Denver Law Review

Volume 27 | Issue 10 Article 5

January 1950

# Prosecution of Habitual Criminals

William E. Doyle

# Prosecution of Habitual Criminals

# PROSECUTION OF HABITUAL CRIMINALS

WILLIAM E. DOYLE
*of the Denver Bar, Chief Deputy District Attorney*

The statute which prescribes proceedings for punishment of second and subsequent offenders, commonly called the Habitual Criminal Act,[1] provides in substance that where a person is convicted of a felony and that individual has been previously twice convicted of a felony in this state or elsewhere, or of a crime elsewhere which would be a felony here, he shall be adjudged an habitual criminal and shall be sentenced to a term of not less than the maximum nor more than three times the maximum on a first conviction. If there have been three or more prior convictions, the punishment prescribed is that of life in prison. It ought to be noted at the outset that this is not a double prosecution for the same offense; it rather involves proof of a condition for the purpose of aggravation of sentence. The case of *Smalley v. People* [2] sets at rest these questions of constitutional law.

Two fact questions arise in this type of prosecution. First, is the prior conviction of the grade of felony in Colorado or elsewhere, or is it an offense elsewhere which would be a felony in Colorado? Secondly, is the defendant the identical individual who is alleged to have suffered the prior conviction? This paper primarily will explore methods to be employed in meeting these issues. It will also review briefly the other procedures.

The information alleges in one or more counts the offense with which the accused is presently charged. Additional separate counts describe prior convictions and contain the alleged date, place, the name of the trial judge before whom the prior case was tried, the offense for which conviction was had and the institution wherein the accused was confined.[3] At the time of arraignment, the alleged prior convictions are read separately to the defendant,

---

[1] 1935 COLO. STAT. ANN., c. 48, §555 (1949 Supp.).
[2] 116 Colo. 598, 183 P. (2d) 558 (1947).
[3] A sample habitual criminal count is as follows:
BERT M. KEATING, District Attorney, in the name and by the authority of the People of the State of Colorado, further informs the Court that on the ..... day of ....., A. D. 19....., at the City of....., State of..... (or City and County of Denver, State of Colorado) by and before the Honorable ..... who was then and there a judge of ....., State of ....., and one of the competent authorities in the premises, (Defendant) by the name of ....., was duly and legally convicted of violating the ..... Statute of the State of ....., and on the ..... day of ....., A. D. 19....., was sentenced to (Name of Institution), and judgment of conviction was entered on said date, which sentence was duly executed and the defendant confined in the State (Name of Institution) at (City), (State), pursuant to said sentence; (contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Colorado.)
*See* Wright v. People, 116 Colo. 306, 181 P. (2d) 477 (1947) to the effect that the final clause in parenthesis above is harmless surplusage, habitual criminality being a condition or state and not a separate crime within the requirements of Art. VI, Sec. 23, of the Colorado Constitution.

and as to each such prior conviction he is asked whether he is the same person who suffered the prior conviction in the manner and form described in the information. An affirmative response is tantamount to a plea of guilty, thus eliminating any extended proof as to identity. The defendant may deny that he is the same person or he may refuse to answer. In either case the effect is the same, i.e., a general issue plea is entered, and the issues of fact which are thus raised are reserved for trial to a jury. The case of *Smalley v. People,*[4] is instructive on this question of absolute necessity for specific arraignment as to such prior conviction. The Supreme Court condemned the practice of a general admission of identity as to all counts.

SEPARATE TRIAL NECESSARY WHERE DENIAL OF IDENTITY

In the event of admission of identity there is no issue for the jury's consideration. The trial judge is simply required to receive the proofs of prior conviction of a felony. If there is a denial of identity, this question must be presented to a jury. Under the early act, the Supreme Court held that this issue should be decided in the trial of the immediate charge.[5] The method which is to be followed under the present act is outlined in the case of *Routa v. People,* [6] wherein it is held that the question of guilt must be determined by the jury before the issue of prior convictions can be submitted. It is pointed out in the *Routa* case that the question of former convictions is "opened for consideration and resolution" in the main trial where the accused takes the witness stand and subjects himself to cross-examination and impeachment. In other words, if the accused is willing to forego his right to testify in his own behalf, he may have his guilt or innocence on the main charge considered separate and apart from the question of habitual criminality.

PROOF WHERE ACCUSED ADMITS IDENTITY

A plea of guilty does not obviate the necessity for proving the prior felony conviction, particularly where it is a foreign conviction. This question was settled in the case of *O'Day v. People.*[7]

There the accused admitted that he had been convicted of violating the burglary statutes of California in one count and of Missouri in another count. The trial court neglected to hear evidence on this question, and the Supreme Court held that this was error. The reason set forth by the higher court was that Colorado courts need not notice the statutes of other states and hence there must be proof, at least that the crime was a felony. It was said:

[4] *Supra,* Note 2.
[5] People v. Wolff, 111 Colo. 46, 137 P. (2d) 693 (1943).
[6] 117 Colo. 564, 192 P. (2d) 436 (1948).
[7] 114 Colo. 373, 166 P. (2d) 789 (1946).

> What "the Burglary Statutes" of the states of California and Missouri are we are not advised. It should be noted that section 551, *supra* sets forth certain crimes known to our law and then provides, "which under the laws of this state would amount to a felony; or, under the laws of any other state, government or county, of a crime which if committed within this state, would be such a felony . . ." Would the violation of the "Burglary Statutes" of the states of California and Missouri, of which it is alleged the defendant was convicted, be one of the felonies enumerated in section 551, *supra*, if they had been committed in the state of Colorado? A fair construction of this statute places the burden upon the people to prove that the defendant is the identical person named in the second and third counts of the information, and this proof was obviated by the defendant's admission. The burden also was upon the people to establish by competent evidence that the defendant had been convicted of crimes in California and Missouri which, if committed in Colorado, would be one of the felonies specifically mentioned in section 551, *supra*, and such proof is entirely lacking. In the absence of this proof, the court committed error in considering, if it did, the charges in the second and third counts in the information.

Thus, it would follow that even after a plea of guilty, it is necessary for the state to satisfy the trial court as to the fact of conviction and also that the offense was a felony. Proof of the conviction is relatively a simple matter. Section 555(2) provides:[8]

> On any trial under the provisions of this subdivision, a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the party indicted or informed against shall be *prima facie* evidence of such convictions and may be used in evidence against such party.

If the conviction is a local one, i.e., within the county where the trial is being conducted, the clerk can produce the judgment book as to name, date, etc., and testify from that. Where the convicion takes place outside the county or state, the above statute comes into play, and the authenticated copy is evidence.

The issue of whether the crime was of the grade of felony is less simple. If the prior conviction occurred in Colorado, the trial court can, without straining its eyesight, notice this fact. If, however, it is an out-of-state conviction, the district attorney must introduce evidence to this point. He may choose to qualify an expert and have him testify that he has examined the statute and that he is of the opinion that the crime specified therein is a felony. However, a more simple approach would be to introduce in evidence an official compilation of the laws of the other state.[9] The foreign statute can be compared with the definition of a felony which is found in the Colorado Constitution, Art. XVIII. If confinement in a state penal institution is provided in the foreign statute, this definition is complied with.

Due to the severity of the punishment under this act and hence the close scrutiny to which such convictions are subjected, it is

[8] 1935 COLO. STAT. ANN., c. 48, §555(2) (1949 Supp.).
[9] These are rendered competent by COLO. STAT. ANN., c. 63, §1 (1935).

suggested that a careful record should be made and proofs offered as to every material issue even though the accused admits identity and thus in effect enters a plea of guilty.

PROOF REQUIRED WHERE ACCUSED DENIES IDENTITY

The problems are much more difficult where the general issue plea is entered either by an express denial of identity or by the entry of the denial by the trial court where the accused remains mute. The issues are the same as noted above, but more care must be exercised in meeting them. The fact of conviction at the time and place alleged is again established at least *prima facie* by production of the judgment roll or an authenticated copy thereof, and proof that it is a felony proceeds as outlined above, but there remains the vital question of whether the accused is the identical man. If witnesses are available who know of their own knowledge that he is the same individual, little else is necessary. Arresting officers who were present in court at the time of the conviction or the judge or clerk are possible witnesses to this fact. Other possibilities include the warden or a guard from the institution. They can testify that the accused was received pursuant to the judgment of conviction. As a further link in the chain of evidence, the custodian of records of the institution can identify the photograph and fingerprints of the person who is alleged to have been an inmate. He should testify that he is required to prepare and keep these records and that he does so systematically and as a matter of routine, and that the particular records were kept in accordance with the established requirements. Known fingerprints and photographs should then be identified by the person who made them at the time of the arrest. Comparison of the fingerprints which were taken at the institution with those which are known to be the prints of the accused by an expert together with his opinion that the prints are of the same individual will complete the chain of identification.

PROOF OF FOREIGN CONVICTIONS DIFFICULT

The difficulties increase where the conviction occurred outside of Colorado. Authenticated copies of the judgment are, of course, admissible to prove the conviction.[10] Also, the official compilation of the laws of the foreign state are admissible.[11] There remains, however, the ever troublesome problem of proof of identification. This is a difficult matter of practice because of the frequent impossibility of securing the presence of officers from foreign institutions. Even if the officers are willing to attend, the operation is expensive and perhaps not warranted in view of the fact that his testimony is limited to identification of the photo-

[10] 1935 COLO. STAT. ANN., c. 48, §655(2) (1949 Supp.).
[11] COLO. STAT. ANN., c. 63, §1 (1935).

graph and prints as official records of the institution. Another reason why presence of a witness of this type seems unimportant is that there is practically no area for defense cross-examination. Thus it would seem that the presence of the officer could well be dispensed with.

One well-reasoned decision from the state of Washington,[12] *State v. Johnson,* has approved a trial technique which allows the introduction of fingerprints and photographs as official records. This excellent opinion explains that the basis for allowing such evidence to be introduced is found in the Constitution of the United States, Art. IV, Sec. 1, which provides that "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State." That section also declares that Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. Congress has enacted a measure which implements this provision to the effect that:[13]

> All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the certificate is given the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.

This statute is made to order for the instant procedure. Certainly, fingerprints and photographs are records within the defiinition of the above statute. The warden is a public officer who is empowered to attest that he is the keeper of the photographic and fingerprint records of persons convicted of crime and imprisoned in his institution, that the fingerprints are kept in conformity with law, and that the particular record is that of an inmate who was incarcerated in the institution at the particular time. The certificate of the judge in the county or district or of the Governor

[12] State v. Johnson, 194 Wash. 438, 78 P. (2d) 561 (1938).
[13] R. S. §906, 28 U. S. C. §688.

or Secretary of State as to the official character of the warden and as to his duties fulfills the other terms of the above quoted statute.

If the documents which are described above are received, there remains the relatively simple task of introducing the known photos and prints for comparison and opinion by an expert, and thus the same evidentiary effect is achieved as that which is accomplished by the presence of the officer or officers.

In the case of *State v. Johnson,* [14] the procedure which is outlined above was followed and approved. The conclusion of the court is as follows:

> We conclude, therefore, that the method of proving the identity of the appellant by introducing certified copies of the fingerprints of the defendant, and then comparing them with the known prints in the possession of the witness, was proper and in accordance with the rules of evidence as approved by the great weight of authority.[15]

To the contention that this procedure deprives the accused of his right to confront his accuser, it was said "Documentary evidence is admissible, and its admission is not in derogation of the defendant's right to meet his accusing witness face to face for the simple reason that a document is not a witness."

It is submitted that the use of documents to prove identity where the convictions are foreign is entirely sound. Such evidence is well within an exception to the hearsay rule, and, as is pointed out above, the accuser is not deprived of any substantial right from the standpoint of cross-examination. The evidence is highly trustworthy, the necessity is apparent, and the right of cross-examination is not impaired. Therefore, if the documents are carefully drafted, there seems to be every reason for admitting them.

In closing this discussion, one brief word of admonition is in order. Our Supreme Court has repeatedly declared that this statute is in derogation of the common law and hence is subject to

---

[14] Note 12, *supra.*

[15] In State v. Johnson, the court described the forms (which it approved) used therein as follows: The certificate of the warden, omitting formal parts, was: "I am keeper and custodian of fingerprint and photographic records of persons convicted of crime and imprisoned in said prison, and that the said fingerprint and photographic records are kept by me on my files in conformity with law. I further certify that the annexed is a true copy of an original fingerprint and photographic record now on file in this prison; that I have compared the transcript hereto annexed with the said original records, and I certify that the same is a true and correct transcript of the said original record and of the whole thereof."

There was attached to the warden's certificate the judge's certificate which, following the name of the warden, so far as pertinent, was as follows: ". . . . . Is the Warden at the above mentioned Prison and hath the keeping and custody of the fingerprints, photographs, files and records of the said Prison; that he is by law the proper officer to make out and certify and attest copies of fingerprints, photographs, files and records of said Prison; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his certificate of attestation to the fingerprints and photograph hereto annexed is in due form; that he was such Warden, Custodian and Keeper at the time of making and subscribing to the foregoing attestation and certificate."

A certificate was attached by the clerk to the effect that the one who signed the last certificate was a judge, and the presiding judge certified as to the identity of the clerk. These documents bear the seal of the court from which they emanated. The certificates of the officials in both states are essentially the same.

strict construction. It follows that the utmost care must be exercised whether the plea is that of guilty or not guilty. In fact, the statute is so severe that it should be invoked with restraint and only against the hoodlum[16] who commits aggravated crime and tends to escape detection and and prosecution and is thus a social menace. In my opinion, this procedure was not intended for use against the petty offender who is readily caught and who invariably pleads guilty. If prosecutions are selected and tried with care, the convictions which follow will receive better treatment on review.

# RIGHTS AND DUTIES OF THE PRESS IN CRIMINAL CASES

MICHAEL G. RYAN*

What is the duty of the press in criminal cases? Those versed in the traditions of the law would answer this question by saying that since a crime is "An act committed or omitted in violation of a public law forbidding or commanding it; a wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name,"[1] the guilt or innocence of one accused of an offense against the state should be determined through utilization of time-tested criminal trial procedures, and the press should interfere with these procedures as little as possible.

That the press has a duty toward the public in handling news of criminal proceedings is undeniable, but this duty is a moral obligation or responsibility which always cannot be enforced by law. That some sections of the press seek to discharge this obligation with a deep sense of responsibility to their readers is one of the main reasons for the continued success of democratic society. That other sections of the press do not handle criminal cases with appropriate moderation is equally obvious.

Freedom of the press is a right secured by the Constitution of the United States and protected by state constitutions.

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people to peacefully assemble. . . .[2]
>
> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.[3]

---

[16] *Cf.* Routa v. People, *supra*, note 6.

* Student, University of Denver College of Law.

[1] Bouvier's Law Dictionary, unabridged, Vol. 1, p. 729.

[2] Constitution of the United States, First Amendment.

[3] Constitution of Colorado, Art. II, Sec. 10.