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Indictment and Information - Whether a Defendant Accused of a Felony May Constitutionally Waive and Consent to Prosecution on Information

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INDICTMENT AND INFORMATION—WHETHER A DEFENDANT ACCUSED OF A FELONY MAY CONSTITUTIONALLY WAIVE AND CONSENT TO PROSECUTION ON INFORMATION—The validity of a basic statutory change in the field of criminal procedure was involved in the recent case entitled *State* v. *Centers*[1] on hearing before an Ohio Court of Common Pleas. The defendant therein, charged with the felony of operating a motor vehicle without the owner's consent, had originally waived presentment to the grand jury in the manner purportedly authorized by a recent addition to the Ohio Revised Code.[2] After the filing of an information in lieu of an indictment, the defendant then moved to dismiss the prosecution on the premise that the statute in question was invalid in the face of a constitutional requirement to the effect that no person should be held to answer for a capital offense, or otherwise infamous crime, except on the presentment or indictment of a grand jury.[3] The motion was sustained when the trial judge reached the conclusion that the statute was invalid because the state constitution dictated the only method available for the prosecution of felonies.

The Ohio court, in reaching this result, relied on the New York case, *People ex rel Battista* v. *Christian*.[4] The New York court decided that the return of a grand jury indictment is a jurisdictional prerequisite which cannot be waived. This was based on the New York constitution, which contained wording similar to that of the Ohio constitutional provision. The New York court analogized the waiver of a grand jury to the waiver of a petit jury, stating that there is a mandatory public policy involved in these constitutional safeguards.[5]

In 1955 the Illinois legislature amended its criminal code to allow waiver of indictment in certain felony prosecutions.[6] The constitutionality

1 162 N. E. (2d) 925 (Ohio Com. Pleas, 1959).

2 Ohio Rev. Code § 2941.021, enacted in 1959, states that: "Any criminal offense which is not punishable by death or life imprisonment may be prosecuted by information filed in common pleas court by the prosecuting attorney if the defendant after he has been advised by the court of the nature of the charge against him and of his rights under the constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court, waives in writing and in open court prosecution by indictment."

3 Ohio Const. 1851, Art. I, § 10.

4 249 N. Y. 314, 164 N. E. 111 (1928).

5 The court cited Cancemi v. People, 18 N. Y. 128 (1858) holding that a petit jury could not constitutionally be waived.

6 Ill. Rev. Stat. 1959, Vol. 1, Ch. 38, § 702, states: "All offenses cognizable in the said courts shall be prosecuted by indictment or, except for crimes of treason, murder or manslaughter, by information if the defendant after he has been advised of the nature of the charges and of his rights, waives in open court prosecution by indictment. The prosecution of a felony under an information shall be conducted in accordance with the statutory requirements of proceedings under an indictment." This amendment has been supplemented by Rule 26 of the Illinois Supreme Court.

of that amendment was upheld in *People* v. *Bradley*.[7] The court specifically rejected the reasoning of the New York court in the Battista case[8] and alluded to the federal and state cases that uphold the constitutionality of waiver of indictment.[9] The Illinois constitutional language is similar to that of the constitutions mentioned but adds a proviso giving the legislature authority to abolish the grand jury altogether.[10] This proviso fortifies the Illinois Court's position for it indicates that any policy considerations concerning the waiver of the indictment requirement may be made by the legislature. It has been suggested, therefore, that "the power to abolish completely included the power to do something less."[11]

Contrary to this Illinois view, the New York and Ohio courts start with the major premise that a right cannot be waived if public injury may result and conclude that a waiver of indictment cannot validly be made. These courts do not explain the minor premise, namely, the nature of the alleged public injury. These courts also do not state their bases or standards that the right to accusation by a grand jury is "fundamental" or "jurisdictional." Authority for the statement that indictment is a jurisdictional prerequisite is found in two early federal cases.[12] But those cases did not deal with the waiver question here involved. The present federal position is that voluntary waiver in a court of the United States does not violate rights conferred by the federal constitution.[13] It was early decided that the federal indictment provision conferred no rights on defendants before state tribunals.[14]

It has been stated by an Ohio court that "the primary function of an indictment is to inform the accused of the offense with which he is

7 7 Ill. (2d) 619, 131 N. E. (2d) 538 (1956).

8 Id. at p. 623 the court said: "The Battista case speaks of 'public injury' which would result from permitting waiver of indictment. But it is hard to see how the public can be injured by allowing an individual to state that he neither needs nor desires the protection of a formal action by the grand jury in a particular proceeding."

9 Id. at p. 624.

10 Ill. Const. 1870, Art. II, § 8: "No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: *Provided*, that the grand jury may be abolished by law in all cases."

11 34 CHICAGO-KENT LAW REVIEW 255, 256.

12 Ex Parte Baine, 121 U. S. 1, 11 S. Ct. 871, 30 L. Ed. 849 (1886), Ex Parte McCluskey, 40 F. 71 (1889).

13 Fed. Rules Crim. Pro., Rule 7(b): "An offense which may be punishable by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant after he has been advised of the nature of the charges and his rights, waives in open court prosecution by indictment." This rule was upheld in Barkman v. Sanford, 162 F. (2d) 592 (1947).

14 Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884).

charged so that he may prepare for trial.''[15] This end could just as properly be fulfilled by the use of an information. Under a waiver provision the accused is given a new privilege without depriving him of any right. By waiving indictment, the accused has the benefit of a trial unhampered by undue delay and the taxpayers have the benefit of a less costly and less cumbersome accusatory procedure.

J. H. ALESIA

INJUNCTION — PRELIMINARY AND INTERLOCUTORY INJUNCTIONS — WHETHER A FAILURE TO SEASONABLY RAISE A STATUTORY OBJECTION TO THE ISSUANCE OF A PRELIMINARY INJUNCTION BARS AN AWARD OF DAMAGES ON THE SUBSEQUENT DISSOLUTION OF THE INJUNCTION—Further illumination of the right of a defendant against whom an injunction has been wrongfully issued to receive an award of damages has been provided in the recent case of *Presbyterian Distribution Service* v. *Chicago National Bank*.[1] The case arose with the entry of a judgment by confession in favor of the defendant and against the plaintiff herein. Upon notice and hearing in the trial court, a preliminary injunction was issued in favor of the plaintiff which restrained the defendant from enforcing the judgment. At that time, the defendant failed to object even though the bond required by statute was not posted.[2] Shortly thereafter, the defendant successfully moved to vacate the order granting the injunction on the ground that the plaintiff had failed to post the mandatory bond and, at this suggestion, was awarded damages by the trial court.[3] The Appellate Court for the First District of Illinois reversed the award since the defendant neglected to interpose an objection which, in all probability, would have been successful and thus prevented the ensuing damage.

The Illinois General Assembly has heretofore enacted two statutes inaugurating the right to an award of damages upon the dissolution of a wrongfully issued preliminary injunction. The first measure was enacted

[15] State v. Roche, 135 N. E. (2d) 789 (Ohio App., 1955).

[1] 21 Ill. App. (2d) 188, 157 N. E. (2d) 789 (1959).

[2] Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 8, provides that prior to the issuance of an injunction restraining the enforcement of a judgment the plaintiff must post a bond in double the amount of the judgment and costs, plus an additional amount to cover any damages that may be awarded in the event the injunction is dissolved.

[3] Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 12, which, in effect, provides that where a preliminary injunction is dissolved, the successful party may be awarded any damages sustained while the injunction was in force.

Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 8, which, in effect, provides that upon the dissolution of an injunction issued to restrain the enforcement of a judgment the plaintiff can be assessed damages not to exceed ten per cent of the monetary value of the judgment released, exclusive of interest and costs.