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Criminal Procedure - Proceedings of Grand Jury - Presence of Unauthorized Person

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implied in the case of misappropriation of funds belonging to an ordinary partnership. It is unlikely, however, that such a distinction was intended by the draftsmen of the Code or the Legislature which enacted it. It is submitted that full effect should be given to the theory that a partnership is a legal entity and to Article 2 of the Criminal Code, thus satisfying the requirement that the taking of property belonging "to another" and thereby imposing criminal liability upon a defrauding partner. In any event, it is hoped that subsequent cases will limit the present holding to cases involving commercial partnerships.

William H. Cook, Jr.

CRIMINAL PROCEDURE — PROCEEDINGS OF GRAND JURY —
PRESENCE OF UNAUTHORIZED PERSON

Defendant filed a motion to quash based on the contention that the presence of a policeman attached to the district attorney's office as an investigator, who "monitored" a "Sound-scriber" machine used to record testimony of witnesses before the grand jury, was a violation of the defendant's right of secrecy during grand jury proceedings. The state contended that the investigator was present in the capacity of a stenographer, as contemplated by Article 215 of the Louisiana Code of Criminal Procedure.¹ The district court granted defendant's motion. On appeal, *held*, affirmed. Article 215 is mandatory in requiring that grand jury sessions be kept secret. The accused's rights were substantially violated by the presence of a recording machine operator who was not one of the persons specifically enumerated and authorized to be present at grand jury hearings. *State v. Revere*, 232 La. 184, 94 So.2d 25 (1957).

The function of the grand jury is to protect both society and the individual.² As an accusatory body, its members decide from the evidence adduced whether there is sufficient cause for requiring the accused to stand trial and answer the charge made

1. LA. R.S. 15:215 (1950) states: "The sessions of the grand jury shall be secret, but the district attorney, as their legal adviser, shall have free access to said sessions; the district attorney may cause the testimony taken before the grand jury to be reported by a stenographer, who must be first sworn by the foreman of the grand jury; and whenever a witness is unable to speak the English language, the grand jury shall have the right, at its discretion, to employ an interpreter to translate the testimony of the witness, but such interpreter shall be first sworn to keep secret the proceedings of the grand jury."

2. *People v. Minet*, 296 N.Y. 315, 322, 73 N.E.2d 529, 532 (1947).

against him.³ To insure the proper functioning of this body, its sessions are conducted in secrecy, to the exclusion of all persons not specifically authorized to be present.⁴ This secrecy requirement is primarily for the benefit of the state:⁵ it secures for complainants and witnesses freedom from any apprehension that their testimony will be revealed; it secures for the jurors freedom from apprehension that their opinions or votes may be publicly disclosed; and it prevents the indicted person from being provided with clues enabling him to avoid arrest and punishment.⁶ On the other hand, it also protects the accused person from public disclosure of groundless charges made against him.⁷ The prevailing American rule, based on the concept that the secrecy requirement is primarily for the benefit of the state, is that, unless the accused is prejudiced by the presence of an unauthorized person during the grand jury proceedings, the irregularity is insufficient grounds for setting aside the indictment.⁸ However, a substantial minority of American states adhere to the rule that, regardless of whether there is a showing of prejudice, indictments will be set aside when unauthorized persons have been present during grand jury sessions.⁹ The minority view finds strong support in those jurisdictions where, as in Louisiana, there is a statutory enumeration of those who may be present at the grand jury proceedings.¹⁰

3. See 4 BLACKSTONE, COMMENTARIES *300; 1 CHITTY, THE CRIMINAL LAW 215 (1819); 2 HALE, PLEAS OF THE CROWN 157 (1736); 2 HAWKINS, PLEAS OF THE CROWN 367 (1787); 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 321 *et seq.* (7th ed. 1956).

4. See *State v. Watson*, 34 La. Ann. 669 (1882); 1 CHITTY, THE CRIMINAL LAW 214 (1819); 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 322 (7th ed. 1956); 8 WIGMORE, EVIDENCE 716 *et seq.* (3d ed. 1940).

5. See *State v. Brewster*, 70 Vt. 341, 40 Atl. 1037, 42 L.R.A. 444 (1898), and cases cited therein. See also 8 WIGMORE, EVIDENCE 716 *et seq.* (3d ed. 1940).

6. 8 WIGMORE, EVIDENCE 716 *et seq.* (3d ed. 1940).

7. *Ibid.*

8. See *Jones v. State*, 150 Ala. 54, 43 So. 179 (1907); *People v. Munson*, 319 Ill. 596, 150 N.E. 280 (1925); *State v. Bates*, 148 Ind. 610, 43 N.E. 2 (1897); *State v. Ernster*, 147 Minn. 81, 179 N.W. 640 (1920); *Le Barron v. State*, 107 Miss. 663, 65 So. 648 (1914); *State v. McFeeley*, 136 N.J.L. 102, 54 A.2d 797 (1947); *State v. Crowder*, 193 N.C. 130, 136 S.E. 337 (1927); *Commonwealth v. Kirk*, 340 Pa. 346, 17 A.2d 195 (1941); *State v. Brewster*, 70 Vt. 341, 40 Atl. 1037 (1898); *Draper v. Commonwealth*, 132 Va. 648, 111 S.E. 471 (1922); *Annot.*, 4 A.L.R.2d 392, 395 (1949), and cases cited therein.

9. See *Commonwealth v. Harris*, 231 Mass. 584, 121 N.E. 409 (1919); *Hartgraves v. State*, 5 Okla. Crim. 266, 114 Pac. 343 (1911); *Meyers v. Second Judicial District Court*, 108 Utah 32, 156 P.2d 711 (1945); *Annot.*, 4 A.L.R.2d 396 (1949), and cases cited therein.

10. While such a result may be rationalized on the rule of strict statutory construction, actually the result is probably based on the broader policy of protecting the accused's substantive rights during the grand jury proceedings. See 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 363 *et seq.* (1904). This view would appear to be borne out by the fact that most of those states following

Article 215 of the Louisiana Code of Criminal Procedure provides that the prosecuting attorney, an interpreter, and a stenographer may be present at the sessions of the grand jury.¹¹ This article is similar to corresponding provisions of the American Law Institute Code of Criminal Procedure¹² and the Federal Rules.¹³ Prior to the 1928 Code of Criminal Procedure Louisiana jurisprudence had not been uniform. Early jurisprudence had followed the strict view that the presence of any unauthorized person during the proceedings of the grand jury would be sufficient grounds for quashing an indictment.¹⁴ However, later Supreme Court decisions had shown a decidedly liberal trend.¹⁵ In *State v. Firmatura*¹⁶ the presence of a deputy sheriff who acted as an interpreter was held to be an insufficient ground for quashing an indictment, because the interpreter was an "ordinary and necessary instrumentality for the discharge of [the grand jury's] duty."¹⁷ In *State v. Louviere*,¹⁸ the court refused to quash an indictment, stating that the presence of a stenographer "was no more prejudicial to the accused than if that same testimony had been recorded on a phonograph or other mechanical device."¹⁹ The holdings of these two cases were codified in the enumeration of authorized persons in Article 215. The court applied this provision in *State v. Howard*,²⁰ sustain-

the majority view (see cases note 8 *supra*) either have no statutory provisions enumerating those permitted to be present during grand jury sessions or else their statutes are broadly drawn.

11. See note 1 *supra*.

12. "Section 133. Who may be present during session of grand jury: No person shall be present at the sessions of the grand jury except the witness under examination, the prosecuting attorney, the stenographer, if any, and the interpreter, if any. No person shall be present while the grand jurors are deliberating or voting. Any person violating either of the above prohibitions may be held in contempt of court."

13. FED. R. CRIM. P. 6(d): "Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting." Rule 6(d) became effective March 31, 1946, and generally continues existing law. See Act of May 18, 1933, c. 31, 48 STAT. 58 (1933).

14. *State v. Watson*, 34 La. Ann. 669 (1882), where the presence of a clerk appointed by the judge was sufficient grounds for quashing the indictment.

15. In *State v. White*, 37 La. Ann. 172 (1885), the fact that an outsider was present during the grand jury session was not sufficient to quash the indictment. To the same effect, see *State v. Stewart*, 45 La. Ann. 1164, 14 So. 143 (1893); *State v. Harris*, 39 La. Ann. 228, 1 So. 446 (1887).

16. 121 La. 676, 46 So. 691 (1908). The opinion shows that the deputy sheriff was sworn by the foreman of the grand jury as an interpreter and indicates that at no time during the grand jury session was he present in his capacity as a deputy sheriff.

17. *Id.* at 681, 46 So. at 693.

18. 165 La. 718, 115 So. 914 (1928).

19. *Id.* at 720, 115 So. at 914.

20. 230 La. 327, 88 So.2d 387 (1956).

ing the use of a recording machine during grand jury proceedings. It held, without indicating who operated the machine, that under Article 215 no unauthorized person was in the grand jury room. However, it was later pointed out that the person operating the recording machine in that instance was the district attorney.²¹

In the instant case, the situation differed from that of the *Howard* case in that the individual operating the recording machine was not one of those specifically enumerated in Article 215. The court's choice of a technical rather than a liberal interpretation of the provision may be explained by the fact that under Louisiana statutory provisions relating to the secrecy of grand jury proceedings, the defendant is unable to contradict statements of unauthorized individuals present at grand jury sessions.²² Since grand jurors are incompetent to impeach any indictment found by the body of which they are members, the defendant cannot use their testimony to show that he has been prejudiced by the presence of the unauthorized person at their sessions. In this situation, the defendant's only real protection is his right to have the jury properly impaneled and its proceedings conducted in strict adherence to the law.²³ Thus, the court found that Article 215 makes it mandatory that grand jury sessions be kept secret, and that this be done by limiting the persons authorized to appear before that body to those specifically enumerated in Article 215.

Seemingly, under the rule of the instant case, the presence of any person not a qualified stenographer to operate the machine would have been sufficient ground for quashing the in-

21. However, the court stated in *State v. Revere*, 232 La. 184, 190, n. 4, 94 So.2d 25, 28, n. 4 (1957): "In the recent case of *State v. Howard*, 230 La. 327, 88 So.2d 387, there was no unauthorized person in the grand jury room, it being conceded the recording machine there used was operated by the district attorney."

22. The two main statutes involved are LA. R.S. 15:470 and 15:471 (1950). R.S. 15:470 reads: "No juror, grand or petit, is competent to testify to his own or his fellows' misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct or of the findings of the body of which he is or was a member." And R.S. 15:471 reads: "No grand juror or district attorney is competent to testify as to anything that took place before the grand jury during its sessions, or to testify upon what evidence any indictment was found, or that it was found upon insufficient evidence, or without evidence; but the grand jurors and the district attorney are competent witnesses both for the state and for the defense in any prosecution for perjury or false swearing, alleged to have been committed before the grand jury." But see *State v. Kifer*, 186 La. 674, 173 So. 169, 110 A.L.R. 1017 (1937).

23. *State v. Revere*, 232 La. 184, 199, 94 So.2d 25, 31 (1957).

dictment.²⁴ However, the court appears to have been strongly influenced by the fact that the "monitor" in this instance was an investigator. While the court does not clearly indicate what the result would have been if the investigator had also been a stenographer, the general tenor of the opinion indicates that the indictment would have been quashed in such a case. It appears, however, that in order to promote the efficiency of grand jury proceedings, a legislative change would be desirable, extending the enumeration of Article 215 to include an individual to operate a recording machine during sessions of the grand jury. Such an amendment should clearly exclude members of the police force and district attorneys' investigatory staff from the grand jury sessions, except when present in their capacity as witnesses.

Patsy Jo McDowell

CRIMINAL PROCEDURE — REMARKS OF PROSECUTING ATTORNEY —
REFERENCE ON RETRIAL TO CONVICTION OF ACCUSED AT

FIRST TRIAL

Defendant's conviction on a charge of manslaughter was set aside by the Supreme Court on a point of evidence. In his opening statement on retrial, the district attorney referred to the prior conviction of the defendant by the previous petit jury. The trial judge refused to grant defendant's request to instruct the jury to disregard the statement. On appeal, *held*, affirmed. The defendant did not show, and the court could think of no way in which the passing reference in good faith by the district attorney to the prior conviction was prejudicial to the cause of the accused. Moreover, the indictment had been presented to the jury with an endorsement thereon that the defendant had been found guilty as charged. *State v. Clark*, 231 La. 807, 93 So.2d 13 (1957).

Some improper remarks by prosecuting attorneys may be "cured" by the trial judge's instructions to the jury to disregard them, while others are held to be "incurable," or reversible error

24. The court stated: "Our statute (RS 15:215) not only makes it mandatory that the sessions of the grand jury be secret, but specifically enumerates the only persons authorized to appear before that body. A 'monitor' or 'operator' of a recording machine is not one of those enumerated, and we must conclude that until provision is made in our law for the presence of such persons, it is not the province of the court to hold they are included." *State v. Revere*, 232 La. 184, 199, 94 So.2d 25, 31 (1957).