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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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I. INDIGENT'S RIGHT TO COUNSEL

By far the most important development in criminal law in South Carolina during the review period was caused by *Gideon* v. *Wainwright*,[1] arising in Florida and going to the United States Supreme Court via the route of certiorari. Since March 18, 1963, the date of this decision, the lawyers and General Sessions judges of the state have been faced with the problem of assuring representation to every indigent defendant accused of crime. In this now celebrated case Gideon was charged in a Florida state court with having broken and entered a pool room, a felony under Florida law. He appeared in court without funds and without a lawyer and asked the court to appoint counsel for him. The court declined his request because under the laws of Florida the only time an indigent defendant is entitled to court-appointed counsel is when charged with a capital offense. Gideon was put to trial before a jury and conducted his own defense. He was convicted and sentenced to serve five years in the state prison. He later filed a petition in the Florida Supreme Court for a writ of habeas corpus attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights guaranteed by the Constitution and the Bill of Rights. The Florida Supreme Court denied relief and upon appeal to the United States Supreme Court certiorari was granted. After argument the Court held that the sixth amendment to the federal constitution, providing that in all criminal prosecutions the accused should enjoy the right to assistance of counsel for his defense, was made obligatory on the states by the fourteenth amendment and that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him. The Court concluded that lawyers in criminal courts are necessities, not luxuries. The Court said:

> . . . reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.[2]

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1. 372 U.S. 335, 9 L. Ed 2d 799 (1963). This case is also noted in the Constitutional Law section at note 20.
2. *Id.* at 344, 9 L. Ed at 805.

The Court went on to say in quoting from *Powell* v. *Alabama*:[3]

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[4]

The effect of this decision in South Carolina has been to require the appointment of counsel in all cases where a defendant is financially unable to employ one. On its authority, new trials have been granted to some defendants who were tried before the decision without counsel. Few lawyers in the state have escaped appointment. In many counties, duties imposed by the cases have become extremely burdensome. This burden has become so great that some bill will probably be introduced in the Legislature during the coming year providing for either a public defender system or for compensation to counsel in appointed cases.

II. RIGHT TO COUNSEL—WAIVER

In *Pitt* v. *State*,[5] the Supreme Court in a prisoner's habeas corpus proceeding concluded that the defendant had waived his right to counsel. The defendant was not illiterate, was above average intelligence, understood his rights but chose to go to trial without the aid of counsel when given an opportunity to procure one. Our court concluded that the right to counsel could be waived by a defendant if intelligently and understandingly done.

3. 287 U.S. 45, 77 L. Ed. 158 (1932).
4. *Id.* at 68, 69, 77 L. Ed. at 170.
5. 240 S.C. 557, 126 S.E.2d 579 (1962). This case is also noted on in the Constitutional Law section at note 17.

III. RIGHT OF INDIGENT TO STENOGRAPHIC TRANSCRIPT OF TRIAL

Another case arising outside of South Carolina which could have some effect on the criminal law of the state is *Draper* v. *State of Washington*.[6] The defendant was convicted in the state of Washington of robbery and applied for a free transcript. The Washington Court concluded that the defendant's exceptions were frivolous and denied to petitioner a free transcript of the record. On appeal to the Supreme Court for a writ of certiorari, review was granted and it held that the conclusion of a trial judge that an indigent's appeal was frivolous was an inadequate substitute for full appellate review available to nonindigents and the case was reversed. The Supreme Court was careful to point out that the state need not supply a stenographer's transcript in every case where a defendant cannot buy it, but that an equivalent report of the events at trial is necessary for an indigent defendant. The Court concluded that it was the duty of the state to provide an indigent as adequate and effective an appellate review as that given appellants with funds, holding that the state must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions. From a careful review of the case, it appears that the state's only defense to a request for a free transcript of record or its equal would be that the defendant was able to purchase it.

In South Carolina two cases were decided involving free transcripts during the review period. In *State* v. *Bishop*[7] the defendant was denied his motion for a free stenographic transcript of the record of trial and an appeal from the decision denying the motion was decided adversely to the defendant. The matter was heard by the resident judge of the Seventh Circuit who said the following in denying the motion:

> After reviewing the record and hearing argument of counsel, I conclude that this defendant is employed, and though he may not have an abundance of finances, I conclude that he would elect to spend what money he does have for things other than the transcript of record.[8]

6. 372 U.S. 487, 9 L. Ed. 2d 899 (1963).
7. 241 S.C. 459, 128 S.E.2d 914 (1962).
8. *Id.* at 460, 128 S.E.2d at 914.

Our court concluded that where a defendant is in fact indigent there is a duty to provide a transcript but that the question of whether or not he is indigent is one for the circuit court judge to decide and if it appears that he is able to purchase for himself a transcript, there is no duty on the state to provide for one.

In *State* v. *Johnson*,[9] an indigent defendant applied for a transcript of trial. The transcript was denied on the ground that the time for appealing had expired and that no facts were alleged which would permit attack upon conviction in a collateral proceeding. Upon appeal our court held that the defendant, who was represented by himself, did not argue exceptions which he had made to the order refusing the transcript and his appeal was dismissed on the ground that exceptions not argued were deemed abandoned.

IV. GRAND JURY—JURY LIST

In *State* v. *Jackson*,[10] the defendant, who was being prosecuted for murder, moved to quash the indictment on the grounds that the grand jury was illegally constituted because the statutory requirement that the jury commissioners prepare a list of prospective jurors including not less than two from every three qualified electors was disregarded by officials. The motion was granted and the state appealed. It appeared that the Anderson County jury commissioners had in the box some 2,700 names out of a possible 15,000 male electors. The commissioners contended that additional names were not in the box because (1) it was made back in W.P.A. days and was not large enough to accommodate the proper number of capsules, and (2) there were not enough capsules available of the type in use in Anderson County. The court concluded that these reasons were wholly insufficient in law for not having a proper jury list and that the result was an unlawful jury list which was subject to timely challenge.

This appears to be an important case and indicates that the requirements of Section 38-52 of the Code will be enforced by the court. Jury commissioners should take note of this decision.

V. VENUE

The defendant in *State* v. *Gasque*,[11] was prosecuted on charges of filing false income tax returns. The indictment was returned

9. 241 S.C. 366, 128 S.E.2d 664 (1962).
10. 240 S.C. 238, 125 S.E.2d 474 (1962).
11. 241 S.C. 316, 128 S.E.2d 154 (1962).

in Richland County and upon the call of the case the defendant moved to quash the indictment on the ground that the tax returns were filed within Marion County by the taxpayer and that if there were any offense, it was committed entirely within Marion County. The taxpayer was a resident of Marion County, received all his income in the county and prepared, made, signed and delivered the tax returns in Marion County to an agent of the Tax Commission.

The motion to quash the indictment was based on article 1, section 17 of the South Carolina Constitution, which provides:

> No person shall be held to answer for any crime where the punishment exceeds a fine of one hundred dollars or imprisonment for thirty days, . . . unless on a presentment or indictment of a grand jury of the County where the crime shall have been committed, . . .

The court concluded that every act with which the respondent was charged as constituting a violation of the section requiring the filing of tax returns took place in Marion County and that the proper place for indictment would be in Marion County. The decision of the lower court was affirmed on appeal.

VI. FRAUDULENT SECURITIES SALES

In *State* v. *Homewood*,[12] the defendant was convicted of violating a statute prohibiting fraud and misrepresentation in the sale of securities. On appeal the defendant contended that he had only failed to disclose material facts relative to the stock and that this failure did not constitute an offense under Section 62-306 of the 1962 Code. The court concluded that this argument was without merit and held that it was unlawful to use or employ any fraud or fraudulent practice in connection with the sale of securities whether or not the conduct of the party charged with violation involved any affirmative false pretense, representation or promise.

VII. IMPARTIAL TRIAL

In *United States* v. *Campbell*[13] the defendant was convicted in the United States District Court of concealing and removing nontax-paid whiskey and he appealed. During the trial of the

12. 241 S.C. 231, 128 S.E.2d 98 (1962).
13. 316 F.2d 7 (4th Cir. 1963).

case but out of the presence of the jury the court made the following comments:

> The Court: I never knew a Campbell in my life that wasn't in the liquor business . . . As a matter of fact, I defended them all. When I was at the bar, I defended all the Campbells in the liquor business; and after I got to be District Attorney, I prosecuted all the Campbells; and now that I have been a judge, I have been trying Campbells 25 years as a judge.[14]

Later on the court had this to say in connection with the defendant's being in a house when an alleged sale was made:

> The Court: What would you think a Campbell would have been doing there with that liquor if he wasn't participating?[15]

The Fourth Circuit Court of Appeals granted a new trial on other grounds and made no decision as to whether or not these comments were so prejudicial as to warrant a new trial. It made the following observation about the Judge's comments:

> It suggests, however, that the District Judge may have been convinced of the defendant's guilt before the trial commenced, and the defendant complains that this was made evident to the jury in a number of remarks and rulings in the course of the trial and in the presence of the jury. We need not detail the instances upon which this contention is based or consider whether, in the absence of any other reason for granting a new trial, they alone were so prejudicial as to warrant the granting of a new trial. The defendant, however, is entitled to be tried in an atmosphere in which he may receive the full benefit of the presumption of innocence to which he is entitled. Under the circumstances, since a new trial must be granted because of the peremptory instruction which foreclosed the jury's choice of permissible but conflicting inferences, we think that the new trial should be before some other district judge whose contacts with the defendant and his relatives have been less extensive.[16]

14. *Id.* at 8.
15. *Id.* at 9.
16. *Id.* at 9.

VIII. HUSBAND AND WIFE

In *State* v. *Campbell*,[17] the defendant was convicted upon a charge of failure to support his wife. An appeal to the Supreme Court ensued and the defendant contended that he had been prejudiced by the failure of the trial judge to permit the introduction of a Georgia divorce decree. It was his contention that a valid decree of divorce afforded him immunity from prosecution for nonsupport. The court agreed, finding: "A valid decree of divorce affords the husband immunity from prosecution for abandonment and nonsupport" and concluded that the trial judge should have admitted into evidence the exemplified copy of the divorce proceedings of the Georgia Court when such was offered in evidence by the appellant. The court decided that the mere offering of this proceeding did not prove that it was valid and that it could be impeached by a showing that the courts of Georgia had not acquired jurisdiction to grant the divorce. It was, however, error to refuse to admit it in evidence and the judgment of the lower court was reversed and the case remanded for a new trial.

IX. ADMINISTRATIVE LAW—RIGHT OF THE LEGISLATURE TO PERMIT DIRECTOR OF THE STATE PENITENTIARY TO PRESCRIBE REGULATIONS FOR THE ENFORCEMENT OF CERTAIN LAWS

In *Cole* v. *Manning*,[18] Cole, the defendant, was convicted of conspiracy to violate Section 55-14 the 1952 Code by furnishing the prisoners in the state penitentiary certain drugs which had been declared contraband by the Director of Prisons. It was his contention that the section in question unlawfully delegated legislative power to the director of prisons. He contended that the section provided no standard by which the Director was to be guided in determining what things he might declare contraband and that the matter, left to his absolute unregulated and undefined discretion, gave to an administrative agency the power to make laws. The court rejected petitioners' argument and said:

17. 242 S.C. 64, 129 S.E.2d 902 (1963). This case is also noted in the Domestic Relation section at note 1.

18. 240 S.C. 260, 125 S.E.2d 121 (1963). This case is also noted in the Administrative Law section beginning at note 10, and in the Constitutional Law section at note 28.

It is elementary that the legislature may not delegate to an administrative agency its power to make laws. But no violence is done to the principle of separation of governmental powers when a law, complete in itself, declaring a legislative policy and establishing primary standards for carrying it out, or, with proper regard for the protection of the public interest and with such degree of certainty as the case permits, laying down an intelligible principle to which the administrative agency must conform, delegates to the agency the power to prescribe regulations for the administration and enforcement of that law within its expressed general purpose.[19]

X. CIVIL RIGHTS

During the review period five cases involving civil rights were heard by the South Carolina Supreme Court. Four of the cases were reversed altogether or in part and one of the cases was affirmed.

In *State* v. *Brown*,[20] Mr. Justice Lewis had this to say:

The defendants have the constitutional right to freedom of speech, assembly and to petition for redress of grievances. The fact that the defendants may have been at the time of their arrests attempting to assert such constitutional rights does not answer the question here. While the state must safeguard the constitutional rights of the defendants, it also has a duty to preserve the public peace and to assure the availability of the streets to serve the necessary requirements of the community. The constitutional guarantees which, admittedly, the defendants have a right to enjoy may not be asserted in any manner, regardless of any resulting peril to the community therefrom. The constitutional principles here invoked do not prohibit state action when a clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public peace or order appears.

The defendants were engaged at the time in expressing their opposition to racial segregation. The question of racial practices is a present and perplexing one, involving deep seated

19. *Id.* at 264, 125 S.E.2d at 623.
20. 240 S.C. 357, 126 S.E.2d 1 (1962).

> feelings and beliefs. Where issues are involved which so deeply affect the feelings and emotions of a people, incidents often precipitate open conflict which in other situations would go unnoticed. In urging the adoption of one's views it must be recognized that the constitutional right exists to oppose as well as to espouse a cause. It is clear, however, that unpopular views may not be silenced under the guise of the preservation of order. In the conflict of opposing ideas the rights of the contending factions must be balanced if the state is to exist and the constitutional rights of all preserved. Therefore, the principle has become fixed that, in exercising the rights guaranteed under the Constitution, one may not commit a breach of the peace. This is not a denial of those rights but rather a recognition that they can only exist in an orderly society.[21]

In *City of Florence* v. *George*,[22] the defendants were convicted in the General Sessions Court of Florence County of violation of an ordinance prohibiting staging of a parade on the public streets without obtaining a permit from the chief of police. The ordinance permitted the chief of police to absolutely deny such a permit. The ground of the appellants' appeal was principally that the ordinance was unconstitutional because it made the peaceful enjoyment to the right of freedom of speech and assembly upon the public streets of the City of Florence contingent upon the uncontrolled will or whim of the chief of police, vesting in him the absolute power to permit or deny the right. Our court concluded that the City of Florence had the right of control but questioned that it was exercised in the proper manner in this instance. The court concluded that it was unconstitutional and reversed the lower court.

In *City of Sumter* v. *Lewis*,[23] the defendants were convicted of breach of the peace and appealed. The breach of the peace complained of consisted of the defendants walking on the sidewalk in a single file carrying placards protesting racial segregation but making no noise and not obstructing traffic.

The court concluded that there was no overt act indicating tension, that no noise was being made, no traffic was being ob-

21. *Id.* at 363, 364, 126 S.E.2d at 4.
22. 241 S.C. 77, 127 S.E.2d 210 (1962). This case is also noted in the Administrative Law section at note 43 and in the Constitutional Law section at note 15.
23. 241 S.C. 364, 128 S.E.2d 684 (1962). This case is also noted in the Constitutional Law section at note 8.

structed and concluded that this conduct did not support the charge of breach of the peace and reversed the lower court.

CIVIL RIGHTS—RESISTING ARREST

In *City of Sumter* v. *Gregg*,[24] the defendants were convicted on the charge of resisting arrest in violation of a city ordinance. The ordinance made it unlawful to resist arrest or interfere with any police officer *of the city* while in the discharge of his duty. The evidence showed that the arresting officer was an officer of the South Carolina Law Enforcement Division and one or more deputy sheriffs of the County of Sumter. The record nowhere indicated that a city police officer participated in the arrest. The court reversed the decision of the Court of General Sessions on the ground that the act complained of was not encompassed by the terms of the ordinance.

XI. VOIR DIRE IN MAGISTRATES' COURT

In *State* v. *Brown*,[25] trial by jury was demanded and an examination of prospective jurors on their voir dire was requested. The magistrate refused to examine the jurors on their voir dire and this refusal was cited as grounds for reversal of the verdict of the jury. Our court said:

> Examination of prospective jurors on their voir dire is a guaranty of the right of the parties to an impartial jury. And, when timely request was made, it became the duty of the Magistrate to make reasonable inquiry of the jurors to determine whether bias or prejudice existed, to the end that the constitutional right of the litigants to a trial by an impartial jury could be secured.[26]

In *City of Rock Hill* v. *Henry*,[27] the defendants were convicted of breach of the peace and appealed. The breach of the peace complained of was the singing of patriotic and religious songs in a loud and boisterous manner and in such fashion that work in the city hall was disrupted. The court, in refusing to reverse the conviction, stated:

24. 241 S.C. 409, 128 S.E.2d 685 (1962).
25. *Supra* note 20.
26. 240 S.C. 357, 365, 126 S.E.2d 1, 5 (1962).
27. 241 S.C. 427, 128 S.E.2d 775 (1962). This case is also noted in the Constitutional Law section at note 9.

> Appellants were not convicted under a statute designed to perpetuate segregation but were convicted of the common law offense of breach of peace, and this applies to any person irrespective of race. The singing of patriotic songs and religious hymns is, of course, not unlawful if done in a lawful manner, but even such praiseworthy acts may be done at a time and place and in such manner as to be unjustifiable and unlawful resulting in a breach of the peace.[28]

A number of other cases were presented to the court, argued and decisions made during the review period. None of these cases have pronouncements of any new principles and were not of such significance as to permit a detailed review of them here.

28. *Id.* at 429, 128 S.E.2d at 776.