

Michigan Law Review

Volume 53 | Issue 7

1955

Criminal Procedure - Venue - Federal Offenses Committed Outside the Jurisdiction of Any State or District

Richard R. Dailey
University of Michigan Law School

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Recommended Citation

Richard R. Dailey, *Criminal Procedure - Venue - Federal Offenses Committed Outside the Jurisdiction of Any State or District*, 53 MICH. L. REV. 997 (1955).

Available at: <https://repository.law.umich.edu/mlr/vol53/iss7/13>

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CRIMINAL PROCEDURE—VENUE—FEDERAL OFFENSES COMMITTED OUTSIDE THE JURISDICTION OF ANY STATE OR DISTRICT—The defendant, an army staff sergeant, was under custody at Fort Meade, Maryland, awaiting disposition of charges of sodomy lodged against him under the Articles of War. After a delay of four months, the charges were dropped and he was shipped by the Army to Fort Jay, New York, where he was separated from the service. Immediately upon his release, he was arrested by the Federal Bureau of Investigation under a commissioner's warrant charging him with treason committed in Japan during a prior enlistment in the army. At the trial in the District Court for the Southern District of New York, the issue of venue was submitted to the jury and was found to be proper. Venue was governed by a federal statute which provides that "the trial of all offenses begun or committed . . . out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."¹ After conviction, with the cooperation of the Army, the defendant obtained confidential records not previously available; these records showed that the Army had brought the defendant to New York at the request of the Department of Justice for the purpose of turning him over to the FBI. On the basis of this newly discovered evidence, the defendant moved to vacate the conviction for improper venue.² The district court denied the motion. On appeal, *held*, reversed. Had the newly discovered evidence

¹ 18 U.S.C. (1952) §3238. This provision is derived from 1 Stat. L. 113, §8 (1790), which provided that the trial "shall be in the district where the offender is apprehended, or into which he may first be brought." No explanation of the change in language from "apprehended" to "found" could be found. *Ex Parte Bollman*, 4 Cranch (8 U.S.) 74 (1807), involved a factual situation amazingly similar to that of the principal case and reached the same result under the 1790 statute.

² 28 U.S.C. (1952) §2255 authorizes this procedure.

been before the jury, they could not have found that the defendant was "found" in the Southern District of New York; he was "found" in Maryland within the meaning of the federal venue statute. *United States v. Provoov*, (2d Cir. 1954) 215 F. (2d) 531.

Misuse of the terms "jurisdiction," "venue," and "vicinage" in the area of federal criminal practice frequently tends to obscure procedural issues. For this reason some precision in definition is needed to appraise the cases in this field. As to "jurisdiction," Congress has provided that the federal district courts "shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."³ Under this statute, if the defendant acts in violation of a federal criminal statute, jurisdiction of all federal district courts of the offense committed is automatically established.⁴ As to "venue," Article III of the Constitution states that the trial of all crimes "shall be held in the State where said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed."⁵ It has been settled by judicial decision that this provision for the place of trial confers personal rights on the accused which he may waive at his election.⁶ It has further been established that in criminal trials in the federal courts venue must be alleged in the indictment and proved at the trial just as all other material allegations.⁷ The concept of venue, then, involves the personal rights of a defendant, as opposed to jurisdiction, which involves the judicial power of the court.⁸ As to "vicinage," the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

³ 18 U.S.C. (1952) §3231.

⁴ Note that the statute speaks of jurisdiction "of all offenses"; in this country criminal jurisdiction "over the person" of the defendant is never a problem since the defendant must be in court in order to be tried. In other countries provision is made for what might be called a "default conviction," similar in procedure to our civil default judgment. See Delaume, "Jurisdiction over Crimes Committed Abroad: French and American Law," 21 *GEO. WASH. L. REV.* 173 (1952).

⁵ U.S. CONST., art. III, §2.

⁶ *Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417 (1932); *United States v. Jones*, (2d Cir. 1947) 162 F. (2d) 72; *Earnest v. United States*, (6th Cir. 1952) 198 F. (2d) 561; *Levine v. United States*, (8th Cir. 1950) 182 F. (2d) 556. But cf. *United States v. Bink*, (D.C. Ore. 1947) 74 F. Supp. 603, and *United States v. Holdsworth*, (D.C. Me. 1949) 9 F.R.D. 198.

⁷ *United States v. Johnson*, 323 U.S. 273, 65 S.Ct. 249 (1944); *United States v. Strewl*, (2d Cir. 1938) 99 F. (2d) 474. In the absence of waiver, the issue of improper venue may be raised at any time. *United States v. Brothman*, (2d Cir. 1951) 191 F. (2d) 70.

⁸ The lower court in the principal case evidently considered venue to be a part of the overall requirement of jurisdiction of the offense. In *United States v. Provoov*, (D.C. N.Y. 1954) 124 F. Supp. 185, the court said at 188: "It is thus essential to the jurisdiction, and hence the validity of the judgment of this court, that the petitioner be shown to have been 'found' in this district. . . ."

...⁹ The place of trial is not involved here; the amendment dictates only the place from which the jury must be summoned. Vicinage also comes within the category of personal rights which may be waived by the defendant.¹⁰ It remains to determine the impact of these principles in cases where the crime has been committed outside the boundaries of any state or district. The jurisdiction of the federal courts should not be affected at all by this fact since a federal criminal statute¹¹ has been violated. To narrow the problem further, the vicinage provision of the Sixth Amendment can have no possible application here since the crime did not occur in a district "previously ascertained by law."¹² Venue remains as the crucial issue. As applied to the facts of the present case, the venue statute provided that the defendant be tried in the district where he was "found."¹³ The trial court correctly defined this term as meaning the district in which the defendant was "first apprehended or arrested or taken into custody, under charges later found in the indictment."¹⁴ This requirement serves the single purpose of prohibiting the government from picking the place of trial most favorable for conviction; it leaves the place of trial to be determined by the chance circumstance of the place of apprehension.¹⁵ Considered in the light of the policy underlying the venue statute, the facts of the present case present a clear attempt by the Department of Justice to violate this policy.¹⁶ All other charges against him having been dropped, it is clear that the defendant was in fact being held in custody at Fort Meade for the crime of treason; the fact that he was held there by the Army rather than the FBI does not materially alter the situation.¹⁷ The necessity, in terms of protection to the accused, for enactment of the venue statute may well be questioned.¹⁸ But faced with the existence of the statute, the result reached in the principal case was inevitable.

Richard R. Dailey

⁹ U.S. CONST., amend. VI. See Blume, "The Place of Trial of Criminal Cases," 43 MICH. L. REV. 59 (1944).

¹⁰ Hagner v. United States, note 6 supra.

¹¹ Note 3 supra.

¹² See note 9 supra. Chandler v. United States, (1st Cir. 1949) 171 F. (2d) 921.

¹³ Note 1 supra. For interpretation of the "first brought" clause, see United States v. Burgman, (D.C. D.C. 1949) 87 F. Supp. 568; Chandler v. United States, note 12 supra.

¹⁴ See note 1 supra. The change in wording from "apprehended" to "found" does not seem to have effected any change in meaning. United States v. Townsend, (D.C. N.Y.) 1915) 219 F. 761.

¹⁵ The place of apprehension may still be controlled by the government, within the limits of the statute of limitation, by merely waiting for the defendant to move voluntarily to another judicial district.

¹⁶ It is interesting to note that 31 Stat. L. 330 (1900), 10 U.S.C. (1952) §15, makes it a crime to use any part of the Army of the United States as a posse comitatus.

¹⁷ Principal case at 538.

¹⁸ Comparable state venue statutes often leave some choice as to the place of trial in the hands of the prosecution. See Mich. Comp. Laws (1948) §45.10 (crimes committed on Lake Michigan).