Washington Law Review

Volume 32
Number 2 *Washington Case Law - 1956*

7-1-1957

Criminal Law

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apparent conflict between the *Finstad* and *Allis-Chalmers* cases was ignored. In the latter case the facts were similar to the *Smith* case, and the agreement provided that upon default the vendor "... may pursue all legal remedies to enforce payment hereunder, but if unable to collect may thereafter repossess the property." The agreement also provided that title was to remain in the vendor until full payment had been made. The court in the *Allis-Chalmers* case stated that a vendor had merely an election of remedies and could not provide himself with both. The court then held that the provision which allowed the vendor to repossess the property if he should be unable to collect must be stricken from the agreement. The apparent conflict between the *Allis-Chalmers* and *Finstad* cases lies in the court's approach to the interpretation problem. In the *Allis-Chalmers* case the vendor, by stating cumulative remedies, attempted to stipulate a remedy which was not available under a conditional sales contract. However, in the *Finstad* case the court interpreted the remedies clause as expressing the intent of the parties to pass title to the vendee.

The result of *Smith v. Downs* appears to be another implied overruling of the *Allis-Chalmers* case. The *Finstad* case appears to be immune from attack.

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CRIMINAL LAW

Appeal—Preservation of Grounds—Misconduct of Prosecuting Attorney. In *State v. Case*[1] defendant appealed from a conviction of carnal knowledge, assigning as error a claim that he had been denied a fair trial because of improper and prejudicial argument by the prosecuting attorney. No objections, motions to strike, or instructions to disregard the remarks of the state's counsel had been made during the trial, nor did the defendant move for a new trial. On appeal the supreme court found that the prosecuting attorney had gone beyond the bounds of proper argument by asserting his personal belief in the guilt of the accused, by referring to the accused's "herd" of witnesses, and by making further prejudicial remarks in his closing argument to the jury. The court, on its own motion, granted a new trial, notwithstanding defendant's failure to preserve the record.

[1] 149 Wash. Dec. 71, 298 P.2d 500 (1956). This was a 7-2 decision. The dissenting judges, Ott and Mallery, disagreed with the majority's finding that the prosecuting attorney had made improper and prejudicial argument. They also felt that, even if there had been improper argument, defendant's failure to raise the question at the trial level precluded him from raising the question on appeal.

The court emphasized that the right to a fair trial is guaranteed by the state constitution,[2] and that the prosecuting attorney, a quasi-judicial officer, must so conduct himself as not to infringe upon that right. While recognizing that misconduct in the form of improper argument is not ordinarily grounds for appeal, unless called to the attention of the trial judge for correction or ruling, the court stated that this rule is not to be followed in criminal cases where the misconduct of the prosecuting attorney has been "so flagrant that no instruction would cure it."[3] If the remarks are so prejudicial that they cannot be cured by instruction, reasoned the court, there is, in effect, a mistrial. If defendant's counsel and the trial judge fail to take proper action to protect the right of the accused to a fair trial, then the appellate court must, in the interests of justice, take it upon itself to grant a new trial.

A great number of cases have stated that the supreme court has the power to pass on an allegation of flagrant misconduct of a prosecuting attorney where the defendant has failed to object or request that the trial judge give instructions to the jury to disregard the improper remarks.[4] In none of these cases, however, did the court expressly consider the need for raising the question on a motion for new trial. In holding that a failure to raise the question by motion for new trial does not waive the right to raise the matter on appeal, the court has repudiated strong language in *State v. Davis*,[5] a recent case involving somewhat similar facts. In that case the defendant claimed upon appeal, and without objection during trial or by motion for new trial, that the trial judge had commented on the evidence by his leading questions of the defendant.[6] In the *Davis* case the court said that although the defendant was excused from making objections, motions to strike, and requests for instructions to disregard the trial judge's remarks, he was not excused from raising the question on a motion for a new trial.[7] Said the court,

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[2] While the right to a fair trail is not expressly mentioned in the constitution, the section which guarantees a speedy public trial by an impartial jury, WASH. CONST. art. I, § 22, is held to a guarantee a fair trial. State v. Case, *supra* note 1.

[3] 149 Wash. Dec. at 78, 298 P.2d at 505.

[4] State v. Meyercamp, 82 Wash. 607, 144 Pac. 942 (1914), was the first Washington case to announce this principle. Later cases are collected in State v. Case, 149 Wash. Dec. 71, 298 P.2d 500 (1956).

[5] 41 Wn.2d 535, 250 P.2d 548 (1952).

[6] The cases present somewhat similar facts, in that both involve remarks by an officer of the court which allegedly violate a constitutional right of the accused. As to constitutional protection of right to fair trial, see note 2 *supra*; as to the provision that trial judge shall not comment upon the evidence, see WASH. CONST. art. IV, § 16.

[7] The court's reasoning in waiving the requirement of objection during the trial was that objection to the trial judge's conduct might prejudice counsel in the eyes of the jury.

"This is but a corollary to the rule that questions not raised in any manner before the lower court will not be considered on appeal."[8]

The court in *State v. Case* distinguished the *Davis* case case by pointing out that in that case there was no allegation that the trial judge's comments were so prejudicial that they could not have been cured by an instruction.

A reading of statutory provisions and court rules on appellate procedure would indicate that the supreme court's power of review is restricted to correcting errors of the trial court in its disposition of questions properly laid before it.[9] There exists however, in addition to cases involving flagrant misconduct of a prosecuting attorney, a group of criminal cases in which the supreme court has considered claims of error upon grounds not adequately preserved in the lower court. In *State v. Marsh*[10] the defendant was allowed to show on appeal that he had not been granted a public trial, as guaranteed by the State Constitution. *State v. Crotts*[11] was the first of several cases[12] in which the claim of error was that the trial judge had made adverse comments on the evidence, in violation of the State Constitution. In *Friedrich v. Territory*,[13] the error claimed on appeal was that the defendant had not been given a fair and impartial trial because the trial judge's jury charge was an argument on the facts. In all of these cases, after considering defendant's claim of error on the merits notwithstanding his failure to preserve the record, the supreme court granted new trials.

Appellate courts in other jurisdictions have likewise declared their power to consider, in criminal cases, error not properly preserved or

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[8] 41 Wn.2d at 537, 250 P.2d at 549.

[9] See dissenting opinion by Ott, J., in State v. Case, 149 Wash. Dec. at 81, 298 P.2d at 506; R.C.W. 2.04.180-200; Rule on Appeal 1, 34A Wn.2d 15; Rule on Appeal 14, 34A Wn.2d 20; Rule on Appeal 17, 34A Wn.2d 24.

[10] 126 Wash. 142, 217 Pac. 705 (1923).

[11] 22 Wash. 245, 60 Pac. 403 (1900).

[12] State v. Jackson, 83 Wash. 514, 145 Pac. 470 (1915); State v. Warwick, 105 Wash. 634, 178 Pac. 977 (1919). It must be pointed out that State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952), also involved comments on the evidence by the trial judge. Prior to the *Davis* case the court emphasized that the invasion of a constitutional right and improper conduct by a trial judge gave sufficient justification for considering the claimed error on appeal. In none of those earlier cases did the court stipulate that the question must have been raised in *some* manner in the lower court. The *Davis* case seemingly limits the principle developed in the earlier cases to waiver of objection during the trial, stressing a different line of reasoning. See note 7 *supra*. However, the court in State v. Case has chipped away at this limitation by indicating that, even on the *Davis* facts, if there is a claim that the trial judge's comments were so prejudicial that right to a fair trial has been impaired, the matter will be considered on appeal despite failure to raise the question at the trial level.

[13] 2 Wash. 358, 26 Pac. 976 (1891).

not raised at all in the lower court in these same situations[14] and in cases involving double jeopardy,[15] incompetency of defendant's counsel,[16] improper admission of evidence,[17] and failure to request an instruction to acquit.[18]

Common to all of these cases is the element that the error assigned, if substantial, would amount to a denial of the fundamental right of the accused to a fair trial. If the appellate court is to rule that the defendant cannot raise these questions on appeal merely because his counsel has not taken the proper procedural steps to preserve error, then the appellate court is denying to the accused his full measure of rights. Some would say that refusal to allow the defendant to raise these questions is the proper result; that the defendant has not been denied these rights at all, but has waived them by not complying with the procedural rules.[19] While such an answer is acceptable when applied to civil actions,[20] it is not convincing in criminal cases, where the interests at stake are the freedom or, in capital cases,[21] the life of the accused. To uphold a conviction where the defendant has not had a fair trial because of flagrantly improper remarks of the prosecuting attorney, or where the defendant's rights have been prejudiced by counsel's failure to make timely objections or motions, would be to place a higher premium on compliance with procedural rules than is placed on reaching a just result.

The court's holding in *State v. Case,* when it is remembered that the court had before it an exceptional case, is consistent with the very

[14] Misconduct of prosecuting attorney: State v. Washelesky, 81 Conn. 22, 70 Atl. 62 (1908); City of Prescott v. Sumid, 30 Ariz. 347, 247 Pac. 122 (1926); People v. Simon, 80 Cal. App. 675, 252 Pac. 758 (1927); People v. Ford, 89 Cal. App. 2d 467, 200 P.2d 867 (1949). These cases apply the same test as in State v. Case, *i.e.,* whether the misconduct of the prosecuting attorney is so flagrant and prejudicial that no instruction or admonition could cure it.

Misconduct of trial judge: People v. Caldwell, 55 Cal. App. 280, 203 Pac. 440 (1921). Right to public trial: State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906).

[15] Belter v. State, 178 Wis. 57, 189 N.W. 270 (1922).

[16] Lloyd v. State, 15 Okla. Crim. 130, 175 Pac. 374 (1918). It might be noted that the attorneys prosecuting the appeal in State v. Case, supra, did not represent the defendant in the trial of the case. Numerous references were made, in the defendant's appellate brief, to the trial counsel's inexperience and to the prosecuting attorney's taking advantage of this lack of experience. Pages 20, 33, 34, Brief of Appellant.

[17] Reppin v. People, 95 Colo. 192, 34 P.2d 71 (1934).

[18] State v. Garcia, 19 N.Mex. 414, 143 Pac. 1012 (1912).

[19] See Fisher v. State, 108 Tex. Crim. 623, 2 S.W.2d 249 (1927).

[20] Among the reasons commonly given are: that such a rule is necessary to the orderly and prompt administration of justice; that the error might have been cured if objection had been taken; that any other rule would give the appellant a chance to conceal errors at the trial, and then bring them up on review in order to prolong litigation. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised And Preserved;* 7 WIS. L. REV. 91 (1932).

[21] See State v. Bailey, 147 Wash. 411, 266 Pac. 163 (1928).

evident proposition that

> "the purpose of judicial systems is to administer justice. Standards [of procedure] are a means to an end; not an end in themselves."[22]

If an appellate court is strongly convinced that the defendant in a criminal action was not properly convicted, then it should grant a new trial despite procedural failures made by the defendant.

STANLEY M. JOHANSON

Habeas Corpus—Attack of Illegal Sentence Where Petitioner Does Not Seek Release From Confinement. In *In re Nahl v. Delmore,* 149 Wash. Dec. 313, 301 P.2d 161 (1956), petitioner had pleaded guilty to and was convicted on a charge of second degree assault. He was subsequently transferred from the state penitentiary to Eastern State Hospital for the insane. An application for a writ of habeas corpus was filed on behalf of the petitioner, the petition alleging that petitioner's plea of guilty was the result of coercion and duress, and that petitioner's constitutional rights had thereby been violated. *Held,* petition transmitted to a superior court for a determination of of the facts, as to the allegations of coercion and duress. The fact that petitioner was confined in a mental hospital and that a granting of the writ would not result in a release from confinement did not make academic the question raised by the petition. Petitioner was entitled to a hearing in order to determine the issues of fact raised. If his allegations are found to be true, then the unlawful conviction and sentence shall be set aside. Under RCW 7.36.130(1), as amended in 1947, if the petitioner alleges a violation of rights guaranteed by the State or Federal Constitution, he is entitled to have his petition heard even though the result sought from the hearing is not a release from confinement.

The court cited and followed *In re Palmer v. Cranor,* 45 Wn.2d 278, 273 P.2d 985 (1954), noted in 30 *Wash. L. Rev.* 123 (1955). In the *Palmer* case the petitioner, lawfully incarcerated under one sentence, challenged the validity of a second sentence on grounds of duress, alleging a violation of constitutional rights. The court ordered a hearing on the issues of fact raised.

Earlier in 1956 the same judges who decided the *Nahl* case ruled, in *In re Ashley v. Delmore,* 149 Wash. Dec. 1, 297 P.2d 958 (1956), that a writ of habeas corpus would *not* issue to test the validity of a sentence at a time when the petitioner was lawfully incarcerated under an earlier and undisputed sentence. Petitioner had been convicted of forgery and was sentenced to a term of twenty years. He escaped from jail, was subsequently recaptured, and was sentenced to an additional term of twenty years. Petitioner applied for a writ of habeas corpus, challenging the validity of the twenty-year sentence for escaping jail. Petitioner's application was based on an interpretation of the sentencing statutes which would make ten years the maximum allowable sentence for violation of the statute related to escaping jail. The court, in denying the writ, said in effect that the question raised by petitioner was academic at that time inasmuch as he was confined under a valid and undisputed sentence.

On the surface, the court's holding in the *Ashley* case seems in conflict with the *Nahl* case and the *Palmer* case. In the *Ashley* case the court stated that the petitioner's lawful confinement precluded any inquiry into the questions raised by his application for the writ; in the other two cases the court ordered a hearing to settle the questions

[22] Campbell, *Extent To Which Courts of Review Will Consider Questions Not Properly Raised And Preserved,* 8 WIS. L. REV. 172 (1933).

raised *despite* petitioner's undisputed confinement. The conclusions reached are justifiable, however. First, and probably most important, there was no attempt made in the *Ashley* case to bring the petition within the liberalizing framework of the 1947 amendment of the habeas corpus statute. Petitioner did not allege a violation of his constitutional rights. Indeed, his challenge was not on constitutional grounds at all, but rather was on a claim of misapplication of sentencing statutes. Second, the petitioner sought, in the *Ashley* case, the determination of an issue of law; in the *Nahl* and *Palmer* cases the petitioner raised an issue of fact. Where the question raised is one of fact, the dangers of postponement until the end of the valid sentence are that "witnesses move away; evidence disappears; memories grow dim." *In re Palmer v. Cranor*, 45 Wn.2d at 285, 273 P.2d at 990. No such problems necessitate an immediate hearing where the question raises a point of law.

Finally, it must be pointed out that although the supreme court turned down the application for a writ in the *Ashley* case the petitioner did not go away empty-handed. In an interesting "asides" remark to the attorney general, the court concluded its opinion by stating that "The attorney general, having conceded that there may be some merit to the petitioner's contention that his sentence... should be ten instead of twenty years, will, we are sure, co-operate with him in working out a *modus operandi* for a speedy determination of that issue." 149 Wash. Dec. at 5, 297 P.2d at 960.

The cases of *In re Nahl v. Delmore* and *In re Ashley v. Delmore*, decided in 1956, serve to illustrate the liberal attitude that our supreme court holds toward the purpose of the writ of habeas corpus in Washington.

Exclusive Jurisdiction of Federal Courts Over Crimes Committed By Indians. In *In re Andy*, 149 Wash. Dec. 437, 302 P.2d 963 (1956), the petitioner had been convicted of burglary. The crime was committed on land which was within the boundaries of the Yakima Indian reservation but which had been patented in fee to a non-Indian. Petitioner, a quarter-blood Indian, applied for a writ of habeas corpus, alleging that the superior court in which he was tried had no jurisdiction. *Held*, petition granted. The federal government has exclusive jurisdiction over an unemancipated Indian who is alleged to have committed murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, *burglary*, robbery and larceny within "Indian country." Indian country includes any land within the boundaries of an Indian reservation. Ownership of the land by a non-Indian does not affect the federal government's exclusive jurisdiction. 18 U.S.C. §§ 1151-1153, 3242 (1952).

DOMESTIC RELATIONS

The Right of Contribution Between Parents for the Support of Their Minor Children. In *Scott v. Holcomb*, 149 Wash. Dec. 377, 301 P.2d 1068 (1956), the Washington Court, on the basis of RCW 26.26.010, held that a father who has cared for four of five minor children of the parties in the absence of any provision in the divorce decree, is entitled to a set-off in an action brought by the mother on a judgment for contribution for the support of the fifth minor child of the parties.

The father and mother, residing in New York, separated in 1934 with the father leaving the home of the parties, taking with him the four oldest children and a woman who later became his wife. The four children resided with the father and were supported by him until they reached majority. In 1940 the mother obtained a divorce on the ground that her husband had absented himself for more than five years and was thought to be dead. In 1949 the father returned to New York to attend the funeral of his son and was served to defend an action brought by his former wife to recover contribution for the support of the child who had remained with the mother.