Land & Water Law Review

Volume 3 | Issue 1 Article 13

1968

Criminal Law - Recidivist Procedure - Admissibility of Evidence of Prior Convictions before a Finding on the Principal Charge - Spiker v. State

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CRIMINAL LAW—Recidivist Procedure—Admissibility of Evidence of Prior Convictions Before a Finding on the Principal Charge. Spiker v. State, 427 P.2d 858 (Wyo. 1967).

Oscar Spiker, having been convicted of a felony on four previous occasions, was convicted of breaking and entering in violation of Wyoming statutes.[1] The determination of his sentencing was, therefore, subject to the Wyoming Habitual Criminal Act.[2] In the trial in the District Court, Park County, evidence of the earlier convictions, which would certainly prejudice the jury against Spiker, was presented without objection from his attorney. On appeal the submission of the evidence of previous convictions was challenged. It was contended that presentation of such evidence deprived the defendant of the substantial and fundamental right to be tried by an impartial jury. The Supreme Court of Wyoming *held* that presentation to the jury of defendant's prior criminal record, before the jury had reached a verdict on the principal offense, was not prejudicial error.

The Court cited *Waxler v. State*[3] as precedent in Wyoming concerning the procedure to be followed. The *Waxler* decision has the effect of supporting the view that evidence of prior convictions presented before a finding on the trial in chief is not prejudicial error. However, the court never squarely discussed this question. After considering the question,[4] the court merely stated the general rule[5] that the prior convictions must be included in the information so that the defendant may be adequately prepared to defend against these charges.[6] No mention was made by the court concerning the legitimacy of the procedure of allowing evidence of prior convictions to be presented in the trial before decision on the principal charge is made.

The Wyoming Court in *Spiker* also cited *Spencer v. State*[7] a recent United States Supreme Court decision concerning three consolidated Texas cases which on appeal

1. WYO. STAT. §§ 6-129 to -131 (1957).
2. WYO. STAT. §§ 6-9 to -11 (1957).
3. 67 Wyo. 396, 224 P.2d 514 (1950).
4. *Id.* at 518.
5. The court here cites 58 A.L.R. 64 and 58 A.L.R. 66 where the discussion of the rule, that prior convictions must be included in the information, is found.
6. Waxler v. State, *supra* note 3, at 519.
7. 87 S. Ct. 648 (1967).

charged that the allegation and reading of the prior offenses and evidence thereof was prejudicial error. In a five to four decision the United States Supreme Court did affirm the *Spencer* decision. This affirmation, however, was not based upon the rightness of the Texas procedure, which was changed subsequent to the Spencer case.[8] The decision was, rather, based on the reasoning that the United States Supreme Court will not determine rules of criminal procedure for the states.[9] The court cites Mr. Justice Cardozo's statement that a state rule of law "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."[10]

In dictum the majority indicated that if the matter were before them in a legislative or rule making context they would likely agree that the English-Connecticut procedure is fairest.[11] Mr. Justice Stewart supported this statement in his concurring opinion. He stated that "it is clear that the recidivist procedures adopted in many states are far superior to those utilized in the case [before us]."[12]

Mr. Chief Justice Warren in his dissent stated that although he recognized the basis of the majority decision, the Supreme Court had long recognized the importance of courtroom procedures in maintaining constitutional liberties.[13] The dissent contended that "the use of prior convictions evidence in these cases is fundamentally at odds with traditional notions of due process . . . because it needlessly prejudices the accused without advancing any legitimate interest of the state."[14] By the ordinary rule of evidence it is prejudicial error for the state to allude to, or to attempt to prove, prior convictions at the trial of the defendant for the present crime.[15] This rule is based upon the rationale that the defendant is being tried only for the principal crime and evidence concerning previous convictions would unduly

8. TEX. CODE CRIM. PROC. ANN. art. 36.01 (1960).
9. Spencer v. State, *supra* note 7, at 654.
10. *Id.*
11. *Id.* at 655.
12. *Id.* at 656.
13. *Id.* at 657.
14. *Id.*
15. J. WIGMORE, EVIDENCE § 192 (3d ed. 1940).

prejudice the jury against the defendant.[16] There are exceptions which occur, *i.e.,* when defendant takes the stand as a witness questions concerning previous convictions can be asked to demonstrate his credibility, or when defendant initiates an inquiry into his character evidence of prior convictions can be used to refute defense witnesses.[17] In these situations the admission of prior crimes evidence rests on the conclusion that the probative value of the evidence outweighs the conceded possibility of prejudice.[18]

These exceptions should not give rise to faulty reasoning that the recidivist statute has similar relation to the issue of guilt for the present crime. The recidivist statute is valid only for the purpose of enhancing the penalty; it has nothing whatever to do with the question of guilt or innocence of the crime currently charged.[19]

The majority of states (thirty) have amended their recidivist procedure either by statute or judicial determination in order to cure the prejudice inherent in the procedure followed by the court in *Spiker.*[20]

One of the earliest decisions which held that it was unduly prejudicial to admit evidence of prior convictions before conviction of the present crime is *Ferrone v. State.*[21] This Connecticut case outlined a procedure which followed that prescribed by an English statute.[22] Under this procedure the information charging the present offense includes the allegation of recidivism and is divided into two parts. However, while notice is given, as to prior conviction in the pleading, only the allegation of the present crime is proved to the jury. The jury upon retiring is given only the first part of the information which includes this charge. If a verdict of guilty is returned, the jury, without reswearing, is then given the second part of the information in which the former

16. *Id.*
17. *See generally* exceptions set out in C. MCCORMICK, EVIDENCE § 157 (1954).
18. *Id.*
19. *See* J. WIGMORE, *supra* note 15.
20. Spencer v. State, *supra* note 7, at 665 n.11, *e.g.* Robertson v. State, 29 Ala. App. 399, 197 So. 73 (1940); State v. Stewart, 110 Utah 203, 171 P.2d 383 (1946); Heinze v. State, 127 Colo. 54, 253 P.2d 596 (1953).
21. 96 Conn. 160, 113 A. 452 (1921).
22. Coinage Offenses Act of 1861, 24 & 25 Vict., c.99.

convictions are alleged.[23] This is the procedure which is generally followed by the thirty states.

Since *Ferrone* there have been a number of jurisdictions which by judicial determination have accepted its procedure.[24] Some of the more recent cases are *Heinze v. State,*[25] *Harris v. State,*[26] *and Lane v. Warden.*[27]

In *Heinze* the court held that the use of proof of convictions of previous offenses cannot obtain until the guilt of the substantive offense on trial is established. It further stated that if a charge of a previous conviction was brought before testimony by the defendant or other means of opening the door to proof of prior convictions the prejudicial error would not be cured even if defendant subsequently testified on his own behalf.[28]

The *Harris* court stated that: "no one can deny that reading an information to a jury reciting numerous previous convictions has a strong tendency to destroy the presumption of innocence."[29] The court then overruled any other procedure and determined that the procedure to be followed in Oklahoma was that of England and *Ferrone v. State.*[30]

The United States Court of Appeals after an exhaustive review of case law concerning recidivist procedure stated in *Lane v. Warden* that "the revelation of Lane's [defendant's] prior convictions to the jury prior to the finding of guilt on the current charges was entirely unnecessary. Alternative procedures which were well known included the Connecticut practice . . . and the West Virginia statutory practice."[31] The court reached the conclusion that reading of the portion of the indictment relating to prior convictions, at the commencement of Lane's trial, destroyed the impartiality of the jury and denied him due process of law.[32]

23. Ferrone v. State, *supra* note 21, at 457.
24. *E.g.* McAllister v. Commonwealth, 157 Va. 844, 161 S.E. 67 (1931); Robertson v. State, 29 Ala. App. 399, 197 So. 73 (1940); State v. Stewart, 110 Utah 203, 171 P.2d 383 (1946); Heinze v. State, 127 Colo. 54, 253 P.2d 596 (1953); Harris v. State, 369 P.2d 596 (Okla. Crim. 1962); and Lane v. Warden, 320 F.2d 179 (4th Cir. 1963).
25. 27 Colo. 54, 253 P.2d 596 (1953).
26. 369 P.2d 187 (Okla. 1966).
27. 320 F.2d 179 (4th Cir. 1963).
28. Heinze v. State, *supra* note 25, at 599.
29. Harris v. State, *supra* note 26, at 193.
30. *Id.* at 195.
31. Lane v. Warden, *supra* note 27, at 185.
32. *Id.* at 187.

The result in *Spiker* also seems to be entirely unnecessary. The court failed to look to the trend of the majority of jurisdictions. It failed to adopt a procedure which would protect the defendant against partiality and insure observance of due process of law. The decision of the court was based instead upon prior cases which did not squarely answer the question regarding the admissibility of evidence of prior convictions before a finding on the principal charge.

Mr. Justice Frankfurter has stated that, "the history of individual liberty is largely coincident with the history of the observance of procedural safeguards."[33]

At a time when such safeguards are being enforced by the majority of the courts in the United States the decision in *Spiker* has fallen short. A change in the recidivist procedure as stated in *Spiker* should be made to bring the Wyoming procedure in line with the better reasoning of the majority.

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33. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951).