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Procedure: Criminal Procedure

Dale E. Bennett

against her on this ground. Had the wife been free of fault, a hiatus in the substantive law of Louisiana would have presented the court with a serious question as to its authority to grant her permanent alimony.

Following this decision, the appellate court called this hiatus in our law to the attention of the Louisiana State Law Institute. On the recommendation of the latter, the legislature in 1964 amended the Civil Code so as to grant a court the right to award alimony to a wife free from fault when the "husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person."[87]

CRIMINAL PROCEDURE

*Dale E. Bennett**

EVIDENCE SEIZED PURSUANT TO LAWFUL ARREST

State v. Pickens[1] provides a clear exposition of the rules governing the scope of the officer's search for weapons and incriminating evidence incidental to an arrest on reasonable suspicion that the arrestee has committed a felony.[2] In *Pickens* the Supreme Court upheld the search of an automobile in which burglary suspects were driving at the time of their arrest shortly after the crime. Thus, the stolen money and goods found were lawfully seized and were properly admissible in evidence at the subsequent burglary trial. Justice Hamlin stressed the fact that "in the case of moving vehicles whose drivers may be carrying contraband or stolen property, and flight and escape are imminent, probable cause can exist for search without a warrant, time being of the essence. If the vehicle or automobile were not searched, apprehension of the criminal would be unnecessarily delayed and perhaps never take place."[3] Upon an examination of the facts and circumstances of the case, it was

87. LA. CIVIL CODE art. 160(3) (1870), *as amended*, La. Acts 1964, No. 48, § 1. This amendment is discussed in *Louisiana Legislation of 1964 — Civil Procedure*, 25 LA. L. REV. 28, 32 (1964).

*Professor of Law, Louisiana State University.

1. 245 La. 680, 160 So. 2d 577 (1964).

2. LA. R.S. 15:68 (1950).

3. 160 So. 2d at 584.

apparent that there was "probable cause" for the arrest and incidental search of the arrestee's automobile.

BASIS OF SEARCH WARRANT

A search warrant may issue only on "probable cause, supported by oath or affirmation," established to the satisfaction of the judge.[4] In *State v. McIlvaine*[5] the officers had obtained a warrant to search the defendant's residence " ' for the purpose of seizing the following described property * * * narcotics — opium derivatives and synthetic drugs and burglary tools' . . . . 'The above officers received information from a confidential and reliable source that there is [sic] narcotics and burglary tools concealed in the premises of 3117 No. Derbigny Street."[6] The Louisiana Supreme Court stated that "the question to be determined is whether the facts and circumstances before the judge who issued the warrant were sufficient to justify a man of prudence and caution in believing that an offense had been or was being committed on the premises described in the search warrant, even though the officer who made the affidavit was requesting the warrant *upon information received from another person.*"[7] (Emphasis added.) Applying this test to the case at bar, the court concluded that under the circumstances of the instant case "it was reasonable for the judge who issued the warrant to conclude that the narcotics were probably present at the place named in the warrant, and this is sufficient."[8] In reaching this conclusion, the court discussed "probable cause," and significantly stated: " 'It is not enough that facts subsequently shown would have sufficed to show probable cause.' "[9] With this admonition in mind, it would have been better, and would have removed any doubt about the validity of the search warrant, if the application for the warrant had included facts which were shown on a motion to suppress: for example, that the officers obtaining the warrants knew the defendants through

4. LA. CONST. art. I, § 7. There is an abundance of jurisprudence interpreting the phrase "probable cause." See State v. Norris, 161 La. 988, 109 So. 787 (1926), *dismissed*, 274 U.S. 719 (1927); State v. Nejin, 140 La. 793, 74 So. 103 (1917); State v. Doremus, 137 La. 266, 68 So. 605 (1913), holding that what is probable cause in a given case is left largely to the discretion of the judge issuing the warrant.

5. 245 La. 649, 160 So. 2d 566 (1964).

6. 160 So. 2d at 568.

7. *Id.* at 569.

8. *Id.* at 570.

9. *Id.* at 569.

prior dealings with them in prior criminal matters, and that the source of information upon which the officers acted had proven reliable in prior cases.

REMISSION OF BAIL FORFEITURE BY GOVERNOR

The Governor has constitutional power to "grant pardons, commute sentences, and remit fines and forfeitures."[10] *State v. United Bonding Ins. Co.*[11] held that this power does not authorize the Governor to issue a remittitur of a bail bond forfeiture. Justice Hawthorne, after reviewing the history of the executive pardoning power, concluded that this power could only be exercised where there had been an offense against the state. He then characterized the question for decision as "whether the forfeiture of bail bond is a forfeiture for an offense against the State." This question was answered in the negative by pointing out that the bail bond forfeiture is a civil proceeding arising out of contract, and that a judgment of forfeiture creating a debt "is a civil obligation, and cannot possibly be considered as a penalty for an offense against the State."[12] It then logically followed that the Governor's power to remit criminal fines and forfeitures does not authorize remission of the forfeiture of a bail bond.

CHANGE OF VENUE

The change of venue provisions of the Code of Criminal Procedure[13] are posited on the idea that the defendant should not be tried in a parish where there is such prejudice that a fair trial cannot be had. The defendant's right to a change of venue must, however, be urged with reasonable promptness after the local prejudice becomes apparent. In *State v. Morris*,[14] a prosecution for murder, the first trial had resulted in a mistrial, and the case was set for trial a month later. On the date set for the retrial, and after selection of the jury had begun, the defendant filed a motion for change of venue. This motion was summarily overruled by the trial judge on the ground that it had not been "made timely." Article 291 of the Code of Criminal Procedure simply states: "No change of venue shall

10. LA. CONST. art. V, § 10.
11. 244 La. 716, 154 So. 2d 374 (1963).
12. 154 So. 2d at 377.
13. LA. R.S. 15:289-301 (1950).
14. 245 La. 475, 157 So. 2d 728 (1963).

be awarded until the accused shall have been arraigned and shall have pleaded 'not guilty'."[15] Defense counsel in *Morris* apparently assumed that the motion could be made any time before the trial had actually commenced. However, the Supreme Court, relying on the required allegation in applications for change of venue "that the application has been made as soon as it could be after the discovery of such prejudice or other cause, and not for delay,"[16] upheld the trial court's ruling that the motion had not been timely made. The adverse publicity of the defendant's first trial, which was the principal basis of the defendant's motion, had occurred more than a month before the date set for the second trial, and no reason was given for delaying the motion until the day of the trial. The timeliness of a motion for change of venue, which is not clearly spelled out in the code articles, becomes a matter of reasonableness. It would be unreasonable to require that the application for a change of venue be made as a preliminary plea at the arraignment, for it is prejudice existing at the time of the trial that is to be guarded against. Conversely, it is reasonable to hold, as the Louisiana Supreme Court does in *State v. Morris*, that the defendant cannot delay his application until the day of the trial.[17]

CONTINUANCE

It is fundamental due process that defense counsel should be given such reasonable time as he can show is necessary for the preparation of his defense, and courts are reluctant to force a defendant to a criminal trial when he insists he is not ready. However, motions for a continuance may be for the purpose of delay, and defense counsel's inability to meet the trial date set may have resulted from inexcusable procrastination or putting other things first. Thus article 320 of the Code of Criminal Procedure[18] very properly provides that "the granting or refusing of any continuance is within the sound discretion of the trial judge." Upon a proper showing of need for additional time to prepare the case, the trial judge will usually grant a continuance even after the date for the trial has been set. When the trial

15. LA. R.S. 15:29 (1950).
16. *Id.* 15:292.
17. *Accord*, article 1 of Tentative Title XX, Change of Venue, of the Louisiana State Law Institute projet for a revision of the Code of Criminal Procedure provides that an application for change of venue "may be made . . . at least two days prior to the commencement of trial."
18. LA. R.S. 15:320 (1950).

judge refuses a continuance his ruling will seldom be reversed. In *State v. Freeman*[19] there was no special showing that a period of eleven days was not sufficient for defense counsel to investigate and prepare the defense to a burglary charge, and the Supreme Court held that the trial judge had not abused his discretion in refusing to grant a continuance. Even when a more specific showing is made the trial judge's ruling will seldom be reversed.[20]

TIME FOR CHARGE TO JURY

The order of procedure in the trial is clearly set out in article 333 of the Code of Criminal Procedure.[21] Under this article the judge is to give his charge to the jury after the argument of counsel. In *State v. Brown*[22] defense counsel had requested the court to charge the jury before any evidence was adduced, relying upon the language of article 389[23] which provides: "The judge shall deliver his charge in writing, whenever requested to do so either by the prosecution or the defense prior to the swearing of the first witness." In upholding the trial judge's refusal to charge the jury at the time requested, the Supreme Court pointed out that the time for charging the jury is prescribed by article 333. The proper application and interrelation of articles 333 and 389 is succinctly and clearly stated by Justice Hawthorne, writing for a unanimous court, when he states: "Article 389 sets the time for counsel to *request* the judge to give the charge in writing, and article 333 fixes the time for the judge to *deliver* the charge (whether oral or written)."[24]

BILLS OF EXCEPTIONS

It is well settled that the Supreme Court will not review alleged erroneous rulings of the judge or other trial irregularities unless the defendant has objected at the time and has reserved and perfected a bill of exceptions to the ruling or irregularity

19. 245 La. 665, 160 So. 2d 571 (1964).
20. In State v. Henry, 196 La. 217, 228, 198 So. 910, 913 (1940), the Supreme Court upheld the trial judge's refusal to grant a continuance where the defendant's motion was based upon the fact that counsel was confronted with other pressing civil cases and was slowed up in the preparation of the defense by their inexperience in criminal law.
21. LA. R.S. 15:333 (1950).
22. 245 La. 112, 157 So. 2d 459 (1963).
23. LA. R.S. 15:389 (1950).
24. 157 So. 2d at 460.

complained of.[25] This requirement was applied in *State v. Ford*,[26] although the entire testimony was attached to and incorporated in a motion for a new trial which had been denied. In so holding the court pointed out that evidence is not a part of the record " 'unless it is appended to and made part of a perfected bill of exceptions.' "[27]

It is sacramental that bills of exceptions must be signed by the trial judge before the appeal is taken.[28] Thus *State v. Robinson*[29] held that unsigned bills are treated as abandoned and will not be considered by the Supreme Court. *State v. Brown*[30] held that bills of exceptions are abandoned when the defendant does not appear or file a brief with the Supreme Court.

APPEALS

The Louisiana Supreme Court's general appellate jurisdiction over misdemeanor convictions is dependent upon the penalty actually imposed, namely, whether a fine exceeding three hundred dollars or imprisonment of over six months is imposed.[31] The 1958 revision of appellate jurisdiction, which became effective on July 1, 1960, logically applied the same appeals formula to criminal prosecutions of adults in juvenile courts.[32] Thus, in *State v. Maricle*[33] a defendant who had been convicted in juvenile court of the misdemeanor of contributing to the delinquency of a minor, and sentenced to ten days imprisonment and a fine of fifty dollars plus costs, had no right of appeal. In dismissing the defendant's appeal the Supreme Court allowed two weeks to apply for supervisory writs, since the defendant may apply for review by discretionary writs in non-appealable cases.

25. LA. R.S. 15:510 (1950).
26. 245 La. 490, 159 So. 2d 129 (1963).
27. 159 So. 2d at 131.
28. LA. R.S. 15:542, 545 (1950).
29. 245 La. 116, 157 So. 2d 461 (1963).
30. 245 La. 442, 158 So. 2d 605 (1963); *accord*, State v. Wessinger, 245 La. 409, 158 So. 2d 594 (1963).
31. LA. CONST. art. VII, § 10.
32. *Id.* §§ 52, 96.
33. 245 La. 439, 158 So. 2d 604 (1963); *accord*, State v. Thomas, 245 La. 444, 158 So. 2d 606 (1963).