Wyoming Law Journal

Volume 10 | Number 1 Article 18

December 2019

Oil and Gas Protection Leases

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of reliance in these cases. It would seem to be the growing trend, however, to allow the plaintiff in these cases to rely on the defendant's due care to the extent that the question of contributory negligence is for the jury, without regard to the "proximity" test.[23]

In conclusion, no general prediction can be made as to when a court will choose to allow reliance by the plaintiff to overcome a defense of contributory negligence in any particular type of case. Nor can it be said how a Wyoming court would regard this theory in any of the situations discussed, with the possible exception of a case like *O'Malley v. Eagan*. However, at least it can be said that this theory of reliance is another tool for use by the plaintiff's counsel in dealing with the problem of contributory negligence. In line with the increasing reluctance on the part of the courts to apply strict fault concepts in automobile accident litigation, it should prove a most useful tool.

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WHAT EVIDENCE SHOULD BE SUBMITTED TO THE JURY WHEN THE DEFENDANT PLEADS GUILTY TO MURDER IN THE FIRST DEGREE?

Prior to 1915 the statute[1] in Wyoming on first degree murder provided only for the punishment of death, i.e., anyone found guilty of murder in the first degree to suffer death. In that year the State Legislature appended the words "but the jury may qualify their verdict by adding thereto 'without capital punishment' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment, at hard labor for life."[2]

One of the first cases to apply this revised statute was *State v. Best*.[3] In that case the defendant changed his plea of not guilty to guilty. The Judge questioned the defendant as to his realization of the import of his plea, and then announced that evidence would be taken for the purpose of enabling the jury to fix the punishment. The evidence was heard and the jury returned an unqualified verdict of murder in the first degree. The defendant appealed from this verdict, contending that his plea of guilty

23. Orth v. Gregg, 217 Iowa 561, 250 N.W. 113 (1933); Mazzaferro v. Dupius, 321 Mass. 718, 75 N.E.2d 503 (1947); cf. Byrne v. Dunn, 296 Mass. 184, 5 N.E.2d 10 (1936) in which the plaintiff was walking in the street on the right side because of ice on the sidewalks. See also, Clouatre v. Lees, 321 Mass. 679, 75 N.E.2d 242 (1947) in which plaintiff, a boy of 16, rode a bicycle out into a street from a driveway between a store and a filling station. The court held that since there was a school in the vicinity, the plaintiff "was entitled to take into account the probability that motorists would regard the presence of the school and the liklihood that school children would be encountered."

1. Wyo. Comp. Stat. sec. 5789 (1910).
2. Wyo. Laws 1915, c. 87 sec. 1. This statute has been carried forward, unchanged, to the present time. See Wyo. Rev. Stat. sec. 31-201 (1931), Wyo. Comp. Stat. sec. 9-201 (1945).
3. State v. Best, 44 Wyo. 383, 12 P.2d 1110 (1932).

was a confession of a killing on purpose and with premeditation, as charged in the information, and that he should have been permitted to change his plea when the evidence brought out that the murder had been committed in the perpetration of a robbery. Citing the case of *Harris v. State*,[4] in which it was held that the plea of guilty confessed the crime shown by the evidence, the court held that a plea of guilty could be accepted, and construed the statute[5] to mean that a jury should have the opportunity to determine the punishment regardless of whether the defendant had been convicted or has pleaded guilty. The trial court had permitted evidence of previous and unrelated crimes but, since no objection had been made by the defendant to this evidence, the Supreme Court did not feel called upon to determine whether or not this was error.

It is clear, of course, that when the defendant pleads guilty of first degree murder some evidence or at least some information must be given to the jury, so that they will be able to act intelligently in arriving at a verdict. Courts have made two approaches to the problem: (1) admission of all proffered evidence concerning the past history of the defendant; relevant and irrelevant, on the theory that it would have a bearing on the punishment to be inflicted, and (2) admission of evidence, according to the rules of evidence, as in a plea of not guilty.

In the case of *U.S. v. Dalhover*,[6] decided by the Circuit Court of Appeals of the Seventh Circuit, in determining punishment after a plea of guilty to the crime of murder while a member of a three man gang (the other two were killed in an attempt to avoid arrest), the court approved the admission of the following evidence at the trial: a detailed statement made by the defendant covering the career of the gang from September, 1935 to October, 1937, disclosing that they had committed approximately 150 grocery store, filling station and drug store robberies as well as three bank and four jewelry store robberies. The statement included the part played by the defendant in the commission of the crimes, and was admitted over the objections and exceptions of the defendant. One judge, dissenting, wanted to restrict the evidence to that which would be admissible on a plea of not guilty. This dissenter argued that the effect of the majority's decision was to place a more severe penalty upon one who pleaded guilty than on one who pleaded not guilty, and whose guilt had to be proved. He recognized, however, that admission of all the evidence (as in this case) might operate to the benefit of a person committing murder in the first degree, as where the defendant had no previous criminal record.

The rule urged by the dissent in the *Dalhover* case, supra, was followed in the Colorado case of *Reppin v. People*.[7] That case involved an attempted "stick-up" and murder by an 18 year old boy. The victim was a

4. Harris v. State, 34 Wyo. 175, 242 Pac. 411 (1926).
5. Note 2 supra.
6. U.S. v. Dalhover, 96 F.2d 355 (7th Cir. 1938), cert. denied, 305 U.S. 632 (1938).
7. Reppin v. People, 95 Colo. 192, 34 P.2d 71 (1934).

taxicab driver. After the defendant entered the taxi, he drew two guns and ordered the victim to drive to a cemetery. In a scuffle that ensued the taxi driver was shot, and the defendant drove away in the cab. Before dying the victim made a detailed statement of the shooting, and at the trial this statement was admitted as a dying declaration, over objection. The trial judge admitted evidence of a prior arrest of the defendant, for conspiracy, in New Jersey. He also admitted testimony by the Chief of Police (a witness for the prosecution) that the defendant, in his statement to the police, reported that he had had a "vision" of holding up a hotel with the aid of about six men. In considering the objection to this ruling, the Supreme Court of Colorado said that in determining the degree of murder, the rules concerning the admissibility of evidence when a murder trial is conducted upon a plea of guilty are the same as those applicable when the trial is upon a plea of not guilty. The court observed that, as held in *Jaynes v. People,*[8] the general rule is that evidence is not admissible to show that the accused has committed a crime wholly independent of the offense for which he is on trial; no person may be convicted of one offense by proving him guilty of another. One exception to this rule, said the court, is to admit evidence of other crimes for the specific purpose of showing intent. The court found, however, that the evidence of conspiracy, and the "vision," did not show intent, and reversed the lower court. But the Colorado court in the *Reppin* case did approve the admission of testimony of offenses of the same character, committed by the defendant, to show intent, and for that purpose only. Defendant's contention that such offenses could not be admitted because the plea of guilty raised no issue of intent was rejected. "If such were the case, evidence of the homicide itself would not be admissible upon a plea of guilty, because such a plea admits the homicide."[9] In a dissenting opinion, in which two other judges concurred, Justice Burke contended that all the evidence should be admitted for the purpose of enabling the jury to fix the penalty. The dissenters thus followed the reasoning of the majority in *U.S. v. Dalhover,* supra.

In addition to *State v. Best,*[10] the Supreme Court of Wyoming has considered the problem in one other case—*State v. Brown.*[11] As a starting point the Court approved *State v. Best,* which had held that the jury should determine the punishment where the defendant pleads guilty to first degree murder. On the *Brown* case the defendant was a transient Negro railroad worker who had raped and killed an elderly white woman, while he was in a drunken stupor. He pleaded guilty to the crime when arraigned before the court, and insisted on that plea in the face of all attempts by the Court and appointed counsel to give him any benefit accompanying a plea of not guilty. In the trial of the cause to determine

8. Jaynes v. People, 44 Colo. 535, 99 Pac. 325, 16 Ann. Cas. 787 (1909).
9. Reppin v. People, 95 Colo. 192, 34 P.2d 71, 79 (1934).
10. State v. Best, 44 Wyo. 383, 12 P.2d 1110 (1932).
11. State v. Brown, 60 Wyo. 379, 151 P.2d 950 (1944).

punishment, the court permitted evidence of the whole sordid crime, e.g., the position of the deceased's body, age and character of the deceased, and th defendant's flight into Idaho to escape prosecution. (It should be noted that this type of evidence would have been admitted in the course of a trial on a plea of not guilty.) Defense counsel contended that the result of admitting this evidence was merely to inflame the jury, and that it served no other purpose. They contended that in the case of *Hernandez v. State*,[12] the Arizona Supreme Court has held that no evidence at all should be submitted to the jury in determining the punishment to be assessed against the defendant. In that case, however, there had been a plea of not guilty and a trial to determine guilt as well as punishment—quite a different situation, since the jury had the advantage of the presentation of the evidence in determining the guilt of the defendants. This was not true of the *Brown* case. To the contention of the defense counsel in *State v. Brown*, Justice Blume replied:

> "It may be that the same latitude should not be allowed when the jury fixes the penalty, which would be permissible when the trial judge does so but it is quite apparent that the same reason for examining into the circumstances of the commission of the crime exists equally in both cases. While, as stated, the discretion of the jury to impose the penalty of death or life imprisonment is untrammeled, they cannot, in the very nature of things, bring in an intelligent verdict, unless they know the circumstances under which the crime was committed, and all the surrounding facts, including the age of the defendant, his intelligence, his mental condition at the time of the commission of the crime, and other relevant facts which might properly aid the jury in exercising their discretion. It is hardly credible that the statute contemplates that the jury shall exercise their discretion blindly and without knowledge of the facts. That must be true in cases in which the defendant pleads guilty as much so as in those cases in which he pleads not guilty, and that, too, notwithstanding the foregoing rule that the jury should be left untrammeled by any instruction of the court in exercising their discretion."[13]

The court, in *State v. Brown*, recognized the existence of the two lines of authority illustrated by *Dalhover* and *Reppin*. However, since the matter of a criminal record was not involved in the *Brown* case, this particular point was not decided by the Wyoming Supreme Court. Consequently, we can only speculate as to how the matter will be handled by our Courts if it comes up in the future. Realistically, evidence of a prior criminal record will definitely have a bearing on an ultimate decision by the jury. Under the *Dalhover* rule the record would, of course, be admitted. The *Reppin* rule would not permit admission of the defendant's criminal record, over his objection, except for the limited purpose of proving intent.

The *Reppin* rule would appear to be more desirable from the follow-

12. Hernandez v. State, 43 Ariz. 424, 32 P.2d 18 (1934).
13. State v. Brown, 60 Wyo. 379, 396, 151 P.2d 950 (1944).

ing standpoints: (1) it follows the comparatively clearly defined rules as to what evidence is admissible on a "not guilty" trial, (2) it offers an incentive to the defendant to plead guilty where there is little or no question of his guilt, thus avoiding the necessity of a trial to prove his guilt and the always present possibility of a "miscarriage of justice." On the other hand, the *Dalhover* rule is likely to result in a plea of not guilty in every instance in which the defendant has a criminal record.[14]

In the ordinary criminal case, after a "guilty" verdict has been found by a jury or after a "guilty" plea by defendant, the trial judge has almost unlimited discretion in obtaining "outside" evidence and information for the purpose of determining the sentence to be imposed.[15] The role of the jury in setting the punishment for first degree murder, following a conviction or a plea of guilty, is analogous. On the basis of this analogy the *Dalhover* rule should be followed. Putting it another way, our Legislature has simply chosen to confer upon a jury, in case of a guilty plea to a first degree murder charge, the same discretion (within limits) ordinarily possessed by a trial judge in passing sentence.

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OIL AND GAS PROTECTION LEASES

The modern practice within oil companies is to examine with great care the title to lands upon which they hold leases. The reason for such concern is the improbable but possible chance that the mineral reserves under the lands will prove to be of unusually high economic value. Because great care is exercised in examining mineral titles, many defects of a technical nature are uncovered, which defects must of course be corrected or assumed as a business risk. In the past the usual method followed to cure title defects has been to require a quitclaim of the questionable interest in favor of the lessor. However, this approach is no longer realistic since the public has over the years become wary of quitclaim deeds. The average individual does not wish to alienate unknown but possible interests which he might hold. As an alternative, the protection lease has been developed.

A protection lease is simply a "quitclaim lease." In general it provides that the owner of a questionable interest leases whatever interest he has, if any, to the lessee, but the lessee is not obligated to recognize any interest

14. The Dalhover case cited People v. Popescue, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199 (1931) to support admitting testimony of other crimes. The defense attempted to distinguish this case on the ground that it was heard by a judge, and not a jury. This distinction was refused on the ground that even if the jury weren't as capable of discriminating and applying evidence as a judge, which this court refused to concede, the court stood by to cure any defects, by granting a rehearing, if it thought there had been a lack of discrimination or misapplication of the evidence.

15. Note, Judicial Discretion in Imposing Sentence, 4 Wyo. L. J. 209 (1950).