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Criminal Law - Probation by Federal Court Does Not Preclude Criminal Jurisdiction over Probationer by State Courts - Stewart v. United States, 267 F.2d 378 (C.A. 10th, 1959)

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warrant is constitutionally required, the constitutional restrictions must apply.

The main point considered by the Court in deciding this case, however, was the relationship between what the individual was forced to give up as compared with benefits that the public welfare would derive by prompt inspections. This conclusion was reached by examining the inspection law which required three elements for a proper inspection: (1) there must be valid ground for suspicion of a nuisance; (2) the inspection must be made in the day time; and (3) the inspector can use no force in order to enter. The Court indicates that as long as these elements are present in an inspection law, the law will be upheld as constitutional as the invasion of the person's privacy is slight, when compared with the benefit to public good. As a result of this public good which the Court felt is to be desired, the privacy of the individual in his home must be sacrificed.

The ramifications of the decision in the *Frank* case are not entirely clear and can only be clarified by subsequent cases. The Court seemed to emphasize the fact that the ordinance required the inspection to be made during the day, that there was ground for suspicion of a nuisance on defendant's property and that no force was authorized. Thus the Court may in subsequent cases limit the inspections without a search warrant to cases where these three elements are present and require a search warrant in all other inspections whether for civil or criminal information. On the other hand, the Court may extend the present decision to all civil inspections whether the three elements are present or not. In either case, the present decision has greatly limited a right which had long been considered as being without limitation. Thus, a person who feels that he has a right to privacy in civil cases, as well as in criminal cases, can no longer look to the Constitution for protection of this right. His only recourse is to campaign against these ordinances and statutes which take this right away from him by authorizing inspections without a search warrant.

CRIMINAL LAW–PROBATION BY FEDERAL COURT DOES NOT PRECLUDE CRIMINAL JURISDICTION OVER PROBATIONER BY STATE COURTS

Errol Leslie Merriman was indicted in the United States District Court for Utah. A plea of guilty was interposed, imposition of sentence was deferred and Merriman was placed on probation for a period of five years. According to the terms of his probation, Merriman was to return to his home in Bakersfield, California, where he was to remain and live with his wife, and supervision of probation was to be transferred to the United States Probation Officer for the Southern District of California. Obedient to the direction of the court, Merriman started by bus for his home.

When the bus reached Fillmore, Utah, plaintiff sheriff took Merriman into custody on a warrant of arrest issued upon a pending criminal charge of violating a penal statute of the state. The United States District Court issued a writ requiring the sheriff to deliver Merriman to the custody of the federal marshal. The sheriff then filed a notice of appeal. In vacating the order, the court of appeals held that where a federal court enlarged accused on probation, it did not thereafter during the period of probation have sole jurisdiction over him in the sense that state authorities were precluded from taking him into custody upon a charge of violating a criminal law of the state. This was found to be true even though the court which placed him on probation objected to the prosecution by the state. *Stewart v. United States*, 267 F.2d 378 (C.A. 10th, 1959).

This ruling is in direct opposition with *Grant v. Guernsey*,[1] an earlier case decided by the same court. In the *Guernsey* case, the court held that the defendant while on probation was subject to the jurisdiction of the federal court. It further decided that the defendant during his probation was immune to prosecution by a state court unless the federal court chose to relinquish its jurisdiction.

The *Guernsey* case was decided only eight years after the federal probation system was put into operation throughout the country.[2] It was the first decision dealing with the question of a state court taking into custody a probationer of a federal court and it clearly equated probation with physical custody of the defendant. In several subsequent cases, the courts have reached a similar decision. In *Dillingham v. United States*,[3] the court held that one on probation was not at large except within the circumscribed limits permitted by his probation. The court said, "he is in law and in fact in the custody and under the control of the court of his probation."[4] Therefore, in this case we see the court following the *Guernsey* decision in equating probation and physical custody.

In *Speece v. Toman*,[5] a 1938 decision by the District Court for Illinois did not follow so closely the reasoning in the *Guernsey* case. Here the court held that one on probation from a federal district court could not be taken out of that court's custody by a state court's subsequent sentence without the express consent of the federal district court. This case dif-

[1] 63 F.2d 163 (C.A. 10th, 1933); cert. denied, 289 U.S. 744 (1933).

[2] 43 Stat. 1259 (1925), 18 U.S.C.A. § 3651 (Supp., 1958).

[3] 76 F.2d 35 (C.C.A. 5th, 1935).

[4] Ibid., at 36.

[5] 23 F. Supp. 119 (N.D. Ill., 1938). In this case the district court amended the probation order to expire immediately and directed delivery of the defendant to the sheriff on sentence of the Illinois court, deciding that the probation order should not be used as a means of conferring immunity from Illinois laws.

fered from the *Guernsey* decision in that the court held the conviction by the state court was valid but without the consent of the federal court it could not execute the sentence.

In 1939, in *United States v. Prendergast,*[6] it was adjudged that while the defendants were on probation they still were in federal custody, and while in custody they could not otherwise be prosecuted without consent of the federal court.

In 1948, *United States v. McGowan*[7] also followed the *Guernsey* decision. It held that one on probation was in the legal custody of the court which imposed the sentence. Furthermore, it was stated that the court which exercised its jurisdiction over defendant holds it to the exclusion of all others until its duty is fully performed or until it relinquishes its jurisdiction.

Guernsey was therefore clearly not without following, particularly in the earlier cases. There has been, however, a trend within the last twelve years in the direction of the *Speece* case. For example, in *United States v. Fenno,*[8] the court decided that where a member of the naval reserve was on probation by a federal district court at the time of his recall to active duty for the purpose of trial by general court martial, the court martial had jurisdiction in the absence of objection by the district court. This was found to be the case even though consent of the district court to court martial was not sought or obtained prior to trial. The *Fenno* case was one of many which opposed *Guernsey* by holding that the second court had jurisdiction without the consent of the first court.[9]

In the *Stewart* case, the court refers to its decision as being the first time that it has followed the more recent trend. This seems doubtful in view of *Rawls v. United States.*[10] In the latter case, a federal district court prosecuted one who was on parole from a state court. In that decision, the Court of Appeals for the Tenth Circuit held that the federal district court had jurisdiction over the defendant even though the state court had not given its consent to the prosecution. In reaching its deci-

[6] 28 F. Supp. 601 (W.D. Mo., 1939). The court implied that it would always consent to the state court's jurisdiction.

[7] 80 F. Supp. 792 (Minn., 1948).

[8] 167 F. 2d 593 (C.C.A. 2d, 1948).

[9] Strand v. Schmittroth, 251 F.2d 590 (C.A. 9th, 1957); United States v. Murphy, 217 F.2d 247 (C.A. 7th, 1954); Stripling v. United States, 172 F.2d 636 (C.A. 10th, 1949); United States v. Fenno, 167 F.2d 593 (C.C.A.2d, 1948); Rawls v. United States, 166 F.2d 532 (C.C.A. 10th, 1948); Powell v. Sanford, 156 F.2d 355 (C.C.A. 5th, 1946); Speece v. Toman, 23 F. Supp. 119 (N.D. Ill., 1938).

[10] 166 F.2d 532 (C.C.A. 10th, 1948).

sion, the court referred to the rule of comity[11] and held that it does not destroy the jurisdiction of the second court. It only requires the later court, in the interest of orderly administration of justice, to postpone the exercise of its jurisdiction by not taking the defendant into custody until the first sovereign is through with him. The court also stated in *Rawls* that where there is no express objection by the first court, there is a presumption that the first court consented to the taking of the defendant. Other courts have indulged in the presumption introduced in *Rawls*.[12]

It would seem that the court in *Rawls* abandoned the *Guernsey* decision in that it held the second court to have jurisdiction without the consent of the first. In the *Rawls* case consent, express or implied, was needed only to comply with the rule of comity.

The rule set forth in the *Speece* case, that because of comity the second court, before it can exercise its jurisdiction over the probationer, must have the first court's consent, has been followed in *United States v. Fenno*.[13] Here the court held that under the rule of comity, the second court has jurisdiction and may proceed unless there is objection on behalf of the first court. Where such objection is present, the second court as a matter of comity must decline to exercise its jurisdiction. The *Rawls* case added the presumption that if the first court does not object, it will be held to have consented.

The principal case seems to be more of a reversal of the *Rawls* case and an abandonment of the rule of comity rather than a reversal of the *Guernsey* case. This is demonstrated by the fact that in the *Stewart* case the court held that the state court not only had jurisdiction but could proceed with its action regardless of the consent of the federal court to the action. The court stated that not only could the state court proceed without the federal court's consent, but it could do so even where the federal court affirmatively protested the state action. This decision finds support in *Strand v. Schmittroth*[14] where it was held that in cases where the first court objects to the later court's action, the first court is without remedy. This is predicated on the theory that where the court of one sovereign has possession of the accused and has power to proceed in a criminal prosecution, neither the court nor the officers of another sovereign may remove the accused since neither courtesy nor comity can be enforced.

[11] "Under this rule the sovereigns have in effect agreed that the one first acquiring custody of the defendant must be permitted to exhaust its remedy against him before the other will exercise its jurisdiction over the same defendant." Rawls v. United States, 166 F.2d 532, 533 (C.C.A. 10th, 1948).

[12] Spellman v. Murphy, 217 F.2d 247 (C.A. 7th, 1954); Stripling v. United States, 172 F.2d 636 (C.A. 10th, 1949); United States v. Fenno, 167 F.2d 593 (C.C.A.2d, 1948).

[13] 167 F.2d 593 (C.C.A.2d, 1948).

[14] 251 F.2d 590 (C.A. 9th, 1957).

Therefore, the *Stewart* case follows the modern trend in recognizing that probation and physical custody are not to be equated. It also recognizes that a court may have jurisdiction over a probationer without the consent of the court which placed him on probation. On the other hand, in its disregard for the rule of comity, it seems to have limited support.

DOMESTICS–PRESUMPTION OF LEGITIMACY NOT OVERCOME BY NON-ACCESS UNTIL 232 DAYS PRIOR TO BIRTH IN WEDLOCK

Richard Holder, plaintiff, commenced this suit for annulment of his marriage to the defendant Ruth Holder on the grounds that his wife had fraudulently induced him to enter into it by representing that she was pregnant with his child. The parties had intercourse on December 24, 1956, were married on February 2, 1957 and the child was born on August 13, 1957. The plaintiff contended this was not his child since the normal period of gestation is 270 days, and that he had no access to his wife until December 24, 1956, which was only 232 days prior to the birth of the child. Before that time he was in Alaska. The Supreme Court of Utah in reversing a decree for the plaintiff held that evidence which showed only 232 days had elapsed between the first possible date of coition and the date of birth was insufficient to overcome the presumption of the legitimacy of a child. *Holder v. Holder,* 340 P.2d 761 (Utah, 1959).

The legal presumption is always that a child born in lawful wedlock is legitimate.[1] This presumption is founded on morality, decency, and public policy and is one of the strongest presumptions in the law.[2] Although there have been many and varied criteria or formulae used to determine the sufficiency of rebutting evidence,[3] the majority of American courts have, in cases involving the presumption of legitimacy, demanded more than a mere preponderance of the evidence; most of them requiring clear, convincing, and satisfactory proof and some even requiring proof beyond a reasonable doubt.[4] This proof must be sufficient to show that the husband was: (1) impotent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent for the period during which the child must, in the course of nature, have been begotten by the alleged father; or (4) only present under such circumstances

[1] Phillips v. Allen, 84 Allen (Mass.) 453 (1861).

[2] Estate of Mills, 137 Cal. 298, 70 Pac. 91 (1902).

[3] 9 Wigmore on Evidence, § 2527 (3rd ed., 1940).

[4] Admire v. Admire, 42 N.Y.S.2d 755, 180 Misc. 68 (1943); In re Jones' Estate, 110 Vt. 438, 8 A.2d 631 (1939).