Washington and Lee Law Review

Volume 20 | Issue 1 Article 18

Spring 3-1-1963

Pre-Trial Discovery by the Prosecution in a Criminal Case

counter the known danger can be made. If it appears to the court that these three elements are present, it can be concluded that the plaintiff has assumed the risk as a matter of law and cannot recover from the negligent defendant.[39]

EDGAR H. MACKINLAY

PRE-TRIAL DISCOVERY BY THE PROSECUTION IN A CRIMINAL CASE

There have been significant developments in recent years in discovery by the accused in criminal cases,[1] with California the leader in allowing the accused liberal pre-trial discovery of evidence in the hands of the prosecution.[2] In the recent case of *Jones v. Superior Court*,[3] the Supreme Court of California took a revolutionary step and allowed the prosecution limited discovery rights against the accused. On the day set for trial of a rape case, the accused moved for a continuance on the ground that he was and for a long time had been impotent, and needed time to gather evidence to establish this as a fact. The motion was granted. A few days later, the district attorney filed a motion for discovery asking that the petitioner be required to furnish the prosecution with the names and addresses of all physicians who had treated petitioner prior to trial; all physicians who would be subpoenaed to testify on behalf of petitioner; all reports of physicians pertaining to the physical condition of petitioner; and all x-rays of petitioner. The trial court granted the state's motion. The defendant sought a writ of prohibition to stop enforcement of the trial court's order.

The Supreme Court upheld the trial court's granting of this motion,

---

[39]"[P]rerequisites for the application of the defense of assumption of risk... are that the assumption must be free and voluntary; that the risk is not assumed where the conduct of the defendant has left the plaintiff no reasonable alternative; and that, if a plaintiff with full knowledge of the dangerous condition of a sidewalk, because of icy conditions, voluntarily attempts to walk on it, he is not deemed to assume the risk of injury unless the defendant proves the reasonable availability of a safer route of travel." Donald v. Moses, 254 Minn. 186, 192, 94 N.W.2d 255, 260 (1959).

[1]For a discussion of the historical background and present status of pre-trial discovery in favor of the defendant, see Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293 (1960).

[2]See Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 Calif. L. Rev. 56, 59 (1961).

[3]22 Cal. Rptr. 879, 732 P.2d 919 (1962).

except insofar as it related to medical reports found to be protected by the attorney-client privilege. The court said that since the purpose of discovery in favor of the accused is to ascertain the facts, "absent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on the issues of the case."[4] In concluding that there was no violation of the defendant's privilege against self-incrimination, the court relied on the "alibi" statutes in effect in a number of states.[5] These statutes require a defendant in a criminal case to give notice to the prosecution, prior to trial, of his intention to rely on an alibi as a defense, and to give information regarding the place where the defendant claims to have been when the crime was committed and the names of witnesses on whose testimony he will rely.[6] Such statutes have been upheld as not violating the defendant's privilege against self-incrimination.[7]

A dissenting opinion in *Jones*[8] pointed out that it is difficult to determine how far-reaching the decision is since it was only through the defendant's motion for a continuance that the prosecution learned of the defense of impotency. It seems unlikely that discovery in favor of the prosecution will be limited to the rare instances in which the defendant for some reason discloses prior to trial that he intends to rely on an affirmative defense. Consequently, the dissenting judge thought the majority was recognizing pre-trial discovery by the prosecution as to any affirmative defense[9]

---

[4]372 P.2d at 920.

[5]Id. at 922.

[6]The Ohio and New York statutes are typical. Ohio Rev. Code, tit. 29, § 2945.58 (1958) provides: "Whatever a defendant in a criminal cause proposes to offer in his defense, testimony to establish an alibi on his behalf, such defendant shall, not less than three days before the trial of such cause, file and serve upon the prosecuting attorney, a notice in writing of his intention to claim such alibi. Notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of proving such an alibi. N.Y. Crim. Code § 95(1) provides: [I]f such defendant intend to offer... testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must... file a bill of particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and places of employment of the witnesses upon whom he intends to rely.... Unless the defendant shall... file such bill of particulars, the court... may exclude such testimony...."

[7]State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); People v. Shade, 161 Misc. 212, 292 N.Y.S. 612 (Queens County Ct. 1936).

[8]372 P.2d at 927.

[9]Ibid.

The constitutionality of the decision of the court may be seriously questioned. As noted, the majority of the court relied on the alibi statutes to sustain the constitutionality of the decision. However, such statutes, and the philosophy used by the courts to find them constitutional, do not seem to give support to the decision of the court. The statutes have for their purpose the informing, through pre-trial notice, of the prosecution of the nature of the defense defendant intends to rely on. They are limited in scope, being applicable only where the defense involved is in the nature of an alibi,[10] or sometimes insanity.[11] The statutes do not involve the production of documentary evidence, and thus are more of a pleading device than a discovery method. The sanction for noncompliance with the statutory requirements is to preclude the defendant from introducing any testimony of alibi witnesses.[12] In upholding the constitutionality of an alibi statute, a lower New York court in *People v. Shade*[13] said:

> "Certain it is that there is nothing about the section which compels the defendant to incriminate himself, nor is there anything which compels him to give any information to the district attorney unless he voluntarily and for his own benefit intends to use an alibi defense. He is the sole judge of what he is going to do and he is not compelled in any sense to be a witness against himself but merely to give certain information to the district attorney if he intends to submit an alibi."[14]

In *Jones,* the court is permitting pre-trial discovery, upon motion by the prosecution, of documents and other evidence the accused intends to rely on in proving his defense. The sanction for noncompliance by the defendant would be contempt of court, not exclusion of the defendant's evidence. Therefore, the court gets little support for its decision from the alibi statutes. It would seem that the holding in *Jones* could be upheld only on the ground that the privilege against self-incrimination is not applicable to pre-existing documents.

The privilege against self-incrimination has been subject to much controversy and debate throughout its history in American juris-

---

[10]See, e.g., statutes note 6 supra; see also 6 Wigmore, Evidence § 1855(b) n.2 (3d ed. 1940).

[11]See 6 Wigmore, Evidence § 1855 (b) n.2 (3d ed. 1940).

[12]See statutes note 6 supra; see also People v. Longaria, 333 Mich 696, 53 N.W.2d 685 (1952); State v. Nooks, 123 Ohio St. 190, 174 N.E. 743 (1930).

[13]161 Misc. 212, 292 N.Y.S. 612 (Queens County Ct. 1936).

[14]Id. at 615-616.

prudence. Calls for its abolition have been made,[15] and friends of the privilege have difficulty in presenting policy reasons of sufficient importance to justify the privilege.[16] Champions of individual liberty have scoffed at the importance of the privilege.[17] In cases which "may be read as a reflection of the Court's lack of enthusiasm for the policy underlying the privilege,"[18] the United States Supreme Court has held that the fourteenth amendment does not make the fifth amendment privilege against self-incrimination applicable to the states;[19] nor can a witness in a federal proceeding claim the privilege on the ground he would be incriminated under state law.[20] Further, where documentary evidence was involved, the Court has held that corporations are not protected by the privilege;[21] nor may corporate officers withhold books on the ground they would be incriminated thereby.[22] Even unincorporated associations may not be protected by the privilege.[23] Nor is the privilege applicable to records kept pursuant to certain regulatory statutes.[24] It can be argued with some force that the privilege should not apply to pre-existing documents at all.[25] If the privilege should logically be limited to testimonial compulsion, dis-

[15]Pound, Legal Interrogation of Persons Accused or Suspected of Crime, 24 J. Crim. L,C. & P.S. 1014 (1934); Terry, Constitutional Provisions Against Forcing Self-Incrimination, 15 Yale L.J. 127 (1906); Carman, Plea for the Withdrawal of Constitutional Privilege for the Criminal, 22 Minn. L. Rev. 200 (1938).

[16]See 8 Wigmore, Evidence § 2251 (McNaughton rev. 1961) (review of the various policy arguments put forth in support of the privilege, and concluding that the policy of the privilege is anything but clear); see also McCormick, Evidence § 75, at 156 (1954) ("Such policy as modern writers are able to discover as a basis for the self-incrimination privilege . . . is feeble and inadequate at best . . .").

[17]See the famous statement by Justice Cardozo, in Palko v. Connecticut, 302 U.S. 319, 325-26 (1937): "This [privilege against self-incrimination] too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry."

[18]Meltzer, Required Records, the McCarran Act. and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687, 688 (1951).

[19]Adamson v. California, 332 U.S. 46 (1947).

[20]United States v. Murdock, 284 U.S. 141 (1931).

[21]Essgee Co. v. United States, 262 U.S. 151 (1923); Wilson v. United States, 221 U.S. 361 (1911).

[22]Ibid.

[23]United States v. White, 322 U.S. 694 (1944).

[24]Shapiro v. United States, 335 U.S. 1 (1948) (records required to be kept by licensee under Emergency Price Control Act held not privileged).

[25]See Meltzer, supra note 18, at 701, where the author concludes that the application of the privilege to pre-existing documents is probably a result of an "unwillingness to command the impossible."

covery could be developed as fully in criminal cases as it has been in civil cases. Nevertheless, despite the inroads on the privilege where documentary evidence is involved, it is well established that the privilege generally extends to compulsory production of pre-existing documents.[26]

Despite the doubt of the constitutionality of *Jones*, the basic premise of the court is sound. It would seem that the objective of liberal pretrial discovery in civil cases is equally desirable in criminal cases. There would seem to be no valid reason to deny discovery to the prosecution, if such discovery could be accomplished within the permissible bounds of the privilege against self-incrimination. This is particularly true where, as in California, liberal discovery rights have been granted to the defendant. Possibilities of waiver of the privilege may present an answer. It has been suggested by Professor Louisell that the defendant be required, as a condition of a discovery order in his favor, to waive his privilege against self-incrimination as to evidence in his hands, which is of approximately equal probative value to that sought.[27] He finds support for this doctrine in *McCain v. Superior Court*.[28] The defendant moved against the prosecution for pre-trial discovery of certain documents in the hands of the prosecution. The prosecution then moved for discovery requesting, as a condition to granting defendant's motion, that defendant be ordered to produce all statements of witnesses and any documents or photographs expected to be used as evidence at the trial. At a hearing, the defendant told the trial court that he had no objection to the production of the documents, and the court granted both motions on a "reciprocal contemporaneous basis." On appeal, the California court held that the defendant, by voluntarily consenting to discovery, waived his privilege against self-incrimination.[29]

In conclusion, with modern development of liberal discovery rights in favor of the accused, it might be expected that there will be an effort on the part of courts toward some development of discovery in favor of the prosecution. *Jones* seems to be such an effort.

ANDREW J. RUSSELL

---

[26]See 8 Wigmore, Evidence § 2264 (3d ed. 1940).
[27]Louisell, supra note 2, at 90.
[28]184 Cal. App. 813, 7 Cal. Rptr. 841 (Dist. Ct. App. 1960).
[29]7 Cal. Rptr. at 843.