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BAIL AND PRE-TRIAL RELEASE

Few criminal defense attorneys would deny the importance of pretrial release of a defendant. Detention not only subjects a defendant to intolerable jail conditions and economic losses but it also interferes with defense preparation for trial, increases the likelihood of conviction and inflicts punishment before conviction. Despite the stakes, however, many defense attorneys remain confused about or unaware of the legal foundations for the bail decision. Attorneys who want to effectively represent their clients must become familiar with the numerous court rules, statutes and constitutional provisions. This article will refer attorneys to those rules while primarily focusing on recent changes in the law and common areas of dispute. Its intended audience is trial counsel in the state jurisdiction.

BAIL IN FELONY CASES

The scope of the right to bail in felony cases has recently been the object of considerable debate and rule-making. While the federal constitution is silent, Michigan's Constitution provided until quite recently that:

> "All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great." Const 1963, art 1, §15.

In November of 1978, Michigan's voters approved a constitutional amendment which had been placed on the ballot as Proposal K. The amendment adds a considerable number of offenses to the class for which bail is not a right. It provides that when the proof is evident or the presumption great, bail may be denied to persons presently charged with a violent felony who have had two prior violent felony convictions in the preceeding fifteen years, persons charged with first degree criminal sexual conduct, armed robbery, or kidnapping, and persons charged with a violent felony alleged to have been committed while the person was on bail, probation or parole. In addition, those charged with first degree criminal sexual conduct, armed robbery or kidnapping may be denied bail "unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person."

The amendment's applicability is questionable however, in light of a recent decision by the Michigan Supreme Court. In People v Gornbein, 407 Mich 863 (1979) the Court ordered defendant's original bail on a charge of first degree criminal sexual conduct reinstated. Without further explanation, the Court's order stated:

> "The trial court erred by revoking defendant's bond. The recent amendment of Const 1963, art 1, §15 does not alter GCR 1963, 790. That court rule continues to be controlling in pretrial release matters, and pursuant to GCR 1963, 790.1 the defendant in this case is entitled to bail." (emphasis added)

Plaintiff-Appellee, the Oakland County Prosecutor, has filed a motion for clarification and/or reconsideration which is presently pending.

While the rationale for the Supreme Court's decision is not stated in the Gornbein order, an explanation may lie in the permissive language of the amendment. By providing that "bail may be denied," the amendment may have made it possible for the Supreme Court to exercise its supervisory power over the courts in the state. Speaking for "one court of justice," the Court may have decided to deny the lower courts the option of applying the amendment.

Such speculation aside, defense counsel should use the order's plain language to argue the exclusivity of the more liberal court rule on bail. GCR 1963, 790, like its statutory counterpart MCL 765.5;MSA 28.892, extends the right to bail to all but those charged with murder or treason. Bail may be granted to persons charged with murder or treason, but only if the proof is not evident and the presumption is not great.

The "proof" and "presumption" language of the court rule and statute has not been addressed by Michigan's appellate courts so its meaning remains somewhat amorphous. Other jurisdictions have given various interpretations to the language, some saying that an indictment alone provides adequate proofs and presumptions, while others have required the state to adduce facts in addition to an indictment. Attorneys are referred to Kamisar, LaFave & Israel, Modern Criminal Procedure (4th ed 1974) pp 779-781, for a survey of such cases. As a general matter, counsel may remind the court that doubts as to whether bail should be granted or denied should always be resolved in favor of the defendant. Herzog v United States, 99 LEd 1299 (1954) [Per Douglas, J., as Circuit Justice].

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PURPOSES OF BAIL

With so much press devoted to crimes committed by probationers and parolees, trial courts have found it increasingly easy to impose unattainable pretrial release conditions which are simply "a thinly veiled cloak for preventive detention." United States v Leathers, 412 F2d 169, 171 (DC Cir. 1969). Often, "[b]ail is deliberately set out of reach of the defendant because of fear that he would commit crimes if released." ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, (Approved Draft, 1968), pp 60-61. That fear underlies many bail decisions, but Michigan courts have decided that it is not a legitimate consideration. People v Edmond, 81 Mich App 743 (1978). GCR 1963, 790 does not include the dangerousness to the community as a bail criterion, just as its model, the Bail Reform Act of 1966, 18 USC 3146 (1976), is silent on the point.

Preventive detention is improper because an accused may not be punished on the basis of anticipated conduct. As one commentator has observed, "[n]o claim of public safety can justify such a flagrant negation of due process of law." Ervin, "The Legislative Role in Bail Reform," 35 Geo. Wash. L. Rev. 429, 445 (1967). An accused is presumed innocent of future conduct as well as the conduct which has been charged. The only legitimate purpose of bail is to insure an accused's appearance at later stages of the prosecution. Stack v Boyle, 342 US 1, 4-5; 72 SCt 1; 96 LEd 3 (1951); Cohen v United States, 82 SCt 526; 7 LEd2d 516 (1962) [Per Douglas, J., as individual Justice]; People v Edmond, supra, at 747-748.

An important caveat is necessary here: preventive detention was written into subsection "C" of Proposal K. If Proposal K is ultimately legitimized for use by the state's trial courts, a court may consider the likelihood that a person charged with first degree criminal sexual conduct, armed robbery or kidnapping would "present a danger to any other person." Read narrowly, that language may mean no more than that a court may consider such specific things as an accused's threats against witnesses in the prosecution for which he is held. That very limited form of preventive detention has been approved in People v Edmond, supra, at 748 and United States v Wind, 527 F2d 672, 674 (CA6, 1975). Counsel should be prepared to argue that the language cannot be extended to cover a general dangerousness to society without offending due process.

FORMS OF RELEASE

Pretrial release is a matter of constitutional and statutory right, but the right is often eviscerated by the form of release which a judge selects. Although GCR 1963, 790.1 provides for release on a defendant's own recognizance and conditional release, courts opt for the third alternative, money bail, in most cases. Counsel should be prepared to argue for the least intrusive form which still guarantees an accused's future appearance. United States v Leathers, supra, at 171.

The only constraints on the form to be used are contained in MCL 765.6a; MSA 28.893(1), which requires a bond or surety other than the accused if he is charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him, or if he has been twice convicted of a felony within the preceding five years. This statute has been interpreted to take precedence over GCR 1963, 789.2, which provides for release on recognizance for persons incarcerated for more than six months. People v Daniels, 394 Mich 524 (1975).

GCR 1963, 790.2 makes release on recognizance the presumptive form of release by providing that "a defendant must be released on his own recognizance unless the court decides that a recognizance release will not assure his appearance." Release on one's own recognizance is favored as well by the ABA Standards, the federal Bail Reform Act and the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967).

If the trial court decides that a defendant cannot be released on his own recognizance, the next step under GCR 1963, 790 is consideration of conditional release. This form gives the most opportunity for creative advocacy. An attorney may analogize to the release conditions which Michigan courts routinely place on probationers or may point to the conditions which are suggested elsewhere. 18 USC §3146(a) requires a federal court to consider placing a person in the custody of a designated person or organization agreeing to supervise him. ABA Standards suggest placing the defendant under the supervision of a probation officer or other appropriate public official. ABA Standards §5.2(b)(ii). Counsel should explore the possibility of having a mature relative, a social agency or a halfway house act as a third-party custodian. In addition, counsel should determine whether there is a bail or recognizance project in the community since such projects often have lists of sponsors.

Other nonmonetary conditions which may be suggested in an appropriate case include part-time custody with release for job and other responsibilities, periodic reporting to a public or private agency, remaining in specified geographical limits, maintaining employment, or submitting to medical treatment. For an excellent discussion of such nonmonetary forms of release, practitioners are referred to Cipes, Criminal Defense Techniques (Vol 1, 1979) ch 1.

Imposition of monetary conditions is only to be considered after release on recognizance and conditional release have been deemed inappropriate. GCR 1963, 790.4. Unless a surety bond is required, a defendant has the options of posting cash or a surety bond in the full amount of bail or depositing ten percent of the bail with the court clerk or peace officer having custody. GCR 1963, 790.4(c). A surety bond may only be required if the court considers factors listed in subrule .5 and states reasons why a surety bond is necessary. GCR 1963, 790.4(b).

The amount of money bail set is "excessive" under the federal and state constitutions if it is set at a figure higher than reasonably necessary to assure the accused's presence. US Const, Am VIII; Const 1963, art 1, §16; Stack v Boyle, supra; Pugh v Rainwater, 572 F2d 1053 (CA 5, 1978). Although money bail is the form most often challenged for excessiveness, conditional release may also be excessive if release on recognizance would reasonably assure presence. United States v Leathers, supra, at 171.

Money bail becomes particularly circumspect when demanded of an indigent accused. Setting any monetary amount may have the practical effect of denying release to the indigent, while a monied counterpart would obtain release. Justice Douglas has stated that "no man should be denied release because of indigence" and that "under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe he will comply with the orders of the Court." Bandy v United States, 82 SCt 11; 7 LEd2d 9 (1961) [Per Douglas, J., as individual Justice]. Money bail demanded of an indigent thus may deny equal protection of the laws. US Const, Am XIV; Const 1963, art 1, §2.

Review of the bail decision must be speedy

if it is to be effective, Stack v Boyle, supra, 342 US at 4, and a bail question becomes moot after conviction, People v Campbell, 30 Mich App 43 (1971). Bail decisions are reviewable by motion and may not be vacated, modified, or reversed except upon a finding of an abuse of judicial discretion. GCR 1963, 790.7. Review cannot take place until a transcript of the bail hearing is available, People v Mendez, 405 Mich 843 (1979); People v Szymanski, 406 Mich 944 (1979), so court reporters must be urged to give such transcripts priority.

If an accused does not comply with the conditions of bail, the trial court may issue a capias for his or her arrest and may enter an order for forfeiture of any money bail. GCR 1963, 790.6. In addition, the accused may be charged with absconding bond, which is a felony when the original charge was a felony. MCL 750.199a; MSA 28.396(1). The elements of the offense are absconding from a criminal proceeding in which a felony was charged, with absconding defined as reckless neglect or disregard of a known obligation to appear and defend. People v Litteral, 75 Mich App 38 (1977); People v Rorke, 80 Mich App 476 (1978).

BAIL IN MISDEMEANOR CASES

Bail in misdemeanor cases is governed by the same general principle as in felony cases: its sole purpose is to assure the defendant's appearance for a scheduled time, and it is not to be construed in any way as a form of punishment. DCR 2004. Persons accused of misdemeanors and traffic offenses have a right to bail which is guaranteed both by the Michigan Constitution and by a series of statutes specifically designed for such cases. MCL 780.61 et seq; MSA 28.872(51) et seq.

The misdemeanor bail statutes do not make release on recognizance the presumptive form of bail, as GCR 1963, 790 does for felony cases. MCL 780.62; MSA 28.872(52) does make it a permissible form, however, with absconding made a misdemeanor. An added proviso states that the section "shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of money loss to insure the appearance of the accused."

Money bail may also be set, with the court to consider the nature of the charged offense, and the accused's past criminal acts, conduct and financial ability. MCL 780.64(1); MSA 28.872(54). When a person is charged with an offense punishable by fine only, the amount of bail may not exceed double the maximum penalty. MCL 780.64(2); MSA 28.872(54).

Conditional release is not specifically provided for, although certain conditions accompany either recognizance or money bail. A person admitted to bail must appear in court as ordered, submit him or herself to the orders and process of the court, not leave the state without permission, and notify the court clerk of any change of address. MCL 780.69(1), 780.71; MSA 28.872(59), 28.872(61).

The amount of money bail may be set either on a case-by-case basis by the court or on the basis of a previously approved bail schedule. Regardless of how it is set, the accused has the absolute right to post bail by depositing ten percent of the bail amount with the court clerk. MCL 780.66; MSA 28.872(56); Pressley v Wayne Sheriff, 80 Mich App 300 (1971); Cahill v Fifteenth District Judge, 70 Mich App 1 (1976). The court has the power to set the bail amount, but lacks the power to require a surety bond or to prescribe the manner in which bond is posted. Pressley v Wayne Sheriff, supra, at 304-305.

A second series of misdemeanor bail statutes addresses the situation of the person arrested for a misdemeanor or traffic violation. The Interim Bail Act, MCL 780.581 et seq; MSA 28.872(1) et seq, gives arrestees the statutory right to recognize "without unnecessary delay" to either a magistrate or the arresting officer or

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RENEWAL OF NEWSLETTER SUBSCRIPTION

If you wish to continue to receive the Criminal Defense Newsletter, please fill out the renewal form which is inserted in this month's Newsletter and return it to the Legal Resources Project. In addition to giving us updated mailing information, you can help us evaluate the impact of the Newsletter by answering all of the questions. We particularly welcome suggestions of topics you would like to see discussed in the Newsletter.

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jailor if the magistrate is unavailable. MCL 780.581, 780.582; MSA 28.872(1), 28.872(2). The act has as its purpose the avoidance of unnecessary incarceration of minor offenders. People v Dixon, 392 Mich 691 (1974).

An officer making a misdemeanor or traffic custodial arrest must inform the accused of the rights under the interim bail statute, People v Dixon, supra, and must accept the bail proferred if a magistrate is unavailable, People v Garcia, 81 Mich App 260 (1978). No custodial search of the accused may occur until he or she is given the opportunity to post bail. People v Cavitt, 86 Mich App 59 (1978). A major consequence of the statute has been its effect on search and seizure law. Dixon held that any evidence gained in derogation of the statutory right to be released upon posting bail must be suppressed. No remedy short of suppression was deemed likely to assure full enforcement and protection of the citizenry from unwarranted and unnecessary inconvenience, embarrassment and risk attendant incarceration for a minor offense. Dixon, supra, at 705.

by Dawn Van Hoek

PROPOSAL B BULLETIN

On October 16, 1979, Attorney General Frank Kelley issued an opinion answering a series of questions posed by Corrections Department Director Perry Johnson. Opinion No. 5583 deals with the effective date and scope of Proposal B, the initiated law which amended Michigan's parole statutes. The Attorney General's conclusions and a brief statement of their rationales follow:

1. The 1978 Initiated Law, which denies good time on a prisoner's minimum term for certain enumerated offenses, applies only to persons who committed the offense on or after December 10, 1978 at 12:01 a.m. Const 1963, art 2, §9; State Appellate Defender, et al v Director of Elections, State Board of Canvassers, et al, 405 Mich 815 (1979).

2. The 1978 Initiated Law applies to all of the crimes enumerated, even though some of them do not involve violence or injury to persons or property. "Violence or injury to persons or property" was the descriptive ballot language of Proposal B and it "provided a fair description of the impact of the proposal."

3. An attempt to commit a crime which is not included in the list of offenses enumerated in 1978 Initiated Law does not fall within its scope.

4. The 1978 Initiated Law precludes parole consideration for a prisoner with a life sentence, so the "Lifer" law, MCL 791.234; MSA 28.2304, has been effectively repealed. The initiated law operates to deny parole consideration until after a minimum sentence has been served and the minimum term in a life sentence is a life sentence. MCL 769.9; MSA 28.1081.

5. A prisoner who has served his or her maximum sentence less good time is entitled to be discharged even though the term served is less than the minimum sentence imposed. Good time continues to reduce a prisoner's maximum term and may place him or her in a discharge rather than a parole position.

6. Where a sentence for a fixed term of years is imposed upon an habitual offender, the offender must serve the full number of years imposed by the Court. Like a life term, such fixed terms have no minimum but the maximum, which cannot be reduced by good time.

Most defense attorneys would agree that the Attorney General's second, fourth, and sixth conclusions are the most objectionable. Those conclusions are not binding precedent on the courts of the state, but they do command the allegiance of the Department of Corrections. Traverse City School District v Attorney General, In re Proposal C, 384 Mich 390 (1971). Attorneys must be prepared to apprise both their clients and the trial courts of these major new Proposal B consequences. Primary among them is the effective repeal of the "lifer" law. That repeal eliminates the difference between first and second degree murder, making them both punishable by mandatory, non-parolable life terms.

Leave Granted in the Michigan Supreme Court

People v Walter Johnson, #62147 and People v Tavolacci, #62854
October 1, 1979

Richard Manning for defendant-appellee Johnson and J. David Reck for defendant-appellant Tavolacci.

The parties were directed to include among the issues to be briefed whether a defendant may be convicted as an aider and abettor under the felony firearm statute, MCL 750.227b; MSA 28.424(2).

People v McDonald, #62077
July 19, 1979

Carl Ziemba for defendant-appellant.

The parties were directed to include among the issues to be briefed whether a first degree murder conviction can be based on the commission of a murder in the perpetration or attempted perpetration of a rape after the adoption of 1974 PA 266 [Criminal Sexual Conduct Act].

People v Shafou, #62885
July 19, 1979

Parzen & Parzen for defendant-appellee-cross-appellant.

The parties were directed to include among the issues to be briefed: (1) whether withdrawal or abandonment is a defense to the crime of inducing, inciting or exhorting another to unlawfully burn property under MCL 750.157b; MSA 28.354(2); (2) whether it was reversible error for the trial court to refuse to charge on attempt and; (3) whether MCL 750.157b; MSA 28.354(2) requires proof of an overt act and that the third party was incited.

Michigan Supreme Court Decisions

People v Perry #62726
September 24, 1979

On defendant's application for leave to appeal, the Supreme Court unanimously reversed his manslaughter conviction and discharged him.

The trial court erred in denying defendant's motion for a directed verdict and in allowing a first degree murder charge to go to the jury. Defendant Perry and co-defendant Folkes were jointly tried for first degree murder as a result of an incident which took place outside a pool hall one night. A prosecution witness testified that Perry and Folkes arrived together and Perry entered the pool hall looking for Moore, the decedent. Moore left with Perry and when the witness stepped outside the front door a few minutes later, he saw Perry and Folkes "body punching" Moore against a car. He retreated

inside and stepped out the back door some two or three minutes later. There, in an alley, he saw Folkes shoot Moore. He did not see Perry in the alley and never saw him with a weapon.

The above evidence was insufficient to support the aiding and abetting theory used against Perry. There was no evidence indicating a preconceived intent to kill and no evidence to connect Perry to what occurred in the alley. No facts supported the inferences, argued by the prosecutor, that Perry helped bring Moore around to the alley or that he was in front waiting for Folkes to shoot Moore. The fact that Perry was involved in a simple assault on Moore a few minutes earlier would not support the inference that he had anything to do with the murder.

People v David Johnson
#50337
October 2, 1979

On the prosecution's appeal, the Supreme Court affirmed the Court of Appeals reversal of defendant's contempt of court conviction.

Defendant was summoned from his Jackson prison cell to appear before a citizens' grand jury which was investigating a homicide. When called and asked to take an oath he refused, claiming that he was "taking the Fifth Amendment." The prosecutor informed him of his rights to remain silent and to have an attorney outside the grand jury room. Johnson was told that if he could not afford an attorney, he could "petition the presiding judge of the circuit court for Wayne County and ask for the appointment of an attorney." Johnson refused to respond both then and when he was taken before a circuit judge. That judge found him guilty of contempt, MCL 767.19c; MSA 28.959(3) and sentenced him to one year in jail and a $10,000 fine.

Five Justices concluded that a person who is the object of contempt proceedings flowing from testimony or a failure to testify before a grand jury has a due process right to the assistance of counsel. Difficult legal questions surround exercise of the Fifth Amendment, and grand jury and contempt proceedings. There is a "reasonable likelihood" that without counsel, a witness is unlikely to understand the proceedings, articulate a position or appreciate options. The purpose of a contempt proceeding is to force a witness back into the grand jury room to provide testimony which might implicate the witness in the crime under investigation. Fundamental fairness requires not only the right to counsel, but also the right to appointment of counsel at the state's expense for an indigent witness.

Justice Ryan, joined by Chief Justice Coleman, dissented. They emphasized that the contempt was civil in nature and no more than a summary proceeding, involving a single, simple issue. Whether fundamental fairness requires the assistance of counsel was deemed a question to be determined on a case-by-case basis. In view of this defendant's obvious, willful refusal to cooperate with the grand jury and the circuit court, it could not be reasonably concluded that he was treated unfairly or that the nature of the proceedings was such that fair treatment was impossible without the assistance of counsel. Due process requires appointment of counsel in only certain "exceptional cases."

FELONY FIREARM UPDATE

The Supreme Court's decision in Wayne County Prosecutor v Recorder's Court Judge, 406 Mich 374 (1979) quelled, but did not quench the felony firearm furor in Michigan. Attorneys have shifted their attention to issues other than the double jeopardy ones decided by the Court last June. Additional challenges include: (1) that the mandatory two year felony firearm sentence constitutes cruel and unusual punishment, Wayne County Prosecuting Attorney v Recorder's Court Judge, __Mich App__ (#78-1721, September 19, 1979); (2) that the mandatory two year sentence violates the separation of powers clause of Michigan's constitution, Wayne County Prosecuting Attorney, supra, slip opinion at 7; (3) that the felony firearm statute violates Michigan Const 1963, art 4, §25 by attempting to amend or alter existing law by implication, Wayne County Prosecuting Attorney, supra, slip opinion at 7-8; (4) that the possessory nature of felony firearm forecloses aider and abettor liability, People v Perry, __Mich App__ (#78-1875, October 2, 1979); and (5) that an inoperable firearm does not meet the statutory definition of firearm, cf, People v Vaughn, __Mich App__ (#78-2640, October 2, 1979); People v Stevens, __Mich App__ (#78-1700, September 19, 1979). Leave to appeal was recently granted on the fourth issue [see the "Leave Granted in the Michigan Supreme Court" feature in this month's Newsletter].

Attorneys should continue to raise double jeopardy challenges in order to exhaust state remedies and prepare cases for further appeal. Indeed, counsel for the defendants in Wayne County Prosecutor filed a notice of appeal to the United States Supreme Court on September 17, 1979, invoking the Court's jurisdiction under 28 USC §1257(2).

Selected Court of Appeals Opinions

SIMILAR ACTS WERE PROBATIVE OF IDENTITY AND ADMISSIBLE

People v Bolden, #78-664, September 19, 1979

Affirmed jury-tried conviction for armed robbery.

Evidence of two prior sexual assaults and robberies was properly admitted as similar acts probative of identity. All of the criteria of People v Wilkens, 82 Mich App 260 (1978) were satisfied: two witnesses testified from first-hand knowledge of the prior acts; the victims were all elderly women living alone in the same area of Detroit who had been tied to a bed, sexually assaulted and robbed; and materiality to scheme and identity were "obvious." Admission was not barred by the fact that defendant had been acquitted in one of the prior cases.

Furthermore, the Court of Appeals determined that the evidence was more probative than prejudicial. Identity was the key trial issue since defendant asserted an alibi and the complainant's poor vision prevented her from making an identification. Lack of prejudice was also demonstrated by defendant's acquittal on the criminal sexual conduct charges.

Holbrook, Jr., concurred in result only.

NUMEROUS ERRORS REQUIRE NEW TRIAL

People v Kraai, #77-262, September 19, 1979

Reversed jury conviction for first degree criminal sexual conduct (CSC I) and plea-based finding of habitual offender.

Reversible error was predicated on the trial court's decision to admit certain similar act evidence. Since defendant asserted an alibi, the evidence of a prior assault was offered to show identity. The problem was, however, that there were insufficient special circumstances common to both the prior and the charged acts from which to infer identity. Both acts occurred during the afternoon in secluded park areas of the same city, both involved young victims grabbed and fondled in a similar way and neither involved a robbery, but those circumstances are common to many other sexual assaults. Circum-

stances on which the two acts differed included use of a weapon, concealment of identity, type of force and infliction of injuries.

Another error which denied defendant a fair trial was the trial court's instruction that defendant's pre-trial escape from custody could be considered in determining guilt or innocence. An escape can only be considered as to defendant's state of mind and even a subsequent, correct charge did not cure the error.

Finally, the trial court again reversibly erred by permitting a rebuttal witness to testify about and demonstrate a wrestling hold. Such "prejudicial courtroom dramatics" were not responsive to any point the defense raised and belonged, if admissible at all, in the prosecutor's case in chief.

Defendant's additional claim that the personal injury definition was unconstitutionally vague had arguable merit, but he lacked standing to raise it. In an appropriate case a defendant may allege that there is no principled distinction between CSC I and CSC III, since any sexual assault necessarily causes at least temporary mental anguish to the victim.

DUAL TRIAL PROCEDURE DID NOT DENY FAIR TRIAL BEFORE IMPARTIAL JURY

People v Brooks, #31222, September 19, 1979

Affirmed jury-tried breaking and entering conviction.

The dual trial procedure used in this case afforded defendant the same protections he would have enjoyed through a separate trial. When it became apparent before trial that co-defendant Martin's defense would incriminate defendant Brooks, the parties agreed upon a joint trial before separate juries. The juries sat together during the prosecutor's opening statement and during direct examination of witnesses, and were separated for everything else. Each jury heard only the evidence against its defendant, thus avoiding the conflicting defense problem.

Defendant's right to a fair trial and impartial jury were protected despite some minor problems with the procedure. The minor problems were traffic jams, seating of one jury outside the jury box and ability of one jury to observe the other.

INOPERABLE GUN MAY BE "DANGEROUS WEAPON" FOR FELONIOUS ASSAULT PURPOSES

People v Stevens, #78-1700
September 19, 1979

Reversed trial court's dismissal of felonious assault charge.

A charge of felonious assault arose from an incident in which defendant, a passenger in one car, pointed a starter pistol at the occupants of another car. The parties stipulated that the gun was totally inoperable as a firearm, though it contained live shells. Defendant's motion to quash was based upon and granted because of that stipulation.

The majority disagreed with the trial court's decision that the inoperable gun was not a "dangerous weapon" for felonious assault purposes. The felonious assault statute, strictly construed, imposes no requirement that a gun be operable. Judges Bashara and Holbrook, Jr., emphasized that the crux of the offense was the victim's state of mind. People v Sanford, 402 Mich 460 (1978). Thus, if the victim saw a handgun, believed it was a dangerous weapon, and was in apprehension of an immediate battery, a prima facie case of felonious assault was made out.

Cavanagh, dissenting, distinguished two cases relied upon by the majority as involving unloaded, rather than inoperable guns. An inoperable gun does not fit the definition of firearm contained in MCL 8.3t; MSA 2.212(20), which requires that a gun be capable of propelling a dangerous projectile.

SENTENCING IMPROPERLY DEFERRED PAST STATUTORY ONE YEAR LIMIT

People v Halbert Gene Turner
#78-2444, September 19, 1979

Affirmed carrying a concealed weapon conviction but vacated sentence.

The sentencing court lacked jurisdiction to impose sentence in a proceeding which occurred more than two years after conviction. Defendant pled guilty in November, 1975 and had sentencing adjourned twice before he appeared again in October, 1976. At that time defense counsel asked the court to defer sentencing since

defendant had not had further criminal contacts. The court agreed to defer sentencing after it extracted a waiver of the right to have sentence imposed within one year of conviction. On February 23, 1978, defendant appeared again and was sentenced to a maximum term.

Case law in the wake of the deferred sentencing statute, MCL 771.1; MSA 28.1131, has emphasized that the one year time limitation can be exceeded in only the most limited circumstances. Like the 180 day rule, a delay will only be excused if good faith efforts to proceed were made. In this case, nothing prevented the court from imposing sentence at any one of the numerous times defendant appeared.

Furthermore, defendant's waiver of the right to be sentenced was meaningless: "such consent is inherently unsound since a defendant, as a practical matter, will always opt for freedom." The Court added that retention or loss of jurisdiction should not depend solely on the defendant's consent. Additional considerations included the public's interest in avoiding delay, problems of court administration created by the delay, and the defendant's interest in having sentence pronounced so that he may proceed with an appeal or apply for pardon or commutation.

INCONSISTENT VERDICTS IN GUN CASE MANDATE REVERSAL AND DISCHARGE

People v Vaughn, #78-2640, October 2, 1979

Reversed jury conviction for felonious assault and discharged defendant.

A properly-instructed jury returned inconsistent verdicts requiring reversal and discharge on double jeopardy grounds. Defendant was charged with felonious assault and felony firearm and the jury returned a verdict of guilty on the first charge while not guilty on the second. There was but one incident and one gun. Since the guilty verdict had to be based on a determination that there was a gun and the not guilty verdict had to be based on a determination that there was not a gun, the verdicts were inconsistent.

The inconsistency could only be avoided if the definition of a handgun for felonious assault purposes differed from the definition for felony firearm purposes. The handgun in this case was both a "dangerous weapon" and a "firearm," so the verdicts were inconsistent. A question the Court specifically declined to reach was whether an inoperable gun would be both a "dangerous weapon" and "firearm."

JUDGE MAY NOT BE INSTIGATOR OR CONDUIT FOR PLEA NEGOTIATIONS

People v Mathis, #78-3544, October 1, 1979

Affirmed jury conviction for assault with intent to do great bodily harm less than murder.

Defendant was not penalized for exercising his right to a trial, despite certain comments made by the trial court before trial. During a pre-trial conference defendant asked about the sentence when his attorney represented that he wanted to plead guilty. Judge Gillis responded:

> "Now, you can go out and hear the trial, and I will hear all the gory details, and the sentence will be accordingly; or you can take a plea in here.
>
> I told your lawyer a week ago the sentence would be one to twenty years. Now we have twenty witnesses sitting out there and a jury panel sitting there. Its no longer one to twenty, I can assure you of that."

The Court spent some time discussing the absence of a record of the "week ago" conference and concluded that there had been an "informal discussion." It could not "conceive how such an offhand reference [the one to twenty sentence] could be considered binding on the trial court." The Court thought that defendant had, at most, missed a plea bargain opportunity.

The Court also disapproved of the active role which this judge played in the plea bargaining process. It emphasized that a trial judge should not be the instigator nor conduit for negotiations.

PRELIMINARY EXAMINATION MUST BE AFFORDED ON ADDED CHARGES

People v Erskin, #78-2223, October 1, 1979

Affirmed conviction for larceny over $100 and finding of habitual offender.

Defendant was charged with two counts of receiving or concealing stolen property and

received a preliminary examination on the charges. Prior to the trial however, the prosecutor became aware of the recently-decided case of People v Kyllonen, 402 Mich 135 (1978) and asked that two counts of larceny be added. The information was amended, over defendant's objection.

Defendant moved for a directed verdict after the prosecution's case was presented and obtained dismissal of one of the larceny counts. He then took the stand, admitted both larcenies, waived jury trial and pled guilty to one count of larceny.

On appeal defendant claimed, rightfully, that he was entitled to a preliminary examination on the larceny charges. An information may be amended, without re-examination, to cure minor defects. It may not be amended to change the offense, however, until there is an examination on the new charge. In this case even the prosecutor admitted that preliminary examination evidence failed to show larcenies. Error in this case was harmless, though, since defendant ultimately pled guilty.

EVEN ERRONEOUS ACQUITTAL BARS APPEAL OR RETRIAL

People v Jakiel, #78-3163, October 2, 1979

Dismissed prosecutor's appeal from trial court's grant of directed verdict of acquittal.

Double jeopardy was held to bar the prosecutor's appeal from the trial court's erroneous decision to grant defendant's motion for a directed verdict. Defendant successfully alleged that a variance between a witness's testimony (that no embezzlement occurred on or after August 1, 1977) and the information (charging an embezzlement committed on August 1, 1977) was fatal to the prosecution. Granting a directed verdict because of that variance was the improper remedy: the information should have been amended since time is not an essential part of the crime of embezzlement. Furthermore, a liberal reading of MCL 767.60; MSA 28.1000 would permit the prosecution to introduce acts of embezzlement occurring both before and after the date alleged in the information.

Regardless of the propriety of the ruling, however, it was made on grounds related to guilt or innocence, so double jeopardy barred appeal or retrial. The court evaluated the prosecution's evidence and found that it was legally insufficient to support an embezzlement conviction. The ruling was an acquittal even though it resulted from an erroneous interpretation of governing legal principles. Sanabria v United States, 437 US 54 (1978).

EVIDENTIARY AND INSTRUCTIONAL ERRORS UNDO MURDER CONVICTION

People v Morris, #78-2731, October 2, 1979

Reversed jury tried conviction for first degree murder.

Three issues were identified as producing reversible error in the case. First, the trial court twice instructed jurors that a person is legally sane if "despite the mental illness that person possesses substantial capacity either to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law." Rather than the disjunctive, the definition should have been phrased in the conjunctive, viz., both requirements must be satisfied to prove sanity. A correct charge was subsequently given when jurors requested reinstruction, but the Court presumed that the erroneous charge was followed. People v Bargy, 71 Mich App 609 (1976).

Secondly, the trial court should have granted defendant's pre-trial request to exclude reference to her prior legal abortions. Since a report prepared by defendant's psychiatrist stated that defendant and the victim had quarrelled over the abortions, the trial court thought them relevant to sanity. Defendant's request to make an offer of proof showing that the abortions were immaterial to the doctor's analysis was also denied. As to relevancy, the Court of Appeals considered the quarrels rather than abortions as the relevant evidence. Even if margainally relevant, the abortions carried with them enormous prejudice and very little probative value.

Finally, the prosecutor erred in asking defendant if she had been arrested three times in 1975 and 1976 for shoplifting. The prosecutor argued that People v Woody, 380 Mich 332 (1968) permitted such questioning, but the Court found Woody inapposite. Woody permitted questioning of a defense psychiatric witness about such antisocial conduct where the expert had already testified that the conduct was relevant to the expert's opinion on sanity. The question in this case was asked of defendant, before her expert testified. It was improper impeachment since it concerned arrests, rather than convictions.

CDAM SPONSORS TRAINING CONFERENCE

The Criminal Defense Attorneys of Michigan (CDAM) will sponsor its last training conference for this year on Thursday, December 6, 1979 through Saturday, December 8, 1979. The conference site will again be the Butzel Conference Center in Ortonville, Michigan.

This conference will focus on pretrial and trial evidentiary problems and on interlocutory appeals. Its format will consist of lectures, demonstrations, and workshops. Participants will receive conference materials in advance so that they may prepare for the workshops. CDAM conferences require considerably more effort by participants than the usual lecture-type seminars, but that effort makes them particularly valuable learning experiences.

Conference participants are primarily drawn from defender offices, and just a few places will be available for defense attorneys in private practice. Private attorneys should write to the address given below for further information and they should register for a place as soon as possible. Inquiries should be addressed to: Jim Neuhard, 1200 Sixth Avenue, Third Floor, North Tower, Detroit, Michigan 48226, (313) 256-2814.

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