Land & Water Law Review

Volume 5 | Issue 2 Article 16

1970

A View by the Prosecution

G. J. Cardine

LAND AND WATER
LAW REVIEW

VOLUME V 1970 NUMBER 2

THE WYOMING RULES OF CRIMINAL PROCEDURE
A VIEW BY THE PROSECUTION

*G. J. Cardine**

THE Wyoming Rules of Criminal Procedure, with several minor amendments, generally adopt the Federal Rules of Criminal Procedure. Some scholars consider the liberal federal rules to be the ultimate in progress and enlightenment. The claim is doubtful. The real virtue, if any, in the adoption of the Federal Rules by the States is, that some time in the future, procedure in all courts across our land may be uniform, allowing courts and their officers to function more easily with each other in the total judicial system.

The Wyoming Rules of Criminal Procedure were adopted after a long period of time in which there was study, discussion, controversy, dispute, amendment, and final agreement. The decision to adopt is irrevocable. We can never return to the past and to the old rules of procedure. For those who resisted the adoption of the Rules of Criminal Procedure, the time for complaining has expired. The time for constructive criticism and improvement of the Rules has arrived.

What is the purpose of the criminal judicial system? Most assuredly, an average cross-section of America would

* Partner, Cardine & Vlastos, Casper, Wyoming; B.S., 1948, University of Illinois; J.D. (with honors), 1954, University of Wyoming; Member of Natrona County, Wyoming and American Bar Associations. Mr. Cardine is presently the County and Prosecuting Attorney for Natrona County, Wyoming, and was a main speaker at the Institute on Criminal Procedure held at the University of Wyoming in February, 1969.

answer with certainty, to convict the guilty and acquit the innocent. When the guilty escapes or the innocent are convicted, the system fails. The battle lines have long been drawn. The defense bar claims innocent persons in great numbers are arrested, tried, convicted and confined in prisons over the country. The prosecution claims the guilty escape through a morass of legal technicality and ill-conceived rules. Where does the truth lie?

I. PRIOR TO THE NEW RULES

Since the founding of our great country, some of the most sacred and cherished rights afforded an accused have been,

A. *The Presumption of Innocence.* Thus, though a person emerge from a dwelling with a smoking gun in his hand and spontaneously state: "I just killed a man in there," he is presumed innocent until proven guilty.

B. *The Privilege Against Self-Incrimination.* The accused with a smoking gun in his hand need never make any statement nor give his version of how the shooting occurred. He need not testify even at his trial, but if he choose, he may testify at the trial for the first time concerning the incident. The State, with no opportunity to prepare or counter, may learn for the first time that the defense will be accident, self-defense, drunkenness or drugs bearing on intent, alibi or any myriad of defenses.

C. *Security Against Search and Seizure.* All persons are secure in their persons, houses, papers and effects against search and seizure, except upon showing of probable cause. Stringent, sometimes excessive, sometimes technical requirements have been a major road block in the way of the State dealing with crime. In a recent U.S. Supreme Court case, *Spinelli v. United States,*[1] F.B.I. Agents, acting on a tip from a confidential, reliable informant, tailed a suspect for five days, observed him enter an apartment rented to a Grace Hagen four consecutive days; the apartment had two

1. 393 U.S. 410 (1969).

telephones with two different numbers; Spinelli was known to the F.B.I as a bookmaker and gambler and they were informed he was accepting wagers and disseminating gambling information by use of the telephones. Pursuant to Search Warrant, gambling paraphenalia was seized, Spinelli arrested, tried and convicted. The conviction was reversed, the Supreme Court holding there was no probable cause for the Search Warrant.

For almost 200 years it was felt that the vast rights afforded defendants in criminal cases required concessions to the State to assure a fair trial to both sides and ultimate justice. The trial was literally a trial by ambush, each side lying in wait ready to ambush the other should they stray from the truth. The procedure was most likely to produce the truth, for anyone caught in a web of false testimony could expect to be convicted. Experienced trial lawyers know that juries severely punish litigants who are proven to have sworn falsely.

Those who believe witnesses do not, on occasion, testify falsely are naive. Persons have been known to lie just for money (in civil cases). Where life or incarceration in prison are at stake, the accused has little to lose. He is a desperate man and understandably will use any means to his own benefit.

II. THE NEW RULES OF CRIMINAL PROCEDURE

Within the year new Rules of Criminal Procedure have been adopted in the State of Wyoming. These new rules give to an accused vast new opportunities to discover the total case of the State. The accused may secure from the State all of the physical evidence, all scientific reports of examinations or studies, the names of all witnesses having any knowledge whatsoever concerning the crime, all statements taken by the State (some courts have required these to be given to the accused before trial), all photographs, all drawings and maps, and all other evidence. The accused having the State's entire case, may now be certain that his defense will be totally consistent with that case.

The State is given nothing under the new Rules of Criminal Procedure. (This statement gives consideration to the ineffective provisions of Rule 18). The accused may conceal his case to the point of withholding his opening statement until the prosecution has rested and then spring from hiding with his ambush. Thus trial by ambush is now accorded only to the defense in a criminal case. Judge Learned Hand, in a quote from a famous case,[2] well states the proposition:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

A Public Defender from a large eastern jurisdiction recently told me that of the several thousand criminal defendants he had represented as a Defender, he had never had one who was totally innocent of the crime charged. "The wrong charge may have been filed, the Information or Indictment improperly drawn, or there may have been technical defects in the procedure," he said, but he never had a defendant who was not in some way connected with the crime. It is likely this statement would apply to all jurisdictions over the United States of America. At a time when law enforcement is incapable of meeting and coping with organized crime, the new Rules of Criminal Procedure seem an anomaly.

2. United States v. Garsson, 291 F. 646, 649 (S.D. N.Y. 1923).

PRELIMINARY HEARING

Rule 7 provides that except upon indictment, the defendant shall be entitled to a preliminary examination. An Indictment is a formal charge returned by a Grand Jury. In Wyoming a Grand Jury may only be called upon order of the District Court pursuant to Section 7-92, Wyoming Statutes 1957 and following sections. The Grand Jury proceeding is never utilized in Wyoming. Every criminal case is commenced upon Complaint and Warrant with a preliminary hearing being required under the Rules.

Rule 7(b), Wyoming Rules of Criminal Procedure is taken from Rule 5(c), Federal Rules of Criminal Procedure. The Rule provides that the defendant may, at the preliminary hearing, cross-examine witnesses against him and he may introduce evidence in his own behalf.

The adoption of Rule 7(b) provides for a full blown trial before the trial. It is strange that two procedures which accomplish the same end, i.e. Grand Jury proceedings and the preliminary hearing, can be so completely different and yet in the eyes of the courts, result in the same justice to a defendant.

The Grand Jury proceeding is a *secret hearing* at which the State presents its evidence establishing probable cause with respect to the crime and persons involved.[3] The prospective defendant is neither present nor represented by counsel. After hearing the evidence, the Grand Jury, in Wyoming by a 9 to 12 vote, may return an indictment upon which a defendant is arrested and arraigned in District Court for trial without a preliminary hearing. The defendant has no right to a transcript of the Grand Jury proceedings nor the evidence, nor may he question any of the jurors in the proceeding or learn anything about it. He does not have the right to discovery which is granted him by Rules of Procedure in preliminary hearings.

3. It is recommended that a Wyoming Statute be enacted permitting the State to grant immunity to one who testifies and the Statutes on Grand Jury be amended to allow the prosecutor to present any inquiry to the Grand Jury.

Initially, the Complaint Warrant, and preliminary hearing procedure was intended to be a simplified method of commencing a criminal proceeding. It was intended to afford a defendant a hearing at the earliest possible opportunity and required the State to show probable cause that a crime had been committed and that the defendant charged had committed the crime before he could be held for trial in the District Court. It was the burden of the State to put on sufficient evidence to establish probable cause and no more.

The preliminary hearing was never intended to be a discovery proceeding, and was not intended to be a full trial at which the State's entire case would be presented over a period of days. Yet this is the result under the new Rules of Procedure.

The defendant in a preliminary hearing may now issue subpoenas and subpoenas duces tecum to every member of the law enforcement agency involved in the investigation of a crime, require production of all documents, memoranda, physical evidence, or anything having to do with the crime, subpoena every person having any knowledge whatsoever of the crime and utilize the preliminary hearing as a massive discovery proceeding with no apparent restrictions of any kind whatsoever.

The apparent intent of provisions of Rule 18, Wyoming Rules of Criminal Procedure is to afford some protection to the State in its own reports, memoranda, or internal governmental documents made by governmental agents. This intent is frustrated by Rule 7. There is no such protection at the preliminary hearing, when, ostensibly, a subpoena duces tecum to a particular officer seeking these documents must be obeyed and the documents produced. Prosecutors will be compelled to seek a protective order from a higher Court against this practice. In view of the direction Courts seem to be moving in this area, there is considerable doubt as to the relief which might be afforded the State.

The cases are not uniform in their holdings in this area. A line of cases hold that the function of the preliminary

hearing is to establish probable cause for holding defendant, and not to afford pretrial discovery.[4] A defendant's right to call witnesses at the preliminary hearing may be supervised by the commissioner and does not confer upon the defendant the right to call anyone and everyone as a witness.[5]

Other cases hold that, although the primary purpose of the preliminary hearing is to establish probable cause, the hearing in practice, may provide the defense with the most valuable discovery technique available to it.[6]

A recent preliminary hearing in a major case in Natrona County resulted in a two day trial. The defense issued a broad subpoena duces tecum for all evidence of any kind, reports, notes, memoranda, etc. The prosecution moved for a protective order. There were extensive arguments by the State and the Defense. The Justice of the Peace required the production of one item of physical evidence only. The hearing proceeded and the defendant was bound over to District Court. The defendant had one trial under Rule 7, his preliminary hearing; now defendant would have a second trial in the District Court before a jury.

The procedure is cumbersome, unnecessary and was never contemplated by the Constitution or Bill of Rights. The defendant is entitled to one trial in the District Court before a jury of his peers. The discovery provisions of Rule 18, of the Wyoming Rules of Criminal Procedure are complete and more than adequate to hand to the defendant the entire case of the prosecution. The confusion and inconsistency between discovery under Rule 7 and Rule 18 should be resolved.

RULE 18, DISCOVERY AND INSPECTION

There was little in the way of discovery in criminal cases prior to the adoption of the Rules of Criminal Procedure in the State of Wyoming. Case law required that the prosecu-

4. United States v. Amabile, 395 F.2d 47 (7th Cir. 1968); Sciortino v. Zampano, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968).
5. United States v. Bates, 287 F. Supp. 657 (E.D. Tenn. 1968).
6. Wheeler v. Flood, 269 F. Supp. 194 (E.D. N.Y. 1967) and United States v. Chase, 372 F.2d 453 (4th Cir. 1967) *cert. den.* 387 U.S. 901 (1966).

tion disclose to the defendant any evidence or information in its file favorable to the defendant in his defense. A failure by the prosecutor to make such disclosure resulted in reversal of a number of cases after conviction.

The newly adopted Rule 18 of the Wyoming Rules of Criminal Procedure provide that the court may order the prosecuting attorney to deliver to defendant,

(a) Copies of his statement or confession;

(b) Results of physical or mental examinations and scientific tests or experiments;

(c) Testimony of the defendant before a Grand Jury;

(d) Upon a showing of materiality and that the request is reasonable, permit the defendant to inspect and copy books, papers, documents, tangible objects, buildings or places; and

(e) Statements of witnesses after the witnesses have testified.

The rule does not authorize discovery or inspection of reports, memoranda or internal governmental documents made by governmental agents.

How has discovery worked in actual practice? Have the Rules been liberally construed as suggested within the Rules?

In a recent case, a Captain of Detectives was ordered by the Court to furnish the defense with a written statement setting forth his theory as to the trajectory of five bullets fired at a murder scene. The defendant, at the time, was out on bail and living in the home where the crime had occurred. The defendant himself had admitted firing the gun at the scene of the crime. In another case, the defense was secretly given the State's evidence over a weekend during trial for testing purposes. On Monday morning, the prosecutor was surprised by an expert witness testifying to tests performed on State's evidence and results of the same. The Prosecution had been granted discovery under Rule 18(d), but received nothing. (This complaint may sound like sour

grapes to the uninformed. The experienced trial lawyer knows that the most difficult witness he must cross-examine is the expert testifying in a highly specialized field. Cross-examination is difficult and hazardous under the best circumstances. If it must be carried out in total surprise, without any prior knowledge of testing or results of evidence, it is extremely difficult and grossly unfair.)

Some courts require the State to furnish the defense the names of all witnesses although no such requirement can be found in the Rules of Criminal Procedure. Some courts have entered orders requiring the State to furnish statements of all witnesses, although the Rules of Criminal Procedure are to the contrary until after the witness has testified.

Rule 18(g) requiring all discovery motions to be made within ten days after arraignment is not enforced. Motions To Strike because a Motion For Discovery is outside the limits of this Rule are not granted. The procedure fosters and encourages an endless series of Motions right down to the time of trial. In a recent major case in Natrona County, the State made ten appearances in the District Court in Bail Bond hearings and pursuant to Motions filed by the defense. In a second case, the State has made five appearances in the District Court pursuant to Motions filed by the defense.

CONCLUSION

Any system under which correction or punishment is meted out must be swift, certain, consistent, fair and just. This is true in all dealings between human beings whether it be courts dealing with offenders or parents and their own children. Where there is great delay between the inception and conclusion of the process, uncertainty as to the handling, inconsistency and unfairness as to the disposition, resentment builds and the hoped for corrective effect is lost.

England was the cradle of our system of criminal jurisprudence. A revisit to the system of our predecessor may demonstrate some of the areas in which we may have lost our way. Under English practice, it is lawful,

(a) To interrogate anyone at any time during a period prior to the filing of formal charges.

(b) Though a search be illegal, the fruits of the search may nevertheless be received into evidence.

(c) The average interval between formal charge and trial is thirty days. Sixty days is considered excessive.

(d) Although there is a privilege against self-incrimination, an accused is almost compelled to testify at his trial. His failure to testify or explain may be commented on by the trial judge who may instruct the jury that such failure should be considered most strongly against the defendant.

(e) Appeals are only upon questions of law and may not practically be taken for insufficiency of evidence.

We have come half-way with the adoption of the Rules of Criminal Procedure. Now, we must go the rest of the way. A demand for discovery should constitute a waiver by the defendant of the privilege against self-incrimination. The choice is that of defendant. An innocent man has everything to gain and nothing to lose. What possible objection could an innocent man have to giving his disposition in the presence of his attorney.

Heretofore the mere existence of the privilege against self-incrimination has been an absolute bar to this kind of thinking. The privilege against self-incrimination is not sacred but can stand critical examination. Much change has occurred in our country in the intervening 200 years since the adoption of the Constitution. The lawmakers, courts, lawyers and the system are out of step with the rest of society. The man who works eight hours a day, earns his way, pays his taxes and sends his kids to school is frustrated by a system that is unable to cope with crime.[7]

7. F.B.I. reports released August, 1968, show serious crime has increased 89% although the population increased only 10% during the preceding 7 years. Solution of serious crimes declined 8% in 1967. 76 law enforcement officers were murdered by felons in 1967; the average for the preceding 7 years was 48. A survey showed 43% of the persons questioned in large cities are afraid to walk the streets after dark.

We have more to fear today from organized crime—the hit man, the mob ostensibly going into legitimate business, the loan sharks, the gamblers, the robbers, the drug and dope peddlers—than we do from the supposed confession forced from the rack at the police station. Justice Harlan, in his minority opinion in the Miranda case[8] was most persuasive in stating,

> We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.
> While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial at court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.

Claimed police brutality and use of evcessive methods is a myth. It occurs in isolated rare instances as it always will in any imperfect system operated by men. The solution does not lie in emasculation of the Rules. The solution lies in upgrading law enforcement with better pay, better working conditions and better personnel.[9]

Under Rules of Criminal Procedure providing total discovery to both sides, the liklihood of ultimate truth and justice would be greatly enhanced. Perhaps law enforcement at last, would have the capability of dealing with crime in this country.

8. Miranda v. Arizona, 384 U.S. 436 (1966).
9. Again we might look to England, for all law enforcement officers possess the same qualifications, training, pay and supervision. The County Sheriffs and two-man Police Departments have been abolished.