

Contempt: Judicial and Criminal Contempt Convictions Arising Out of a Single Episode Not Barred Under Double Jeopardy Prohibition

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parties and to the courts to provide a means by which unnecessary litigation might be avoided. In cases involving contracts, such as *Panzeca*, litigation might be prevented by a settlement based on an amount named in the plaintiff's claim; in cases involving torts, filing of a claim will, at the least, enable the defendant to investigate it while the facts are still fresh.²³⁰

CRIMINAL CONTEMPT PROCEEDINGS

Contempt: Judicial and criminal contempt convictions arising out of single episode not barred under double jeopardy prohibition.

In *People v. Colombo*²³¹ the New York Court of Appeals has unanimously decided that a recent Supreme Court pronouncement does not alter the traditional view that successive contempt convictions under the Judiciary and Penal Laws are not within the ambit of the double jeopardy prohibition.

Granted immunity, defendant Colombo nevertheless refused to testify before a regular Kings County grand jury investigating the use of legitimate business enterprises as a cover for alleged criminal activities. A supreme court justice ordered the defendant to testify. Subsequently, he was adjudged in criminal contempt of court pursuant to section 750(A)(3) of the Judiciary Law²³² for his refusal to obey the supreme court order, and was sentenced to thirty-days imprisonment.

Thereafter, the grand jury indicted defendant for his refusal to testify in violation of section 600(6) of the former Penal Law.²³³ His

²³⁰ See, e.g., *Winbash v. City of Mt. Vernon*, 306 N.Y. 327, 333, 118 N.E.2d 459, 462 (1954).

²³¹ 29 N.Y. 2d 1, 271 N.E.2d 694, 323 N.Y.S.2d 161 (1971).

²³² A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

3. Willful disobedience to its lawful mandate.

N.Y. JUDICIARY LAW § 750(a)(3) (McKinney 1969).

²³³ The former section 600(6) provided:

A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor:

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory. . . .

The present counterparts of the above provision are:

A person is guilty of criminal contempt when he engages in any of the following conduct:

4. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding except a refusal to give testimony before a grand jury, or after being sworn, to answer any legal and proper interrogatory. . . .

N.Y. PENAL LAW § 215.50(4) (McKinney Supp. 1970).

A person is guilty of criminal contempt of a grand jury where, after having been granted immunity, he refuses to be sworn as a witness before a grand jury, or who, after being sworn as such a witness, refuses to answer any legal and

motion to dismiss the indictment as a violation of the double jeopardy limitation was granted by the Supreme Court, Kings County. However, the dismissal was overturned by the Appellate Division,²³⁴ Second Department, and the Court of Appeals, without opinion, affirmed.²³⁵

At the petitioner's request, the United States Supreme Court granted a writ of certiorari, vacated the judgment, and remanded the case to the New York Court of Appeals for further consideration in light of *Waller v. Florida*,²³⁶ decided after the Court of Appeals' affirmance.²³⁷ In *Waller*, the petitioner was tried and convicted by a municipal court for removing a mural from the city hall of St. Petersburg. Upon completion of a 180-day prison term, petitioner was tried and convicted of grand larceny by a Florida state court. The Supreme Court

decide[d] only that Florida courts were in error to the extent of holding that — "even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court."²³⁸

The New York Court of Appeals, in adhering to its original decision, found *Waller* to be inapplicable for three major reasons: (1) *Waller* involved successive prosecutions by a municipality and a state; no such distinction existed in *Colombo*; (2) *Colombo* did not involve two prosecutions, for the proceeding under the Judiciary Law was essentially civil; (3) *Waller* was prosecuted twice for a single act; *Colombo's* continued refusal in the face of the court order gave rise to distinct bases for punishment. Thus, the opinion conforms to the traditional view that the interests served by imposition of criminal contempt are distinct from those involving judicial contempt. In the latter case, the illegal behavior is the attempt to undermine the power of the courts. In this sense, the refusal to obey the court is a separate act. This

proper interrogatory. Criminal contempt of a grand jury is a Class E felony. N.Y. PENAL LAW § 215.51 (McKinney Supp. 1970).

The penalty for contempt under 215.50 is limited to imprisonment for one year. Section 215.51 provides for a maximum sentence of four years. The distinction and corresponding disparity in punishment was prompted by district attorneys who had encountered difficulty in investigating organized crime because suspected members of organized crime repeatedly refused to testify before grand juries. 39 MCKINNEY'S N.Y. PENAL LAW § 215.51, supp. commentary at 130 (1970).

²³⁴ 32 App. Div. 2d 812, 302 N.Y.S.2d 488 (2d Dep't) (mem.), *aff'd without opinion*, 25 N.Y.2d 641, 254 N.E.2d 340, 306 N.Y.S.2d 258 (1969).

²³⁵ 25 N.Y.2d 641, 254 N.E.2d 340, 306 N.Y.S.2d 258 (1969), *vacated and remanded*, 400 U.S. 16 (1970) (*per curiam*), *reinstated*, 29 N.Y.2d 1, 271 N.E.2d 694, 323 N.Y.S.2d 161 (1971).

²³⁶ 397 U.S. 387 (1970).

²³⁷ 400 U.S. 16 (1970) (*per curiam*).

²³⁸ 397 U.S. at 395.

distinction finds statutory support in Penal Law 215:55, wherein punishment for a criminal contempt adjudicated under 750(A)(3) of the Judiciary Law is declared not to preclude criminal prosecution for the same conduct.

While the continued erosion of the simple common-law maxim, *nemo debet bis puniri pro uno delicto*,²³⁹ may properly be the subject of criticism,²⁴⁰ it appears to be sound policy, for purposes of double jeopardy, to distinguish between the commission of a single crime and the type of conduct involved in *Colombo*. The mildness of the judicial contempt sanction in New York makes the instant decision all the more palatable.

SURROGATE PRACTICE

Waiver of citation and consent to probate: Pre-probate decree withdrawal permitted where status quo remained unchanged.

Section 401(4) of the Surrogate's Court Procedure Act²⁴¹ provides that in any proceeding within the subject matter jurisdiction of the Surrogate's Court, the filing of a waiver of issuance and service of process shall constitute a notice of appearance.²⁴² Although this same act makes no provision for the filing of a consent to probate (an act which is wholly unnecessary so long as there is a valid waiver of citation),²⁴³ that consent is normally embodied in the original waiver of process.²⁴⁴

²³⁹ "No man ought to be punished twice for one offense." BLACK'S LAW DICTIONARY 1189 (4th ed. 1951).

²⁴⁰ See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, 150 (1958) (Black, J., dissenting); *Abbate v. United States*, 359 U.S. 187, 201 (1958) (Black J., dissenting). See generally Note, *Double Jeopardy: A Vanishing Constitutional Right*, 14 How. L. J. 360 (1968); Note, *Constitutional Law — Double Jeopardy*, 13 N.Y.L.F. 133 (1967).

²⁴¹ N.Y. Surr. Ct. Proc. Act § 401(4) (McKinney 1967) [hereinafter SCPA]:

Appearance by waiver of process. Any adult competent party may also appear by an acknowledged waiver of issuance and service of process. . . . In a probate proceeding the waiver shall state the date of the will to which it relates.

²⁴² It is in that reference that the document serves to confer in personam jurisdiction on the court, as the maker "appears" in the Surrogate's Court and "waives" the issuing and service of a citation. SCPA § 203 states that "[p]ersonal jurisdiction of parties is obtained by service of process upon the parties or by submission to the jurisdiction of the court by waiver of issuance and service of process . . ." (Emphasis added). It should be noted that SCPA § 1403 sets out those persons upon whom process is to be served in a proceeding for the probate of a will where no waiver has been executed. It is of further significance that a majority of all probate proceedings are dealt with by waiver of citation, and that less than one percent of all will contests are ever successful. *In re Frutiger*, 29 N.Y.2d 143, 155, 272 N.E.2d 543, 549, 324 N.Y.S.2d 36, 45 (1971) (Burke, J., dissenting).

²⁴³ "For a valid probate the portion relating to consent is unnecessary. When a citation is issued and no objections are filed, there are no consents by the person so cited." *In re Frutiger* 62 Misc. 2d 169, 167, 308 N.Y.S.2d 692, 697 (Sur. Ct. Broome County), *rev'd*, 35 App. Div. 2d 755, 314 N.Y.S.2d 949 (3d Dep't 1970), *rev'd* 29 N.Y.2d 143, 272 N.E.2d 543, 324 N.Y.S.2d 36 (1971).

²⁴⁴ See, e.g., 25 CARMODY-WAIT 2d § 149:183, at 170-71 (1968).