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Criminal Law

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CRIMINAL LAW

Criminal Law—Discovery in Criminal Cases. In *State v. Thompson*,[1] the Washington court allied itself with the liberal view on pre-trial discovery in criminal cases. For the first time, a defendant was permitted pre-trial examination of material in the prosecutor's possession.

Defendant was an eighteen-year-old Canadian accused of first degree murder. Before trial, court-appointed counsel moved for the order of disclosure, stating that "inspection of the documents was necessary to the proper preparation for trial of the cause and essential to cross-examination, and for possible impeachment purposes."[2] Specifically, the documents were: (1) statements made by defendant while under arrest and without counsel, (2) autopsy reports on victim, and (3) FBI reports on the examination of clothing, personal effects, and blood samples of defendant and victim. The trial court granted discovery of the requested documents, and the state sought a writ of prohibition. The Washington Supreme Court upheld the trial court's order. In affirming this order, the Washington court took a stride forward, recognizing the need of a defendant in certain cases to have certain information made available to him.

The Washington court did not change its rule by the *Thompson* decision. Since 1895, the rule in Washington has been that discovery in criminal cases is at the discretion of the trial court.[3] What distinguishes *Thompson* is that it is the first case in which the Washington Supreme Court has upheld a lower court's order permitting discovery before the trial in a criminal case.

Why did the supreme court allow discovery in the *Thompson* case? Unfortunately, the majority opinion did not present the conflicting arguments traditionally surrounding the problem of criminal discovery, nor did it explain its decision to accept a liberal rather than a strict view. Rather, it accepted the reasons given by the trial court and concluded that the lower court did not abuse its discretion in granting discovery.[4]

In connection with the autopsy report, the court had to surmount

[1] 154 Wash. Dec. 91, 338 P.2d 319 (1959).

[2] *Id.* at 93, 319 P.2d at 320.

[3] State v. Payne, 10 Wash. 545, 39 Pac. 157 (1895). For other cases illustrating the same rule, see State v. Payne, 25 Wn.2d 407, 171 P.2d 227 (1946); State v. Clark, 21 Wn.2d 774, 153 P.2d 297 (1944); State v. Morrison, 175 Wash. 656, 27 P.2d 1065 (1933).

[4] Lower court held discovery was proper because defendant was a foreigner, only eighteen years old, indigent, and represented by court-appointed counsel.

an additional obstacle. By statute,[5] autopsy reports in Washington are "confidential." The court distinguished "confidential" from "privileged" and thus made the autopsy report a subject for discovery. It reached this result by also citing the statute which allows a person to obtain the result of an autopsy.[6] Furthermore, the court distinguished *State v. Petersen,*[7] which had apparently held that a defendant was not entitled to pre-trial discovery of an autopsy report, by referring to the statements therein concerning autopsy reports as dicta.

To delve into the principle involved, it is necessary to go outside Washington and examine opinions of other courts. One of the earliest informative opinions was that in *People ex rel. Lemon v. Supreme Court.*[8] There, the New York Court of Appeals held that it was proper for the intermediate court to have quashed the trial court's order granting discovery. The material sought for discovery was statements of witnesses and of a conspirator, which could not be introduced in evidence. Speaking for the court, Justice Cardozo said that the remedy sought was beyond any precedent and could not be obtained in the New York courts. He admitted that the requested statements probably would have aided defendant in planning her defense.

New Jersey perhaps presents the best cases for an analysis of the criminal discovery problem. In 1951, New Jersey seemingly adopted the standard rule that discovery in criminal cases is at the discretion of the trial court by upholding an order denying discovery.[9] Then came *State v. Tune.*[10] The trial court there granted discovery of defendant's confession and denied discovery of witnesses' statements. The order granting discovery was reversed. The court refused to accept defendant's allegation that he could not remember the contents of the confession as a sufficient reason for granting discovery. The *Tune* decision, which affirmed the refusal to grant discovery of the witnesses' statements, in effect made discovery non-existent in New Jersey. The dissenting opinion attacked the theory that advantages are already with defendant, pointing out that the state has the whole

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[5] RCW 68.08.105. "Reports and records of autopsies or post mortems shall be confidential, except to the prosecuting attorney or law enforcement agencies having jurisdiction. . . ."

[6] RCW 68.08.102. "Any party by showing just cause may petition the court to have an autopsy made and results thereof made known to said party at his own expense." The court found that these two sections read together did not make autopsy reports "privileged."

[7] 47 Wn.2d 836, 289 P.2d 1013 (1955) (trial court abused its discretion in entering order to abate proceedings until defendant given a copy of autopsy report).

[8] 245 N.Y. 24, 156 N.E. 84 (1927).

[9] State v. Cicenia, 6 N.J. 296, 78 A.2d 568 (1951), *aff'd,* 357 U.S. 504 (1958).

advantage when the defendant is subjected to intense police interrogation, the state then being able to examine the confession to obtain evidence while denying the same opportunity to the defendant.

In 1958 the New Jersey court allowed discovery of a confession.[11] Adopting the minority position of *Tune,* the court reasoned that often in criminal trials, the confession is the core of the case. Its content is important in establishing guilt. Certain facts may be omitted which should have been included, or certain prejudicial matter may be contained in it. At any rate, the defendant should have ample time, as does the state, to compare other evidence with the statements in the confession. The court specifically rejected the four reasons often given for denial of discovery. As to perjury, the court said that there was no proof that pre-trial discovery caused deliberate lies. As for inequality, while a defendant has many advantages in a trial, it is the state, with its wealth and modern detecting devices, which has the advantage in the matter of examining articles and documents. Furthermore, the court, in granting discovery, could protect against the intimidation of witnesses. Finally, the rising incidence of crime is no reason for denying an individual defendant all opportunities to clear himself.

Few state court cases have been carried to the United States Supreme Court. Those which have been reviewed by that tribunal give little relief to a defendant denied discovery in a state court. In *Leland v. Oregon,*[12] it was held that denial of discovery did not violate the due process clause. A similar result was reached in *Cicenia v. LeGay.*[13] The Supreme Court said that while it might be better practice to allow discovery, failure to do so is not a denial of a fair trial.

In other jurisdictions, under the general rule that the trial court has discretionary power to permit inspection of documents and articles in the prosecutor's possession,[14] specifically, the decisions run the gamut from no right of discovery to a very liberal discovery procedure.

The federal courts are of course governed by the federal rules. Those applicable are Rule 16 and Rule 17(c).[15] In *Bowman Dairy Co. v.*

[10] 13 N.J. 203, 98 A.2d 881 (1953).
[11] State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958).
[12] 343 U.S. 790 (1952).
[13] 357 U.S. 504 (1958).
[14] State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954); People v. Murphy, 412 Ill. 458, 107 N.E.2d 748 (1952); Commonwealth v. Galvin, 323 Mass. 205; 80 N.E.2d 825 (1948); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); State v. Lack, 118 Utah 128, 221 P.2d 852 (1950); State v. Thompson, 154 Wash. Dec. 91, 338 P.2d 319 (1959).
[15] Rule 16 enables a defendant to examine documents and other tangible objects

United States,[16] in explaining the applicability of these rules, the Supreme Court revealed the tendency of allowing discovery in the federal courts. The court stated: "However, the plain words of the Rule [17(c)] are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial."[17] The federal courts are evidently progressing toward a more liberal discovery policy; they do, however, construe the rules literally. They have held that defendants' confessions are not covered by Rule 16.[18]

Neighboring western states display the range from strict to liberal discovery policies. Oregon still follows the stricter view. In its most recent case,[19] the prosecution possessed defendant's confession and coroner's records pertaining to the death of the victim. Prior to the trial for murder, the trial court denied discovery, and the Oregon Supreme Court upheld the denial, holding that it was not an abuse of discretion to deny the motion. Mentioned as authority was *State v. Clark*,[20] a Washington case decided when Washington also maintained a strict view on discovery. Both cases were heard on appeal, with error assigned after conviction.

Idaho has few cases pertaining to this subject. Probably still good law in Idaho is a 1929 decision in which the court held that discovery applied only to civil cases.[21] Two notes of caution should be mentioned here: this is a rather old case and the discovery was sought from a third party.

On the other hand, California has presented a line of cases liberally granting discovery. Typical is *Powell v. Superior Court*,[22] where the California Supreme Court reversed a denial of discovery to a defendant in an embezzlement case. Sought by the defendant were his signed statement and a typewritten transcript of a tape recording given to the police. The court held that while the trial judge has discretion to order discovery in criminal cases, he will be abusing that discretion if

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seized from him or from others. According to the Advisory Committee's Note to Rule 16, this was a departure from previous procedures in federal criminal cases. Rule 17(c) allows a defendant to obtain by subpoena evidentiary material which was not seized or is not to be used as government evidence.

[16] 341 U.S. 214 (1951).

[17] *Id.* at 220.

[18] Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Shores v. United States, 174 F.2d 838 (8th Cir. 1949).

[19] State v. Leland, 190 Ore. 598, 227 P.2d 785 (1951), *aff'd*, 343 U.S. 790 (1952).

[20] 21 Wn.2d 774, 153 P.2d 297 (1944).

[21] Idaho Galena Mining Co. v. Judge of Dist. Court, 47 Ida. 195, 273 Pac. 952 (1929).

[22] 48 Cal.2d 704, 312 P.2d 698 (1957).

he refuses to order discovery when adequate reasons are stated. Illustrating its liberal viewpoint, the court said,

> That it was desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.[23]

Other states present various degrees of liberality.[24]

In forecasting the effect of the Thompson decision in Washington, it must be remembered that a defendant is not, by that case, entitled as of right to discovery. The case has opened the door in Washington for a trial court to order discovery. Already the case has made its presence felt. In *State v. Olsen,*[25] the court upheld a contempt order against a coroner for refusing to turn over an autopsy report to a defendant who was granted discovery by the trial court. The big test of just how far Washington has gone will come when, under facts similar to the *Thompson* case, the trial court denies discovery. Will the supreme court overrule and call the denial an abuse of discretion, or will it continue to follow the old cases where discovery was denied? The answer will be a strong indication of Washington's place on the scale of liberality in granting pre-trial discovery in criminal cases.

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DOMESTIC RELATIONS

Domestic Relations — Adoption — Necessity of Consent by Natural Parent — Constitutional Aspects. In the recent case of *In re Candell's Adoption*[1] the Washington court held that a father's consent

[23] 312 P.2d at 701, quoting from State v. Tippett, 317 Mo. 319, 296 S.W. 132, 135 (1927).

[24] For example, Oklahoma follows a carefully limited discovery rule. "Only because of the peculiar circumstances of this case are we impelled to deny the writ of prohibition herein prayed for." State *ex. rel.* Sadler v. Lackey, 319 P.2d 610, 615 (Okla. Crim. App. 1957) (order granting discovery upheld). Because a recording made to the county attorney was not evidence nor applicable to the "essence of the case," discovery of it was denied. Application of Killion, 338 P.2d 168 (Okla. Crim. App. 1959).

Louisiana presents an unusual situation. State v. Dorsey, 207 La. 928, 22 So.2d 273 (1945), held that refusal to allow defendant to inspect his confession deprived him of a fair and impartial trial, thereby making discovery of confessions a right in Louisiana. Later cases strictly limit the Dorsey rule to confessions. State v. Haddad, 221 La. 337, 59 So. 2d 411 (1951), held that a defendant is not entitled to any witnesses' statements or reports in police or district attorney's hands.

[25] 154 Wash. Dec. 275, 340 P.2d 171 (1959).

[1] 154 Wash. Dec. 279, 340 P.2d 173 (1959).