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Constitutional Law

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one in the instant case, it would appear that suit may be maintained by the domiciliary administrator. This could be done without first acquiring ancillary letters of administration in a Washington Court. To state, however, that the dicta of the court in the present case represents the Washington rule would be premature.

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CONSTITUTIONAL LAW

Construction of Statutes—Denial of Equal Protection. *In re Olsen v. Delmore*[1] involved an application for habeas corpus based on alleged illegal confinement in the state penitentiary. The petitioner had been convicted of a violation of the Washington Firearms Act.[2] In allowing the writ, the Supreme Court of Washington held the penalty provision of that Act to be unconstitutional. That provision, RCW 9.41.160, provides:

> Any violation of any [preceding provisions of this chapter] is punishable by a fine of not more than five hundred dollars or imprisonment in the county jail for not more than one year or both, or by imprisonment in the penitentiary for not less than one year nor more than ten years.

The five-to-four decision[3] is based on the conclusion that the language of the penalty provision gives "... a pretty clear indication that the legislature thereby intended to vest in prosecuting officials the discretion to charge as for either a gross misdemeanor or a felony."[4] It is apparently within constitutional limits to vest discretion in the trial judge to fix sentence.[5] By statute in Washington both the judge and the Board of Prison Terms and Paroles are granted discretion in this area.[6] It may be assumed, as the majority opinion did, that the

[1] 48 Wn.2d 545, 295 P.2d 324 (1956).

[2] RCW 9.41.010 to 9.41.160. This act is modeled after the work by the National Conference of Commissioners on Uniform State Laws. See 1930 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, 563-567. Eleven other jurisdictions have adopted this form, however only Washington made no change in the penalty section as suggested by the National Conference.

[3] Majority by Chief Justice Hamley with the concurrance of Judges Mallery, Schwellenbach, Donworth and Rosellini. Dissent by Judge Hill with whom Judges Finley, Weaver and Ott concurred.

[4] 48 Wn.2d at 548, 295 P.2d at 326.

[5] See *Ex parte* Rosencrantz, 297 Pac. 15, 211 Cal. 749 (1931) which justifies a placing of certain discretion in the trial judge as follows: "Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute."

[6] As to felonies the court has the power to fix the maximum term to be served under RCW 9.95.010 and the Board of Prison Terms and Paroles has the power to fix the actual duration of confinement under RCW 9.95.040.

same discretion, if placed in prosecuting officials or a grand jury, would violate both state[7] and federal[8] concepts of equal protection of the laws.[9] Unless RCW 9.41.160 is construed as placing discretion in the prosecuting officials, the reasoning of the majority fails.

A close reading of the statute does not require this construction. Once it is agreed that there is another reasonable interpretation to be accorded to the statute, all orthodox rules of construction require that the statute in question be read in the light that will sustain its constitutionality.[10]

The majority opinion in the *Olsen* case relies in part on a recent Oregon decision, *State v. Pirkey*,[11] as to the unconstitutionality of a statute allowing wide discretion in prosecuting officials.[12] The statute involved in that case set out the general requisites of a crime as to the use of n.s.f. checks with an intent to defraud and states that such crime,

> ... may be proceeded against either as for a misdemeanor or as for a felony, in the discretion of the grand jury or the magistrate to whom complaint is made, or before whom the action is tried....

This statute was held unconstitutional under both the U.S. and Oregon constitutions. The Washington Court, referring to the *Pirkey* case, noted that "... the statute there in question more clearly and explicitly lodged such discretion with prosecuting officials than does the statute before us in the instant case." Actually the Oregon statute states definitely where the discretion is placed. A comparison of the two provisions makes it clear that the same cannot be said of the Washington statute.

The Washington statute can be as readily interpreted as not vesting discretion in prosecuting officials. The accepted rule is that classification of a crime as either a felony or a misdemeanor depends on the maximum penalty which may be inflicted for commission of such an

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[7] WASH. CONST. art. I, § 12.

[8] U.S. CONST., amend. XIV.

[9] It seems, however, that the more proper constitutional objection to the vesting of such discretion in prosecuting officials would be based on procedural due process or a non-compliance with popular notions as to separation of powers. For a discussion of the constitutional aspects involved in the placing of this discretion see the dissent to Berra v. United States, 351 U.S. 131 (1956).

[10] See State *ex rel.* Campbell v. Case, 182 Wash. 334, 47 P.2d 24 (1935). This case upheld the constitutionality of a particular statute, the court relying on the normal canon of interpretation states as follows: "It is a well settled rule that, where a statute is open to two constructions, one of which will render it constitutional and the other unconstitutional, the former construction, and not the latter, is to be adopted." This rule was apparently recognized in Department of Labor and Industries v. Cook, 44 Wn.2d 671, 269 P.2d 962 (1954).

[11] 203 Or. 697, 281 P.2d 698 (1955).

[12] Oregon Laws 1949, c. 129, § 1.

act. Under RCW 9.01.020 a crime that may be punished by imprisonment in the state penitentiary is classified as a felony.[13] Thus the statute may be viewed as defining a felony. The only discretion that it allows is in giving wide latitude to the authorities who prescribe sentence.

This interpretation of RCW 9.41.160 is further substantiated by a comparison with the many other penalty sections in the Washington code which provide an alternative penitentiary or county jail sentence.[14] Apparently none of these statutes have been held to deny equal protection although it is difficult to understand how they demonstrate anything less than the same "pretty clear indication" of placing discretion in the prosecutor that the court found in RCW 9.41.160.[15]

The prospect of an avalanche of applications for habeas corpus sought by persons convicted under statutes similar to RCW 9.41.160 has apparently been foreclosed by the court's statement that such statutes are "substantially different" from the one held to be uncon-

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[13] The full text of RCW 9.01.020 reads as follows: "A crime is an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine or other penal discipline. Every crime which may be punished by death or by imprisonment in the state penitentiary is a felony. Every crime punishable by a fine of not more than two hundred and fifty dollars, or by imprisonment in the county jail for not more than ninety days, is a misdemeanor. Every other crime is a gross misdemeanor." Note also the possible effect of the criminal law doctrine of merger as explained in 22 Corpus Juris Secundum, p. 61: "Merger of Offenses. Where the same criminal act constitutes both a felony and a misdemeanor, there is, in the absence of statutory change or abrogation of the rule, a merger of the two offenses, the misdemeanor being merged in the felony and the latter only being punishable."

[14] See RCW 9.72.030 (Second degree perjury), 9.02.010 (Abortion), 9.48.060 (Manslaughter), 9.16.010 (Removing lawful brands), 9.16.020 (Imitating lawful brands), 9.33.050 (Blackmail), 9.37.020 (Obtaining signature by false pretenses), 9.40.010 (Obstruction of extinguishment of fire), 9.79.080 (Indecent liberties, exposure, etc.), 9.82.030 (Misprision of treason), 46.56.040 (Negligent homicide). The manslaughter statute is typical although there may be variation in the length of the confinement in the penitentiary or a lack of a provision for a fine. The manslaughter statute, RCW 9.48.060, states that those found guilty of manslaughter are "... punishable by imprisonment in the state penitentiary for not more than twenty years, or by imprisonment in the county jail for not more than one year, or by fine of not more than one thousand dollars, or by both fine and imprisonment."

[15] The majority attempts to make a distinction between RCW 9.41.160 and the alternative sentence statutes. See 48 Wn.2d at 548, 295 P.2d at 326. It is stated that in RCW 9.41.160 "... the provisions for a fine or county jail sentence are linked together with the words 'or both,' after which, and separated by another conjunctive 'or,' the provision for penitentiary punishment is set out." This wording is said to render RCW 9.41.160 "substantially different" from these other statutes. The reasoning process appears to be strained at this point. Perhaps a better argument for distinction could be made on the dissimilarity between RCW 9.41.160 and the other statutes by the inclusion in RCW 9.41.160 of both a maximum and a minimum limit on the possible penitentiary sentence. This could be viewed as evidence of an intent by the legislature to define two distinct crimes, one a felony (with punishment limits ranging from one year to ten years in the penitentiary) and the other a misdemeanor (with limits ranging from no confinement up to one year in the county jail). The reasoning here also appears faulty yet more logical than the distinction attempted by the court.

stitutional.[16] Awkward as the distinction might be, it nevertheless indicates the court's predisposition as to those who might seek habeas corpus on similar grounds.

The result of the holding in the *Olsen* case has been to leave Washington with a firearms statute on the books which lacks an enforcing proviso. In *In re Kahler v. Squire*,[17] the Washington court granted habeas corpus to the petitioner who was being restrained under a now void judgment and sentence based on the unconstitutional statute. An attempt was made to remedy this situation at the last session of the Washington State Legislature with the introduction of Proposed Senate Bill 169.[18] This bill was referred to the Judiciary Committee and, by resolution March 14, 1957, was "indefinitely postponed."[19]

It appears that the Washington court with the *Olsen* decision has departed from the normal rule favoring a constitutional interpretation when such an interpretation is readily available.

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CONTRACTS

Mutual Assent—Formation of Construction Subcontracts—Use of Subcontractor's Bid as Acceptance. In the recent case of *Milone & Tucci, Inc.* v. *Bona Fide Builders, Inc.*[1] the court held that the use of a subcontractor's bid by a general contractor in preparing his bid for the prime contract, did not constitute an acceptance of the subcontractor's bid.

The defendant and several other general contractors had been invited to bid competitively for the work of constructing four government buildings. General contractors by trade practice compute their bids according to offers which they receive from various subcontractors. The plaintiff, a subcontractor, telephoned the defendant and other general contractors and inquired whether they desired his bid on that portion

[16] 48 Wn.2d at 548, 295 P.2d at 326.

[17] 149 Wash. Dec. 194, 299 P.2d 570 (1956).

[18] That bill was designed to amend several sections of the Firearms Act. Section 6 of that bill, which was to delete the unconstitutional RCW 9.41.160, read as follows: "Any person convicted of committing a crime of violence when armed with a pistol, or who, having been convicted of a crime of violence, shall thereafter violate any of the provisions of RCW 9.41.010 through 9.41.160, shall be guilty of a felony and may be punished therefor by imprisonment in the penitentiary for not less than one year nor more than ten years. All other violations of the provisions of RCW 9.41.010 through 9.41.160 shall be misdemeanors and punishable as such under the laws of the state of Washington."

[19] See Legislative Record for the Thirty-fifth Session of the Washington Legislature (January 14-March 14) No. 8.

[1] 149 Wash. Dec. 354, 301 P.2d 759 (1956).