St. John's Law Review

Volume 15, April 1941, Number 2 Article 16

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St. John's Law Review

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Recommended Citation

St. John's Law Review (1941) "Criminal Law--Alibi--Application of Section 295(L) of the Code of Criminal Procedure to Defendant's Testimony (People v. Rakiec, 260 App. Div. 452 (3d Dep't 1940))," *St. John's Law Review*: Vol. 15 : No. 2 , Article 16.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol15/iss2/16

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CRIMINAL LAW—ALIBI—APPLICATION OF SECTION 295(L) OF THE CODE OF CRIMINAL PROCEDURE TO DEFENDANT'S TESTIMONY.—The defendants had been convicted of burglary in the third degree [1] in the County Court of Chemung County. Their appeal is based on two counts: that Section 295(L) of the Code of Criminal Procedure [2] is unconstitutional; that, even if the statute is constitutional, there is reversible error in the lower court's denial of a motion to dismiss after refusing permission to defendant, Charles Shambrook, to offer testimony as to his and his co-defendant's whereabouts at the time the crime was committed. The refusal was based on defendant's failure to file a bill of particulars in accordance with the provisions of Section 295(L) of the Code of Criminal Procedure, after demand for such by the prosecuting attorney. *Held,* judgment reversed, and new trial ordered. Exclusion of defendant's testimony as to his whereabouts at the time of the crime is reversible error as being prejudicial and depriving defendant of his right to a fair trial.[3] Section 295(L) of the Code of Criminal Procedure does not apply to defendant's testimony. *People* v. *Rakiec,* 260 App. Div. 452, 23 N. Y. S. (2d) 607 (3d Dept. 1940).

Section 295(L) of the Code of Criminal Procedure is constitutional.[4] At common law a party to an action was not a competent

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[1] N. Y. PENAL LAW § 404 (The breaking and entering of a building with intent to commit a crime therein; or the breaking out from a building after having committed a crime therein, although the entry was accomplished without breaking in is burglary in the third degree. The punishment for burglary in the third degree is imprisonment for not more than ten years).

[2] N. Y. CODE OF CRIM. PROC. § 295(L) (In all cases where a defendant has been indicted by a grand jury, the prosecuting officer may, not less than eight days before the case is moved for trial, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intend to offer, for any purpose whatever, testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must within four days thereafter serve upon such prosecuting officer and file a bill of particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences and places of employment of the witnesses upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall, pursuant to such demand, serve and file such a bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, may exclude such testimony or the testimony of such witness. In the event that the court shall allow such testimony, or the testimony of such witness, it must upon motion of the prosecuting officer, grant an adjournment not to exceed three days).

[3] "A fair trial is a legal trial conducted according to the rules of common law except in so far as it has been changed by statute and one wherein legal rights of the accused are safeguarded and respected." Universal Adjustment Corp. v. Midland Bank, Ltd., 281 Mass. 303, 184 N. E. 152 (1933); Johnson v. City of Wildwood, 116 N. J. L. 462, 184 Atl. 616 (1936).

[4] People v. Schade, 161 Misc. 212, 292 N. Y. Supp. 612 (1936). In other states having similar statutes, they have been held constitutional. People v. Wudauki, 253 Mich. 83, 234 N. W. 157 (1931); People v. Marcus, 253 Mich.

witness at the trial.[5] In conjunction with this, one accused of a crime was incompetent to testify in his own behalf, on the theory that he would swear falsely.[6] The foregoing rule has been changed by statute.[7] At trial, in the instant case, the defendant was deprived of his right to testify in his own behalf on the ground of noncompliance with Section 295(L) of the Code of Criminal Procedure. Before 1935, the defense could interpose witnesses, without notice, to prove that the accused was not at the scene of the crime at the time of its commission and thus create a reasonable doubt as to the verity of the testimony of the state's witnesses.[8] The purpose of the "alibi [9] statute" was to prevent such practice.[10] But it does not abrogate the defendant's right to testify as to his whereabouts at the time covered by the indictment.[11] A defendant in a criminal action is entitled to a fair trial.[12] Section 295(L) of the Code of Criminal Procedure does not compel the defendant to incriminate himself or give information to the district attorney unless defendant voluntarily and for his own benefit intends to use alibi witnesses.[13] If the defendant is required to divulge his own testimony beforehand, the advantage given to the prosecutor would be so great that the defendant would most certainly be deprived of his right to a fair trial.[14] Where a defendant is deprived of his right to testify in his own behalf he is not accorded a fair trial.[15] When a defendant enters a plea of not guilty and his attorney ignores the district attorney's demand for a bill of particulars pursuant to statute, refusal to allow defendant to testify as to his whereabouts on the night of the crime, denied him his legal right to testify in his own behalf.[16]

410, 235 N. W. 202 (1931); State v. Thayer, 124 Ohio St. 1, 176 N. E. 656 (1931).

[5] Le Blanc v. Yawn, 99 Fla. 328, 126 So. 789 (1930); Haswell v. Walker, 117 Me. 427, 104 Atl. 810 (1918).

[6] State v. Wilcox, 206 N. C. 691, 175 S. E. 122 (1934).

[7] N. Y. CODE OF CRIM. PROC. § 393 (the defendant in all cases may testify as a witness in his own behalf). Similar statutes have been enacted in all states.

[8] Witt v. State, 205 Ind. 499, 185 N. E. 645 (1933).

[9] In Tomlinson v. United States, 93 F. (2d) 652 (App. D. C. 1937) and State v. Grant, 98 S. W. (2d) 761 (Mo. 1936), it was held "alibi" meant that defendant claims he was in another and different place than the place in which the alleged crime was committed, at the time such crime was committed.

[10] People v. Schade, 161 Misc. 212, 292 N. Y. Supp. 612 (1936).

[11] State v. Thayer, 124 Ohio St. 1, 176 N. E. 656 (1931).

[12] People v. Mahoney, 201 Cal. 618, 258 Pac. 607 (1927); Petro v. State, 201 Ind. 401, 184 N. E. 710 (1933); Fitzsimmons v. State, 116 Neb. 440, 218 N. W. 83 (1928); State v. Heator, 149 Wash. 452, 271 Pac. 89 (1928).

[13] People v. Schade, 161 Misc. 212, 292 N. Y. Supp. 612 (1936).

[14] People v. Cosmos, 205 N. Y. 91, 98 N. E. 408 (1912).

[15] People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846 (1898); People v. Mantin, 184 App. Div. 767, 172 N. Y. Supp. 371 (1st Dept. 1918); People v. Wujanik, 239 App. Div. 764, 264 N. Y. Supp. 906 (4th Dept. 1933); People v. Rosenzweig, 135 Misc. 324, 239 N. Y. Supp. 358 (1929).

[16] State v. Nook, 123 Ohio St. 190, 174 N. E. 743 (1930); State v. Thayer, 124 Ohio St. 1, 176 N. E. 656 (1931). In a prosecution for burglary and larceny, testimony of defendant as to his whereabouts, introduced for the purpose of impeaching the state's witness, was admissible without notice before

Section 295(L) of the Code of Criminal Procedure does not apply to the testimony of a defendant but only to the testimony of other witnesses produced for the purpose of giving evidence upon the question of an alibi.[17]

A. M.

CRIMINAL LAW—LOTTERIES.—In 1931 a combination was formed to gain control of and operate the various "policy" enterprises. The appellant was taken into the combination for the purpose of affording its members and operators protection from arrest, and if arrested, immunity from conviction by using his political influence. Appellant was found guilty by the jury and convicted on thirteen counts in the court below. The first count charged a conspiracy to contrive, propose and conduct lotteries known as "policy" [1] and "the numbers game", and the remaining twelve counts charged twelve separate substantive crimes; each of which consisted of participating in, contriving, proposing or drawing a lottery. His conviction was unanimously affirmed by the Appellate Division.[2] On appeal, appellant contends: that the game of "policy" does not constitute a "lottery"; and that, consequently, the offenses of which he stands convicted, because they relate to "policy", are not punishable under provisions of the Penal Law on lotteries.[3] Appellant also contends that the conspiracy count in the indictment should be dismissed for insufficiency on the face thereof, because it fails to allege an overt act [4] committed within two years, the applicable period of limitations,[5] for the crime of conspiracy is a misdemeanor.[6] *Held,* conviction affirmed on the twelve counts of taking part in contriving, proposing or conducting a lottery, but modified so as to dismiss the count for conspir-

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trial as to alibi, and the exclusion of such testimony was prejudicial. Reed v. State, 4 Ohio App. 318, 185 N. E. 558 (1933).

[17] State v. Nook, 123 Ohio St. 190, 174 N. E. 743 (1930); State v. Thayer, 124 Ohio St. 1, 176 N. E. 656 (1931).

[1] "Policy" is a game of chance in which a player selects a number containing three figures. That number is written on a slip of paper which is given with the amount bet to a so-called collector. The winning number is determined by chance by a computation based on the moneys paid on the result of horse races at a designated track. Winners are paid six hundred times the amount of the bet.

[2] 258 App. Div. 466, 17 N. Y. S. (2d) 141 (1st Dept. 1940).

[3] N. Y. PENAL LAW §§ 1370–1372. Appellant was convicted under § 1372 which provides: "A person who contrives, proposes or draws a lottery, or assists in contriving, proposing or drawing the same, is punishable by imprisonment for not more than two years, or by fine of not more than one thousand dollars, or both."

[4] N. Y. PENAL LAW § 583.

[5] N. Y. CODE OF CRIM. PROC. § 142.

[6] N. Y. PENAL LAW § 580.