Washington Law Review

Volume 29
Number 2 *Washington Case Law-1953*

5-1-1954

Criminal Law

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under compulsion of judgment as provided by RCW 71.32.300, or after interpleading conflicting claimants as provided by RCW 4.08.150, the garnishee may be later required to pay a second time to a claimant of the debt who was not made a party to the garnishment proceeding. "When a writ of garnishment is served upon a garnishee, it casts upon him the responsibility of protecting his interests." He can do this only if he pays under compulsion of judgment or interpleads conflicting claimants as provided by the statutes.

CRIMINAL LAW

Equivocal Plea of Guilty. In *State v. Rose*[1] the defendant, charged with first degree assault, entered a plea of guilty, but when asked, some minutes later, if he had anything to say on his behalf, replied, "I would like to make it clear I didn't fire the pistol at anybody with intentions to hit them." While noting that intent is an element of the crime charged, the court held the plea was a bona fide plea of guilty. *State v. Stacy*[2] came up to the court later in the year. The defendant, also charged with first degree assault, answered the court's question of plea, saying, "I plead guilty to that charge. . . . I would like to make a statement to that charge. Even though I am pleading guilty to that charge it is a lie on my part. I am doing so on advice of counsel." He made a similar statement a few moments later, adding that he was so pleading "on the advice of my wife." The court held that the trial court erred in accepting the plea without first eliminating the equivocation.

All guilty pleas should be considered against the background of certain general principles. The plea entered by the defendant must be guilty *or* not guilty *or* former jeopardy or acquittal.[3] The plea of guilty should be entirely voluntary by one competent to know the consequences and not induced by fear, apprehension, persuasion, promises, inadvertance or ignorance.[4] A plea of guilty admits all the elements of the crime charged.[5] One of the maxims resulting from an amalgamation of these general principles is that the crucial test of a trial court's action in accepting a plea of guilty is whether the defendant entered his plea of guilty *freely and understandingly,* whether he readily understood that he was admitting *the commission of the acts consti-*

[1] 42 Wn.2d 509, 256 P.2d 497 (1953).
[2] 143 Wash. Dec. 331, 261 P.2d 400 (1953).
[3] RCW 10.40.150
[4] Ortigas v. State, 140 Fla. 671, 192 So. 795 (1940); Bennett v. State, 75 Okl. Cr. 42 (1942); Pennington v. Smith, 35 Wn.2d 267, 212 P.2d 811 (1949).
[5] People v. Mendietta, 100 Cal. App.2d 763, 226 P.2d 812 (1951); Cummings v. Perry, 194 Ga. 424, 21 S.E. 2d 847 (1942); Brandon v. Webb, 23 Wn.2d 155, 160 P.2d 529 (1945).

tuting the offense charged.[6]

When the facts in the *Stacy* case are examined with these principles in mind the court's conclusion is the only plausible one. Stacy's protestation of innocence at the same time as his confession of guilt could hardly be viewed as a plea of guilty. Stacy had a history of neurotic disturbances which should have signalled the need for the trial court to determine the defendant's competence and to ascertain his understanding of the plea and the presence or absence of volition. Rationalization of the court's conclusion in the earlier *Rose* case is not so simple. Rose's denial of commission of the crime *as charged* came some minutes after the plea. Rose, like Stacy, had originally entered a plea of not guilty. The court's language in denying the defendant's claim of equivocal plea is enlightening:

> After appellant had orally announced his plea, the court requested that the record show that appellant had withdrawn the plea of not guilty and entered a plea of guilty. *What thereafter transpired had nothing to do with the entry of appellant's plea.* That act had been completed. The statement which appellant made regarding his *lack of criminal* intent was offered while the court was seeking information to assist it in fixing the sentence. *The court apparently discounted* the truth of this statement, perhaps believing that it was offered only for the purpose of obtaining leniency and not to disavow the new plea of guilty which had just been entered. The failure of the appellant or his counsel to then request a withdrawal of the plea of guilty tended to substantiate such a conclusion.[7] (Emphasis added.)

To support its position the court cited *People* ex rel. *Hubert v. Kaiser*[8] which appears similar on its facts. The New York court rejected the argument that the plea was invalid. The defendant contended that answers given the court after the plea should have indicated to the court that he had not pleaded guilty with full understanding. Neither the answers nor the questions of the court are clear from the report of the case. Such vagueness makes the case questionable in its application to the *Rose* situation where the substance of the colloquy was very important.

Although the plea of guilty admits all the elements of the crime charged[9] Rose denied an important element. He must certainly have misunderstood the full meaning of his plea. The fact that the trial court "apparently discounted the truth of this statement" is the very issue

[6] Crooks v. State, 214 Ind. 505, 15 N. E. 2d. 359 (1938); Loucks v. State, 212 Ind. 108, 11 N. E. 2d 694 (1938).
[7] 42 Wn.2d 509, 515; 256 P.2d 497, 504 (1953).
[8] 206 N.Y. 46, 99 N. E. 195 (1912).
[9] Note 5 *supra.*

in question. Should this statement have been discounted? Is the trial court free to discount such statements at its discretion? The Washington court seems to place the emphasis on the "*measure* of equivocation" and not on the *existence* of equivocation. The court said in the *Stacy* case, distinguishing the *Rose* case, "In the Rose case, we decided that a valid plea of guilty had been entered, *despite some measure of equivocation,* and we noted that the equivocal matter wherein the defendant *asserted innocence* had come in *after* the plea and was offered in the hope of reducing the severity of the sentence."[10] Note that the court interprets the statement of the defendant in the *Rose* case as an assertion of innocence not just a statement "regarding lack of criminal intent." The only clear distinctions between the cases appears to be the time period between the assertion of innocence and the plea and the "measure of equivocation." Are these the criteria for determining whether the plea of guilty is too equivocal? So it appears. Perhaps the matter is one which should be left to the discretion of the trial court limited only by a manifest abuse of that discretion as is the case where the question involves permission to change the plea.[11]

Whatever the test in Washington the result should be, as the court in the *Stacy* case said, the protection of the defendant's right to an opportunity to establish his innocence in a trial before a jury. Such a liberal test "obviates a collateral attack on a judgment . . . by a later claim that the plea was too equivocal to bind the pleader. . . ."[12] The unequivocal position of the Washington court on the general subject of pleading should be perpetuated.[13]

Obtaining Money by False Pretenses — Misrepresentation of 'Architects Fees.' In *State v. Emerson,* [14] the defendant building contractor was convicted of larceny by false pretenses when he retained part of a sum earmarked for the payment of 'architect's fees.' He accepted the money on contracts under which he was to furnish architect's blueprints. Two-hundred and fifty dollars was the sum to be paid for architect's fees, and, according to the architect's testimony, was his

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[10] 143 Wash. Dec. 331, 336, 261 P.2d 400, 403 (1953) (italics added).

[11] State v. Wood, 200 Wash. 37, 93 P.2d 294 (1939); State v. Hensley, 20 Wn.2d 95, 145 P.2d 1014 (1944).

[12] 143 Wash. Dec. 331, 335, 261 P.2d 400, 403 (1953).

[13] "Under the statutes of this state and the decisions of this court no person informed against or indicted for a crime shall be convicted thereof except by *admitting the truth of the charge* in his plea, by confession in open court or by the verdict of a jury, accepted and recorded by the court." (Emphasis added.) State v. Williams, 30 Wn.2d 18, 22, 190 P.2d 734, 737 (1948) and cases cited.

[14] 143 Wash. Dec. 4, 259 P.2d 406 (1953).

charge for the plans; but the defendant, by agreement with the architect and unknown to his clients, was allowed to keep $100 because he had obtained other business for the architect and provided some small amount of work toward the completion of the blueprints. The prosecuting witnesses received the blueprints. Although they testified that it was their understanding that no part of the money paid initially was to accrue to the defendant, the only false representation charged to the jury was exaggeration of the architect's costs.[15] On appeal the conviction was upheld, six to three, the majority holding that the defendant's statement that the 'architect's fees' were $250, when the architect received only $150, was a false representation.

False pretenses as generally understood is obtaining the property of another by an intentional false statement concerning a material matter of fact in reliance on which the title or possession of property is parted with.[16] All the elements are *clearly* present in the instant case, with the only question involved being the false representation itself. Since the issue was limited to whether or not the defendant "falsely exaggerated the architect's costs" attention is immediately focused on the definition of terms. What is meant by 'architect's fees' or 'architect's costs' in the factual context of the instant case? If the term meant the money to be paid to the architect, exclusive of any kick-backs to the contractor, then the defendant's representation of the fees or costs was unquestionably false. If the term meant the charge of the architect, regardless of his disbursal of the sum, then the representation was not false. The jury apparently interpreted the facts to bear the former definition.[17]

One of the major arguments of the dissent requires special attention. In the instant case the prosecuting witnesses obtained the blueprints

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[15] The trial judge said: ". . . unless this man is guilty of obtaining the money originally by the false representation of exaggerating the amount of the architect's costs, that he wouldn't be guilty of anything. . . . The case will go to the jury . . . on the sole theory of misrepresentation, falsely exaggerating the architect's costs." *Ibid*, 143 Wash. Dec. at 16, 259 P.2d at 414.

[16] State v. Swan, 55 Wash. 97, 104 Pac. 145 (1909); People v. Jordan, 66 Cal. App. 10, 4 Pac. 773 (1884); People v. Oris, 52 Colo. 244, 121 Pac. 163 (1912).

[17] On the point of evidence to support the facts the majority and dissent seem to differ in their interpretation of the trial record. Bearing on what 'architect's fees' meant the majority considers the testimony that it was understood no part of the down payment was to go to the defendant. "He told them that all he was to realize was the $50 per week for the supervision and that no part of the down payments were (*sic*) to go to him personally; that included in the down payment was the sum of $250 for architect's fees." 143 Wash. Dec. at 11, 259 P.2d at 411. The dissent stated that ". . . the court eliminated that part of the evidence . . ." dealing with the understanding of the prosecuting witnesses that no part of the money was to go to the defendant. 143 Wash. Dec. at 16, 259 P.2d at 413.

they bargained for. Noting this, the dissent said:

> In a case of this kind where one claims that in bargaining with another false representations are made by which he is induced to part with money, he is not cheated or defrauded in the sense contemplated by the statute if he gets in exchange that for which he bargained. *In re Rudebeck,* 95 Wash. 433, 163 Pac. 930; *State v. Sargent,* 2 Wn.2d 190, 97 P.2d 692, and text authority cited therein.[18]

Such a rule was not stated in the *Rudebeck* case. There the court was addressing itself to the statement in some of the cases that the owner must have been actually defrauded; it said:

> But this expression does not imply that he must have suffered actual pecuniary loss . . . The owner is actually defrauded when he parts with his property or money and fails to receive in exchange that for which he bargained.[19]

The *Sargent* court cited this passage, then cited text authority to the effect that "as a rule the crime is not committed if the prosecutor gets out of the transaction just what he bargained for."[20] This was followed by the statement upon which the dissent in the instant case based its rule: "It will be noted that it is pointed out in *both* of the foregoing quotations that a crime is not committed if the person from whom the property is obtained gets in exchange what he bargained for."[21] One of the defenses in the *Sargent* case was that there had been no allegation that the prosecuting witness was defrauded in the sense of suffering any pecuniary loss, so the information was vitiated. The above-quoted passage from *In re Rudebeck* was cited in response to this argument. The defendant in the *Sargent* case argued that the prosecuting witness obtained what he bargained for, thus the crime had not been committed; the court decided he had not obtained what he bargained for. It appears the *Sargent* court recognized this 'bargained for' principle as a good defense, but under the facts of that case there was no *holding* on this precise question. The majority in the instant case made no mention of the *Sargent* case and its 'bargained for' rule; this could possibly mean the majority views the 'rule' as actually dicta.

Two final observations should be made. The fact of the defendant's silence about retaining a part of the sum paid is an aspect of the case not dealt with by either the dissent or majority. It has been contended that mere silence or suppression of the truth or a mere withholding of

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[18] 143 Wash. Dec. at 20, 259 P.2d at 416.
[19] In re Rudebeck, 95 Wash. 433 at 440, 163 Pac. 930 at 933 (1917).
[20] 25 C.J. 608, False Pretenses § 39 (1921).
[21] State v. Sargent, 2 Wn.2d 190 at 194, 97 P.2d 692 at 694 (1940).

knowledge on which another may act is not sufficient to constitute false pretenses,[22] but this may be qualified by the rule that the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication, is a false representation.[23] If the "exaggeration of the architect's costs" is viewed from the standpoint of considering it a failure on the part of the defendant to disclose that part of those costs included kick-backs to him these principles would bear examination and possible application.

From the interpretation of 'architect's fees' in this case there may, in the future, be some dangers involved in the use of such terms in business dealings. Situations in which the contractor, or businessman in a similar position, has kick-back arrangements could be productive of criminal prosecution where the customer discovers the arrangements and, unsatisfied with the transaction as a whole, decides to be vindictive.[24]

Obtaining Money by False Pretenses—Check Obtained in One County and Deposited in Another—Venue. In *State v. Phillips*,[25] the defendant deposited in his bank in Kittitas county a check obtained by false pretenses in Yakima county. He was charged with obtaining 'a specific amount of money' by false pretenses. Tried and convicted in Kittitas county, he argued lack of jurisdiction on the ground that the gravamen of the offense was the obtaining of the check and that venue would properly lie only in Yakima county. The court held that the crime was complete when the defendant deposited the check in his bank. Following the general rule that the crime of obtaining money or property by false pretenses is completed when the money or property is obtained,[26] the court concluded that he had *obtained the money* when he received what the court called an 'immediate credit.' The court stated that under the statute covering crimes committed partly in one county and partly in another county[27] this case could be tried in either county.

[22] McCorkle v. State, 170 Ark. 105, 278 S.W. 965 (1926); Stumpff v. People, 51 Colo. 202, 117 Pac. 134 (1911). (non-disclosure of mortgages on property sold).

[23] People v. Mace, 71 Cal. App. 10, 234 Pac. 841 (1925); People v. Etzler, 292 Mich. 489, 290 N.W. 879 (1940); Montez v. People, 110 Colo. 20, 132 P.2d 970 (1943). The court in the last case referred to a "positive course of affirmative falsity."

[24] In the instant case the victims prosecuted after they discovered they could not obtain the loans to go ahead with construction.

[25] 42 Wn.2d 137, 253 P.2d 919 (1953).

[26] 22 C.J.S., Crim. Law, § 185 (1940).

[27] RCW 10.25.020.

The cases involving a check obtained by false pretenses fall generally into two categories: those in which the defendant *cashes* the check and those in which he *deposits* the check to his account. In the instant case the court followed a North Dakota case,[28] and the cases cited therein, in which the defendant *cashed* the check. Notwithstanding the question of when the check is actually paid so far as the drawer is concerned[29] these cases reasoned that in *cashing* the check the defendant *obtained the money*. Recognizing the general rule,[30] the courts in these cases held that venue would lie in the county in which the check was cashed.

In cases where the defendant *deposits* the check to his account as in instant case, it has been held that venue lies where the check is *charged to the account of the drawer*.[31] The cases in this category follow the reasoning that when the drawer's account is charged for the check the payee (defendant in the cases) obtains the money unconditionally at that time and place. Until the drawer's account is charged he may prevent the payee from receiving unconditional credit by stopping payment, unless certification is a factor.[32] However, in Washington it is still possible to argue that venue will lie in the county in which the defendant-depositor's bank is located. Under the Bank Collection Code the depository bank is ordinarily the depositor's agent for collection.[33] Acting in such a capacity, the bank, in effect, 'transports' the proceeds of the item for collection from the drawee bank to the payee's account in the depository bank. Within the general principles of agency the *payee* has 'transported' the proceeds. When stolen property is taken from one county into another county jurisdiction is in either county and venue will so lie.[34] Thus, on the facts of the instant case venue will lie in the county where the defendant deposited the check but not necessarily for the reasons stated in the cases cited by the court. In *State v. Moore*[35] the court used much the same reasoning as suggested here. In that case the defendant deposited a check drawn on a Montana

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[28] State v. Hastings, 77 N. D. 146, 41 N. W. 2d 305 (1950).
[29] BRITTON, BILLS AND NOTES § 262 (1943).
[30] Note 26, *supra*.
[31] State v. Mandell, 353 Mo. 502, 183 S.W. 2d 59 (1949); *accord,* Raymond v. State, 116 Tex. Cr. 595, 33 S. W. 2d 192 (1930).
[32] BRITTON, *op. cit. supra* note 5, § 181.
[33] RCW 30.52.020.
[34] RCW 10.25.040. It should be noted that the constitutionality of this statute has been questioned where applied to an indictment for burglary, although this point has not been raised as to its application in the case of larceny. State v. Carroll, 55 Wash. 588, 104 Pac. 814 (1909).
[35] 189 Wash. 680, 66 P.2d 836 (1937).

bank in a Washington bank and the statute covering *inter*-state transporting of stolen property was applied.[36]

While the court's conclusion in the instant case is correct the application of the cases cited by the court may be open to question.

Automobile Theft—Punishment. In *In re Macduff*[37] the petitioner pleaded guilty to a charge of taking a motor vehicle without permission of the owner, in violation of RCW 9.54.020. The sentence was imprisonment for a period of not more than 20 years. The statute defines the crime, makes it a felony and provides *no penalty*. The petitioner claimed his term of confinement could not legally exceed 10 years as provided by RCW 9.92.010.[38] The court held the sentence imposed to be correct under RCW 9.95.010.[39] The former applies to "every person convicted of a felony *for which no punishment* is specially prescribed ." The latter applies "if the law *does not provide a maximum term* for the crime. . . ."

In *State v. Mulcare*[40] the defendant was convicted of attempted robbery for which a penalty is fixed with relation to the penalty for robbery.[41] The robbery statute provides no maximum.[42] In *State v. Seabrands*[43] the defendant pleaded guilty to attempted rape. The applicable statutes provide for penalty but no maximum.[44] In *State v. McVeigh*[45] the defendant was convicted of attempted arson. Here again the statutes provide for penalty but no maximum.[46] In each of these cases RCW 9.95.010 was applied rather than RCW 9.92.010. These three cases were cited to support the court's position in the instant case. The statute under which the petitioner in the instant case was prosecuted provides *no penalty*,[47] either minimum or maximum.

If RCW 9.95.010 does not render 9.92.010 inapplicable it would

[36] RCW 9.54.010.
[37] 42 Wn.2d 488, 256 P.2d 293 (1953).
[38] "Every person convicted of a felony for which no punishment is specially prescribed by a statutory provision in force at the time of conviction and sentence, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars."
[39] " If the law does not provide a maximum term for the crime of which such person ('a person convicted of any felony, except treason, murder in the first degree, or carnal knowledge of a child under ten years. . . ') was convicted the court shall fix such maximum term at not less than twenty years."
[40] 189 Wash. 625, 66 P.2d 360 (1937).
[41] RCW 9.01.070. Attempts, how punished.
[42] RCW 9.75.010.
[43] 191 Wash. 472, 71 P.2d 393 (1937).
[44] RCW 9.79.010. Rape defined. Note 41, *supra*.
[45] 35 Wn.2d 493, 214 P.2d 165 (1950).
[46] RCW 9.09.010. Arson—First degree. Note 41, *supra*.
[47] RCW 9.54.020.

appear that the contention of the petitioner has some merit. The opinion of the Attorney General in 1946 supports the petitioner's position.[48]

SAMUEL F. PEARCE

Criminal Law—Sodomy—Penetration Whether penetration is necessary to constitute the crime of sodomy was decided for the first time in Washington in *State v. Olsen,* 42 Wn.2d 733, 258 P.2d 810 (1953). With proof of penetration lacking, the court reversed the conviction. This is the general rule. The court pointed out that the defendant could have been charged under the indecent liberties statute (RCW 9.79.080), and the proof would have been sufficient.

Agreement with Wife as Defense to Crime of Non-Support. In *State v. Prince,* 42 Wn.2d 314, 254 P.2d 731 (1953), the defendant was charged with the crime of non-support under RCW 26.20.030. As a complete defense he offered to prove an agreement with his wife that he would not be expected to support the children. It was held that to support this defense, the defendant must have proved that his wife agreed to support the children, that she had sufficient means for that purpose, and that he relied upon that agreement in good faith.

Bribery—Application of Statute—Interpretation of "Upon Agreement and Understanding." In *State v. Emmanuel,* 42 Wn.2d 1, 252 P.2d 386 (1953), the defendant secretary of the state land board was convicted under RCW 9.18.020 of soliciting a bribe. Since the statute providing for his office specifies no official duties, the defendant contended there were, in the words of the bribery statute, no "matters then pending," so he could not and did not influence the sale of timber lands within the meaning of the statute. He further argued that there was no testimony of an "agreement or understanding" as required by the bribery statute; and thus, the evidence was insufficient to support the verdict. *Held,* First, the bribery statute does not limit the crime to instances in which official duties are prescribed by statute; it is sufficient if the state officer, agent or employee is given official duties by direction of his superiors or by customary practice. Second, the provision of the bribery statute that the crime of asking a bribe, "upon an agreement or understanding" that the official's acts will be influenced thereby, does not require an understanding in the sense of an agreement with the person approached, but merely an understanding on the part of the bribe seeker himself that his official action shall be influenced. Evidence of such understanding and its communication to the person approached is sufficient within the meaning of the statute.

DAMAGES

Award of Nominal Damages after Finding of Substantial Damage —Duty of Trial Judge. In *Gilmartin v. Stevens Investment Co.*[1] the plaintiffs had purchased from defendant a tract of land under contract of sale, and had built a house on the property. Defendant agreed by the contract to furnish an adequate water supply to the land, which

[48] Surveying the statutes in question in the instant case the Attorney General said, ". . . it is the opinion of this office that a person convicted of the crime of taking a motor vehicle without permission may not be sentenced to be punished by confinement . . . for a maximum term in excess of ten years." 46 OAG 774 (1946).

[1] 143 Wash. Dec. 267, 261 P.2d 73 (1953).