USE OF JUDGE'S DISCRETION AND CONSTITUTIONALITY OF THE OHIO "ALIBI STATUTE" AS CONSTRUED AND APPLIED

State v. Cunningham
89 Ohio L. Abs. 206, 185 N.E.2d 327 (Ct. App. 1961)

On the first day of his trial for burglary the defendant gave notice of his intention to produce testimony of alibi. The testimony was to be given by a clergyman who informed the defense counsel for the first time on the day preceding the trial that defendant was with him far from the scene of the alleged crime on the date in question. Defendant did not remember his whereabouts due to a four-year interval between that date and his indictment. The trial court refused to receive evidence of alibi, applying the Ohio "alibi statute"[1] which requires three days' notice of defendant's intention to claim alibi and places discretion in the trial judge to exclude any alibi evidence if the statute is not followed. The court of appeals affirmed, stating that the trial judge had not abused his discretion and that the statute was constitutional on its face and as applied.[2]

Alibi statutes have been enacted in fourteen states[3] changing the common law rule that evidence of alibi was admissible under the general plea of not guilty.[4] These statutes attempt to prevent presentation of surprise alibi

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[1] Ohio Rev. Code § 2945.58 (1953):
Whenever a defendant in a criminal case 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 an alibi. Notice shall include specific information as to the place at which the defendant 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 alibi. (Emphasis added.)

[2] State v. Cunningham, 89 Ohio L. Abs. 206, 185 N.E.2d 327 (Ct. App. 1961), *motion for leave to appeal overruled,* Oct. 11, 1961.

[3] Ariz. R. Crim. P. 192B; Ind. Ann. Stat. §§ 9-1631 to 1633 (1956); Iowa Code § 777.18 (1946); Kan. Gen. Stat. Ann. § 62.1341 (1949); Mich. Comp. Laws §§ 768.20-.21 (1948); Minn. Stat. § 630.14 (1947); N.J. Rules 3:5-9; N.Y. Code Crim. Proc. § 295-1; Ohio Rev. Code § 2945.58 (1953); Okla Stat. tit. 22, § 585 (1961); S.D. Code § 2801 (1939); Utah Code Ann. § 77-22-17 (1953); Vt. Stat. Ann. tit. 13, § 6561-62 (1958); Wis. Stat. § 955.07 (1957). See also Committee on Rules Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, Rule 12A, Notice of Alibi 5-6 (1962).

[4] Fletcher, "Pretrial Discovery in State Criminal Cases," 12 Stan. L. Rev. 293, 315 (1959). See Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L.J. 1149, 1186 (1960). Many states have enacted similar statutes requiring notice of defendant's intention to plead insanity at the time of the act. See Fletcher, *supra.* See, e.g., Ariz. R. Crim. P. 192A; Ind. Ann. Stat. § 9-1701 (1956); Ohio Rev. Code § 2943.03 (1953).

defenses near the trial's end without affording the prosecution adequate opportunity to check the credibility of the witnesses or the accuracy of the statements.[5]

These statutory changes in the common law appear basically procedural and are designed to facilitate a search for the truth in criminal prosecutions. The procedural changes are not unreasonable in permitting the judge to exclude evidence if the defendant knows the evidence is available and can reasonably give notice. Accordingly, the statutes have been declared constitutional by the weight of authority.[6]

However, a substantial due process problem is presented when the alibi statute is applied to exclude material defenses where advance notice is not feasible and no indication of suppression by the defense exists. In the instant case, the court of appeals recognized this problem but followed *State v. Thayer* as authority for the constitutionality of the act as applied.[7]

In *Thayer* the defendant was charged with soliciting a bribe on or about August 15. The state's witnesses variously placed the date of the crime from August 10 to August 28. Evidence of alibi offered by two defense witnesses was excluded because the defendant failed to give the statutory notice.[8] The court of appeals reversed, partially on the basis that the alibi statute was unconstitutional.[9] Although the supreme court affirmed on nonconstitutional grounds, Judge Kinkade, in writing the majority opinion, stated that the statute was constitutional.[10] Despite Judge Kinkade's dictum, three of the five judges joining in the majority opinion concurred in finding the statute unconstitutional as construed and applied to the particular facts of the

[5] State v. Kapacka, 261 Wis. 70, 51 N.W.2d 495 (1952); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); State v. Schade, 101 Misc. 212, 292 N.Y. Supp. 612 (Sup. Ct. 1930).

[6] State v. Thayer, *supra* note 5; State v. Schade, *supra* note 5. For cases affirming the constitutionality of the parallel insanity statutes, see People v. Troche, 206 Cal. 35, 273 Pac. 767 (1928); People v. Hickman, 204 Cal. 470, 208 Pac. 909 (1928). However, Judge Allen, in a dictum in Evans v. State, 123 Ohio St. 132, 138, 174 N.E. 348, 350 (1930), cast doubt on the constitutionality of the Ohio insanity statute. ". . . [A]n enactment which would deprive an insane person of a defense going to the very vitals of his case, because of non-action upon the part of his attorney, would necessarily be unconstitutional, upon the ground that it would deprive such insane person of due process of law."

[7] State v. Cunningham, *supra* note 2.

[8] As required by Ohio Rev. Code § 2945.58 (1953).

[9] State v. Thayer, *supra* note 5. No reasons were offered to support the declaration of unconstitutionality.

[10] State v. Thayer, *supra* note 5, at 4, 176 N.E. at 657:

> We cannot concur with the Court of Appeals in the reasons, assigned by that court to sustain the unconstitutionality of section [2945.58]. This law pertains to a very important feature of criminal law. It gives the state some protection against false and fraudulent claims often presented by the accused so near the close of the trial as to make it impossible for the state to ascertain any facts as to the credibility of the witness called by the accused, who may reside at some point far distant from the place of trial.

case.[11] In using *Thayer* as authority, the court in the instant case mistakenly treated the concurring opinion as a minority rather than majority view.[12]

Both *Thayer* and *Cunningham* are significant because their particular facts place them beyond the constitutional purpose of the alibi statute. The indefinite date of the alleged crime made it impossible for the defendant in *Thayer* to give notice of his alibi defense. Defendant in *Cunningham* could not give the required notice because he had no actual knowledge of the clergyman's recollection until the day before trial. There was no suppression on his part; notice was served the day following the discovery of an alibi. The trial judge's refusal to accept evidence of alibi had the effect of unreasonably denying defendant a defense material to his innocence and unavailable to him in time to meet the requirements of the statute. This denial of an opportunity to present a defense has in other contexts been deemed fundamentally unfair and, therefore, violative of fourteenth amendment due process.

For example, regarding jurisdiction of the person in civil cases, due process requires that the defendant be given adequate notice,[13] to assure him of the opportunity to assert defenses. Similarly, in contempt proceedings due process requires that the accused be advised of the charges and be given a reasonable opportunity to defend.[14] Moreover, due process now requires the appointment of counsel for the indigent in all state criminal cases.[15] Assuredly, however, appointment of counsel is but an empty gesture

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[11] State v. Thayer, *supra* note 5, at 12, 176 N.E. at 659. Six judges participated in the decision, but one of these concurred only in the judgment. Judge Mathias and two concurring judges held: "The operative effect of the statute therefore as applied in this case deprived defendant of his rights under the due process provisions of the Constitution."

[12] State v. Cunningham, *supra* note 2, at 210, 185 N.E. at 328: "Since this holding of the minority concurring opinion was the only reason for the separate opinion, it would seem that the majority disagree with this position."

[13] Pennoyer v. Neff, 95 U.S. 714 (1878), held that under fourteenth amendment due process a personal judgment rendered in a state court against a nonresident without personal service within the state or his appearance in the action was without validity. *Accord*, Baker v. Baker, Eccles & Company, 242 U.S. 394 (1917).

[14] Cooke v. United States, 267 U.S. 517, 537 (1925): "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by the way of defense or explanation. We think this includes the right to assistance of counsel . . . ." See Blackmer v. United States, 284 U.S. 421, 440 (1932).

[15] Gideon v. Wainwright, 9 L. Ed. 2d 799 (1963). The Supreme Court overruled Betts v. Brady, 316 U.S. 445 (1942), and held that the indigent defendant's right to appointment of counsel in all felony cases was fundamental and guaranteed from abridgement by the state by fourteenth amendment due process. In *Betts* the Court held that on the particular facts and circumstances of the case, the failure to appoint counsel was not so offensive to the concept of fundamental fairness as to amount to a denial of due process. The following cases, applying the *Betts* view, held that there was a denial of due process under the facts of the particular case. See Chewning v. Cunningham, 368 U.S. 443 (1962); Chandler v. Fretag, 348 U.S. 3 (1954); Hamilton v. Alabama,

if, as happened in the instant case, all evidence of a defense is unreasonably excluded.[16]

Alibi statutes serve a legitimate purpose, but only if they are limited in application to cases in which the defendant has a reasonable opportunity to give notice or there is evidence of suppression. Both Judge Kinkade in *Thayer* and the court in *Cunningham* misinterpreted the purpose of the statute and thereby created a problem of constitutionality. Had the statute been properly interpreted, it would have been held in both cases that the statute was inapplicable, and the constitutional problem never would have arisen. The exclusion in the instant case was improper for it was not within either the purpose or spirit in which the statute was enacted.

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368 U.S. 52 (1962). Unlike *Gideon*, each of these cases stresses the complexity of the defense and the importance of counsel for the preservation of any available defense.

Although *Gideon* erased the factual distinctions (*i.e.*, seriousness of the felony and complexity of the defense) in felony right-to-counsel cases, the question remains whether the defendant will have an absolute right to counsel in cases involving a misdemeanor.

[16] The defense in *Cunningham* completely depended upon the testimony of the clergyman; defendant could not remember his whereabouts. Therefore he was not merely denied the opportunity to present his defense in the most effective manner, but was denied the opportunity to present the defense altogether. In *Thayer*, defendant was permitted to give testimony that he was elsewhere even though statutory notice was not given. However, all corroborating evidence was excluded. Exclusion of such evidence, an integral part of the alibi defense, substantially impedes the presentation of the defense. Thus, the subtle question presented by *Thayer* is whether an impediment, short of a complete denial of the defense, has constitutional dimensions.

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