DePaul Law Review

Volume 12
Issue 2 *Spring-Summer 1963*

Article 12

Constitutional Law - Waiver of Right To Claim Denial of Due Process in Cases Involving Perjured Testimony - People v. Lueck, 4 Ill.2d 544, 182 N.E.2d 733 (1962)

DePaul College of Law

in state criminal proceedings the identical and fundamental justice of the right to counsel which the sixth amendment has always guaranteed in federal prosecutions and in neither case will there be a distinction made between capital and non-capital offenses.

CONSTITUTIONAL LAW–WAIVER OF RIGHT TO CLAIM DENIAL OF DUE PROCESS IN CASES INVOLVING PERJURED TESTIMONY

Robert Lueck, Fred Dittmer, Jr. and DeKoven S. Crowley were charged in the Criminal Court of Cook County with the crimes of conspiring to commit larceny and conspiring to receive stolen property. Dittmer and Crowley each pleaded guilty. The prosecutor, in asking the court to delay the sentencing of these two defendants until such time as the court would dispose of the case involving Lueck, made certain statements in the presence of Littmer, Lueck, and Lueck's counsel. Among other things, the prosecutor related that the State had agreed and made representations to Dittmer and Crowley that, in the event they testify on behalf of the State against the defendant Lueck, the State would recommend that both be placed on probation for a term of two years. Two weeks later, at Lueck's trial, Dittmer testified that the State's Attorney had not offered him any inducement for testifyng as a witness. Lueck was subsequently found gulity. In his writ of error to the Supreme Court of Illinois, Lueck alleged that he was denied due process of law when the prosecution knowingly used perjured testimony to secure his conviction. The Court ruled that the failure of the prosecution to correct the testimony, which it knew to be false, denied Lueck due process of law in violation of the due process clauses of both the Federal and Illinois constitutions.[1] *People v. Lueck*, 4 Ill. 2d 554, 182 N.E. 2d 733(1962).

Due process of law in criminal cases requires that the accused (1) know the nature of the charge against him; (2) have such charge specifically and definitely set before him; and (3) be granted an opportunity to be heard and introduce evidence in his own defense.[2] However, these requirements are not satisfied by mere notice and hearing if the state has contrived a conviction through the presentation and use of testimony which is known to the prosecution to be perjured. Such contrivance in securing the conviction and imprisonment of a defendant is as inconsistent with the basic demands of justice as is the procuring of a like result

[1] U.S. CONST. amend. XIV, § 1; ILL. CONST. art. II, § 2.

[2] People v. Sherwin, 353 Ill. 525, 187 N.E. 441 (1933).

through intimidation.[3] Prohibition of the knowing use of false testimony to obtain a conviction is implicit in any concept of ordered liberty.[4] Consequently, the right of a defendant to obtain a reversal, by claiming a denial of due process upon the showing that his conviction was secured by the prosecution's knowing use of perjured testimony, has crystallized into law.[5]

The elements which the defendant must show to gain reversal of his conviction are simple and precise. Due process is held to be denied when a defendant is convicted of a crime at a trial in which perjured testimony on a material point is knowingly used by the prosecution against the accused. Further, the accused must have been prejudiced by such testimony.[6] Enumerating the necessary elements in detail, they are:

1) *The testimony must be perjured.*[7] A person commits perjury when under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.[8] It is generally held that there must necessarily be an actual perjured statement by a government witness used against the defendant before he can obtain a reversal.[9]

2) *The perjury must pertain to a material point.*[10] Not only can the accused claim a denial of due process when the perjury pertains to the main issue, but the accused could also claim a denial of due process when the perjury goes merely to the credibility of the witness, even as to minor issues.[11]

[3] Mooney v. Holohan, 294 U.S. 103 (1935).

[4] Napue v. People, 360 U.S. 264 (1959).

[5] Pyle v. Kansas, 317 U.S. 213 (1942).

[6] *Ibid.*; Alcorta v. Texas, 355 U.S. 28 (1957); White v. Ragan, 324 U.S. 760 (1945).

[7] Ryles v. United States, 198 F. 2d 199 (10th Cir. 1952); Soulia v. O'Brien, 188 F. 2d 233 (1st Cir. 1951). *But cf.* McGuinn v. United States, 239 F. 2d 449 (D.C. Cir. 1956) where the allegations of perjury had to do with situations where witnesses' recollections differ as to immaterial matters, and as such were not held to be sufficient to support the charge.

[8] ILL. REV. STAT. ch. 38, § 32-2 (1961).

[9] For an analysis of the effect of a retraction of the perjured statement by the witness after the trial, see United States v. Branch, 261 F. 2d 530 (2nd Cir. 1958); Cobb v. Hunter, 167 F. 2d 888 (10th Cir. 1948); Cobb v. United States, 161 F. 2d 814 (6th Cir. 1947).

[10] Lister v. McLeod, 240 F. 2d 16 (10th Cir. 1957). The accused has the burden of proving the perjured matter was material.

[11] Napue v. People, 360 U.S. 264 (1959). See the test of materiality which is set forth in Curran v. Delaware, 154 F. Supp. 27 (D.C.D. Del. 1957).

3) *The prosecution must know the testimony is perjured.*[12] Even if there is actual tainted testimony resulting in a conviction, there can be no reversal of the conviction by a claim of denial of due process unless the accused[13] brings concrete evidence[14] that the government officers[15] had actual[16] knowledge of the falsity of the statements constituting the perjury and nevertheless used such testimony to secure a conviction.[17]

4) *The accused must suffer prejudice because of the perjured testimony's effect on the jury.*[18] The standard to measure the prejudicial effect is an objective one.[19] The weight of other evidence sufficient in itself to obtain a conviction has no effect on the right to claim a denial of due process if there is also perjured testimony used in obtaining the conviction.[20]

The Court, in applying these criteria to the facts in the *Lueck* case, found a denial of due process. There was perjured testimony by co-defendant Dittmer on a point which reflected on his credibility as a witness. Such perjury was known to the prosecution, and it had a prejudicial effect on the jury.[21] The Court, in arriving at the decision, stood heavily on the facts and decision of *Napue v. People.*[22] In that case, at the murder trial

[12] Kowalak v. Frisbie, 93 F. Supp. 777 (E.D. Mich. 1950); Tompsett v. Ohio, 146 F. 2d 95 (6th Cir. 1944).

[13] Lister v. McLeod, 240 F. 2d 16 (10th Cir. 1957). The accused has the burden of the proof.

[14] See Green v. United States, 158 F. Supp. 804 (1st Cir. 1958) which held that hearsay is no evidence. Wild v. Oklahoma, 187 F. 2d 409 (10th Cir. 1951); Hinley v. Burford, 183 F. 2d 581 (10th Cir. 1950).

[15] Curran v. Delaware, 259 F. 2d 707 (3rd Cir. 1958). The officers of the government must have knowledge of the perjury. It is enough that these officers are not the prosecuting attorneys, but merely the arresting police officers.

[16] Taylor v. United States, 229 F. 2d 826 (8th Cir. 1956). *Contra,* Wild v. Oklahoma, 187 F. 2d 409 (10th Cir. 1951), which held that constructive knowledge would be sufficient.

[17] Compare In re Sawyer's Petition, 229 F. 2d 805 (7th Cir. 1957), which held that there could be no reversal without a knowing use of perjured testimony, with Jones v. Kentucky, 97 F. 2d 335 (6th Cir. 1938), which granted a reversal although there was no proof of a knowing use of perjured testimony to secure a conviction.

[18] Hickman v. United States, 246 F. 2d 178 (8th Cir. 1957).

[19] Napue v. People, 360 U.S. 264 (1959). Guile or intent to prejudice is of little importance where the result is prejudicial.

[20] *Id.* at 264; Coggins v. O'Brien, 188 F. 2d 130 (1st Cir. 1951). Other evidence is no excuse. The burden is not on the convicted person to show the perjured evidence tipped the jury scale. *Contra,* Jones v. Mayo, 87 F. Supp. 700 (S.D. Fla. 1949) *aff'd,* 181 F. 2d 92 (5th Cir. 1950).

[21] Had the testimony of Dittmer been impeached, the result of the trial could have been affected.

[22] Napue v. People, 360 U.S. 264 (1959).

of the defendant, Napue, in an Illinois state court, the principal state witness testified in response to a question by an attorney for the state that he had received no promise of consideration for testifying. The State's Attorney knew that this testimony was false but did nothing to correct it. Napue was found guilty and was sentenced. Subsequently, Napue discovered that the principal witness had been offered a consideration by the state for testifying. Alleging these facts, Napue filed a petition to set aside his conviction, but this petition was denied and the denial was affirmed by the Supreme Court of Illinois. On certiorari, the Supreme Court of the United States unanimously reversed the judgment. In an opinion by Chief Justice Warren it was held that, under the aforementioned circumstances, the conviction violated the due process clause of the fourteenth amendment to the federal constitution.[23] The Court in the present case concluded that the facts of the *Napue* case and the instant facts were without a difference, and thus, as in the *Napue* case, a reversal of the conviction was warranted.

In the dissent, however, Chief Justice Hershey noted a distinction between the two cases: the fact of the falsity of the particular testimony in the *Napue* case was not known to the defendant or counsel until *after* the trial. Here, the falsity was known to the defendant *at* the trial and such fact presented the question of a possible waiver of defendant's right to claim a denial of due process.

Waiver is the intentional relinquishment of a known right,[24] and it applies to *all* rights intended solely for the individual's benefit.[25] The United States Court of Appeals has held that one may waive the right to claim a denial of due process on the ground that the testimony given for the prosecution in a criminal trial was perjured.[26] The accused, if he knows the testimony is false, cannot remain silent, for he is bound to use the means available to him to counteract such testimony.[27] He cannot withhold such evidence or objection, thereby hoping later to obtain a reversal by claiming he was denied due process when convicted by reason of perjured testimony.[28]

[23] People v. Napue, 13 Ill. 2d 566, 150 N.E. 2d 613 (1958).

[24] Johnson v. Zerbst, 304 U.S. 458 (1938).

[25] Sartin v. Hudson, 143 S.W. 2d 817 (Tex. Civ. App. 1940).

[26] McGuinn v. United States, 239 F. 2d 449 (D.C. Cir. 1956).

[27] In Taylor v. United States, 229 F. 2d 826 (8th Cir. 1956), Justice Stone, speaking for the majority, stated: "The accused is fully entitled to present, at his trial, all evidence in defense of which he has actual knowledge at that time. He cannot remain silent as to such thus hoping to gain an acquittal on the evidence actually presented and thereafter expect to have a second trial and chance for acquittal on evidence he has knowingly concealed at the time of the trial." *Id.* at 833.

[28] Tucker v. United States, 255 F. 2d 271 (9th Cir. 1958).

Chief Justice Hershey in the dissent in the *Lueck* case reaffirmed the position that the knowledge of the accused of the falsity of the testimony, and his failure to do anything about said perjury at the proper time, constituted a waiver of his right to claim a denial of due process thus securing a reversal of his conviction. This position was best illustrated in another case brought before the Illinois Supreme Court, *People v. Lewis*,[29] when Justice Hershey, speaking in the decision for the majority, stated:

> It does not, however, follow that mere allegations of perjury are sufficient to sustain a petition. . . . In order to be entitled to relief, petitioner must not only show that adequate grounds for relief exist but also that it was through no fault or neglect of his own that the grounds now claimed for relief were[30] not previously made to appear to the trial court. . . .

In accordance with this opinion, the number of the previously discussed requisites which an accused must prove before he can seek a reversal of his conviction on the basis of denial of due process is increased from four to five, the fifth requisite being that the accused must show that through no fault of his own was the falsity of the testimony *not* made known at the time of the trial.

These five requirements, and especially the fifth, are emphasized by Justice Brennan speaking for the majority in *Shammas v. Shammas*[31] where he lists the requirements for reversal to be: (1) a false testimony, (2) on a material point, (3) wilfully and knowingly used, and (4) having a prejudicial effect on the defendant. In addition he adds:

> Further, a party seeking to be relieved from the judgment must show that the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial or that for other good reason the failure to use diligence is in all circumstances not a bar to relief.[32]

The holding in the present case indicates a new attitude in that due process is held to be denied although the accused knew of the falsity of the statement at the trial and failed to do anything about it until after the trial. This new view has desirable and undesirable ramifications. From a positive standpoint, such a view discourages completely the use of perjured testimony by officers of the state to obtain a conviction. A tainted trial cannot be corrected or waived by any failure to act on the part of the defense. However, from a negative side, the defense, knowing the testimony is perjured, is offered a dubious advantage of being able to wait until the end of the trial and gamble on an acquittal, or to seek a reversal of the conviction because of the prosecution's use of perjured testimony if an acquittal is not forthcoming.

Certainly, from the definition of due process previously mentioned, the

[29] 22 Ill. 2d 68, 174 N.E. 2d 197 (1961).
[30] *Id.* at 70, 174 N.E. 2d at 198.
[31] 9 N.J. 321, 88 A. 2d 204 (1952).
[32] *Id.* at 330, 88 A. 2d at 208.

older and majority view is more in conformity with the guarantees provided for in the due process clauses of the Federal and Illinois constitutions. It is a distortion of justice to allow these clauses to be used as tools to thwart the very principles upon which they are founded. Future decisions will either re-establish the older principles of justice or lead us further into a new understanding of the principles to which the present decision points. Time alone will determine the direction.

DAMAGES–THE COMPENSATORY THEORY FAVORED OVER THE COLLATERAL SOURCE DOCTRINE

The plaintiff, a doctor, suffered injuries when the defendant negligently struck the rear of his automobile; plaintiff received medical care from his colleagues and his permanently staffed nurse at no actual cost. In his bill of particulars the plaintiff listed $2,235 for medical and nursing care, alleging that he should recover for such collateral benefits. The lower court refused to allow recovery, and the New York Court of Appeals affirmed, holding that the value of medical and nursing care rendered the injured physician gratuitously was not recoverable as special damages, as it was the policy of the Court to allow only actual compensatory damages in recoveries. *Coyne v. Campbell*, 11 N.Y. 2d 372, 183 N.E. 2d 891 (1962).

The plaintiff based his theory of recovery on the New York Court of Appeals case of *Healy v. Rennert*[1] where plaintiff, a fireman, was allowed to recover although his medical and nursing bills had been paid by an insurance plan to which he had contributed, and even though his disability allowed him to receive a disability pension. The Court however, in the *Coyne* case, followed its ruling in *Drinkwater v. Dinsmore*,[2] where a plaintiff was precluded from collecting as damages lost wages which had been paid gratuitously by his employer, and again applied the compensatory theory of damages. The Court said that the *Healy* case did not cast doubt on the continued validity of the *Drinkwater* case, as the plaintiff contended, for there were factual distinctions between the two cases. It was pointed out by the Court that in the *Healy* case, the plaintiff paid a premium for the health insurance and had worked for eighteen years to earn eligibility for the disability pension, whereas in the *Coyne* and *Drinkwater* cases, the plaintiffs' benefits were wholly gratuitous. The dissenting opinion in the *Coyne* case stated that a tortfeasor should not be permitted to deduct from his damages the benefits which plaintiff received from another source gratuitously; in other words, it said that the collateral source doctrine should have been applied in this case.

[1] N.Y. 2d 202, 173 N.E. 2d 777 (1961).

[2] 80 N.Y. 390 (1880).