South Carolina Law Review

Volume 19 | Issue 2 Article 8

1967

Recent Decisions

RECENT DECISIONS

CRIMINAL LAW—Use of illegally obtained confession by the prosecution to impeach the credibility of a defendant who testifies in his own behalf. *People v. Kulis* (N.Y. 1966); *State v. Brewton* (Ore. 1967).

Before the defendant in the former case was arrested or subjected to any restraint by the police, he made admissions and exhibited physical conditions in his apartment which tended to connect him with a murder then being investigated. On his arrest the defendant requested that he be allowed to see a lawyer. This request was not promptly granted by the police and before a lawyer reached him, a statement was taken from the defendant by an assistant district attorney. On direct testimony in his own behalf, the defendant denied any complicity in the murder, but the prosecutor was allowed to introduce the inadmissible confession to impeach his credibility as a witness. The defendant was convicted and the Supreme Court, Appellate Division, affirmed. On appeal to the Court of Appeals of New York, *held*, affirmed. Although the statement would not have been admissible as part of the People's direct case under *Escobedo v. Illinois*,[1] it was admissible on the question of the defendant's credibility as a witness. *People v. Kulis*, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966). (5-to-2).

In the latter case the defendant made statements elicited by police interrogation without the warnings and advice concerning fifth and sixth amendment protection now required. The State conceded that the statements were inadmissible as part of its case in chief. When the defendant took the stand in his own defense and told a story which was inconsistent with his previous statements, however, the state offered his police station admissions for the limited purposes of impeachment, and they were so received over a timely objection. The defendant was convicted, and on appeal the Supreme Court of Oregon, *held*, reversed and remanded. The statements elicited from a defendant by police interrogation which were inadmissible as part of the prosecution's case in chief because of failure to comply with constitutional requirements could not be used to impeach the defendant as a witness even though such statements were volun-

1. 378 U.S. 478 (1964).

tarily made. *State v. Brewton*, 422 P.2d 581 (Ore. 1967). (4-to-3).

The opinion in *Kulis* states that the basis of distinction between the admissibility of wrongfully obtained evidence in the direct case of the prosecution and its use to impeach the credibility of the defendant as a witness is demonstrated in the opinion of Justice Frankfurter in *Walder v. United States*.[2] In *Brewton* the dissent of Justice Perry follows the same reasoning. There was also vague reference to *Walder* in Judge Keating's dissent in *Kulis* which argues only on the basis of exclusion and inadmissibility as determined in *Escobedo v. Illinois*[3] and *Miranda v. Arizona*[4] and fails to attack the majority reliance on *Walder*. Justice Goodwin's majority opinion in *Brewton* likewise ignores *Walder* and dwells on the constitutional questions answered in *Miranda*. There was no need, however, for either court to point to any exclusionary rule since both prosecutors, apparently realizing that the statements were obtained without the constitutional protections, did not attempt to use the statements in their cases in chief. It further appears that those who rely on *Walder* have failed to make a close examination of this case, and Judge Keating's vague reference in *Kulis* to the rule of *Walder* did a disservice to the strength of his dissent.

The most effective and frequently employed attack upon the credibility of a witness is by proving that he, on a previous occasion, has made statements inconsistent with his present testimony.[5] The sanction of this tactic by the courts appears firm: illegally obtained evidence may be used to challenge the truth and reliability of a defendant's assertions *collateral* to the issue of guilt if the defendant takes the stand and if his testimony is at variance with such statements.[6] In *United States v. Curry*[7] the Court of Appeals for the Second Circuit recognized that the prosecution cannot use the fruits of an illegal action to establish elements of the crime with which the defendant is charged. The court, however, acknowledged that if the defendant offers testimony contrary to the facts disclosed by the

2. 347 U.S. 62 (1954).

3. 378 U.S. 478 (1964).

4. 384 U.S. 436 (1966).

5. 3 WIGMORE, EVIDENCE §§ 1017-1046 (3d ed. 1940); Hale, *Prior Inconsistent Statements*, 10 So. CAL. L. REV. 135 (1937).

6. United States v. Curry, 358 F.2d 904, 909 (2d Cir. 1966) citing Walder v. United States.

7. 358 F.2d 904 (2d Cir. 1966).

evidence, the prosecution may, in the interest of truth, use the illegally obtained evidence to establish facts collateral to the ultimate issue of guilt. This is the doctrine of *Walder v. United States*.[8]

Thus, *Kulis* and *Brewton* may be distinguished from *Walder*, for in *Walder* the defendant made sweeping claims that went beyond a mere denial of complicity in the crimes for which he was charged. The defendant was charged with conspiring to sell narcotics and admitted receiving packages, the contents of which were unknown to him. On cross-examination he stated that he had never seen narcotics. The prosecution was allowed to impeach this defendant's credibility as a witness by introducing evidence of an unconnected seizure of narcotics in his possession two years previous, which seizure was illegal under the fourth amendment.[9]

The Supreme Court in *Walder* contrasted that case with *Agnello v. United States*[10] in which the prosecution, after having failed in its efforts to introduce the tainted evidence in its case in chief, tried to smuggle it in on cross-examination by asking the accused the broad question, "Did you ever see narcotics before?" After eliciting the expected denial, the prosecution sought to introduce evidence of narcotics located in the defendant's home by means of an unlawful search and seizure in order to discredit the defendant's credibility as a witness. The Court in *Agnello* said, "[T]he contention that the evidence of the search and seizure was admissible in rebuttal is without merit . . . . [Agnello] did nothing to waive his constitutional protection or to justify cross-examination in respect of [*sic*] the evidence claimed to have been obtained by the search."[11]

In *Kulis* and in *Brewton* the respective defendants did not of their own accord exceed the bounds of testimony necessary to their defense by making sweeping claims. They can offer their own version of the events charged in the indictment. Moreover, the evidence used to impeach their credibility as witnesses was in the nature of a confession of the very charge on trial. This raises a clear likelihood of prejudice not present when, as in *Walder*, the impeaching evidence is unrelated to the indictment. Thus, *Walder* does not allow the testimony regarding

8. 347 U.S. 62 (1954).
9. *Ibid.*
10. 269 U.S. 20 (1925).
11. *Id.* at 35.

Kulis' confession or Brewton's statements. "[T]he Government could do no more work in this evidence on cross-examination than it could on its case in chief."[12]

In *Johnson v. United States*[13] the court stated that the general rule is that evidence which is inadmissible to prove the case in chief is inadmissible for all purposes. The evidence is not rendered admissible merely because the defendant testifies in his own behalf. In *Harrold v. Oklahoma*[14] the court said, "The privilege granted to an accused person of testifying in his own behalf would be a poor and useless one indeed if he could exercise it only on condition that every incompetent confession . . . should become evidence against him."[15]

Justice Goodwin, speaking for the majority in *Brewton* sums up the need for the Oregon ruling:

> If we should today adopt a restrictive application of the exclusionary rule, the result could be a major step backward. This court would in effect be saying to the overzealous that police officers will be free in the future to interrogate suspects secretly, at arms length, without counsel, and without advice, so long as they use means consistent with threat-or-promise voluntariness, and so long as they understand that they may file the information only for use to keep the defendant honest. Thus the police could, at their option, take a calculated risk: By giving up the possibility of using the suspect's statements in the state's case, they could obtain by unconstitutional means and store away evidence to use if the defendant should elect upon trial to take the stand. As commendable as it may be to prevent perjury, the price of such prevention could be to keep defendants off the stand entirely. In some cases, the temptation to silence a suspect of dubious probity might very well outweigh the desire to conduct a constitutionally valid interrogation. We have concluded that to introduce such a rule could undo much of the recent progress that has been made in upgrading police methods to preserve the rights guaranteed under the Fifth

12. Walder v. United States, 347 U.S. 62, 66 (1954) describing the holding in Agnello v. United States.
13. 344 F.2d 163 (D.C. Cir. 1964).
14. 169 Fed. 47 (8th Cir. 1909).
15. *Id.* at 50.

and Sixth Amendments, and would be inconsistent with the trend of our recent decisions.[16]

To permit the State of New York to introduce illegally obtained statements which bear directly on a defendant's guilt or innocence in the name of "impeachment" would seriously jeopardize the important substantive policies and functions underlying the established exclusionary rules.

STANLEY H. KOHN

16. 422 P.2d 581, 583 (Ore. 1967).

EMINENT DOMAIN — Water pollution — Under the laws of South Carolina, a manufacturer has no vested right to discharge industrial wastes into streams. *United States v. 531.13 Acres of Land* (4th Cir. 1966).

As a result of the Hartwell Dam and Reservoir Project, a federal flood control venture on the Savannah River, the Seneca River, a tributary of the Savannah, was reclassified by the South Carolina Water Pollution Control Authority[1] from class "C" to a class "A" stream. The reason for the change was that the new reservoir created by the Hartwell dam was to be partially devoted to public fishing, swimming, and boating, and consequently required a higher degree of purity from its tributaries. The effect on J. P. Stevens & Co. was that its plant on the banks of the Seneca could no longer discharge its waste into that stream without first running it through a disposal facility. Relying on another Fourth Circuit decision, *Town of Clarksville v. United States*,[2] Stevens insisted that since the need for the disposal facility had been precipitated by the government, the cost for its construction should be borne by the United States as part of compensation for property taken from Stevens under the power of eminent domain. A commission appointed by consent reported the claims sustained and the United States District Court for the Western District of South Carolina reached the same conclusions on independent findings as well as in approval of those made by the commission. On appeal to the Court of Appeals for the Sixth Circuit, *held*, reversed. An upper riparian owner may discharge waste into a stream in South Carolina only so long as this does not interfere with a reasonable use being made of the stream by a lower riparian owner. The offensive use of the stream may be terminated either by an owner through common law remedies or the state through the Water Pollution Control Board. Neither amounts to a taking of property for which compensation must be paid. *United States v. 531.13 Acres of Land*, 366 F.2d 915 (4th Cir. 1966).

Before looking at this court's interpretation of South Carolina law, it would be best to point out the manner and extent of change indicated in the circuit court's attitude toward pollution of rivers and riparian rights.

1. S.C. CODE ANN. §§ 70-101 to -139 (1962) set up the agency, spelled out the state's policy, and specifically authorized the classification of waters at § 70-112.

2. 198 F.2d 238 (4th Cir. 1952), *cert. denied*, 344 U.S. 927 (1953).

In *Town of Clarksville v. United States*, noted above, the government was also engaged in building a dam and creating a sizeable backwater. The impounded waters were to inundate approximately forty-one per cent of the town of Clarksville and render useless its sewage system, which had previously emptied directly into the stream to be dammed. The government conceded to the town that it should pay for the construction of a substitute facility. Arrangements were complicated, however, when the State Water Control Board of Virginia announced that the town's indefinite license to run sewage into the stream was being revoked (as all parties admitted knowing it would be sooner or later) and that a new system would have to include a sewage treatment facility before it would be approved. The government was required to pay for the treatment facility because, said the court, "We fail to see how it can logically be argued that the Government's action did not fasten this obligation upon the Town. The duty to build the plant was not present before the condemnation. . . ."[3]

In answer to the government's argument that the necessity of the treatment plant was brought about by state, not federal, action and that such state action was bound to happen regardless, the court said:

> We do not agree with this interpretation. The Water Control Board took no positive action until after the condemnation was started. The taking was at least operative as both notice and spur to the Board to act. Moreover, it is apparent that the Board's policy was not to modify or revoke existing licenses until a sewer system was substantially changed. Certainly there is a strong inference that, without such forced alteration by the Government, the Town could have operated under its present license for many years, if not indefinitely, without being required to build a treatment plant.[4]

Though necessarily abbreviated here, the similarity between the facts of the two cases is striking. Here are two entities, a factory and a town, whose waste disposal facilities are declared improper by a state water pollution control agency whose action is admittedly precipitated by federal condemnation and construction activities; both had land taken by the government, and

3. Town of Clarksville v. United States, 198 F.2d 238, 243 (4th Cir. 1952).
4. *Ibid.*

both were required by the state agency to build a waste treatment facility.

The court in *531.13 Acres of Land* distinguished *Clarksville* on the ground that in that case the government had already conceded its obligation to build a comparable sewage system for the town, while in *531.13 Acres of Land* no obligation had been conceded. "The only question there," said the court, "was the amount of compensation; here liability for any amount at all is the issue."[5]

The distinction is of doubtful validity. In both cases the problem was whether the government should pay for a waste treatment facility, the need for which it had brought about through its dam-building projects.

In *Clarksville* the town and the government had stipulated that just compensation should be in the form of a substitute facility. The court said the issue was "what constitutes that facility under conditions as they will exist when the flooding becomes an accomplished fact."[6] In other words, the government and the town had stipulated that just compensation was to be paid and the court decided that the question was what constituted just compensation—hardly a novel problem.

But in *531.13 Acres of Land*, a new question was raised which was not considered by the court in *Clarksville*, though the opportunity was certainly present. The issue presented in *531.13 Acres of Land* was whether a riparian owner has a compensable property right to use a stream for waste disposal purposes. So the issues are different indeed; not because of the facts, however, but because the court has redefined the question. In so doing it has indicated that the lenient attitude assumed toward the town in *Clarksville* should no longer be relied upon.

Having dispensed with the *Clarksville* case, the court was free to consider whether, under South Carolina law, the right to run waste into a stream existed.

The right of all riparian owners to make reasonable use of passing waters is a principle deeply embedded in the common law of South Carolina.[7] The reasonableness of the use, however, has traditionally been tested by its effect on other landowners

5. United States v. 531.13 Acres of Land, 366 F.2d 915, 920 (4th Cir. 1966).
6. Town of Clarksville v. United States, 198 F.2d 238, 242 (4th Cir. 1952).
7. *E.g.*, Duncan v. Union-Buffalo Mills Co., 110 S.C. 302, 96 S.E. 522 (1918); Garrett v. McKie, 1 Rich. L. 444 (S.C. 1845); Omelvany v. Jaggers, 2 Hill L. 634 (S.C. 1835).

along the stream. As early as 1835 the Supreme Court of South Carolina approved the following statement of this rule:

> [T]he possessor of lands through which a natural stream runs, has a right to the advantage of the stream flowing in its natural course, and to use it as he pleases, and for any purposes of his own *not inconsistent with a similar right of the proprietors of the land above and below*. . . .[8]

Directly in point and supporting the court's position is a jury instruction approved by the court in *Duncan v. Union-Buffalo Mills Co.*:

> Owners of land on the banks of a stream are entitled to the reasonable use of the stream; that they can use the stream for their own purposes to a reasonable extent; that while it is true that a stream must not be polluted, still this does not mean that nothing can be put into the stream; but that *nothing can be put therein that will deprive the landowners below to the reasonable use of the stream.*[9]

Undeniably, the rule is that if a use of a stream interferes with another's reasonable use thereof, the interfering use is unreasonable and will support a cause of action by the injured landowner. Further, it is equally undeniable that the Water Pollution Control Authority may exercise its power to terminate unreasonable pollution of streams where the interest of the public is threatened.[10] It follows, a fortiori, that no riparian owner has a compensable right to interfere with a lower riparian owner's reasonable use of the land.

The court, through the age-old legerdemain of "distinguishing the issues," has avoided overruling its decision in *Town of Clarksville v. United States* but has all but destroyed its usefulness as a precedent for the scores of cases which are sure to arise in this area.

J. SPRATT WHITE, IV

8. Omelvany v. Jaggers, *supra* note 7, at 638-39 (emphasis added).
9. 110 S.C. 302, 306, 96 S.E. 522, 524 (1917) (emphasis added).
10. S.C. CODE ANN. §§ 70-101 to -139 (1962).

TAXATION — The "Overnight" Rule — The Commissioner's "overnight" or "sleep or rest" rules have no rational relation to the business necessity of the meal expense. *Correll v. United States* (6th Cir. 1966).

The taxpayer, a grocery salesman, sold his merchandise to restaurants in various cities. In order to be in his territory at the beginning of the day he had to arise at 4:30 in the morning. He was required by his employer to eat his breakfast and lunch at customers' restaurants, where he could be reached by telephone. He traveled 150 to 175 miles daily, returning home about 5:30 in the afternoon. The taxpayer's employer reimbursed him for meal expenses. The taxpayer deducted costs of his meals as business expenses incurred "while away from home."[1] The Commissioner disallowed the deduction and assessed a deficiency on the ground that the cost of meals was not deductible unless the duration of the travel was so extensive as to require the taxpayer to obtain sleep or rest. The taxpayer paid the deficiency, applied for a refund, and upon its denial, sued in the District Court.[2] A jury verdict was returned in favor of the taxpayer for the full refund, plus interest. On appeal to the Court of Appeals for the Sixth Circuit, *held*, affirmed. The Commissioner's "overnight" or "sleep or rest" rules bear no rational relation to the business necessity of the meal expenses. *Correll v. United States*, 369 F.2d 87 (6th Cir. 1966).

Traveling expenses fall into two categories: (1) traveling expenses while away from home and (2) other traveling expenses such as transportation expenses in the local area. Where the travel is away from home, the cost of meals and lodging may be deducted in addition to the transportation expenses, such as railroad and taxicab fares.[3] The cost of traveling from one's

1. INT. REV. CODE of 1954, § 162(a)(2). The relevant part of the Code reads as follows:

> (a) In General—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business including. . . .
>
> (2) traveling expenses (including amounts expended for meals and lodging . . .) while away from home in the pursuit of a trade or business . . . .

2. Correll v. United States, 65-1 CCH U.S. Tax Cas. ¶ 9337 (E.D. Tenn. 1965).

3. INT. REV. CODE of 1954, § 162(a)(2); Treas. Reg. § 1.162-2(a) (1958); with regard to an employee's duty to account for reimbursed travel expenses see Treas. Reg. § 1.162-17 (1958).

home to his place of business, *i.e.*, commuting expense, is not deductible.[4]

The short phrase "away from home" has spawned a long line of cases which have attempted to clarify its meaning.[5] This phrase made its first appearance in the Revenue Act of 1921 which provided that the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business could be deducted as travel expenses.[6] This provision was included without alteration in section 23(a)(1) of the 1939 Code,[7] and was carried over verbatim in the 1954 Code as section 162(a)(2).[8]

Nothing in the legislative history of section 214(a)(2) of the Revenue Act of 1921 [now section 162(a)(2) of the 1954 Code] lends support to any contention that the words "while away from home in the pursuit of a trade or business" were intended to have a special significance over and above the ordinary import of the language. It should be particularly noted that there is no language in the statute limiting its application to the expenses incurred while away from home *overnight.* Indeed, it was not until 1958 that regulations were adopted which mentioned for the first time the word "overnight."[9]

This overnight rule has been repeatedly questioned and limited.[10] However, the Commissioner in *Correll* and in earlier cases[11] took the position that being away from home "overnight" is a prerequisite to travel status, and expenses incurred for meals while not away from home "overnight" are personal expenses

4. Expenses of going to work by car or any other method, even in emergencies, are not deductible. Lenke Marot, 36 T.C. 23 (1961). *But see* Rice v. Riddell, 179 F. Supp. 576 (S.D. Cal. 1959) holding that a casual musician who played the tuba and bass at various locations could deduct car expenses in traveling to these locations.

5. For a discussion of other problems that arise while "away from home" *see generally* Haddleton, *Traveling Expenses "Away From Home"*, 17 TAX L. REV. 261 (1962); Note, *Travel Expense Deductions,* 43 VA. L. REV. 59 (1957).

6. Revenue Act of 1921, ch. 136, § 214(a)(1), 42 Stat. 239.

7. Int. Rev. Code of 1939, ch. 1, § 23(a)(1), 53 Stat. 12.

8. INT. REV. CODE of 1954, § 162(a)(2).

9. Treas. Reg. §§ 1.162-17(b)(3)(ii), 1.162-17(b)(4) and 1.162-17(c)(2) (1958).

10. Most previous cases rejecting the overnight rule dealt only with transportation expenses. Chandler v. Commissioner, 226 F.2d 467 (1st Cir. 1955); Scott v. Kelm, 110 F. Supp. 819 (D. Minn. 1953); Horace E. Podems, 24 T.C. 21 (1955); Kenneth Waters, 12 T.C. 414 (1949).

11. Cases cited note 10 *supra; see also* Al J. Smith, 33 T.C. 861 (1960); Fred Marion Osteen, 14 T.C. 1261 (1950).

which do not come under section 162(a)(2) of the Internal Revenue Code.

However, as the *Correll* case illustrates, the future of the "overnight" rule seems dim. The Tax Court has drastically modified it,[12] and the Courts of Appeal for the First,[13] Fifth,[14] Sixth[15] and Eighth[16] Circuits have flatly rejected it.

Although earlier Tax Court decisions strictly construed the Commissioner's rulings,[17] the recent case of *Bagley v. Commissioner*[18] took a more liberal view. In that case the court allowed a consulting engineer a deduction for meals purchased on non-overnight trips to work sites. In so ruling, the court stated that it had discarded the "overnight" rule as an absolute standard and will decide future cases on their individual facts.

In *Williams v. Patterson*,[19] a railroad conductor who lived in Montgomery, Alabama, had a six-hour layover in Atlanta, Georgia. He rented a hotel room near the station in order that he might sleep before the return trip home. There was no requirement that he do this. He also ate lunch and dinner in Atlanta. His deduction for meals and lodging in Atlanta was approved. The court stated:

> The 'overnight' gloss was dreamed up by the Department. . . . [T]here is nothing in the statute indicating any congressional intent that 'away from home' means either overnight or away from home for a period substantially longer than an ordinary working day, or that it means 'a trip on which the taxpayer's duties [in his released time] required him to obtain necessary sleep away from his home terminal.'[20]

12. Bagley v. Commissioner, 46 T.C. 176 (1966).

13. Chandler v. Commissioner, 226 F.2d 467 (1st Cir. 1955). As this issue went to press, the First Circuit reversed its former position by accepting the "overnight" rule in Commission v. Bagley, 67-1 CCH U.S. Tax. Cas. ¶ 11-50 (1st Cir. 1967).

14. Williams v. Patterson, 286 F.2d 333 (5th Cir. 1961).

15. Correll v. United States, 369 F.2d 87 (6th Cir. 1966).

16. United States v. Morelan, 356 F.2d 199 (8th Cir. 1966).

17. In Fred Marion Osteen, 14 T.C. 1261 (1950), a deduction for meals was denied a railway postal clerk who had a six hour and twenty minute round trip and ate a meal while at his destination. The Court reasoned that the taxpayer was in "no essentially different position from the worker who is unable to have one of his meals at home." *See also* Sam J. Herrin, 28 T.C. 1303 (1957).

18. 46 T.C. 176 (1966).

19. 286 F.2d 333 (5th Cir. 1961).

20. *Id.* at 335.

Shortly after the Fifth Circuit rejected the "overnight" rule in *Williams*, the Eighth Circuit followed suit in *Hanson v. Commissioner*,[21] stating that the only test authorized by the statute was whether the taxpayer was "away from home."[22] In *United States v. Morelan*[23] the Eighth Circuit again refused to follow the "overnight" rule. There, the State of Minnesota set up meal schedules for highway patrolmen and directed that they eat only in certain places so that they could be reached if necessary. The court held that the subsistence allowance was not includible in gross income since the meals were furnished on the business premises primarily for the convenience of the employer. However, the court went on to state that even if includible in gross income it would be deductible since, "[t]he appellees herein clearly fall under § 162 as they were required to be and were 'away from home' for certain meals while on patrol in any and all parts of their station areas."[24]

The court in *Correll*, relying on *Hanson*, held that the plain language of the statute means what it says and stated that any change in the statute lies with Congress and not with the judiciary. The court stressed that in an era of supersonic travel the use of a time element in testing deductibility is irrelevant.

The courts that refused to follow the "overnight" rule have sacrificed the convenience of a "rule of thumb" for a more just result. Unfortunately, it appears that the Internal Revenue Service prefers the "rule of thumb" and will continue to use the "overnight" rule as a test of being away from home.[25]

Within the framework of section 162(a)(2) the *Correll* decision is to be commended as a reasonable interpretation of the statutory language and must be approved for entirely rejecting the application of the "overnight" rule.

MICHAEL A. PULLIAM

21. 298 F.2d 391 (8th Cir. 1962).

22. *Id.* at 397. "For tax purposes, the petitioner's home was Washington, Iowa. Any travel on business away from the area of Washington, Iowa, was travel away from home within the meaning of the statute, whether such travel involved remaining overnight or not."

23. 356 F.2d 199 (8th Cir. 1966).

24. 356 F.2d 199, 210 (8th Cir. 1966).

25. Rev. Rul. 63-239, 1963-2 CUM. BULL. 87.