONS

CONSTITUTIONAL LAW—DUE PROCESS—CONVICTION WITHOUT EVIDENCE OF GUILT—Petitioner was convicted in the Police Court of Louisville, Kentucky, of two offenses. After seeing petitioner "dancing by himself" on the dance floor, the police charged him with loitering;[1] when he became argumentative about this arrest, he was also charged with disorderly conduct.[2] Although he protested that he had come into the restaurant where he was arrested to "wait on a bus" and have a meal, he was nevertheless taken into custody. At the trial the arresting officer testified that the manager had told him that petitioner had been there "a little over a half hour and that he had not bought anything."[3] The city offered no other evidence against petitioner except a record showing fifty-four previous arrests. The police court sitting without a jury found petitioner guilty and fined him ten dollars on each charge. Further state review of the case was unavailable.[4] On certiorari to the United States Supreme Court, *held,* reversed. It is a violation of due process of law under the fourteenth amendment to convict a person without evidence of his guilt. *Thompson v. City of Louisville,* 362 U.S. 199 (1960).

By basing its decision on a finding of "no evidence whatever . . . to support these convictions,"[5] the Court brought into question the scope of Supreme Court review of state judicial proceedings, and in particular the extent to which state findings of fact will be reviewed.[6] It is true that the Court has traditionally made an independent examination of so-called "con-

[1] LOUISVILLE, KY., ORDINANCES § 85-12 provides: "It shall be unlawful for any person . . . without visible means of support, or who cannot give a satisfactory account of himself . . . to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building. . . ."

[2] LOUISVILLE, KY., ORDINANCES § 85-8.

[3] Principal case at 200. The officer's testimony was seriously undermined at the trial by the manager's testimony that he personally had not served the petitioner any food, but that a waiter or waitress might have. Principal case at 201 n.3.

[4] Police court fines of less than $20 on a single charge are not subject to appeal or review in any other Kentucky court. KY. REV. STAT. § 26.080 (1960). In response to petitioner's request for a stay of the judgment to give him an opportunity to apply for certiorari to the Supreme Court, the police court suspended judgment for 24 hours during which time petitioner sought a longer stay from the Kentucky circuit court. That court granted a stay on the grounds that the petitioner's constitutional claims were "substantial and not frivolous," Thompson v. Taustine, No. 40175, Jefferson, Ky., Cir. Ct., 1959. Principal case at 203. On appeal by the city the Kentucky Court of Appeals held that the circuit court lacked the power to grant the stay, but, in an extraordinary step, granted its own stay, even though petitioner had not applied to it for a stay. Thus, the Kentucky courts indicated their desire that the Supreme Court pass on the constitutional questions raised by the case. See principal case at 202, 203.

[5] Principal case at 206.

[6] The opinion of the Court, written by Mr. Justice Black, follows an analysis similar to that used in Konigsberg v. State Bar, 353 U.S. 252 (1957), in which the Court held, three Justices dissenting, that it was a denial of due process of law for a committee of bar examiners to refuse to certify an applicant for admission to the bar because he had failed to prove that he was of good moral character. In *Konigsberg,* as in the principal case, the Court made an independent examination of the sufficiency of evidence to determine whether the adjudicating body was justified in reaching the result it did.

stitutional facts" where a conclusion of law relating to a federal right and a finding of fact are so intermingled that it is necessary to analyze the facts in order to pass upon the federal question.[7] But to hypothesize that "sufficiency of evidence" is such a constitutional fact is to beg the question by assuming the answer to the serious problem raised by the case: "*Is* sufficiency of evidence hereafter to be considered a constitutional fact?"

The development of a broader scope of review by the Supreme Court of state judicial decisions[8] makes it possible to identify three general areas in which the Court will review state findings of fact for alleged due process violations. First, the Court will review the facts to make sure that the defendant has not been denied a right so fundamental that it is beyond the reach of state police power regulation.[9] Here the Court is protecting substantive rights from state encroachment by means of due process interpretation. The test of constitutionality, whether the state action can be deemed "reasonable," is determined by a balancing of police power interests and private rights.[10] The use of this analysis in the principal case would have necessitated elevating "dancing with oneself" to the status of a fundamental right, a course the Court was understandably unwilling to follow.[11] Secondly, the Court will also review the facts in cases in which it is alleged that the defendant's trial lacked that degree of fundamental fairness demanded by the due process clause.[12] Rather than examining the quality or quantity of evidence, this approach examines those factors, unrelated to the probative value of the evidence, which may serve to vitiate the trial due to the conduct

7 Fiske v. Kansas, 274 U.S. 380, 385-86 (1927).

8 See KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY (1956); Forkosch, *American Democracy and Procedural Due Process*, 24 BROOKLYN L. REV. 173 (1958).

9 Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (petitioner deprived of fundamental right of free speech by arbitrary application of municipal charter); De Jonge v. Oregon, 299 U.S. 353 (1937) (arbitrary application of criminal syndicalism statute infringed upon right of free speech). See Brown, *Due Process of Law, Police Power, and The Supreme Court*, 40 HARV. L. REV. 943 (1927).

10 The state police power must be "exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ." Hurtado v. California, 110 U.S. 516, 535 (1884) (prosecution for felonies by information not violative of due process). See Mr. Justice Frankfurter's extensive discussion of the fundamental rights concepts in Bartkus v. Illinois, 359 U.S. 121 (1959) (conviction by state after acquittal by federal government held valid).

11 It may also be surmised that Mr. Justice Black's failure to use a substantive due process approach was at least partially motivated by his personal conviction that the only substantive rights immunized from the exercise of state police powers are those contained in the Bill of Rights and "incorporated" into the Fourteenth Amendment. He has condemned the concept of substantive due process of law as a "natural law formula" and "an incongruous excrescence on our Constitution." Adamson v. California, 332 U.S. 46, 68, 75 (1947) (dissenting opinion).

12 Powell v. Alabama, 287 U.S. 45 (1932). In this case the Court held that the petitioners were denied due process of law because they were prevented from securing counsel of their own choice and were denied a fair hearing by failure of the trial court to provide effective assistance of counsel in their behalf. See also Moore v. Dempsey, 261 U.S. 86 (1923) (threat of violence denies due process); De Meerleer v. Michigan, 329 U.S. 663 (1947) (denial of counsel to indigent juvenile accused of murder violates due process). *But see* Betts v. Brady, 316 U.S. 455 (1942).

of the trial or of the police which "shocks the conscience"[13] or which violates rights "implicit in the concept of ordered liberty."[14] This analysis would not have been appropriate in the principal case for it has never been intimated, and the Court in the principal case did not intimate, that conviction without sufficient evidence is sufficiently shocking that it violates due process.[15] Thirdly, the Court has reviewed evidentiary findings of state courts when it is the *quality* of the evidence which is challenged. Evidence tainted by perjury[16] or by a coerced confession[17] are typical situations in which such inquiry has been made. The question in cases of this type is not whether there is sufficient evidence to sustain a conviction, but whether the evidence presented is reliable enough to do so. This classification was inapplicable because the evidence in the principal case had no such taint. Instead of using one of these traditional approaches to the due process question, the Court looked to the *quantitative* aspect of the evidence, and held that the amount was insufficient to sustain the conviction.[18] This fact was elevated to one of constitutional significance when the Court concluded that the petitioner had been denied due process of law.[19]

[13] Rochin v. California, 342 U.S. 165, 172 (1952) (stomach pumping for evidence of dope vitiates trial. *Compare with* Breithaupt v. Abram, 352 U.S. 432 (1957) (extraction of blood from vein does not violate due process).

[14] Palko v. Connecticut, 302 U.S. 319, 325 (1937) (dictum).

[15] *Cf.* Lyons v. Oklahoma, 322 U.S. 596, 605 (1944), in which the Court declared that mere error in reaching a jury verdict does not violate due process. Other cases in which the Court has stated its view that the Constitution does not guarantee that the decisions of state courts shall be free from error include Gryger v. Burke, 334 U.S. 728 (1948) (erroneous interpretation of state law does not deny due process); and Ballard v. Hunter, 204 U.S. 241, 258 (1907) (tax assessment error does not deprive petitioner of property without due process).

Moreover, the Court has not been "shocked" by the admission of evidence in state trials procured by unconstitutional searches and seizures, Irvine v. California, 347 U.S. 128 (1954); Wolf v. Colorado, 338 U.S. 25 (1949).

[16] Napue v. Illinois, 360 U.S. 264 (1959). The Court said: "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution involate," *id.* at 271. See also Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 294 U.S. 103 (1935).

[17] Brown v. Mississippi, 297 U.S. 278 (1936) (use of a confession obtained by physical torture denies due process). *Cf.* Stein v. New York, 346 U.S. 156 (1953), where the Court found no denial of due process despite police tactics which included holding the prisoners incommunicado while subjecting them to intermittent questioning over a 32-hour period. It was in this case that Mr. Justice Jackson, speaking for the majority, indicated that the fourteenth amendment did not exact a rigid exclusionary rule of evidence but only protected against conviction on inherently untrustworthy evidence. *Cf.* Spano v. New York, 360 U.S. 315, 320-21 (1959), which indicated that coerced confessions are excluded because of the basic unfairness in attaining them and not because of their inherent untrustworthiness as evidence.

[18] Principal case at 206. Here the Court followed the analysis used in *Konigsberg*, *supra* note 6, and used in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), in which the Court held it to be a denial of due process to deny petitioner's application to take the New Mexico bar examination because "[P]ast membership in the Communist Party does not justify an inference that he presently has bad moral character." *Id.* at 246.

[19] It is submitted that the Court could have found a denial of due process without "second guessing" the trier of fact. It could have held that the loitering statute, *supra* note 1, provided petitioner with inadequate notice that his conduct fell within the statute's prohibitory mandates, and therefore that the application of the statute to the petitioner's

Review of the quantitative value of the evidence requires the Court to determine whether the fact-finder could reasonably infer the ultimate fact of guilt from the sum of evidence presented by the state.[20] In this respect the analysis most closely resembles that used by the Court when reviewing convictions based upon statutory presumptions. In the principal case the Court reviewed the reasonableness of the inference of guilt from the facts proved; in the statutory presumption cases it reviews the rationality of the connection between the fact proved and the ultimate fact presumed.[21] The parallel is even more apparent, for the decision in the principal case was based only on an examination of the uncontroverted evidence, not of contested issues.[22] For this reason, it would be unwarranted to conclude that the *Thompson* case signals the intervention by the Supreme Court into the process by which the relative weight of evidence is determined.[23] It seems probable that the Court will confine this case to its facts in light of the Court's historical reluctance to intervene in state fact-finding processes, and in view of the plethora of peculiar facts in this case—no state appellate review available; petitioner's record of previous arrests which may have led the Court to suspect harassment; the unspoken equal protection concern because the petitioner was a Negro; the uncontested nature of the evidence; the judge as the sole trier of facts. If the case is so limited, the chief impact will have been identification of problems and weaknesses in state procedures which otherwise might have escaped public notice. But if the case portends the Supreme Court's willingness to review the sufficiency of uncontroverted evidence, the role of the Court in the administration of state criminal justice will have been significantly expanded.[24]

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acts was an arbitrary act in violation of due process. See United States v. Brewer, 139 U.S. 278, 288 (1891) (election procedure statute held not applicable under the facts), in which the Court said, "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. . . . Before a man can be punished, his case must be plainly and unmistakably within the statute." See also United States v. Lacher, 134 U.S. 624 (1890) (embezzlement statute held applicable to petitioner) (dictum).

[20] Schware v. Board of Bar Examiners, *supra* note 18, at 246-47. See also Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192, 197 (1953) (dictum).

[21] Tot v. United States, 319 U.S. 463, 467, 468 (1943) (presumption of violating Federal Firearms Act invalidated); Manley v. Georgia, 279 U.S. 1 (1929) (presumption of fraud from bank insolvency held invalid). See Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17 and 178 (1930).

[22] The only disputed fact was whether petitioner had purchased anything to eat in the restaurant. The Court dismissed this issue believing it to have no significance. Principal case at 201 n.3.

[23] See Gallegos v. Nebraska, 342 U.S. 55, 61 (1951) in which the Court said, "The state's ultimate conclusion on guilt is examined from the due process standpoint in the light of facts *undisputed by the state.*" (Emphasis added.)

[24] As a matter of pure speculation, it may be suggested that the Court is requiring "substantial evidence" as it does in administrative law cases. This requires that there be enough evidence to support the inference of guilt. As defined in NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), "[Substantial evidence means] . . . enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it [the evidence] is one of fact for the jury."