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Criminal Law - Successive Sentences for Separate Refusals to Answer Related Questions After a General Refusal Held Improper Multiplication of Offenses

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"sacrilegious" films.[39] The United States Supreme Court has invalidated a statute imposing punishment on "gangsters" who were classified as any person "not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or any other state." The statute was said to be too vague to notify a person of a criminal violation.[40]

It has long been a principle of Anglo-American jurisprudence that the element of will is to be taken into consideration in determining guilt for crimes and it is not lightly to be imputed to the defendant nor is it to be supposed that a legislature had intended to eliminate consideration of this element.[41]

Although it has been held that the terms "wilful" and "wilfully" may be used in a sense which does not imply any malice or wrong,[42] or anything necessarily blamable,[43] Mr. Justice Holmes has written:

> [A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.[44]

And as Mr. Justice Douglas concludes in the *Lambert* case:

> Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.[45]

[39] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[40] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[41] Mr. Justice Murphy dissenting in United States v. Dotterweich, 320 U.S. 277 (1943).

[42] Cole v. Loew's Inc., 8 F.R.D. 508 (S.D. Cal., 1948); Peterson v. Peterson, 112 Utah 542, 189 P. 2d 961 (1948); Davis v. Morris, 37 Cal. 2d 269, 99 P. 2d 345 (1940); Shields v. State, 184 Okla. 618, 89 P. 2d 756 (1939).

[43] Cole v. Loew's Inc., 8 F.R.D. 508 (S.D. Cal., 1948); Wilson v. Security-First Nat'l Bank of Los Angeles, 84 Cal. 2d 427, 190 P. 2d 975 (1948); Davis v. Morris, 37 Cal. 2d 269, 99 P. 2d 345 (1940).

[44] Holmes, The Common Law 50 (1881).

[45] 355 U.S. 225, 229 (1957).

CRIMINAL LAW–SUCCESSIVE SENTENCES FOR SEPARATE REFUSALS TO ANSWER RELATED QUESTIONS AFTER A GENERAL REFUSAL HELD IMPROPER MULTIPLICATION OF OFFENSES

Mrs. Oleta Yates, an admitted executive of the American Communist Party, while on trial for conspiracy to violate the Smith Act,[1] took the

[1] 18 U.S.C.A. § 2385 (1951), as amended, 18 U.S.C.A. § 2385 (Supp. 1956).

witness stand in her own defense. Thereafter, on two separate occasions, she refused to answer questions upon cross-examination. On the first occasion, the trial judge caused Mrs. Yates to be incarcerated until she agreed to answer the questions. She was recalled to the stand four days later at which time she refused to answer eleven questions which the court had ordered her to answer. The district judge informed Mrs. Yates that he intended to treat her conduct as criminal contempt, but he deferred sentence. After the conspiracy trial had ended, Mrs. Yates was brought before the court for criminal contempt on eleven counts, one count for each refusal. The trial judge sentenced Mrs. Yates to one year in prison for each of the counts. The eleven separate sentences were to run concurrently, but were to commence after the completion of the sentence in the conspiracy case. The Court of Appeals for the Ninth Circuit affirmed the trial court and Mrs. Yates prosecuted her appeal on certiorari to the United States Supreme Court. The majority of the Supreme Court held that sentencing Mrs. Yates for each refusal to answer after she stated she would not answer any more questions, was an improper multiplication of offenses, believing that since all the questions related to the same area of identity, Mrs. Yates committed but one crime. The dissenting justices[2] agreed that the court had improperly multiplied the offenses, but were of the opinion that the petitioner's contempt was full and complete on the first occasion and that Mrs. Yates should be completely acquitted of contempt on the second occasion. *Yates v. United States*, 78 S. Ct. 128 (1957).

The question arising from this decision is whether a witness who refuses to answer several questions can be sentenced for each refusal when all the questions are within the same area of interrogation, and the witness has stated he will answer no more questions. In reply to this query, it has been concluded that he may not be so sentenced as he has committed but *one* punishable crime.

This case follows the doctrine enunciated in the lower federal courts as in *U.S. v. Costello*[3] where a similar question was presented. Costello, while being questioned by the Senate Crime Investigation Committee, stated that he would not answer any more questions. Mr. Halley, Counsel for the Committee, asked Costello several questions and each time Costello refused to answer, professing to be too ill. Subsequently, Costello was indicted, tried and convicted on several counts of contempt and sentenced on each count. The Court of Appeals in reversing held:

> Each of these counts dealt with the defendant's refusal to answer a specific question put to him after he had flatly refused to give any further testimony on

[2] Messrs. Douglas, Black, and the Chief Justice all dissenting.

[3] 198 F. 2d 200 (C.A. 2d, 1952).

that particular day. Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statements and as such were not separately punishable.[4]

The Court of Appeals for the Third Circuit[5] applied the reasoning of the *Costello* case in a situation where the defendant refused to answer two questions seeking to establish but one fact. The defendant was indicted on two counts and was later sentenced on both counts. The court, in reversing the second count, asserted:

> Where there are separate refusals . . . to answer separate questions, it is proper for each refusal to be set forth in a separate count of the indictment. . . . But where separate questions seek to establish but a single fact, or relate to but a single subject of inquiry, only one penalty for contempt may be imposed.[6]

It should be pointed out that although an indictment may allege several crimes within the same act, the indictment is not defective due to duplicity. That question has frequently arisen in the lower federal courts where it has been uniformly held that the indictment was proper,[7] but that the defendant could be punished for but one crime. The District of Hawaii,[8] in a criminal contempt proceeding as in the instant case, upheld the government's right to frame each refusal in a separate count of the indictment. But there the court cautioned that all the counts charged only one crime. The case of *United States v. Kamin*[9] also provides that only one sentence may be rendered for the several counts where all the counts allege a refusal to answer the same question in various forms, but the indictment is proper.

Although the problem involved here is a very old one, it is only with the advent of congressional investigating committees that it has drawn much judicial attention. The state courts have dealt with this subject as early as 1876, and from then until the present, the state courts have been in accord with the decision in the instant case. *Maxwell v. Rives*,[10] an

[4] Ibid., at 204.

[5] United States v. Orman, 207 F. 2d 148 (C.A. 3d, 1953).

[6] Ibid., at 160.

[7] United States v. Emspak, 95 F. Supp. 1012 (D.D.C., 1951).

[8] United States v. Yukio Abe, 95 F. Supp. 991 (D. Hawaii, 1950).

[9] 135 F. Supp. 382 (D. Mass., 1955).

[10] 11 Nev. 213 (1876).

1876 Nevada case, held that a defendant could commit but one contempt regardless of how many questions he refused to answer. The Supreme Court of that state held:

> [A] penal statute . . . must be strictly construed. . . . Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same trial . . . cannot be deemed more than one contempt, no matter how many questions he may refuse to answer. . . . The District Judge erred in finding that each separate refusal to answer a question was a distinct contempt. . . .[11]

The state of New York has a statute,[12] somewhat similar to the federal law governing criminal contempt before congressional committees,[13] wherein a separate count is allowed in the indictment for *any* refusal to answer a pertinent question. The New York Supreme Court, dealing with a defendant's refusal to answer seven similar questions, stated:

> The question then presents itself as to whether or not by refusing to answer seven questions relating to the same subject matter the defendant was guilty of seven separate and distinct contempts. . . . The court is of the opinion that the defendant committed but one contempt. To hold otherwise would enable a prosecutor to ask an unlimited number of questions concerning the same subject matter, or even ask the same question in various forms with the net result that a witness might be incarcerated for the balance of his life.[14]

This case illustrates the rationale followed in the instant case. The prosecutor could have continued to ask questions of her *ad infinitum;* to permit this as proper could result in a sentence to a life term in prison.

The Supreme Court of Ohio in *Fawick Airflex Co. v. United Electrical Workers*[15] decided that where three questions seek to establish but one fact, the refusal to answer all three results in one contempt. The court held that the questions were of such a character that they should be treated as an inquiry into but a single subject.

The rule as to when a defendant can be sentenced separately for each count in the indictment when the facts are similar to the cases considered herein was stated in *Upshaw v. United States:*

> And the generally recognized test for determining whether the offenses charged in two or more indictments or in different counts of the same indictment are identical or separate is whether the same proof would sustain a conviction under both or whether each requires proof of one or more facts which is not required of the others.[16]

[11] Ibid., at 221.

[12] N.Y. Judiciary Law (McKinney, 1948), § 750.

[13] 2 U.S.C.A. 192 (1927) as amended 2 U.S.C.A. 192 (Supp. 1957).

[14] People v. McDonnell, 100 N.Y.S. 2d 463 (1950).

[15] 92 N.E. 2d 431 (1950).

[16] 157 F. 2d 716, 717 (C.A. 10th, 1946).

If the same evidence is used to prove the several counts in the indictment the court may render one general sentence, but if additional evidence is needed to convict on any other count, then separate sentences may be given. This is a workable rule and it can be seen how it would apply in the instant case. In considering this rule, the courts give the impression that in order to sentence on separate offenses charged in several counts, those counts must rest on separate and distinct acts.[17] Therefore, if the acts were committed at the same time and were part of a continuous criminal act being inspired by the same criminal intent, they would culminate in but one punishment.[18] For example, in *Kerr v. Squir*,[19] defendant was indicted on three counts of mail theft and was later sentenced to three separate and consecutive terms of five years each. After serving the first five year term, the defendant was released on a writ of habeas corpus, the court asserting that he had committed but one criminal act for which he had already paid the penalty. There are, however, situations where one criminal act will result in several offences but in such cases there is often more than one victim of the defendant's criminal act.[20]

In the instant case, the dissent took issue with the majority on the fact of whether Mrs. Yates' second refusal to answer the prosecution's questions was a contempt at all. The majority, in affirming, held that it was a separate contempt since the offense was of a continuing nature and that if a defendant who refused to comply with the terms of a mandatory injunction was in continuing contempt of court, so also was Mrs. Yates in contempt. On the other hand, the dissenters reasoned that Mrs. Yates' contempt was absolute on June 26th and that her conduct on June 30th was merely an extension of her earlier position. She could have been sentenced for her defiance on the first occasion either civilly or criminally as the court saw fit.[21] But as for the second occasion, she committed no

[17] Smith v. United States, 211 F. 2d 957 (C.A. 6th, 1954). Appellant prosecuted under 18 U.S.C.A. § 1709 (1951) for stealing two letters at the same time, though statute provides for punishment for each individual letter stolen, held to be one punishable crime.

[18] Blockburger v. United States, 284 U.S. 299 (1932), where defendant was sentenced on two counts for selling narcotics to the same person at the same time. The drugs on the second sale were not to be delivered until the next morning, and were delivered at that time. The Supreme Court upheld the sentences on the basis that the deliveries one day apart constituted two distinct acts.

[19] 151 F. 2d 308 (C.A. 9th, 1945).

[20] Bell v. United States, 213 F. 2d 629 (C.A. 6th, 1954). Bell transported two women across the state line for immoral purposes in the same car at the same time and it was held to be two crimes, Bell being sentenced twice. In Ladner v. United States, 230 F. 2d 726 (C.A. 5th, 1956) though the defendant fired shotgun once at two federal agents while they were sitting in the front seat of an automobile, he was properly convicted and sentenced for two crimes.

[21] Nilva v. United States, 352 U.S. 385 (1957); Penfield Co. v. S.E.C., 330 U.S. 585 (1947); United States v. United Mine Workers, 330 U.S. 258 (1947).

crime. Continuing, the dissent maintained that to hold the defendant for contempt on the second occasion was to state a rule that would fit this particular case only. There is much merit to this contention because under the rule in this case there is nothing to restrain a prosecutor from recalling the witness to the stand any number of times and proceeding to ask the same questions in which instance the witness would be in continuing contempt of court. Where the witness is in continuing contempt, he could be sentenced for each such appearance on the stand where he refused to answer questions. That the questions were identical each time the witness was called to the stand would be of no consequence since, in the instant case, the questions were quite identical because they were so closely related.

Thus, the Supreme Court of the United States, as have various state courts, maintained that a defendant refusing to answer questions after numerous interrogatories should be in no worse position than a witness who refuses to testify at all, and who could be sentenced for only one contempt. This principle is based on the idea that purposes and policies of the law are to encourage testimony and not to discourage it by a more severe penalty where the witness takes the stand and cooperates as to all queries except one.

CRIMINAL LAW—22-YEAR DELAY BETWEEN INDICTMENT AND TRIAL NOT ERROR IN ABSENCE OF DEMAND FOR TRIAL

Defendant, in 1934, was indicted for and pleaded guilty to a charge of murder. Thereupon, he was released on bail. The case remained dormant for twenty-two years, until the acting prosecutor, in January of 1957, discovered the open indictment. On February 7, 1957 the defendant was brought to trial. During the twenty-two year interim the defendant made no demand for a trial. The defendant made a pre-trial motion to dismiss on the ground that the long delay had harassed and prejudiced him. The motion was denied. He was found guilty of second degree murder and on appeal to the New Jersey Supreme Court, the conviction was affirmed. The court, after expressing disapproval for the delay, held that the defendant should not go free merely because his trial was long delayed, where there was no evidence that he was thereby prejudiced and he had made no demand for a trial. *State v. O'Leary*, 25 N.J. 104, 135 A. 2d 321 (1957).

The United States Constitution provides that, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ."[1] Although this constitutional provision does not apply to the states, New

[1] U.S. Const. Amend. 6.