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EFFECT OF CONFESSIONS OF ERROR IN CRIMINAL CASES; THE RULE IN COLORADO.

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THE procedure which is taken by appellate courts in most of the jurisdictions outside of Colorado, when and after confessions of error are filed in criminal cases, is that which was followed in an Arkansas case.[1] The Rev. Elijah Skaggs "wanted to be hung" in order that he might "on the third day rise and redeem the world" in his capacity as "Elijah, King of the Gentiles". He brought about an indictment of himself for the crime of rape, punishable in that state by hanging. The jury found him guilty of a lesser offense, and assessed his punishment at 21 years in the penitentiary. Being thus thwarted in his scheme for the redemption of the world, he appealed to the Supreme Court. The Attorney General confessed error as to four different matters. Counsel for the Rev. Skaggs submitted the case upon such confession. The Supreme Court proceeded to examine and discuss the points raised by the Attorney General, and found no reversible error in the record. The judgment was *affirmed*.

The Supreme Court of Florida reversed a judgment of conviction in a case where the Attorney General had filed a confession of error, but did so because the confession had "support in the transcript of the record."[2] A like situation arose in North Carolina. While the appellate court reversed the judgment, it did not do so merely because of the Attorney General's admissions. In the opinion the court said:[3]

"While the opinion of the state's attorney has much weight with us, it is our practice to examine the record carefully ourselves before setting aside a conviction for crime."

In a Washington case counsel for appellants who had been convicted of a crime obtained from the prosecuting attorney a stipulation "to the effect that the conduct of the trial court was prejudicial and reversible error."[4] The Supreme Court said:

1. Skaggs v. State, 113 S. W. 346.
2. Tucker v. State, 105 So. 140. *Accord*: Mo.—State v Goddard, 48 S. W. 82.
3. State v. Stephens, 69 S. E. 11.
4. State v. Waite, 238 Pac. 617.

"The attorneys, of course, know that we cannot affirm or reverse a case simply because it is stipulated that there is or is not error in the record."

The Appellate Court in Illinois, in a contempt case, refused to reverse the judgment, notwithstanding the fact that the State's Attorney had confessed error, "asking that the judgment be reversed."[5]

The Court of Criminal Appeals of Oklahoma has many times followed the following procedure:[6]

"Where the Attorney General confesses error, this court *will examine the record,* and, if the confession is *sustained thereby,* and is *well founded* in law, the conviction will be reversed."

We come now to the subject of the procedure in Colorado. The best case from an illustrative standpoint is *Richardson v. People.*[8] There seven persons had been charged with murder in the first degree. At the conclusion of the trial the jury found two of them guilty of voluntary manslaughter. A writ of error was sued out by the convicted defendants, and execution of a sentence to the state penitentiary was stayed.

In the case in question a vast array of able lawyers prepared, signed, and filed in the office of the Clerk of the Supreme Court an abstract of the record and a voluminous and exhaustive brief on behalf of the plaintiffs in error. Thereafter, and on January 9, 1917, the Attorney General then in office, with two assistant attorneys general, filed a brief on behalf of the people, contending for an affirmance of the judgment. On April 13, 1917, the reply brief was filed.

The next step taken in the case was upon September 27, 1917. On that date the succeeding Attorney General filed a Confession of Error. This had the effect, indirectly, of striking from the files the brief of the first Attorney General. According to the "uniform rule," hereinafter discussed, the court could have disposed of the case the same day as that upon which the confession was filed. However, no official announcement was made regarding the cause until January 7, 1918. On that date the court filed the following memorandum:

5. The People v. Mortenson, 224 Ill. App. 221.
6. Bindrum v. State, 228 Pac. 168; Raymer v. State, 228 Pac. 500; Henderson v. State, 197 Pac. 720; Green v. State, 193 Pac. 1,077; Scwake v. State, 228 Pac. 168; Brasheers v. State, 192 Pac. 433.
8. 69 Colo. 155, 170 Pac. 189.

"Per Curiam.

"Plaintiffs in error were convicted of voluntary manslaughter and sentenced to serve terms in the penitentiary. They have assigned and argued numerous alleged errors occuring in the trial of the cause, which they claim entitled them to a reversal of the judgment. The prosecution, acting through the attorney general, has filed a confession of error and asks for a reversal of the judgment. Under these circumstances, it is not incumbent upon us to investigate the record and determine as to the correctness of his conclusions. We therefore reverse the judgment and remand the cause."

The difference between that pronouncement and what was said and done by courts in other jurisdictions under like circumstances is obvious. It was "not incumbent" upon the court either to "investigate the record" or to examine the brief of the first Attorney General. The court ignored the existence or filing of that brief in another respect. The title page furnished to the publishers of the report of the case, as well as the caption sheet attached to the original memorandum, contained neither the name of the first Attorney General nor the names of the two Assistant Attorneys General who acted and appeared in the cause with him. In the reports of other cases the names of all attorneys who ever appeared are published, including that of any Attorney General who went out of office before the cause was determined.[9]

There is no reason for supposing that the court intended to assume that the Attorney General was infallible in the matter of "the correctness of his conclusions." The filing of a confession of error implies a disagreement, as to a matter of law, with the prosecuting attorney who tried the case and with the trial judge who overruled a motion for a new trial, as well as with any predecessor in office who filed a brief in support of an affirmance. Such other officials may have been correct in *their* conclusions. The reason for the court's action in reversing, without opinion, the judgment of conviction in *Richardson v. People* appears but imperfectly in the memorandum filed. In an earlier case,[10] however, the court said:

"The attorney general has presented a confession of error and asks a reversal of the judgment.

"It is the uniform rule of this court in such cases to act affirmatively upon such request of the attorney general. By the Constitution and statutes

9. E. g. Lawson v. People, 63 Colo. 270, 165 Pac. 771.
10. Soto v. People, 64 Colo. 528, 173 Pac. 399.

of this state the Attorney General is the only person who is authorized by law to appear for the people, before the Supreme Court. The duty and responsibility of the control of such cases are his. * * *

"The judgment is reversed."

Obviously, therefore, the reversal of the judgment in *Richardson v. People* was not on account of any serious or reversible error in the record but simply because of the "request of the attorney general." The request in question is acted "affirmatively upon" because, it is said, he has "control" of the case. The Supreme Court of Iowa[11] has discussed the question of "control," under statutes not materially different from ours, but when in a case[12] thereafter arising the attorney authorized to appear for the state filed "a written confession of errors" the court did not reverse the judgment solely because of such confession but did so for the reason apparent from the following language of the memorandum it filed: "As the errors confessed appear to be prejudicial, the application to * * * reverse and remand it, will be granted." The court first satisfied itself that the alleged errors were in fact "prejudicial".

In civil actions, where each party has control of his own case, appellate courts have refused "to reverse the judgment of a trial court upon an agreement of the litigants that the judgment of said trial court is erroneous, or upon a confession of error, unless the record discloses that the trial court's judgment was, in fact or law, erroneous."[13]

In Alabama the refusal was upon the ground that the confession of error could not be allowed to "oust a court of its appellate jurisdiction, or limit the principle of decision by excluding certain legal considerations which may be pertinent to the issue."[14]

Prior to the reversal of the judgment in *Richardson v. People,* the main case herein discussed, our Supreme Court said that "it appears to have been the uniform practice of this court to reverse the case upon his (the attorney general's) confession of error, without giving it further consideration," but added that inasmuch as the former Attorney General, dur-

11. State v. Fleming, 13 Iowa 443.
12. State v. Bailey, 85 Ia. 713, 50 N. W. 561.
13. Riley v. Commissioners' Court (Tex. C. A. 1929), 12 S. W. 2nd 1072. *Accord*: Sivley v. Sivley (Miss.), 50 So. 552; Webb Sumner Oil Mill v. Southern Coal Co. (Miss.), 91 So. 698.
14. Boss Livery Co. v. Griffith, 85 So. 849.

ing his term of office, had filed a brief in support of "the regularity of the conviction, * * *" it is "the better practice to pass upon some of the assignments of error, or one of them at least, upon which the present Attorney General has confessed error."[15] The "better practice" was not followed in the Richardson case, determined later, and so we may conclude that that practice has been abandoned.

According to the "uniform rule" of reversing a criminal case upon the confession of error "without giving it further consideration," the attorney general may confess any error, trivial, harmless, or otherwise, and thereby obtain a reversal of the judgment upon his mere "request." It lies in his power, therefore, to prevent the court from applying, and the public from benefiting by, the rule embodied in the following judicial pronouncement:

> "Where one knowingly and willfully violates the law, and his guilt is clearly proven, he cannot successfully rely for a reversal on technical errors occurring during a trial."[16]

If it be assumed that an attorney general will always act honestly and studiously in filing a confession of error, the fact still remains that he may be mistaken as to the law or the record. He is as apt to be wrong in making a "request" for a reversal as he sometimes is in contending for an affirmance.

There is a possibility that the attorney general erred in filing the confession in the Richardson case. At least the court could have had plausible, if not unassailable, grounds for affirming the judgment if the alleged errors were only those confessed. The confession in that case involved, in substance, only two points, one concerning an instruction to the jury and the other relating to remarks of the trial judge (Cavender).

There was a count in the information upon which plaintiffs in error had been tried which charged the specific act of murder to some person unknown to the district attorney, and then alleged that the defendants were then and there present, standing by, aiding, abetting and assisting such unknown person to commit the murder. The court instructed the jury that if defendants "aided, abetted or assisted" the one actually

15. Lawson v. People, 63 Colo. 270, 165 Pac. 771.
16. May v. People, 236 Pac. 1,022; Gizewski v. People, 239 Pac. 1,026.

guilty of murder in the commission of such crime, they themselves were guilty of murder. The first alleged error confessed consisted in the failure of the trial court to make the instruction more complete and instruct that the defendants must also be found to have *known the criminal intent* of the person aided or abetted.

The confession of error did not say that the instruction as given had been objected to, but assuming that a proper objection had been made, the court might have found the error, if such it was, not reversible, under the following rule:[17]

"An instruction which follows the language of the statute in defining a principal or an accessory will ordinarily be sufficient, and usually it is better to do so."

Again, the court might have held the error cured by verdict, which found the defendants guilty only of voluntary manslaughter. At common law, and under statutes declaratory thereof, there cannot be accessories before the fact to voluntary manslaughter, which is killing in the heat of sudden passion and without malice,[18] and is, therefore, inconsistent with the idea of premeditation.[19] Error in defining accessories is harmless when the verdict is for voluntary manslaughter.

The second alleged error confessed related to remarks of the trial judge made in connection with rulings on the admissibility of certain evidence or the propriety of certain questions propounded to witnesses. In the instructions to the jury the trial court embodied the usual charge to disregard remarks of either court or counsel made during the progress of the trial.

If the Supreme Court had reviewed the record and examined all the briefs it might have agreed with the first Attorney General and his two assistants who had argued for an affirmance and in conclusion said:

"We conscientiously believe that the defendants here had a fair and impartial trial and that the verdict of the jury should be affirmed by this court."

The Richardson case was never retried. It was reversed nearly four years after the homicide charged was committed, and more than three years after the trial.

17. 1 Randall's Instructions, section 314.
18. Sec. 6,666 C. L. 1921.
19. 29 C. J. 1,066, section 38.

For reasons hereinbefore indicated, the appellate procedure in Colorado in criminal cases is such that any criminal may escape punishment if he or his friends can induce the attorney general to file a confession of error, or if that official files such a document because of some mistake on his part. Some criminal cases are not tried more than once, for reasons familiar to the profession. Where such cases reach the Supreme Court, the attorney general has the power to nullify, in effect, the provisions of the state constitution relating to the pardoning power.

If a criminal case is remanded on the "request" of the attorney general, and never retried, the defendant has all of the benefits and none of the stigma of a pardon. When the governor exercises his constitutional pardoning power the public is aware of the fact, and the executive may be subjected to adverse criticism. When the attorney general exercises his indirect pardoning power the people are not familiar with his procedure, and they may on learning of the "reversal" assume that the District Attorney had recklessly injected error into the record and that the trial judge had stupidly permitted him to do so. Moreover, county officials may be unjustly accused of having unwisely spent large sums of the people's money in maintaining a prosecution which did not result in the incarceration of the accused.

Under the "uniform rule" in Colorado a reversal of the judgment in a criminal case when made upon the "request" of the attorney general is without any opinion on any point of law. This situation makes pertinent the following language of the Court of Appeals of Alabama:

> "It would be puzzling to say the least, as to how the trial court would proceed in another trial of this cause, should we act on the confession of error, * * *."[20]

Only in Colorado has it ever been judicially said that there may be, in a criminal case, a "reversal without comment."[21] In other jurisdictions where a reversal occurs following a confession of error either the confession is quoted in full or the error confessed is so set forth as to enable the trial court to know how to proceed in the event of another trial.[22]

20. Boss Livery Co. v. Griffith, 85 So. 849.
21. Zancannelli v. People, 63 Colo. 252, 254.
22. Bindrum v. State (Okla.), 228 Pac. 168; Harris v. Com. (Va.), 68 S. E. 834; State v. Ward (S. D.), 155 N. W. 185.