Denver Law Review

Volume 41 | Issue 2 Article 3

January 1964

One Year Review of Constitutional Law

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ONE YEAR REVIEW OF CONSTITUTIONAL LAW

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I. CONSTITUTIONAL RIGHTS OF THE CRIMINAL DEFENDANT AND THE CONVICT

A. Double Jeopardy

In *Krutka v. Spinuzzi*[1] the court was presented with the question whether a retrial of Spinuzzi, who had been acquitted of murder, would be in violation of his right under the Colorado Constitution not to be twice put in jeopardy for the same offense.[2] At his trial, after presentation of the State's evidence, Spinuzzi had obtained a directed verdict of not guilty on the grounds that the evidence was legally insufficient. The State brought error under a statute providing for review of criminal cases on behalf of the State,[3] whereupon the supreme court "disapproved" the action of the trial court.[4] Spinuzzi was then rearrested upon the issuance of an *alias capias*. He applied for and was granted a writ of habeas corpus on the grounds of double jeopardy, and the sheriff to whom the writ was directed sought a review of that decision.

Before the supreme court, Spinuzzi argued that he had been placed in jeopardy at the moment the jury in the original trial was impaneled and sworn; a retrial on the same charge therefore would not only violate his rights under the Colorado Constitution[5] but also was prohibited by the statute which had authorized the review of his acquittal.[6] The statute contains an express limitation that it shall not be construed "so as to place a defendant in jeopardy a second time for the same offense."

The sheriff argued in reply that under the Colorado Constitution a defendant is not deemed to have been in jeopardy if a criminal judgment is reversed for an error of law and that therefore the defendant had not yet been placed in jeopardy. Furthermore, even if he had been in jeopardy, it was a continuing one which would not be terminated until the completion of a trial free from error.

The court rejected the "single and continuing jeopardy" concept, stating in answer to Krutka's argument (the concept is logical and appeals to the common sense): "We are not permitted to be governed by our personal concept as to what the law in this regard ought to be, but rather to determine what the law, in Colorado, *is*."[7]

The most important development of the case is the interpretation of article II, section 18, of the Colorado Constitution.[8] It has long been established that, by virtue of this section, a defendant

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1 384 P.2d 928 (Colo. 1963).

2 Colo. Const. art. 11, § 18. "No person shall be compelled to testify against himself in a criminal case nor shall any person be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy."

3 Colo. Rev. Stat. § 39-7-27 (1953). "Writs of error shall lie on behalf of the state, or the people, to review decisions of the trial court in any criminal case upon question of law arising upon the trial . . . . Nothing in this section shall be construed so as to place a defendant in jeopardy a second time for the same offense."

4 People v. Spinuzzi, 149 Colo. 391, 369 P.2d 427 (1962).

5 *Supra*, note 2.

6 *Supra*, note 3.

7 384 P.2d at 935.

8 *Supra*, note 2.

who obtains a reversal of his conviction may not avoid a second trial for the same offense on grounds of multiple jeopardy.[9] The same is true of the "implied acquittal" of the greater offense charged when the defendant appeals the conviction of a lesser included offense.[10] The supreme court has not previously had occasion to determine the effect of the section on the status of a defendant whose acquittal has been reversed at the instance of the State.[11] Although it could be argued that it did not have such an occasion in this case,[12] the court nevertheless determined to decide the issue. It rejected the sheriff's argument by examining the "state of things existing when the constitution was framed and adopted,"[13] and concluding:

> As of 1876 only the defendant had the right to a writ of error in a criminal proceeding. Hence, when read in this context, Article II, section 18 of the Colorado Constitution was of necessity only intended to preclude a defendant who on appeal obtained a reversal of his judgment of conviction from thereafter claiming former jeopardy when the state sought to try him for the same offense.[14]

In other words, the constitution does not preclude the defendant from claiming former jeopardy if the *State* secures a reversal of his judgment of *acquittal.*

This decision seems to be in line with the general import of a number of Colorado cases. In nearly every criminal case in which the State has obtained a review of an acquittal and in which the supreme court has found error, the action of the trial court has not been reversed but merely "disapproved."[15] This disapproval was made over the persistent contention that the cases should be reversed,[16] a clear indication that the court recognized that a question of double jeopardy would arise as a result of such a reversal.

Although this article is concerned primarily with the constitution, it seems advisable to consider briefly what influence *Krutka v. Spinuzzi* will have on the efficacy of C.R.S. '53 § 39-7-27.[17] Since the court expressly declared that the statute was "not at odds" with the constitution,[18] the State will continue to have the right in a criminal proceeding to secure a review of an acquittal. But it will not be able in such a review to obtain a reversal of the judgment.

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9 Packer v. People, 8 Colo. 361, 8 Pac. 564 (1885); Garvey's Case, 7 Colo. 384, 3 Pac. 903 (1884).

10 Young v. People, 54 Colo. 293, 130 Pac. 1011 (1913).

11 Only one previous review under this statute "upon question of law arising upon the trial" has resulted in a reversal. People v. Cox, 123 Colo. 179, 228 P.2d 163 (1951). In that case the district attorney elected not to proceed further. In two other cases, decided on the same day and arising out of the same incident, the court "disapproved and reversed" in short opinions by Mr. Justice Burke. People v. Shirley, 72 Colo. 120, 210 Pac. 327 (1922); People v. Corbett, 72 Colo. 117, 209 Pac. 808 (1922).

12 The action of the trial court was not reversed in People v. Spinuzzi, *supra*, note 2, only "disapproved." Therefore, the constitutional provision relied upon by Krutka is, strictly speaking, not applicable at all and need not be construed. Perhaps the court felt that the time had come to resolve the question raised by the dissents in the cases cited in footnote 16, *infra.*

13 384 P.2d at 933.

14 *Ibid.*

15 People v. Futamata, 140 Colo. 233, 343 P.2d 1058 (1959); People v. Gomez, 131 Colo. 476, 283 P.2d 949 (1955); People v. Wilson, 106 Colo. 435, 106 P.2d 1063 (1940); People v. Kilpatrick, 79 Colo. 303, 245 Pac. 719 (1926); People v. Bartels, 77 Colo. 498, 238 Pac. 51 (1925); People v. Bright, 77 Colo. 563, 238 Pac. 71 (1925). *But see* People v. Cox, 123 Colo. 179, 228 P.2d 163 (1951); People v. Snirley, 72 Colo. 120, 210 Pac. 327 (1922); People v. Corbett, 72 Colo. 117, 209 Pac. 808 (1922).

16 People v. Byrnes, 117 Colo. 528, 190 P.2d 584 (1948) (dissent by Mr. Justice Burke); People v. Rapini, 107 Colo. 363, 112 P.2d 551 (1941) (concurring opinion by Mr. Justice Burke, joined by Mr. Justice Bouck); People v. Wilson, 106 Colo. 435, 106 P.2d 1063 (1940) (concurring opinion by Mr. Justice Burke, joined by Mr. Justice Young).

17 *Supra*, note 3.

18 384 P.2d at 931.

It is apparent, therefore, that a "disapproval" of the case can have no adverse effect upon the defendant. This being so, there is nothing to persuade him to argue the case before the supreme court.[19] The ultimate effect of this decision, then, is that the supreme court will be called upon to render an advisory opinion that can have effect only on future decisions based upon unilateral argument. Is it reasonable or just to adjudge defendants in those future cases by rules of law established without the benefit of adversary proceedings?

B. Equal Protection or Due Process

In *Vanderhoof v. People*[20] the defendant was charged under C.R.S. '53 § 40-2-32[21] with four counts of indecent liberties. The district attorney withdrew three charges and the defendant pleaded guilty to one charge. Before accepting the defendant's plea, the court warned him it would subject him to a possible term of imprisonment of fourteen years in the state penitentiary. The court then accepted the plea and, following procedures set forth in the Sex Offenders Act,[22] sentenced the defendant to not less than one day nor more than life in the state penitentiary.

A petition in the district court to correct judgment and sentence to conform with the maximum penalty of ten years under C.R.S. '53 § 40-2-32 was denied, and the defendant brought error to the Supreme Court of Colorado alleging:

(1) the Sex Offenders Act constitutes a denial of the equal protection of the law since it prescribes a penalty different from that of C.R.S. '53 § 40-2-32; the state therefore treats

19 In fact, no appearance was made for Spinuzzi in People v. Spinuzzi, 149 Colo. 391, 369 P.2d 427 (1962).

20 380 P.2d 903 (Colo. 1963).

21 "Assault on child under sixteen.—Any person over the age of fourteen years who shall assault any child under sixteen years of age and shall take indecent and improper liberties with the person of such child, or who shall entice, allure or persuade any such child into any room, office or to any other place for the purpose of taking such immodest, immoral and indecent liberties with such child, or who shall take or attempt to take such liberties with the person of such child at any place, shall be deemed a felonious assaulter, and, upon conviction thereof, shall be punished, if over eighteen years of age, by confinement in the penitentiary for a term of not more than ten years, and, if under eighteen years of age, may be punished by commitment to the state reformatory or to the state industrial school."

22 Colo. Rev. Stat. §§ 39-19-1 to -10 (Perm. Supp. 1960).—"Indeterminate sentences to institutions.—For the better administration of justice and the more efficient control, treatment and rehabilitation of persons convicted of the crimes of indecent liberties, incest, assault with intent to commit unnatural carnal copulation, assault with intent to commit rape, if the district court is of the opinion that any such person, if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, the district court in lieu of the sentence now provided by law, for each such crime, may sentence such person to a state institution for an indeterminate term having a minimum of one day and a maximum of his natural life."

Sections 2 to 10 set forth the procedure to be followed when one is sentenced pursuant to the Sex Offenders Act.

a sex offender sentenced under the Act differently from a sex offender sentenced under § 40-2-32;

(2) the classification of persons under the Sex Offenders Act is unreasonable, arbitrary and capricious because the classification is determined by the discretion of the sentencing judge acting solely in his own opinion;

(3) the *sentence* was void because the defendant was warned of a possible fourteen years sentence and was subsequently given an indeterminate sentence which could extend to life imprisonment.

The court dismissed the first two contentions, holding that the state legislature can classify persons upon reasonable and natural distinctions and that under the Sex Offender Act the trial judge only determines whether the defendant factually comes within the predetermined classification set forth in the Act; he does not determine the classification. However, the defendant's third contention created a question technically of first impression in Colorado. The court, citing three Colorado decisions as authority,[23] stated

> [T]he provisions of the *statute* dealing with arraignment, advice of counsel, warning as to consequences of the plea, taking of evidence in mitigation and aggravation, and presentence investigation are mandatory and a prerequisite under *due process*.[24]

The court then held that the life sentence imposed by the trial court was void, as the defendant had not been warned in advance of this possible consequence of his guilty plea.

The court next considered whether the judgment as well as the sentence was void and quoting from *Little v. People*[25] held: ". . . a failure to comply strictly with the statute does not affect the validity of the judgment but only the sentence, and in a proper case might require the remanding . . . and re-sentencing."[26] Since the trial court erred in warning the defendant he could receive fourteen years imprisonment as opposed to only ten years under the statute the defendant was charged with violating, the supreme court reversed the judgment of the district court and remanded the cause with instructions to resentence the defendant within the limits of one day to ten years.

Adequate support can be found for the court's holding on Vanderhoof's first two contentions,[27] but its treatment of the defendant's third contention is unclear. The court's reference to "due process" is perhaps misleading. A mere casual reading of those cases cited by the court as support for its statement that the provisions of the statute are mandatory and a prerequisite under due process[28] indicates that those cases were decided solely on statutory interpreta-

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23 Little v. People, 138 Colo. 572, 335 P.2d 863 (1959); Smith v. Best, Warden, 115 Colo. 494, 176 P.2d 686 (1946); Arrano v. People, 24 Colo. 233, 49 Pac. 271 (1897).

24 380 P.2d at 905 (emphasis supplied).

25 138 Colo. 572, 575, 335 P.2d 863, 864 (1959).

26 380 P.2d at 905.

27 Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940) (sexual psychopath law held constitutional on its face as construed by the highest court of the state); People v. Scherbing, 93 Cal. App. 2d 736, 209 P.2d 796 (1949) (Youth Authority Act not violative of equal protection of the law); People v. Israel, 91 Cal. App. 2d 773, 206 P.2d 62 (1949), *cert. denied*, 338 U.S. 838 (1949) (discretion of trial judge under Habitual Criminal Statute pertains only to sentencing and the judge properly has discretion to vary punishment); State v. Evans, 73 Idaho 50, 245 P.2d 790 (1952); People v. Johnson, 412 Ill. 109, 105 N.E.2d 766 (1952), *cert. denied*, Johnson v. State, 344 U.S. 858 (1954).

28 *Supra*, note 26.

tion—not constitutional principles.[29] It is my opinion that the present court used the term "due process" only in the sense of the "proper statutory procedure" to be followed under C.R.S. '53 § 39-7-8.[30]

This statute sets forth mandatory procedures for the court to follow when a defendant wishes to enter a guilty plea. The requirements are divided into two portions—those proceedings which the court must follow prior to the acceptance of the plea, and those proceedings to be followed prior to sentencing.[31] The *Arrano, Smith,* and *Little* cases cited by the court as authority for its holding that a sentence is void if the procedures of C.R.S. '53 § 39-7-35 are not followed are all concerned with procedural error arising *after* the guilty plea has been accepted by the court and prior to the sentencing. In the *Vanderhoof* case the supreme court had to deal with error arising both *before* the acceptance of the guilty plea and before the sentencing. The latter error, *i.e.,* the imposition of a life sentence when the defendant had only been warned of a possible fourteen year sentence, was properly disposed of whether the court based its decision on constitutional or on statutory grounds. If error appears only at the presentencing stages, only the sentence and not the judgment should be voided.

The first error committed by the trial court, *i.e.,* the warning of a possible fourteen year sentence when defendant could only, by statute, receive a maximum ten year sentence, was error arising *prior* to the acceptance of the plea of guilty by the trial court. Obviously, the supreme court could not remand the cause with instructions to resentence the defendant to a term within the limits of from one to fourteen years as he was originally instructed by the trial judge; the statute under which the defendant was charged permitted a maximum sentence of ten years. The court therefore had two choices as to its final disposition of the *Vanderhoof* case: It could find that both the sentence and the judgment were void; or it could hold that only the sentence was void.[32]

In choosing the latter alternative, the court relied solely on language from the *Little* case.[33] As has been indicated *supra,* the court in that case did not consider whether error arising *prior* to

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29 *Supra, note 23.* All three cases are founded on alleged violations of statute requiring that when a plea of guilty is accepted by the trial court, if the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense.

30 "Plea of guilty — court to examine witnesses. — In all cases where the party indicted shall plead guilty, such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea, after which, if the party indicted persists in pleading guilty, said plea shall be received and recorded, and the court proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense."

While this statute is not mentioned by name in the court's opinion, the court gives two "hints" that this statute forms the basis for its decision. First, the court casually makes reference to some mystical statute, the provisions of which are mandatory and a prerequisite under due process. Second, Little v. People, Smith v. Best, Warden, and Arrano v. People all consider the proper procedure to be followed under this statute or its predecessors, *i.e.,* Colo. Stat. Ann. ch. 48 § 482 (1935), and Mills' Ann. Stat. § 1463.

31 This division is specifically recognized in Little v. People. "This statute is divided into two parts, viz: The duty of the trial court to explain the consequences of a plea of guilty before receiving it; and, the duty of the trial court to examine witnesses as to aggravation and mitigation of the offense. . . ."

32 While defendant Vanderhoof did not challenge the validity of the trial court's *judgment,* the supreme court, of its own initiative, discusses this matter.

33 138 Colo. 572, 575, 335 P.2d 863, 864 (1959). "[A] failure to comply strictly with the statute does not affect the validity of the judgment but only the sentence, and in a proper case might require remanding for the taking of evidence and resentencing."

the acceptance of the guilty plea would void the judgment.[34] Furthermore, while the court in the *Little* case held that failure to comply strictly with the provisions of C.R.S. '53 § 39-7-8 would not void the judgment, the minor error found in that case[35] is not comparable to the error committed by the trial judge in the *Vanderhoof* case.

While it may seem that no injustice is done to one who pleads guilty under the belief that he may receive a fourteen year sentence when in fact he can only receive a maximum penalty of ten years imprisonment, I submit that in certain cases a defendant may think it better to plead "not guilty" when only a short maximum penalty is involved and plead "guilty" and rely on the leniency of the court when he may receive a longer maximum penalty. Furthermore, future cases arising under § 39-7-8 will be founded on error different from that arising in the *Vanderhoof* case. Will the judgment be voided when a defendant, charged under a statute providing for a mandatory penalty of forty years imprisonment, is told by the trial judge that he may receive only a ten year maximum imprisonment, and he thereby pleads "guilty"?[36]

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34 The defendant alleged that the court did not sufficiently apprise him of his right to counsel — error arising prior to the acceptance of the guilty plea. Since the court found that no error was committed by the trial judge at this stage of the proceedings, it never decided whether the judgment would be void if error had been found.

35 The error to which the court was referring when it said " . . . a failure to comply strictly with the statute does not affect the valildity of the judgment but only the sentence," was the failure of the court to examine witnesses as to mitigation or aggravation of the offense. Under § 39-7-8, it is the duty of the court to take such evidence. However, in the Little case, the trial court asked the defendant if he had any evidence he wished to introduce, and the defendant answered in the negative. The trial judge did not examine witnesses but considered the Probation Officer's report and the F.B.I. report as to mitigation or aggravation of the offense. The defendant therefore had an opportunity to have witnesses examined but waived this method of having the court apprised of the facts. While the court did not comply *strictly* with the provisions of § 39-7-8, the defendant was afforded sufficient opportunity to have witnesses examined.

In the Vanderhoof case, however, the defendant was *incorrectly* forewarned of the consequences of his plea. This would seem to be prejudicial error as opposed to failure on the part of the trial judge to comply strictly with the statutory mandates.

36 An indication of the answer to this question can be found in Glass v. People, 127 Colo. 210, 255 P.2d 738 (1953). The trial judge, pursuant to Colo. Stat. Ann. ch. 48, § 482 (1935), informed the defendant that he *might* be subjected to life imprisonment as a result of his guilty plea; the Habitual Criminal Statute under which the defendant was charged made the imposition of a life sentence *mandatory*. The defendant was sentenced to life imprisonment, and after being denied a petition to vacate judgment and sentence, he brought error to the Supreme Court of Colorado alleging as error the failure of the trial court to properly forewarn him of the consequences of his guilty plea. The court found that under the "facts of the . . . case the right of defendant to be advised concerning the consequences of his pleas of guilty was sufficiently protected." The facts of the case show that the trial court made certain the defendant had been informed by counsel as to the consequences of his plea. Furthermore, the court felt that language employed by the trial court in informing the defendant of the consequences of his plea was not such as would deprive the defendant of his rights under the statute. The tenor of the court's opinion, however, is unclear whether the decision would have been the same had the defendant not been apprised, by counsel, of the consequences of his plea.

C. *Search and Seizure*

The Colorado Constitution prohibits "unreasonable searches and seizures."[37] It does not, however, prohibit the introduction into evidence of materials obtained in violation of the constitutional provision.[38]

The Constitution of the United States similarly prohibits unreasonable searches and seizures.[39] It has been interpreted to require the exclusion of evidence unlawfully obtained.[40] But since the Bill of Rights has been held to apply only to the Federal Government,[41] the Fourth Amendment does not require such exclusion in state courts.[42]

Recent United States Supreme Court cases, however, have extended the meaning of "due process of law" as guaranteed against the states in the Fourteenth Amendment[43] to include unreasonable searches and seizures,[44] with the result that the federal exclusionary rule is extended to the state courts.[45] The states remain free to apply their own evidentiary standards so long as they do not violate the terms of the Fourteenth Amendment as interpreted by the Supreme Court as a limit.[46]

In *Hernandez v. People*[47] the Supreme Court of Colorado provided working guidelines for its definition of "unreasonable." Hernandez was arrested under a warrant for assault to murder. In addition, three search warrants for the seizure of marijuana were issued. In the affidavits in support of the search warrants,[48] the affiant swore that "he has reason to believe" that Hernandez had

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37 Colo. Const. art. II, § 7. "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

38 Williams v. People, 136 Colo. 164, 315 P.2d 189 (1957); Wolf v. People, 117 Colo. 279, 187 P.2d 926 (1947); Bills v. People, 113 Colo. 326, 157 P.2d 139 (1945); Roberts v. People, 78 Colo. 555, 243 Pac. 544 (1925); Massantonio v. People, 77 Colo. 392, 236 Pac. 1019 (1925).

39 U.S. Const. amend. IV. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

40 Elkins v. United States, 364 U.S. 206 (1960); Kremen v. United States, 353 U.S. 346 (1957); Walder v. United States, 347 U.S. 62 (1954); United States v. Jeffers, 342 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948); Grau v. United States; 287 U.S. 124 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Weeks v. United States, 232 U.S. 383 (1914).

41 Rochin v. California, 342 U.S. 165 (1952); Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445 (1904); Eilenbecker v. District Court, 134 U.S. 31 (1889).

42 Feldman v. United States, 322 U.S. 487 (1943).

43 U.S. Const. amend. XIV, § 1. " . . . nor shall any state deprive any person of life, liberty or property without due process of law, . . . "

44 Wolf v. Colorado, 338 U.S. 25 (1949).

45 Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

46 This statement is based upon the following words from the opinion of Mr. Justice Clark on pages 33 and 34 of Ker v. California, 374 U.S. 23 (1963): " . . . although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. . . . The States are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

47 385 P.2d 997 (Colo. 1963).

48 Mr. Justice Pringle emphasized the fact that the Colorado Constitution requires that probable cause be supported by oath or affirmation *reduced to writing*. See note 1, *supra*.

the property and that it had been or was intended to be used in the commission of a criminal offense. The basis of the affiant's belief was not given.

Hernandez was arrested and searched; a stolen dictating machine was found in his automobile. He was charged with and convicted of receiving stolen property. Before the supreme court on writ of error, he assigned as error the admission into evidence of the dictating machine over timely objection.

The supreme court first held that the search warrants were invalid:

> Before the issuing magistrate can properly perform his official function he must be apprised of the underlying facts and circumstances which show that there is probable cause to believe that proper grounds for the issuance of the warrant exist. Mere affirmance of the belief or suspicion on the officer's part is not enough. To hold otherwise would attach controlling significance to the officer's belief rather than to the magistrate's judicial determination. . . . Therefore, the affidavits in question here containing only the conclusion of Officer Borden . . . without setting forth facts and circumstances from which the judicial officer could determine whether probable cause existed were fatally defective. The warrants issued thereon were nullities.[49]

It then held that the search, as incident to a lawful arrest, was unreasonable:

> [T]he search, whether under a valid search warrant or whether as incident to a lawful arrest, must be one in which the officers are looking for specific articles and must be conducted in a manner reasonably calculated to uncover such articles. Any search more extensive than this constitutes a general exploratory search and is squarely within the interdiction of the constitutional guarantee against unreasonable search and seizure.[50]

Since there is no other way that a search and seizure can be "reasonable" than under authority of a search warrant or incident to a lawful arrest, the dictating machine was illegally seized; and the motion to suppress should have been granted.

In dicta, the court made two other points. An officer conducting "a lawful search, either under a valid search warrant or incident to a valid arrest where the search is such as is reasonably designed to uncover the articles he is looking for,"[51] may seize any contraband, or article, the possession of which is a crime, which he discovers in the course of the search without fear that it will be excluded from evidence.

Furthermore, *any* alteration of a search warrant, even correcting an address, by any person other than a judicial officer, is improper. It is not made clear in the decision, however, whether this invalidates the warrant or leaves it valid according to its original tenor.

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49 385 P.2d at 999.
50 *Id.* at 1000.
51 *Ibid.*

II. Judicial Review of Constitutional Questions

A. When the Court Will Decide a Question Not Raised by the Parties

It is an established principle of constitutional law that only issues which are duly raised and insisted upon, and are adequately argued, will be considered; and that generally a court will not inquire into the constitutionality of a statute on its own motion.[52] Yet constitutional questions are often of immediate importance to the general public as well as to the parties. Recognizing its duty to resolve such questions where the legislation is "patently unconstitutional and void, and under which many persons are receiving unfair, discriminatory, and unlawful treatment," the Supreme Court of Colorado last year considered and determined the constitutionality of a statute not questioned by either party at trial or on appeal.[53]

Under a 1947 act,[54] as amended in 1959,[55] a mosquito control district along the Animas River Valley and encompassing part of the City of Durango was created. It included property owned by the plaintiff in error telephone company. The company petitioned the district court to declare that its property was not a part of the district, relying on an exclusionary provision of the act.[56] The trial court construed the provision adversely to the company and denied the petition.

On appeal the initial briefs and arguments of the parties related to the construction of the exclusionary clause, but the supreme

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52 City of Golden v. Schaul, 105 Colo. 158, 95 P.2d 806 (1939). See also People *ex rel.* Attorney General v. Barksdale, 104 Colo. 1, 87 P.2d 755 (1939); Clark Hardware Co. v. Centennial Tunnel Mining Co., 22 Colo. App. 174, 123 Pac. 322 (1912).

53 Mountain States Tel. & Tel. Co. v. Animas Mosquito Control Dist., 380 P.2d 560 (1963).

54 Colo. Rev. Stat. § 89-3 (1953). This article provides for the establishment of metropolitan districts for the purpose of water supply, sanitation, fire, police and safety protection. It establishes organizational procedure, district powers, and procedure for dissolution.

55 Colo. Rev. Stat. § 89-3-2(7) (Perm. Supp. 1960). The amendment provides for the creation of mosquito control and street improvement districts.

56 Colo. Rev Stat. § 89-3-3 (1953). " . . . A district may consist of noncontiguous tracts or parcels of property but no single tract or parcel of land containing more than twenty acres of which, together with the buildings, improvements, machinery and equipment thereon situate shall have an assessed valuation in excess of twenty-five thousand dollars . . . may be included . . . without written consent of the fee owners . . . . "

court ordered additional briefs and argument on the constitutionality of the section and on whether the balance of the act would survive if that section were severed.

The court took pains to indicate that its action in considering the constitutional question was an extraordinary measure, but said: "Courts in many jurisdictions, including Colorado, have held that, under circumstances such as we have here, it is proper for the court *sua sponte* or on motion of a person not aggrieved to pass on the constitutionality of a statute."[57]

Once having determine that it could reach the constitutional question, the court held that the exclusionary provision was violative of the state and federal constitutions:

> The exemption provision . . . is a flagrant violation of Article 5, Section 25 of the Constitution of the State of Colorado in that it is special legislation; and that it fails to provide for all persons "the equal protection of the laws" guaranteed by the Fourteenth Amendment to the Constitution of the United States.[58]

As reason for this holding, the court stated that the attempted classifications are discriminatory. It quotes 12 Am. Jur. *Constitutional Law* § 481 to the effect that "a classification to be valid must rest upon material differences between the persons included in it and those excluded."[59] The quoted material in the original text refers only to the federal constitution.

Although it is not completely clear, this appears to be a statement that the prohibition of article V, section 25, includes the prohibition of the Fourteenth Amendment against denial of equal protection of the laws, so that any violation of the latter would also be a violation of the former. This implication has not been made so clearly before but is not inconsistent with prior Colorado cases.[60]

Except for the exclusionary clause, the statute was held to be valid. The court determined that the statute was severable and that exclusion of the clause did not prevent the remainder from standing alone.

In a companion case,[61] the court found an exclusionary provi-

57 380 P.2d at 653. It should be noted that four of the six cases from other jurisdictions cited in support of this statement are at best of doubtful precedential value. Two Tennessee cases, Algee v. State, 200 Tenn. 127, 290 S.W.2d 869 (1956), and Remine v. Knox County, 182 Tenn. 680, 189 S.W.2d 811 (1945), seem to indicate that the chancellor in Tennessee may consider the constitutionality of a statute on his own motion in any circumstance. Even if this inference is incorrect, the question of the constitutionality of the statute was raised by the pleadings in both of these cases.

In State *ex rel.* McMonigle v. Spears, 358 Mo. 23, 213 S.W.2d 210 (1948), the issue before the court was one of res judicata. No constitutional question was under consideration. The court's statement that constitutional questions could be decided *ex mero motu* where matters of public concern are involved, must be considered mere obiter dictum.

In United Textile Works of America v. Lister Worsted Co., 91 R.I. 15, 160 A.2d 358 (1960), the Supreme Court of Rhode Island did not consider the constitutionality of a statute, and expressly declined to consider whether the trial judge had erred in doing so. It did indicate that there were situations in which the court might use its own initiative to consider a statute's constitutionality, but gave no clue as to what they were. The decision was made on other grounds.

Since it is clear that the statement of the court is in accord with prior cases in Colorado, City of Golden v. Schaul, 105 Colo. 158, 95 P.2d 806 (1939), it is not felt necessary to further pursue the actual status of the law in other jurisdictions.

58 380 P.2d at 565.

59 *Id.* at 566.

60 See, e.g., McCarty v. Goldstein, 376 P.2d 691 (Colo. 1962); Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851 (1960); People *ex rel.* Dunbar v. People *ex rel.* City & County of Denver, 141 Colo. 459, 349 P.2d 142 (1960); Board of Trustees v. People *ex rel.* Behrman, 119 Colo. 301, 203 P.2d 490 (1949); Allen v.Bailey, 91 Colo. 260, 14 P.2d 1087 (1932); Rifle Potato Growers Co-op. Ass'n v. Smith, 78 Colo. 171, 240 Pac. 937 (1925); Consumers' League of Colorado v. Colorado & S. Ry., 53 Colo. 54, 125 Pac. 577 (1912); People *ex rel.* Johnson v. Earl, 42 Colo. 238, 94 Pac. 294 (1908).

61 Colorado Interstate Gas Co. v. Sable Water Dist., 380 P.2d 569 (1963).

sion in a statute establishing water and sanitation districts[62] void for similar reasons.

B. *Stare Decisis*

In *People v. Quimby*[63] the court was called upon to interpret state constitutional provisions to decide which of two appointees should hold office as Garfield County Commissioner. The incumbent commissioner died in office after his re-election, but prior to the commencement of the new term. Governor McNichols appointed Quimby ". . . to hold office as by statute provided, to-wit: until the next general election and until his successor elected thereat shall have been duly qualified. . . ."[64] At the expiration of the commissioner's term of office, Governor Love, who had succeeded Governor McNichols, appointed Diemoz to the office. Diemoz took the oath and otherwise qualified but was refused recognition by Quimby.

The court held that, despite the apparently clear language of article IV, section 9, of the Colorado Constitution[65] and of C.R.S. '53 § 35-3-9,[66] the appointee holds the office until the next general election only if no new term commences in the interim. If a new term does so commence, he holds only until an appointee for the new term is named and qualified. Under this rule, Diemoz was adjudged the rightful holder of the office.

The court indicated that had the case been one of first impression, the decision might have gone the other way. It felt compelled, however, to follow the precedent set by two prior cases[67] which held that the language of article XII, section 10, of the Colorado Constitution[68] was controlling. The office is vacant whenever the person neglects to qualify for it, even if the reason is death, and regardless of the existence of any incumbent.

While recognizing that the ruling that the office is vacated is a minority view, Mr. Justice Day said:

> The doctrine of "stare decisis" should be adhered to in the absence of sound reason for rejecting it. If a decision is palpably wrong or great social changes have been wrought so as to make the prior decision repugnant to rather than in aid of the constitution, a court may be justified in overruling prior interpretation of the constitution. No such compelling reasons present themselves here.[69]

The lone dissenter, Mr. Justice Frantz, found the decision of the court to be the equivalent of a judicial "amendment" to the constitution, since the rule it applied in deciding the case was not in accord with the plain meaning of the words of the constitution. He argued that the true principle which should control the court's

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62 Colo. Rev. Stat. § 89-5-4 (1953).

63 381 P.2d 275 (Colo. 1963).

64 The appointment is quoted *Id.* at 276.

65 "In case of a vacancy occurring in the office of county commissioners, the governor shall fill the same by appointment; . . . and the person appointed shall hold the office until the next general election, or until the vacancy be filled by election according to law."

66 "In case of a vacancy occurring in the office of county commissioner, the governor shall fill the same by appointment of a person . . . The person appointed shall hold the office until the next general election or until the vacancy be filled by election according to law, and until his successor shall be qualified."

67 Gibbs v. People, 66 Colo. 414, 182 Pac. 894 (1919); People *ex rel.* Callaway v. De Guelle, 47 Colo. 13, 105 Pac. 1110 (1909).

68 "If any person elected or appointed shall refuse or neglect to qualify therein within the time prescribed by law, such office shall be deemed vacant."

69 381 P.2d at 277.

interpretation of the constitution was not stare decisis, a common law doctrine, but the limitation expressed in the constitution itself, in article II, section 2—that the power to alter or abolish the constitution is vested solely in the people. He approved the following language:

> The only power which the Supreme Court has to interfere with the sovereign will of the people, is when there is a violation of the federal compact. If the constitution makers had used doubtful or uncertain language, it is the province of this court to say what it [sic] really meant by such doubtful or uncertain language, but it is neither the duty nor province of this court to substitute any other language for that used by the constitution makers, nor to place any forced construction upon such language, nor to eliminate any language from the organic law of the people.[70]

III. DECISIONS OF INCIDENTAL INTEREST

Because of a difference of opinion between El Paso County Commissioners and the judges of the Fourth Judicial District, the Supreme Court of Colorado was called upon to decide whether the judicial or the legislative branch was vested with ultimate authority to fix salaries of certain court employees. In upholding the lower court decision in *Smith v. Miller*[71] in favor of the judiciary, the court interpreted the controlling legislative enactment[72] in the light of article III of the state constitution.[73]

In its opinion, the court virtually adopted the conclusion of the trial court:

> It is an ingrained principle in our government that the three departments of government are coordinate and shall co-operate with and complement, and at the same time act as checks and balances against one another but shall not interfere with or encroach on the authority or within the province of the other . . . . It is abhorrent to the principles of our legal system and to our form of government that courts, being a coordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will. Such would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice.[74]

The court held that the duty of the commissioner was a ministerial one rather than a discretionary one except where the amounts are so unreasonable as to indicate that the judges acted arbitrarily and capriciously.

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70 381 P.2d at 282, quoting from People *ex rel.* Attorney Gen. v. Curtice, 50 Colo. 503, 522, 117 Pac. 357, 363 (1905). Emphasis added by Mr. Justice Frantz.

71 384 P.2d 738 (Colo. 1963).

72 Colo. Rev. Stat. § 39-16-1 (1953). The statute reads, in pertinent part: "The judge or judges of the district court of each judical district shall appoint one or more probation officers who shall not be dismissed without good cause shown. The judge or judges shall fix the salary of such officers commensurate with the time required to discharge the duties hereunder, subject to the approval of the county commissioners of the counties of such judicial district."

Colo. Rev. Stat. § 56-3-8 (1953) contains a similar provision regarding clerks.

73 "The powers of the government of this state are divided into three distinct departments — the legislative, executive, and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

74 384 P.2d at 741.