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Confining Material Witnesses in Criminal Cases

CONFINING MATERIAL WITNESSES IN CRIMINAL CASES

Since the presence of a particular material witness may be essential to the prosecution of a criminal case, some means must be used to assure his attendance at the trial. When it is doubtful whether such a witness will be available to testify, the prosecution may ask for his confinement or at least his giving of bond. Then the appropriate court will be confronted with the question of when a material witness may be confined to await trial, and this, in turn, gives rise to a difficult question regarding the rights of a material witness.

The rights of material witnesses were recently involved in *Quince v. State of Rhode Island.*[1] The plaintiffs, migrant farm workers, were taken into custody as material witnesses to a homicide. Although their connection with the homicide was nothing more than a chance observation, they were confined for two days without being charged with anything or given the assistance of counsel. On the third day they were brought before a Rhode Island District Court which, without hearing any testimony on their part, found them to be material witnesses and set their bonds at $5,000 each, a figure far beyond the means of migrant farm workers. After spending 158 days in jail, due to inability to meet this bond, the plaintiffs filed for a writ of habeas corpus, which was issued in the proceeding of *Quince v. Langlois.*[2] Under a special grant of legislative authority,[3] the plaintiffs then sued the State of Rhode Island, and each recovered a judgment for $1,250 for loss of earning power and $2,500 for deprivation of liberty and humiliation and disgrace suffered as a result of this degrading experience.

The common law did not recognize any authority to confine a material witness, and such authority existing today is purely statutory.[4] A court at common law could require a witness to enter into a recognizance, but he could not be required to provide a surety.[5] Even

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[1]179 A.2d 485 (R.I. 1962).

[2]88 R.I. 438, 149 A.2d 349 (1959).

[3]H.R. 1418 and H.R. 1486, R.I. Acts, 1960, at 1221 and 1226. Herein is the auhority which enabled the plaintiff's to sue the sovereign State of Rhode Island.

[4]"By the Statutes of Philip and Mary, referred to in Chitty's Criminal Law page 61 (marginal page 90)... authority is conferred on the magistrate to recognize witnesses to attend at a future time in court, but nothing is said about requiring security of them." Bichley v. Commonwealth, 25 Ky. (2 J.J. Mar.) 572, 574 (1829).

[5]Bichley v. Commonwealth, 25 Ky. (2 J.J. Mar.) 572 (1829); Comfort v. Kittle, 81 Iowa 179, 46 N.W. 988 (1890).

after statutes authorized the requiring of sureties, he could be punished only for contempt if he failed to appear as directed.[6]

Today most states do have statutes authorizing the courts to require a surety of a material witness and in default thereof to confine him.[7] These statutes, as they have been interpreted by the courts, generally contain three limitations: a judicial hearing, reasonableness in the amount of the surety, and reasonableness in the duration of confinement.

The Rhode Island statute under which the petitioners were confined illustrates the first limitation:

> "[The Court]... may bind by recognizance with or without surety, such witness as it shall deem material to appear and testify at the higher court in case it shall deem it necessary to insure the atendance of such witness.
>
> "Every witness who shall refuse to comply with the order of a district court requiring him to give recognizance whether with or without surety shall be committed to jail in the same county, there to remain until he gives recognizance or be discharged pursuant to law."[8]

The words "such witness as it [the court] shall deem material" have been interpreted repeatedly to mean that no determination of whether recognizance is to be required shall be made without first providing the witness with an opportunity to testify at a court hearing.[9] A judicial officer, and not the prosecution, must determine whether facts existed that warrant requiring the witness to enter into a recognizance, either with or without sureties.[10] Such a judgment can be exercised only upon evidence adduced at a hearing.

At the hearing a person held as a material witness has a right to counsel.[11] While this is contrary to the general rule that a witness is not as a matter of right entitled to counsel,[12] a distinction is drawn between a witness subpoenaed to testify under ordinary procedure and a witness who is asked to give bond or whose confinement is

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[6]Bates v. Kitchell, 160 Mich. 402, 125 N.W. 684 (1910).

[7]The following state statutes are illustrative: Mich. Comp. Laws § 767.35 (1949); N.Y. Code Crim. Proc. § 618-b; R.I. Gen. Laws Ann. §§ 12-12-12 - 13 (1956). See also 97 C.J.S. Witnesses § 33 (1957).

[8]R.I. Gen. Laws Ann. §§ 12-13-12 - 13 (1956).

[9]Quine v. Langlois, 88 R.I. 438, 149 A.2d (1959); De Stefanis v. The Zoning Board, 84 R.I. 343, 124 A.2d 544 (1956).

[10]State v. Grace, 18 Minn. (Gil. 359) 398 (1868); In re Wendel, 173 Misc. 819, 18 N.Y.S.2d 586 (Sup. Ct. 1940).

[11]People ex rel. Fusco v. Ryan, 204 Misc. 861, 124 N.Y.S.2d 690 (Sup. Ct. 1953).

[12]People ex rel. McDonald v. Keeler, 99 N.Y. 463, 2 N.E. 615 (1885).

being sought.[13] In the case of *People ex. rel Fusco v. Ryan* the following occurred at the hearing:

> Material Witness: "You Honor, I think it is no more than right I should have a lawyer."
> The Court: "Have you a lawyer?"
> Material Witness: "Yes, sir."
> The Court: "Yes, well, you can have your lawyer see you in Bronx County Jail to which you will be committed. You will be permitted to phone your lawyer from the Bronx County Jail."[14]

In reviewing the commitment, the court held that the failure or refusal to accord one proceeded against as a material witness his right to counsel is the deprivation of a substantial right which will vitiate an order requiring such a person to give bond or be committed. However, there seems to be no authority extending his right to enlist the aid of counsel to the right to have the court appoint counsel for him if he is unable to obtain counsel for himself.[15]

If the witness is deemed material, and a bond is necessary to insure his availability, the court must fix such bond in a reasonable amount.[16] The amount of the bond will depend on the following facts:[17] the seriousness of the crime under investigation, the character of the person held as a material witness, his relationship to those against whom he may be called upon to testify, the possibility of flight to avoid giving testimony, and the difficulty of procuring the person's return if he should leave the jurisdiction.[18] Other factors such as the witness's army record, age, or residency also may be considered.[19] While some emphasis is placed on the magnitude of the crime, bonds may vary greatly in amount in light of the different circumstances surrounding each material witness. The bond of a material witness

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[13]See note 11 Supra.

[14]124 N.Y.S.2d at 695.

[15]In criminal proceedings one accused of a capital crime has an absolute right to court appointed counsel. Powell v. Alabama, 287 U.S. 45 (1932). But there is no such automatic right to court appointed counsel extended to one accused of a non-capital offense unless there is a showing of special circumstances. Betts v. Brady, 316 U.S. 455 (1942), Carnley v. Cochran, 369 U.S. 506 (1962). See Generally Marden, Equal Access To Justice, 19 Wash. & Lee L. Rev. 153 (1962).

[16]People v. Solomon, 296 N.Y. 220, 72 N.E.2d 163 (1947).

[17]People ex rel. Rao v. Adams, 296 N.Y. 231, 72 N.E.2d 170 (1947); People ex rel, Rothensis v. Searles, 299 App. Div. 603, 243 N.Y.S. 15 (1930).

[18]People ex rel. Richards v. Warden of City Prison, 277 App. Div. 87, 98 N.Y.S.2d 173 (1950).

[19]People v. Warden of City Prison, 285 App. Div. 836, 137 N.Y.S.2d 432 (1954). O'Connell v. McElhinery, 138 N.Y.S.2d 138 (Sup. Ct. 1954).

in one case involving bookmaking was set at $250,000[20] while the bond of the witness in a similar case was set at $10,000.[21] In the former case the witness was of doubtful character since he freely admitted that he had bribed police officials. In the latter case there was nothing derogatory brought out regarding the witness's character, as he was not charged with the commission of any crime; he had freely testified before the grand jury; and there was no sound basis for a finding that he would not be available whenever his testimony would be required.

However, this does not mean that the seriousness of the crime is not also weighed,[22] for where the crime involved is serious, such as murder, $250,000 has been held to be reasonable.[23] In setting the amount of a bond a court is allowed great discretion,[24] and appellate relief in reducing the bond will be granted only to prevent invasion of a constitutional right[25] and not because of a difference of opinion between the lower court and the reviewing court as to the amount to be fixed.[26] The third limitation on the statutory right to confine arises after the witness has been committed to jail for his failure to meet the bond.[27] The confinement is limited to a reasonable time, and 158 days, as in the principal case, is not considered a reasonable time. Four months was not considered a reasonable time in *Ex parte Grzyeskowiak*.[28] Here the petitioner witnessed a murder and, after the proper proceedings, he was confined to await the trial. Meanwhile, a warrant was issued for the arrest of the murder suspect, but after four months from the time that the petitioner was confined, the suspect was still unapprehended. The petitioner was released, for the court held that under these circumstances it would be unreasonable to hold him any longer as it would be impossible to predict when, if ever, the suspect would be apprehended.[29]

Even after considering the protections afforded a material witness, it still seems quite unfair to confine a completely innocent person in

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[20]People ex rel. Gross v. Sheriff of New York, 302 N.Y. 173, 96 N.E.2d 763 (1951).

[21]See note 18 supra.

[22]See note 17 supra.

[23]Ibid.

[24]People ex rel. Weiner v. Collins, 260 App. Div. 806, 22 N.Y.S.2d 775 (1940).

[25]U.S. Const. amend. VIII. See following state constitutions: Conn. Const. art. I § 13; Ill. Const. art II § 7; Mass. Const. art. XXVI; N.Y. Const. art. I § 5; R.I. Const. art. I § 9.

[26]See note 11 supra.

[27]97 C.J.S. Witnesses § 33 (1957).

[28]267 Mich. 697, 255 N.W. 359 (1934).

[29]There seems to be little authority on this limitation for the apparent reason that a court will not confine a material witness until it appears reasonably certain that the suspect will soon be apprehended.