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resulting situation would be an arbitration agreement unenforceable in the Illinois courts because there was no existing dispute when executed, but valid, enforceable, and irrevocable in the federal court hearing the case because of diversity.

Congress has not seen fit to make arbitration agreements federal questions. Since the jurisdiction of the federal courts in matters of arbitration must be based on diversity, or a federal question, the more utilitarian solution to this problem would be strict adherence to the *Erie* doctrine and Justice Frankfurter's reasoning in the *Bernhardt* case. Conflicting results in state and federal courts dealing with the same arbitration agreement in the same state would thus be avoided.

FEDERAL PROCEDURE–LIKELIHOOD OF THE DEFENDANT CONTINUING IN THE NARCOTICS TRAFFIC HELD SUFFICIENT GROUNDS TO DENY BAIL PENDING APPEAL

The defendant was found guilty by a jury of a violation of the Federal Narcotic Control Act involving twelve ounces of heroin.[1] The trial judge entered a conviction, sentenced the defendant to fifteen years in prison and imposed a fine of $10,000. Following motions after verdict the defendant served notice of intent to appeal, and asked that bond be set. The trial judge refused to enlarge the defendant on bail pending appeal for reasons, *inter alia*, that the defendant had been previously convicted of a narcotic offense by the same court, and served a sentence of some three years, but did not learn from his previous experience and had returned to unlawful dealings in narcotic drugs. Under such circumstances, the trial judge refused to assume the responsibility of putting defendant on the street where he could again commit such violations. The trial court also found defendant's appeal to be frivolous. The defendant appealed this ruling and, in a memorandum and order, the appellate court affirmed the

[1] 21 U.S.C.A. § 174 (Supp., 1959) provides: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

trial court's decision denying defendant bail pending appeal. *United States v. Campbell*, No. 12903 (C.A. 7th, 1960).

Bail pending appeal is allowed by Rule 46 (a)(2) of the Federal Rules of Criminal Procedure. As amended in 1956: "Bail *may* be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay."[2] Prior to this amendment, bail was authorized only if it appeared that the appeal or petition for certiorari involved substantial questions for review.[3] Bail may now be allowed on appeals to a court of appeals by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice. If bail is allowed, it runs until final termination of the proceedings in all courts. Pending appeals or petitions for certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or the Supreme Court or any Justice thereof. Any court or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.[4]

The legislative purpose of the new rule was to liberalize the basis for allowing bail in the federal courts pending appeal, guarding against the risk of incarceration for a conviction which might later be upset. The effect of the amendment was to shift the burden on the convicted defendant to establish eligibility for bail and to require the government to persuade the trial judge that the minimum standards for allowing bail have not been met.[5]

Further, the new rule vests the court with discretion concerning matters other than determining whether the appeal is frivolous or taken for delay. In *United States v. Williams*,[6] the court said:

> It is obvious that where there is no showing that the appeal is frivolous or taken for delay, and under the plain language of the Rule that bail may be allowed, there are some cases where, under the facts, the court is allowed . . . discretion in passing upon such a motion as before us here.[7]

In the exercise of such discretion, a trial judge may deny bail pending appeal if a bail bond will not adequately protect against the possibility of flight.[8] It has also been held that the character and extent of a series of offenses may afford a proper basis for the exercise of discretionary power to deny bail pending appeal.[9]

[2] 18 U.S.C., Rule 46(a) (2) (Supp., 1959) (emphasis supplied).

[3] 18 U.S.C.A., Rule 46(a) (2) (Supp., 1959).

[4] 18 U.S.C.A., Rule 46(a) (2) (Supp., 1955).

[5] Ward v. United States, 76 S.Ct.1063 (1956).

[6] 253 F.2d 144 (C.A.7th, 1958).

[7] Ibid., at 148.

[8] United States v. Coduto, No. 12847 (C.A.7th, 1959), Petition for bail addressed to Mr. Justice Clark denied.

[9] United States v. Wilson, 257 F.2d 796 (C.A.2d, 1958).

The novel point in the *Campbell* case is that the court of appeals sustained the trial court's exercise of discretion in denying bail under Rule 46 (a)(2) and established for the first time that the likelihood of the defendant continuing in the narcotics traffic is sufficient grounds to deny bail pending appeal. In other words, the area of discretion that still remains under the amended rule to deny bail pending appeal is extended by this case to include the likelihood of the defendant continuing in the narcotics traffic. Heretofore, only the likelihood of flight and the character and extent of a series of offenses have afforded a proper basis for exercise of discretionary power to deny bail pending appeal.[10]

The *Campbell* opinion is not a clear-cut decision on this point alone since the court of appeals also adopted the trial court's finding that the appeal was frivolous. However, the language of the memorandum opinion *suggests* that weight was placed on the likelihood of the defendant continuing in the narcotics traffic as a sound reason for denying bail pending appeal in narcotic cases. The court said:

> Following motions after verdict the trial court refused to enlarge the defendant on bail for reasons, *inter alia,* that the defendant was convicted of a transaction involving an especially large amount of heroin; that the defendant had been previously convicted of a narcotic offense by the same court, but did not learn from his previous experience, and had returned to dealing in unlawful narcotic drugs. The trial court also made a finding that the instant appeal is frivolous. . . . Upon consideration of the records, files, and briefs herein, and considering Rule 46 (a) (2) Federal Rules of Criminal Procedure providing that the grant or denial of bail pending appeal is addressed to the sound discretion of the court to which application is made, it is ordered, the motion of defendant-appellant to be enlarged on bail pending appeal be and the same is hereby DENIED.[11]

The ruling in the *Campbell* case is the latest in a series of rulings by the Seventh Circuit Court of Appeals denying bail pending appeal in narcotic cases in which that part of Rule 46 (a)(2) relating to "frivolous" appeals and appeals "taken for delay" was not in issue. In *United States v. Davis,*[12] decided December 28, 1959, the court denied bail pending appeal to a defendant with a twenty-five year history of narcotic violations on the authority of its order in *United States v. Coduto*[13] which was decided December 2, 1959. The *Coduto* opinion emphasized the possibility of the defendants fleeing from the jurisdiction of the court as "a danger not to be disregarded"[14] and found that in reaching such a conclusion the trial

[10] Cases cited notes 8, 9 supra.

[11] United States v. Campbell, No. 12903 (C.A.7th, 1960).

[12] No. 12870 (C.A.7th, 1959).

[13] No. 12847 (C.A.7th, 1959), Petition for bail addressed to Mr. Justice Clark denied.

[14] Ibid., at 3.

court did not abuse its discretion in the exercise of sound judgment. Even though the defendants in the *Coduto* case were first offenders, the record of the trial discloses that they were engaged in the sale of heroin in wholesale quantities. Therefore, it is not surprising that one of the reasons why the trial court declined to enlarge the defendants on bail was "to halt their trafficking in heroin during the pendency of any appeal they may prosecute."[15]

Mr. Justice Frankfurter, as Circuit Justice in the *Ward* case stated that: "Elaboration of whatever occasions for discretion may remain [in Rule 46 (a)(2)] had better be left to the specific occasions which may give rise to such claims."[16] Seemingly if a narcotics case involving a second offender reaches the Supreme Court they may hold that it is a reasonable exercise of discretion under Rule 46 (a)(2) for the trial judge to deny bail pending appeal because there is a likelihood of the defendant continuing in the narcotics traffic. It is probably a matter of judicial notice that dealing in narcotics is one of the most profitable of criminal enterprises and that major offenders tend to continue in that enterprise after conviction. Further, the court may consider that because of the extreme length of the sentences imposed for narcotic violations and the fact that many narcotic violators will never be eligible for parole, it is relatively unimportant to them whether additional criminal liability may result from new narcotics offenses.[17] Another consideration which the court may entertain is that the well known practical result of releasing narcotic violators on bail pending appeal is to give them another year in which to sell narcotics to finance their appeals.[18] Finally, it appears that the denial of bail pending appeal in narcotic cases may be an exercise of sound judicial discretion for the purposes of safeguarding the public interest when the facts of the particular case indicate the defendants are likely to continue in the narcotics traffic.

Consideration of the cases ruling on the residuary discretion remaining in Rule 46 (a)(2) to deny bail pending appeal leads to the conclusion that

[15] Transcript of Record at 3, United States v. Coduto No. 58 CR 32 (N.D. Ill., 1959).

[16] Ward v. United States, 76 S.Ct. 1063, 1065 (1956).

[17] 26 U.S.C.A. § 7237(d) (Supp., 1959) provides: "Upon conviction

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c),(h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United State Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply."

[18] Chicago Daily News § 1, p. 18, col. 1 (February 8, 1960).

the denial of bail pending appeal in the *Campbell* case was a proper exercise of the court's discretion. However, a court in exercising its discretion under Rule 46 (a)(2) in narcotic cases should carefully consider the factual situation in each case. Perhaps more leniency should be exercised in the case of first offenders than in the case of second offenders. Moreover, bail should never be denied for the purpose of punishment, since the judgment of conviction cannot be executed while the matter is stayed pending appeal.[19]

[19] Cf. Reynolds v. United States, 80 S.Ct. 30 (1959).

LABOR LAW–BUSINESS HOURS NOT PROPER SUBJECT FOR COLLECTIVE BARGAINING

Jewel Tea Co. filed suit against Locals 189, 262, 320, 546, 547, 571 and 638 of the Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO, and several officials of the union, alleging a violation of Sections 1 and 2 of the Sherman Antitrust Act.[1] The complaint alleged that the defendants had engaged in an unlawful combination and conspiracy to suppress competition among retail meat markets in the Chicago area and to prevent all sale of meats and meat products before 9 a.m. or after 6 p.m. It was pleaded that under compulsion of the alleged conspiracy and the threat of strike by the unions, the plaintiff was forced to sign contracts with the defendant unions containing, among other things, a restriction that market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer coming into the market before or after said hours would be served. The operation of the agreements has enabled Associated Food Retailers of Greater Chicago, Inc., a major competitor, to remain closed after 6 p.m. without fear of losing trade to plaintiff, because of evening sales, and also to avoid the added expense of remaining open during the evening. *Jewel Tea Co. v. Amalgamated Meat Cutters,* No. 12653 (C.A.7th, 1960).

The defendants appealed from orders by the United States District Court denying their motion to dismiss the complaint; the court of appeals affirmed the district court's orders and remanded the suit to the district court for determination of the amount of damages. Certiorari was denied by the Supreme Court of the United States. Docket No. 732 (March 28, 1960). 28 Law Week 3283.

While Sections 1 and 2 of the Sherman Act prohibit any contract or conspiracy in restraint of trade, such anti-trust legislation is not applicable

[1] Also named as defendants, but not parties to the appeal, are Associated Food Retailers of Greater Chicago, Inc., a not-for-profit trade association representing several thousand individual or independent food stores engaged in the retail sale of meat in the Greater Chicago area, and the secretary-treasurer of said association.