Summer 1976

Criminal Law in Tennessee in 1975: A Critical Survey

Joseph G. Cook

TENNESSEE LAW REVIEW

Volume 43 Summer 1976 Number 4

CRIMINAL LAW IN TENNESSEE IN 1975: A CRITICAL SURVEY*

JOSEPH G. COOK**

** B.A., J.D., University of Alabama; LL.M., Yale Law School. Professor of Law, University of Tennessee.

I. INTRODUCTION

The most noteworthy events in criminal law in Tennessee in 1975 were two decisions of the Tennessee Supreme Court.[1] In

1. This survey encompasses state and federal decisions reported in the National Reporter System during the calendar year 1975.

Occasional reference will be made to previous surveys, the complete citations for which are as follows: Cook, *Criminal Law in Tennessee in 1974: A Critical Survey*, 42 TENN. L. REV. 187 (1975); Cook, *Criminal Law in Tennessee in 1973: A Critical Survey*, 41 TENN. L. REV. 203 (1974); Cook, *Criminal Law in Tennessee in 1972: A Critical Survey*, 40 TENN. L. REV. 569 (1973); Cook, *Criminal Law in Tennessee in 1971: A Critical Survey*, 39 TENN. L. REV. 247 (1972); Cook, *Criminal Law in Tennessee in 1970: A Critical Survey*, 38 TENN. L. REV. 182 (1971). [Hereinafter these surveys will be cited as follows: *1974 Survey; 1973 Survey; 1972 Survey; 1971 Survey; 1970 Survey.*]

Kersey v. State,[2] the giving of the *Allen* charge to deadlocked or potentially deadlocked juries was disapproved, and guidelines for such instructions fashioned after the ABA Standards Relating to Trial by Jury were articulated.[3] In *Baxter v. Rose*,[4] the court replaced the traditional "farce" or "mockery-of-justice" standard for determining effective assistance of counsel with what was intended to be a more stringent standard. At the same time, the distinction in standards between retained and appointed counsel was abolished.[5] In the area of substantive criminal law, the Tennessee crime-against-nature statute was sustained against constitutional challenge by the United States Supreme Court.[6]

II. OFFENSES

A. Against Person

1. Homicide

Several cases raised the issue of the showing of premeditation required to sustain a conviction of first degree murder. In *Sikes v. State*,[7] the defendant had shot and killed his seventeen-year-old stepson. The fatal shooting was the culmination of a long dispute, during which the deceased and the defendant had engaged in a fist fight and the deceased had fired his pistol in the direction of the defendant. Although the defendant testified that the deceased had been shooting at him at the time of the fatal injury, other evidence contradicted this, including the fact that the deceased was shot from the rear and was found with his pistol in his pocket containing no spent shells. In sustaining a conviction for first degree murder, the court took special notice of the fact that the defendant had fired two shots from a shotgun. It reasoned, "The fact that the death weapon had to be manually 'pumped' before it could be fired the second time is a strong indication of willful, deliberate intent to kill."[8] Notably, the court did not address the issue of premeditation. While it might well be concluded that the second shot was premeditated, that fact is

2. 525 S.W.2d 139 (Tenn. 1975).
3. *See* text accompanying notes 174-81 *infra*.
4. 523 S.W.2d 930 (Tenn. 1975).
5. *See* text accompanying notes 123-32 *infra*.
6. *See* text accompanying notes 32-41 *infra*.
7. 524 S.W.2d 483 (Tenn. 1975).
8. *Id.* at 486. *See also* People v. Bjornsen, 79 Cal. App. 2d 519, 180 P.2d 443 (1947).

immaterial if the deceased was killed by the first shot. Apparently the evidence did not clearly indicate which one of the shots was lethal. Apart from this evidence, however, premeditation might have been found in the fact that the defendant "stealthily approached the house, carrying a shotgun loaded and ready to fire."[9]

A first degree murder conviction was also affirmed in *Everett v. State.*[10] As the result of an exchange of words that took place outside a grocery store, the defendant attacked the deceased with a claw hammer. The deceased successfully avoided the blow, whereupon the defendant reached into his pocket, removed a pistol and fired it, killing the deceased. The supreme court agreed with the conclusion of the court of criminal appeals that the defendant "'deliberately and designedly and premeditatedly baited the deceased by some offensive remark calculated to infuriate him and provoke him to belligerence; . . . the defendant planned and instigated this difficulty with the intention and purpose of creating an excuse to kill the deceased.'"[11]

In *Suggars v. State,*[12] the court found that an initial claim of innocence by the defendant coupled with a confession two days later manifested premeditation. Judge Galbreath, dissenting, suggested that the denial of guilt was no indication of premeditation.[13]

---

9. 524 S.W.2d at 486. This evidence is itself ambiguous in light of the testimony of the defendant that he was defending himself against further armed assaults by the deceased. The court concluded that the jury acted within its province in rejecting the theory of the defendant.

Justice Henry, dissenting, found the conclusion of the majority unwarranted:

> In my view either the defendant or the deceased could have shot the other under a well-founded fear of death or the infliction of great bodily harm. It was inevitable that this "running fracas" would lead to bloodshed. This tragedy came as a result of their joint, mutual and concurrent criminal conduct. I am unwilling to visit upon the survivor of this duel in the dark the penalty of a first degree murder conviction and sentence.

Id.

10. 528 S.W.2d 25 (Tenn. 1975).

11. *Id.* at 28. Justices Brock and Henry dissented. Justice Brock reasoned that while anger induced in the defendant was insufficient to reduce the offense to manslaughter, it did "negate a finding of cool deliberation which is essential to a finding of first degree murder. . . ." *Id.* at 29. Justice Henry concluded that there was no proof of premeditation.

12. 520 S.W.2d 364 (Tenn. Crim. App. 1974).

13. The fact that the defendant denied his guilt proves nothing. It is not inconsistent with human nature that a person who has accidently killed another under circumstances that would constitute involuntary manslaughter, or indeed

Tennessee law on a different point may be affected by *Mullaney v. Wilbur*,[14] in which the United States Supreme Court held that the due process clause of the fourteenth amendment was violated by a Maine rule that required a murder defendant who desired to reduce the offense to manslaughter to establish by a preponderance of the evidence that the act had been in the heat of passion or sudden provocation.

> Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where . . . it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. . . . We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.[15]

The court stated that the requirement, existing in many states, that the defendant must present "some evidence" that he was acting in the heat of passion before the prosecution has the burden of negating that element is not affected by the decision.[16] Tennessee cases speak in terms of a presumption of malice whenever a homocide is shown, however, and thus place on the defendant the burden of demonstrating that the offense should be reduced to manslaughter.[17] Such a presumption would seem to be inconsistent with the holding in *Mullaney* in a case in which a defendant has "properly presented" the assertion that he was acting in the heat of passion.

2. Rape

The degree of force required to sustain a conviction for rape

---

> nonculpable homicide, might seek to evade detection as the killer. So the fact that he denied complicity proves nothing except that he wanted to escape the consequences, in so far as possible, of his rash act. The state of mind at the time of the killing is the key factor.

Id. at 369.

14. 421 U.S. 684, 95 S. Ct. 1881 (1975).

15. *Id.* at ____, 95 S.Ct. at 1892 (emphasis in original).

16. *Id.* at ____, 95 S.Ct. at 1891 n.28.

17. *See* Hawkins v. State, 527 S.W.2d 157 (Tenn. 1975); Humphreys v. State, 531 S.W.2d 127 (Tenn. Crim. App. 1975); Bunch v. State, 3 Tenn. Crim. App. 481, 463 S.W.2d 956 (1970). *See also 1973 Survey, supra* note 1, at 511.

was considered in two cases in which the accused had neither brandished a weapon nor violently assaulted the victim prior to the act of intercourse. Nor was there any explicit resistance by the victim in either case. It is clearly established that the force required for penetration is insufficient alone to support a conviction for rape.[18] In *Lundy v. State*,[19] the court held that because the victim had been kidnapped and imprisoned by the defendant, she was under a reasonable apprehension of harm and this satisfied the requirement of force.[20] Similarly, in *Lillard v. State*,[21] the court concluded that if the victim justifiably feared that any resistance would be met with the force the accused deemed necessary to accomplish the act, then the crime was forcible. The reasonableness of such a belief was supported in this case by the fact that resistance to a second act of intercourse had been countered by a violent response.[22]

A second issue in the *Lillard* case was whether multiple acts of intercourse with the same victim could support multiple charges of rape. The accused had been engaged in intercourse with a second victim when the first assaulted him with a rock.

---

18. *See* 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 307 (1957).

19. 521 S.W.2d 591 (Tenn. Crim. App. 1975).

20. It would be an unreasonable misapplication of the law to require as a matter of law that a captured female be required to incur a beating before it could be said that demanded intercourse with her was rape. The force and restraints inherent in the situation supply the forcible character to the act.

Id. at 594.

21. 528 S.W.2d 207 (Tenn. Crim. App. 1975).

22. The persuasiveness of this point is slightly diminished by the fact that the defendant had intercourse with two victims. While he was engaged in intercourse with the second victim the first attacked him with a rock. The violence of the accused was in retaliation for this act rather than, at least immediately, for the purpose of accomplishing the act of intercourse. While the accused thereafter engaged in another act of intercourse with the second victim, he made no further advances against the first. The evidence, therefore, is seen by the court as manifesting a violent disposition on the part of the accused prior to the initial sexual assaults upon each. Wigmore observes, "*Subsequent* hostility is . . . receivable; that it arose only subsequently is a matter for explanation by the opponent." 2 J. WIGMORE, EVIDENCE § 396 (3d ed. 1940) (emphasis in original). Certainly such an explanation is offerable by the defendant in the present case. The matter is further complicated by the fact that the issue is not simply the violent propensity of the defendant but the victim's reasonable apprehension of that propensity. The subsequent behavior of the defendant is scarcely relevant to the ultimate fact.

While the court chose to rely on the subsequent hostility of the defendant to demonstrate the use of force in the perpetration of the offense, the belief of the victim in the futility of resistance might as easily be attributed to the defendant's statement prior to either assault "that he had a pistol, that he was out on bond for having killed a university professor and that killing them wouldn't matter." 528 S.W.2d at 209.

He thereupon terminated the intercourse and assaulted the first victim with his fists, threatening to kill her. Thereafter he drove the second victim to another location and recommenced the intercourse. The court concluded that there were "[i]n fact two separate rapes," and that the defendant could be convicted of both.[23] In support of its conclusion, the court cited Wharton's,[24] which in turn had cited a single decision in support of the principle.[25] In that case,[26] the defendant had engaged in two acts of sexual intercourse in one county and then had driven to another county and engaged in an additional act of intercourse. He was acquitted in respect to the first two acts and pleaded double jeopardy in respect to the third act. The Alabama Supreme Court affirmed the conviction,[27] holding that "each act of intercourse constitutes a separate and distinct offense."[28]

Judge Galbreath, dissenting in the present case, quoted a passage from *Patmore v. State*[29] in which the court had said:

> Even if it be conceded that two convictions and two punishments may be had in any case upon separate counts, the practice is not approved, and, certainly it must be clear that the offenses are wholly separate and distinct. Our own cases appear to prohibit the practice where the offenses grow out of one transaction and involve but one criminal intent.[30]

---

23. *Id.* at 210.

> [W]e do not agree that a man who has raped a woman once may again assault and ravish her with impunity, at another time and at another place, as was done here. An intent was formed to rape her again. The evidence of the second rape is entirely additional to that of the first. Additional orders were given to the captive female, an intent to have her again was formed and manifested and the crime committed. Certainly there was separate and additional fear, humiliation and danger to the victim.

Id. at 211.

24. 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 304 (1957).

25. The present court cited two contra Oklahoma decisions that it chose not to follow.

26. Mikell v. State, 242 Ala. 298, 5 So. 2d 825 (1941).

27. The charge given the jury in the *Mikell* case would probably be unacceptable today under the authority of Ashe v. Swenson, 297 U.S. 436 (1970), which held that the state was collaterally estopped from litigating a fact that had been decided in favor of the defendant in a previous proceeding.

The Tennessee Court of Criminal Appeals incorrectly reported that the Alabama court found the second prosecution barred. In fact the Alabama Supreme Court reversed the court of appeals and affirmed the judgment of conviction.

28. 242 Ala. at 299, 5 So. 2d at 826.

29. 152 Tenn. 281, 277 S.W. 892 (1925).

30. *Id.* at 284, 277 S.W. at 893.

However, the context in which the issue arose in the *Patmore* case was quite different. The defendant had been charged with the possession of a still used for the manufacture of whiskey and with the unlawful manufacture of whiskey. The court concluded that the case came within the quoted rule since "the two offenses were but parts of the same transaction, and evidence of the manufacturing affords proof of the possessing."[31] Such an interrelationship of offenses was not presented in *Lillard*.

3. Sodomy

The constitutionality of the Tennessee crime-against-nature statute[32] was sustained by the United States Supreme Court in *Rose v. Locke*.[33] The respondent had been convicted under the statute for an act of cunnilingus, and his conviction had been affirmed against claims that the act did not come within the statute and that the statute was unconstitutionally vague.[34] Thereafter he renewed the constitutional argument in a petition for writ of habeas corpus in the federal district court, which rejected the contention[35] on the authority of *Wainwright v. Stone*.[36] The United States Court of Appeals for the Sixth Circuit, however, reversed, finding that "no reported Tennessee opinion had previously applied the Tennessee statute to cunnilingus"[37] and apparently concluding that the respondent had received insufficient notice of the proscribed behavior. The court distinguished *Stone*, holding that the Florida statute there involved "had long been construed as proscribing '[t]hese very acts.'"[38]

The Supreme Court reversed, holding that such previous constructions of the statute were not a prerequisite to constitutionality.[39] More important than such prior constructions was the

31. *Id.* at 285, 277 S.W. at 893.
32. TENN. CODE ANN. § 39-707 (1955).
33. 423 U.S. 48 (1975).
34. Locke v. State, 501 S.W.2d 826 (Tenn. Crim. App. 1973).
35. *See* Locke v. Rose, 514 F.2d 570, 571 (6th Cir. 1975).
36. 414 U.S. 21 (1973).
37. 514 F.2d at 571.
38. *Id.*
39. "If that were the case it would be extremely difficult ever to mount an effective prosecution based upon the broader of two reasonable constructions of newly enacted or previously unapplied statutes, even though a neighboring jurisdiction had been applying the broader construction of its identically worded provision for years." Rose v. Locke, 423 U.S. 48, ____, 96 S. Ct. 243, 245 (1975).

fact that the broader construction advocated by the petitioner had been adopted in other jurisdictions[40] and that there was language in prior Tennessee decisions favoring such a broader interpretation.[41] Justice Brennan and Justice Stewart, each joined by Justice Marshall, wrote dissenting opinions contending that the respondent had been denied due process of law.

B. Against Property

1. Forgery

An essential element of the offense of uttering or passing a forged instrument is knowledge that the instrument is false.[42] In *Clancy v. State*,[43] the petitioner and a female companion went to a sporting goods store and selected several items for purchase. The companion offered what appeared to be a payroll check from a restaurant in payment for the goods. The merchant refused to accept the check or part with the goods and notified law enforcement authorities of the incident. Although the two were convicted of offering to pass a forged instrument, on appeal the petitioner contended that there was insufficient proof of knowledge on his part that the instrument was false. The court of criminal appeals affirmed the conviction, observing that " '[i]t would take a remarkably naive and ingenuous jury to accept as reasonable the theory that this defendant had lived in intimate association with his co-defendant, as he did, without the knowledge that she had in her possession these checks . . . .' "[44] The supreme court disagreed and reversed, finding neither sufficient proof of knowledge nor even direct or circumstantial evidence that the check was forged.

2. Extortion

The question of the first amendment as a bar to a prosecution

40. "Anyone who cared to do so could certainly determine what particular acts have been considered crimes against nature, and there can be no contention that the respondent's acts were ones never before considered as such." *Id.* at 244.

41. The court cited Sherrill v. State, 204 Tenn. 427, 321 S.W.2d 811 (1959), and Fisher v. State, 197 Tenn. 594, 277 S.W.2d 340 (1955).

42. *See* Woffard v. State, 210 Tenn. 267, 358 S.W.2d 302 (1962); Keebler v. State, 3 Tenn. Crim. App. 447, 463 S.W.2d 151 (1970).

43. 521 S.W.2d 780 (Tenn. 1975).

44. *Id.* at 783.

for extortion[45] arose in *Moore v. State.*[46] The defendant and another had approached the manager of a grocery store and requested a donation to the survival program of the Black Panther Party. When the manager advised them that he was without authority to make such a donation and that the president of the company was the appropriate party to contact, the defendant said, "Well, I guess we will have to close them up." After a subsequent solicitation of a donation was equally unsuccessful, the defendant and others set up a picket line at the grocery. The defendant was convicted of extortion, and the conviction was affirmed on appeal. Notwithstanding the fact that the picketing was peaceful, a majority of the court submitted that means "lawful in themselves, can be rendered unlawful by the ends for which they are undertaken."[47] The court found that the purpose of the picketing was to harm the business interests of the store, and that "[t]he defendant had no legitimate relationship with the store whereby this purpose could be approved under the protection of the First Amendment."[48] Judge Oliver, dissenting, submitted that since no contributions were made to the defendant or any of his associates, the crime of extortion had not occurred.[49] Moreover, the dissent urged that the conduct of the defendant was fully protected by the first amendment.[50]

---

45. The Tennessee extortion statute, TENN. CODE ANN. § 39-4301 (1955), provides:

> If any person, either verbally or by written or printed communication, maliciously threaten to accuse another of a crime, offense, or immoral act, or to do any injury to the person, reputation or property of another, with intent thereby to extort any money, property, or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall, on conviction, be punished by imprisonment in the penitentiary not less than two (2) years nor more than five (5) years.

46. 519 S.W.2d 604 (Tenn. Crim. App. 1974).

47. *Id.* at 606.

48. *Id.* "It is apparent that the Red Food Store should have a free and unencumbered right not to contribute, in a free system, secure in the knowledge that no retribution will be forthcoming under the guise of constitutional protection." *Id.* at 607.

49. In Swain v. State, 219 Tenn. 145, 407 S.W.2d 452 (1966), a conviction for extortion was affirmed under circumstances similar to those in *Moore*. In *Swain*, however, the victim actually purchased space in the defendant's magazine.

50. Reasonable peaceful picketing lawfully urging boycott of a business establishment, which does not improperly interfere with the public's right to safe and convenient use of the streets and other facilities, nor violates proper statutes or ordinances, designed for the protection of such rights of the public, nor contravenes any paramount interest to the public at large or a valid public policy of the state, is a constitutionally protected right of free speech and free assembly and is not unlawful.

519 S.W.2d at 610-11.

In a subsequent petition for federal habeas corpus relief[51] the petitioner again alleged the unconstitutionality of the statute under which he was convicted. The principal argument made in the petition was that the statute was too vague to give fair warning as required by the due process clause of the fourteenth amendment. In rejecting that argument the district court noted that any ambiguities appearing on the face of the statute had been corrected by narrowing interpretations in the state courts.[52] As an alternative ground for relief the petitioner again raised the argument that had failed in state court: since the right to picket is constitutionally protected, a threat to do so cannot give rise to criminal liability. Agreeing with the state court, the district court distinguished picketing or threatening to picket for the purpose of extorting a payment and held that picketing for extortionate purposes was not protected.

3. Receiving and Concealing Stolen Property

In *Whitwell v. State*,[53] the defendants were charged with grand larceny and with receiving and concealing stolen property, both charges arising out of a theft of cattle. After deliberating for some time, the jury reported that they were unable to agree. The foreman said, "Judge, we've considered grand larceny and we've all decided that the defendants did take and load the cattle and they did have them in their truck but we don't think they knew they were stealing at the time . . . . We can't agree on anything else."[54] The court entered a verdict of not guilty on the grand larceny charge but only granted a mistrial on the receiving and concealing stolen property charge. The supreme court, however, remanded the case for a dismissal of all charges. It reasoned that the defendants could not be guilty of receiving stolen property since they did not receive the cattle from anyone.[55] In addition, to be guilty of concealing stolen property, it was necessary that the defendants knew the property to have been stolen. Since the statement of the jury foreman indicated a resolution of that issue

51. Moore v. Newell, 401 F. Supp. 1018 (E.D. Tenn. 1975).

52. *See* Swain v. State, 219 Tenn. 145, 407 S.W.2d 452 (1966); Furlotte v. State, 209 Tenn. 122, 350 S.W.2d 72 (1961).

53. 520 S.W.2d 338 (Tenn. 1975).

54. *Id.* at 340.

55. *See* Deerfield v. State, 220 Tenn. 546, 420 S.W.2d 649 (1967). *See also 1970 Survey, supra* note 1, at 189.

favorable to the defendants, they had effectively been found not guilty of concealing stolen property.[56]

C. *Against Person and Property*

1. Burglary

Burglary as defined at common law requires an entering of the premises with the intent to commit a felony.[57] In *State v. Crow*,[58] the court recognized that the entry requirement is satisfied if any portion of the body of the defendant enters.[59] Affirming the conviction, the court concluded that the record showed that the defendant either reached through the broken glass in the door, or, alternatively, inserted the instrument needed to break the window through the opening. The first alternative would clearly be sufficient to establish entry, but the preferred common law view would distinguish an instrument used to accomplish the entry from an instrument intended to be used in the subsequent felony. The entry requirement could only be satisfied by the use of an instrument in the latter category.[60]

2. Robbery

In *State v. Scates*,[61] the defendant and a companion escaped from a penal institution by overpowering the superintendent and a guard with axes and gaining possession of a pickup truck, which later was found abandoned several miles away. The defendant was convicted of escape and armed robbery. The court of criminal appeals found insufficient proof of an intent to permanently deprive the owner of the truck, but the supreme court held that the intent could be established by circumstantial evidence. Moreover, it observed that, since a vehicle was taken, the "joyriding" statute,[62] which does not require proof of an intent permanently to deprive, was applicable. The defendant, however, was

56. Justice Harbison, dissenting, did not agree with the all-encompassing reading given the statement of the jury foreman by the majority. 520 S.W.2d at 345.

57. *See* Davis v. State, 43 Tenn. (3 Cold.) 77 (1866).

58. 517 S.W.2d 751 (Tenn. 1974).

59. *See generally* 2 R. ANDERSON, WHARTON'S LAW AND PROCEDURE § 401 (1957).

60. *See* State v. O'Leary, 31 N.J. Super. 411, 107 A.2d 13 (App. Div. 1954); State v. Crawford, 8 N.D. 539, 80 N.W. 193 (1899); Russell v. State, 158 Tex. Crim. 350, 255 S.W.2d 881 (1953).

61. 524 S.W.2d 929 (Tenn. 1975).

62. TENN. CODE ANN. § 59-504 (1955).

convicted of robbery, which is an aggrevated larceny.[63] By its decision the court, without explanation, appears to have expanded the scope of the robbery statute to encompass an aggravated violation of the "joy-riding" statute.

The court was then called upon to reconcile *Young v. State*.[64] There a deputy sheriff was putting a prisoner in a cell with the defendant when the defendant pointed a loaded pistol at the deputy, took his keys, and then ordered him into the cell and locked it. Defendant then escaped, discarding the keys in a field adjoining the jail. He was convicted of escape and armed robbery, but the supreme court found insufficient intent to permanently deprive the owner of the keys. In *Scates*, the court concluded somewhat feebly, "Probably [*Young*] can be distinguished factually from the present case where the accused obviously did more than merely retard pursuit. We do not find it necessary to overrule *Young*, but we are persuaded that to extend it beyond its precise facts would be contrary to the public interest."[65]

D. Public Offenses

1. Interfering with an Officer

A conviction for the common law crime of interfering with an officer was affirmed in *Pope v. State*.[66] The offense had been recognized, though not found proven, in an earlier case[67] in which the court had required a showing of the official status of the officer, a lawful act by the officer, and an act of resistance by the defendant. In the present case, the defendant was found to have shouted and held the arm of an officer while the latter was making a legal arrest of two others.[68]

2. Conspiracy

In 1897 a statute was enacted making it a felony to conspire

63. *See* Freeman v. State, 520 S.W.2d 739 (Tenn. 1975); Watson v. State, 207 Tenn. 581, 341 S.W.2d 728 (1960).

64. 487 S.W.2d 305 (Tenn. 1972).

65. 524 S.W.2d 929, 932 (Tenn. 1975); *cf. id.* at 932 (Henry, J., dissenting).

66. 528 S.W.2d 54 (Tenn. Crim. App. 1975).

67. State v. Wright, 164 Tenn. 56, 46 S.W.2d 59 (1932).

68. Judge Galbreath, dissenting, found insufficient proof of the offense. 528 S.W.2d 54, 60 (Tenn. Crim. App. 1975).

to take human life, inflict punishment or destroy property.[69] While the conduct proscribed was also covered by the earlier enacted general conspiracy statute,[70] the later provision carried more severe punishment. In 1929, in *Trotter v. State*,[71] the court recognized that the statute had been enacted to thwart the activities of a terrorist group known as the White Caps[72] and held that the statute should be interpreted in that historical context. The *Trotter* court concluded that, so viewed, the 1897 statute "was not intended to deal with the ordinary crime of conspiracy."[73] This interpretation was followed in *Presley v. State*,[74] in which the court reversed a conviction for conspiracy improperly brought under the statute.

III. PROCEDURE

A. Arrest

1. Probable Cause

Probable cause for arrest may arise from observations made by an officer from a legitimate vantage point. In *Smith v. State*,[75] the arresting officer was invited onto premises adjoining those of the accused and from there observed marijuana growing in a box adjoining the accused's mobile home. The court held that the

---

69. TENN. CODE ANN. § 39-1106 (1975):

Conspiracy to take human life, inflict punishment or burn or destroy property—Penalty. It shall be a felony punishable by from three (3) years to twenty-one (21) years' imprisonment in the penitentiary and by full judgment of infamy and disqualification, for two (2) or more persons to enter into or form any conspiracy or combination under any name, or upon any pretext whatsoever, to take human life, or to engage in any act reasonably calculated to cause the loss of life, whether generally or of a class or classes, or of any individual or individuals; or to inflict corporal punishment or injury, whether generally or upon a class or classes, or upon an individual or individuals; or to burn or otherwise destroy property or to feloniously take the same whether generally or of a class or classes, or of an individual or individuals.

70. TENN. CODE ANN. § 39-1101 (1975).

71. 158 Tenn. 264, 12 S.W.2d 951 (1929).

72. "This organization burned property, took human life, inflicted corporal punishment, and terrorized communities in which it operated. Its existence had grown to be a public scandal, and this drastic statute was passed with the object of destroying this and all similar lawless conspiracies or combinations." *Id.* at 270, 12 S.W.2d at 953.

73. *Id.* at 271, 12 S.W.2d at 953. *See also* Asbury v. State, 178 Tenn. 43, 154 S.W.2d 794 (1941).

74. 528 S.W.2d 52 (Tenn. Crim. App.), *cert. denied, id.* (1974).

75. 519 S.W.2d 407 (Tenn. Crim. App. 1975).

observation provided a sufficient basis for the arrest of the accused and an incident seizure.[76]

2. Fruit of the Poisonous Tree

In *Brown v. Illinois*,[77] the United States Supreme Court addressed a question that had been the source of substantial controversy in the state and federal courts:[78] If a suspect is illegally arrested, will the giving of *Miranda* warnings sufficiently dissipate the taint of the illegal arrest and thereby render any ensuing statement of the accused admissible in evidence? The landmark decision is *Wong Sun v. United States*,[79] which concerned, *inter alia*, the statement of one defendant given at gunpoint in the course of an illegal arrest in his residence and the statement of another defendant given several days after an illegal arrest but while he was still illegally detained. The Court concluded that the first statement was inadmissible as the fruit of the poisonous tree but that the latter statement was admissible because "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.' "[80]

In *Brown* the accused was arrested for murder, without probable cause and thus illegally, and taken to the police station. A short time thereafter he was given *Miranda* warnings, and he then waived his rights and confessed the crime. The Supreme Court held that *Miranda* warnings were not sufficient, standing alone, to neutralize the effect of an illegal arrest, and that to hold otherwise would largely eliminate the constitutional protection against illegal arrest.[81] The Court concluded that, under the *Wong Sun* standard, the determination of admissibility of a confession fol-

76. *See* text accompanying notes 88-89 *infra*.

77. 422 U.S. 590 (1975).

78. *See* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: PRETRIAL RIGHTS § 171 (1972) [hereinafter cited as PRETRIAL RIGHTS].

79. 371 U.S. 471 (1963).

80. *Id.* at 491.

81. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom hopefully could be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure all" and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

422 U.S. at ___, 95 S. Ct. at 2261.

lowing an illegal arrest must remain a matter of evaluation of all the relevant facts in each case, no one of which will be dispositive.[82]

3. Hearing on Probable Cause

While reaffirming the principle that an arrest for felony may be made without a warrant,[83] the Supreme Court held in *Gerstein v. Pugh*[84] that an accused detained for trial on an information, as opposed to a grand jury indictment, is entitled under the fourth amendment to "a judical determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[85] Such a determination is not required to take the form of an adversary hearing, nor is it a "critical stage" in the prosecution requiring the assistance of counsel. Further, "although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause."[86]

B. Search and Seizure

1. Incident to Arrest

The most frequently employed exception to the warrant requirement is the search incident to arrest.[87] For such a search to be valid, the prosecution must demonstrate that probable cause was present prior to the moment the arrest occurred; the arrest cannot be retroactively validated by the product of the search. In

---

82. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by the exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

Id. at ___, 95 S.Ct. at 2261-62.

83. *See* PRETRIAL RIGHTS, *supra* note 78, at § 15.

84. 420 U.S. 103 (1975).

85. *Id.* at 114.

86. *Id.* at 119.

87. *See* PRETRIAL RIGHTS, *supra* note 78, at § 44. The search must be spatially confined to the area surrounding the person arrested. *See* Chimel v. California, 395 U.S. 752 (1969); United States v. Hayes, 518 F.2d 675 (6th Cir. 1975).

Smith v. State,[88] however, the court followed the frequently articulated rule[89] that a search may precede an arrest and still be incident thereto if the prosecution can show that probable cause for the arrest was already present.

2. Plain View

A warrant is not required for the seizure of incriminating evidence that comes within plain view[90] provided the officer who sees the evidence is in a place where he has a right to be.[91] In *Coolidge v. New Hampshire*,[92] the Supreme Court made the dubious pronouncement that for the plain view doctrine to apply, the evidence must have been discovered inadvertently, that is, unexpectedly. Although this portion of the *Coolidge* opinion garnered the support of less than a majority of the Court, it has been followed by a substantial number of lower courts.[93] The issue was squarely confronted in *United States v. Sanchez*,[94] in which a state narcotics agent received a tip from a reliable informant that he had observed heroin in the home of the accused. This information was received between 7 and 8 p.m., and a search warrant was issued around 10 p.m. Shortly thereafter the informant again called the agent and advised him that explosives would also be found on the premises. Although the agent then contacted a federal agent who was an expert in handling explosives and requested his assistance in carrying out the search, no additional warrant for the explosives was sought. Sometime after midnight the search was carried out; no narcotics were found, but seventy pounds of explosives were seized. The Sixth Circuit Court of Appeals found the search illegal because the warrant only authorized state officers to enter the premises in search of narcotics. Since there was probable cause to search for the explosives and ample opportunity to obtain a warrant, the seizure could not be validated under the warrant for narcotics.

---

88. 519 S.W.2d 407 (Tenn. Crim. App. 1975). *See also* Miller v. State, No. 31 Cocke (Tenn. Crim. App. April 15, 1975), *cited in* ABSTRACT (Office of the Attorney General), Sept./Oct. 1975, at 10.

89. *See* PRETRIAL RIGHTS, *supra* note 78, at 45.

90. *See id.* at § 47.

91. *See* United States v. Cody, 390 F. Supp. 616 (E.D. Tenn. 1974).

92. 403 U.S. 443 (1971).

93. *See* PRETRIAL RIGHTS, *supra* note 78, at § 47 n.13.

94. 509 F.2d 886 (6th Cir. 1975).

3. Exigent Circumstances

Warrantless searches are frequently sustained because they are found to be reasonable under the exigent circumstances doctrine.[95] In *United States v. Gargotto*,[96] two officers arrived at the scene of a building fire and proceeded to collect evidence that they believed might prove that the fire had been caused by arson. The court held the search reasonable since at the time of the seizure firemen were still hosing the area and there was a substantial danger of losing the evidence.

In 1967 the Supreme Court held in *Warden v. Hayden*[97] that a warrantless entry of residential premises for purposes of arrest may be reasonable if the officers are in "hot pursuit"[98] and that evidence discovered in the process is admissible. In *United States v. Holland*,[99] a detective followed footprints in the snow from the scene of a robbery to a driveway from which it appeared that an automobile had recently departed. When the driver of the automobile was located, he informed officers that another party had also been in the automobile, a fact that was confirmed by the dectective. Police proceeded to the home of the other party, entered without a warrant and arrested him. Holland was found during a search of the attic and was also arrested. The court, relying on *Hayden*,[100] held that these facts detailed "exigent circumstances" that came within the "hot pursuit" exception to the fourth amendment warrant requirement.[101]

4. Consent

A search may be carried out without a warrant if the party

---

95. *See* PRETRIAL RIGHTS, *supra* note 78, at § 49.

96. 510 F.2d 409 (6th Cir. 1974). *See also* United States v. Gargotto, 476 F.2d 1009 (6th Cir. 1973).

97. 387 U.S. 294 (1967).

98. In *Hayden*, officers, acting on reliable information that the petitioner was hiding in a certain residence and that he had weapons that had recently been used in a robbery, entered the premises, arrested petitioner, and seized the weapons. The Court concluded that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Id.* at 298-99.

99. 511 F.2d 38 (6th Cir.), *cert. denied*, 421 U.S. 1001 (1975).

100. Judge McCree dissented, arguing that the majority was extending the concept of hot pursuit beyond the facts and rationale of *Hayden*. *Id.* at 47.

101. *Id.* at 46. *See also* United States v. Rose, 440 F.2d 832 (6th Cir.), *cert. denied*, 404 U.S. 838 (1971).

in interest consents to the search.[102] Consent will not be found, however, if the party has acquiesced to an apparent assertion of lawful authority.[103] In *Kirvelaitis v. Gray*,[104] officers had probable cause to arrest the accused for murder. They telephoned the apartment in which the accused was living, and allowed the telephone to ring some fifty or sixty times, but received no answer. They knocked at the door at three-thirty in the morning and received no response. When the passkey failed to work, they broke down the door, finding within a Mr. Riboczi, the tenant, asleep in his bed. He indicated that the accused lived in the next room. The officers entered the room with drawn pistols, found the accused under the bed and placed him under arrest. Both the accused and Mr. Riboczi were asked for permission to search the premises, and both acquiesced. The court held that the consent of the accused, given at gun point, was involuntary, but that the consent of Mr. Riboczi was voluntary and was sufficient because the area searched was within the joint control of both parties.

5. Vehicle Searches

In *State v. Parker*,[105] the Tennessee Supreme Court reversed its earlier restrictive interpretation of *Carroll v. United States*[106] and held that if an officer has "reasonable or probable cause to believe that a vehicle contains items subject to seizure" and reasonably believes the vehicle to be moveable, a search may be undertaken.[107] The basis for the officer's "reasonable belief" in this case was a very detailed tip by a reliable informant that the accused had marijuana in his car. A few moments after receiving the tip the officer observed the car weaving along the highway and upon stopping the vehicle found the marijuana in the locations specified by the informant. In upholding the search the court rejected its earlier holding in *Tenpenny v. State*[108] that the

102. *See* PRETRIAL RIGHTS, *supra* note 78, at § 50.

103. *See* Bumper v. North Carolina, 391 U.S. 543 (1968).

104. 513 F.2d 213 (6th Cir. 1975). *See also 1974 Survey, supra* note 1, at 208-09.

105. 525 S.W.2d 128 (Tenn. 1975).

106. 267 U.S. 132 (1925).

107. 525 S.W.2d at 130. *See also* Hughes v. State, No. 1545 Williamson (Tenn. Crim. App. June 16, 1975), *cited in* ABSTRACT (Office of the Attorney General), Sept./Oct. 1975, at 9, *rev'd*, State v. Hughes, 544 S.W.2d 99 (Tenn. 1976).

108. 151 Tenn. 669, 270 S.W. 989 (1925). *Tenpenny* was decided less than a month after the United States Supreme Court handed down the *Carroll* decision. The accused

Carroll decision only applied to automobile searches authorized by statute.[109]

The propriety of a search of an impounded vehicle arose in *Hill v. State.*[110] Officers stopped the accused after they observed him going through a red light and took him into custody because he staggered and had a strong odor of alcohol on his breath. Following standard procedure, the officers called a wrecker to remove the car to the police station. Before the wrecker arrived one of the officers searched the vehicle in order to make a list of its contents and in the process found marijuana. The court upheld the admissibility of this evidence, saying that such searches were not motivated by an intent to discover evidence of crime but rather by a desire to protect the property of the owner of the impounded car.[111] The holding is consistent with a continuing line of United States Supreme Court decisions admitting evidence discovered during legitimate inventories of impounded vehicles.[112]

6. Standing to Object

An accused may effectively waive any fourth amendment objection to search of property by disclaiming ownership of that property. In *Miller v. State,*[113] the accused was arrested with an accomplice while in the process of a burglary. He informed the police that he had no car and had come into Tennessee from Ohio by hitchhiking. In a search incident to the arrest, however,

---

was driving a two-horse buggy at night when a car in which the sheriff was a passenger drove by him. Upon passing the accused the sheriff observed the reflection of what appeared to be a glass jar under a rug in the buggy. The sheriff then stopped the vehicle, threw back the rug and found illegal whiskey which the accused was charged with transporting. There was no indication in the record of any suspicious activity on the part of the accused or any informant's tip that gave rise to a reasonable belief that contraband was in the buggy.

109. The court in *Parker* placed heavy reliance on the explanation of *Carroll* given by the United States Supreme Court in Chambers v. Maroney, 399 U.S. 42 (1970).

110. 516 S.W.2d 361 (1974).

111. "Moreover as pointed out in the attorney general's excellent brief, to have surrendered the defendant's car to the wrecker company to be impounded by the city, without making an inventory of the contents of the car, would have been neglect of a duty resting upon the officer." *Id.* at 366. *But see* Depriest v. State, No. 1409 Humphreys (Tenn. Crim. App. August 26, 1975), *cited in* ABSTRACT (Office of the Attorney General), Nov./Dec. 1975, at 5.

112. *See* Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 1074 (1973); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967).

113. 520 S.W.2d 729 (Tenn. 1975).

car keys were found which fit the door, ignition and trunk of an automobile with an Ohio license plate parked at a nearby motel. A search of that vehicle yielded incriminating evidence linking the accused to another burglary. The court observed that although it would be a "close question" whether the search would have been valid if the accused had given the correct information about the ownership of the vehicle, it was a question which need not be considered.[114]

> As a general rule one person cannot complain about the reasonableness or legality of the search of the premises or property of another. Even if the warrantless search in question was illegal or unreasonable under the circumstances, we hold that these petitioners cannot complain of it, since they denied that the automobile in question was theirs or that they had any connection with it. Had they given the correct information to the police officers at the outset, the officers could have proceeded to obtain a warrant, if one was in fact necessary; or, if the officer did proceed improperly, the true owner or possessor would then have had standing to question the search.[115]

C. Right of Confrontation

The most elemental instance of the sixth amendment right of confrontation is the right of the accused to be present at his trial.[116] In *Stone v. State*,[117] on the second day of his trial the accused, claiming that he was ill, refused to leave his jail cell to come to court. Upon the advice of the jail physician that there was nothing physically wrong with the accused, the trial judge informed the accused that if he did not come to court the trial would proceed without him. The accused still refused to appear, and the trial was resumed. He appeared a few minutes later, after the testimony of one witness had been heard. The testimony did not implicate the accused, and his attorney had elected not to cross-examine the witness. The appellate court held that the continuation of the trial in the absence of the accused was error. It reasoned that if the trial court was convinced that the accused

---

114. *Id.* at 734.

115. *Id.* at 733.

116. J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: TRIAL RIGHTS § 5 (1974) [hereinafter cited as TRIAL RIGHTS].

117. 521 S.W.2d 597 (Tenn. Crim. App. 1974).

was able to attend, it should have physically compelled him to do so. While recognizing that the accused could waive the right to be present, the court found no waiver in this case, apparently because he had been given the option of remaining in his cell.[118] The court nevertheless affirmed the conviction because it found the error harmless.

D. Right to Counsel

1. Pro Se Defense

In *Faretta v. California,*[119] the United States Supreme Court held that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."[120] The right to present a pro se defense was thus legitimized not merely as the waiver of the right to counsel but as a distinct substantive right "to make one's own defense personally."[121] The Court viewed the right to the assistance of counsel as a "supplement" to this fundamental right.[122]

2. Effective Assistance

In one of the more significant decisions of the year, *Baxter v. Rose,*[123] the Tennessee Supreme Court abandoned the farce or mockery of justice standard for determining ineffective assistance of counsel and replaced it with the following test: "[W]hether the advice given, or the services rendered by the

---

118. Judge O'Brien concurred, finding an effective waiver of the right to be present.

119. 422 U.S. 806, 95 S.Ct. 2525 (1975).

120. *Id.* at ___, 95 S.Ct. at 2533.

121. *Id.*

122. *Id.* at ___, 95 S.Ct. 2534.

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Id. See also Burkhart v. State, No. 350 Knox (Tenn. Crim. App. August 13, 1975), *cited in* ABSTRACT (Office of the Attorney General), Sept./Oct. 1975, at 8, *rev'd*, State v. Burkhart, 541 S.W.2d 365 (1976).

123. 523 S.W.2d 930 (Tenn. 1975).

attorney, are within the range of competence demanded of attorneys in criminal cases."[124] The court expressly declined "to establish any precise nomenclature or . . . lay down any specific standards or guidelines."[125] It nevertheless did indicate that it would measure competence according to criteria suggested in *United States v. De Coster*[126] for the District of Columbia Circuit[127] and *Beasley v. United States*[128] for the Sixth Circuit.[129]

Tennessee has traditionally subscribed to the view that the defendant can not raise the issue of effective assistance of counsel

---

124. *Id.* at 936.

125. *Id.*

> We are content to leave the matter resting on a foundation of reasonable competence as tested by the authorities as herein set out. Trial courts and defense counsel should look to and be guided by the American Bar Association's Standards relating to the Administration of Criminal Justice in general, and specifically to those portions of the Standards which relate to the Defense Function.

Id.

126. 487 F.2d 1197 (D.C. Cir. 1973).

127. Specifically-(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

> (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them . . . . Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence.
>
> (3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Id. at 1203-04.

128. 491 F.2d 687 (6th Cir. 1974).

129. [T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.

Id. at 696 (citations omitted).

when counsel was retained by the defendant.[130] In *Baxter*, the court held that the sixth amendment right was "not necessarily dependent upon state action,"[131] and that the new standards for effective assistance applied "with equal force to privately retained counsel and counsel appointed to represent the indigent."[132]

Courts have frequently recognized that unreasonable restraints upon the use of counsel may result in a deprivation of constitutional rights.[133] In *Herring v. New York*,[134] the Supreme Court held unconsitutional a state statute that authorized judges in non-jury trials to deny counsel the opportunity to make a closing argument.[135] The Court did not question the power to regulate such arguments, however.[136]

In *Ray v. Rose*,[137] the petitioner, convicted of the murder of Dr. Martin Luther King, Jr., claimed ineffective assistance of counsel because his attorneys had a financial interest in certain contracts for publication rights to the story of the crime.[138] He

---

130. *See* Waggoner v. State, 512 S.W.2d 627 (Tenn. Crim. App. 1974); Long v. State, 510 S.W.2d 83 (Tenn. Crim. App. 1974). *See also 1972 Survey*, *supra* note 1, at 604; *1971 Survey*, *supra* note 1, at 273; *see generally* TRIAL RIGHTS, *supra* note 116, at § 42.

131. Baxter v. Rose, 523 S.W.2d 930, 938 (Tenn. 1975).

132. *Id.*

133. *See* TRIAL RIGHTS, *supra* note 116, at § 41.

134. 422 U.S. 853 (1975).

135. The only conceivable interest served by such a statute is expediency. Yet the difference in any case between total denial of final argument and concise but persuasive summation could spell the difference, for the defendant, between liberty and unjust imprisonment.

Id. at ___, 96 S.Ct. at 2555-56.

136. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark or otherwise impede the fair and orderly conduct of trial. In all these respects, he must have broad discretion.

Id. at ___, 96 S.Ct. at 2555.

137. 392 F. Supp. 601 (1975).

138. Hanes, first-retained counsel, arranged a contract whereby Ray assigned to Hanes 40% of the proceeds of a subsequent contract with Huie, an author. The subsequent contract was entered into by Hanes, Huie, and Ray and gave Huie exclusive rights to literary material dealing with the assassination. Huie agreed to pay both Ray and Hanes 30% of the gross receipts of the literary works. Later, the contract between Ray and Hanes was amended to limit the amount received by Hanes to $20,000 plus expenses.

Six months later, Hanes transferred all of his rights to royalties from Huie to Ray, and Ray transferred all of his rights to proceeds to his second-retained counsel, Foreman. Foreman conditionally reassigned to Ray all of the royalties in excess of $165,500, the

contended that they failed to pursue his defense adequately because it was not in their personal interest to do so.[139] The federal district court concluded that the petitioner had failed to establish that the performance of his attorneys "was not at least of the caliber of a lawyer with ordinary training and skill in criminal law."[140]

E. Guilty Plea

To be effective a guilty plea must be voluntarily and intelligently entered by the accused. Two cases raised the issue of improper coercion exerted upon a confessing accused by his own attorney. In *Stout v. United States*,[141] counsel induced the defendant to plead guilty by indicating that a lighter sentence would be imposed upon a guilty plea than upon a finding of guilt after a jury trial.[142] The Sixth Circuit Court of Appeals held that "[a] plea is not rendered involuntary merely because a prediction that a guilty plea will result in a light sentence does not come true."[143]

---

condition being that Ray would plead guilty without any unseemly conduct in court. *Id.* at 606-07.

139. In the habeas corpus petition Ray maintained that Hanes "refused to hire a professional investigator . . . [and refused to request a continuance because] their contract with Huie provided that they must go to trial within a certain number of days . . . [and that Hanes] rejected Ray's expressed desire to take the stand and testify in his own behalf because that would be giving away testimony that could be sold . . . ." *Id.* at 608-09.

Ray maintained, *inter alia*, that Foreman "refused to take any action to halt adverse pretrial publicity . . . [and told Ray to plead guilty] even if he had not committed the crime." *Id.* at 614-15.

140. *Id.* at 618. The court relied on Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), in which the Sixth Circuit Court of Appeals rejected the "farce and mockery" test for ineffective assistance of counsel and held that "the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance." *Id.* at 696. *See 1974 Survey*, *supra* note 1, at 223-24.

141. 508 F.2d 951 (6th Cir. 1975).

142. Appellant testified that after his motion to suppress the evidence of handwriting exemplars taken from him had been denied on the second day of trial, his attorney said, ". . . I'm sorry; I don't think I can beat the case . . . ." Appellant further testified that the attorney advised him to change his plea to guilty. Appellant added that the attorney indicated that a guilty plea would be met with a "couple of years probation," whereas a guilty verdict after a jury trial might prompt the judge to impose the maximum 60-year sentence. Appellant understood these choices and chose to plead guilty.

Id. at 952.

143. *Id.* at 953. Although counsel advised defendant that a guilty plea could be met with a couple of years probation, the district court sentenced defendant to three years confinement.

The court recognized that a determination that the attorney's advice "was not within the range of competence demanded of attorneys in criminal cases . . ."[144] could render the plea "unintelligent" due to ineffective assistance of counsel, but found that the defendant failed to meet the burden of proof in establishing that his counsel's competence was not within that range.

A similar issue arose in *Ray v. Rose*,[145] a habeas corpus proceeding attacking the validity of a guilty plea entered by James Earl Ray.[146] Defendant asserted that the financial interests of his attorneys[147] encouraged them to compromise Ray's defense and coerce a guilty plea.[148] The United States District Court for the Middle District of Tennessee concluded that, while the attorneys' actions may have been inappropriate, Ray failed to establish that incompetent advice induced an involuntary guilty plea.[149]

---

144. *Id.*

145. 392 F. Supp. 601 (W.D. Tenn. 1975).

146. This proceeding was an evidentiary hearing pursuant to a remand by the Sixth Circuit Court of Appeals, 491 F.2d 285 (6th Cir. 1974), to determine whether the financial interest of Ray's attorneys had prejudiced his defense. *See 1974 Survey*, *supra* note 1, at 214-15.

147. The details of the financial arrangements between Ray, the attorneys (Hanes and Foreman), and the author (Huie) are described in note 138 *supra*. Huie entered into an agreement with Dell Publishing Co. dated November 20, 1968, pertaining to a book to be written by Huie about Ray. The court had the following to say about that agreement:

> Two "special agreements," numbered paragraphs 19 and 21, bear noticing herein. Number 19 provided that publication would not be sooner than four weeks after the final Look magazine article; however, in any event, Dell could publish the book on or after March 5, 1969. The book was not published until May 20, 1970. This Court finds that the provision that Dell could publish the book after March 5, 1969, was not a factor that directly or indirectly caused Ray to plead guilty on March 10, 1969. In special agreement Number 21 Huie agreed that none of the proceeds from the contract "shall directly or indirectly be used for the benefit of James Earl Ray." Huie was either unaware of this proviso in the contract or he was prepared to violate it when the book produced any royalties.

392 F. Supp. at 606-07.

148. According to Ray, Foreman coerced him into a guilty plea because "book rights would be of little value were Ray to have been tried and found innocent." 491 F.2d 287 (6th Cir. 1974) (footnote omitted).

149. The contract negotiated by Hanes is an apparent violation of Disciplinary Rule 5-104(B) of the Code of Professional Responsibility of the American Bar Association, which was adopted August 12, 1969, to become effective on January 1, 1970. Furthermore, as this Court noted previously herein, if Foreman had been able to collect the agreed amount of the fee, namely $150,000, this Court is of the opinion that the fee would have been unreasonable. In the opinion of this Court, it would have been subject to an attack limiting the amount of the fee to recovery based upon a *quantum meruit*.

However, based upon the total proof, the irregularities of the attorneys

F. *Self-Incrimination*

1. Discovery by Prosecution

In *United States v. Nobles*,[150] the accused sought to impeach the credibility of a key prosecution witness through the testimony of an investigator who had previously obtained an inconsistent statement from the witness. Over objection by the defense, both the witnesses and the prosecutor were permitted to examine the report of the investigator. During the presentation of evidence by the defense the court ruled that the investigator could not testify about interviews with witnesses unless the prosecution was supplied with copies of the pertinent reports. The Supreme Court held that compelled disclosure of such reports would neither impinge upon the privilege against self-incrimination,[151] nor infringe upon the sixth amendment right to compulsory process and confrontation.[152]

2. *Miranda* Rights

The rights secured by *Miranda v. Arizona*[153] are only applicable when the accused is in custody.[154] Thus the warnings are not required prior to general questioning at the scene of the crime.[155] Additionally, the accused may waive the *Miranda* rights and agree to talk to officials,[156] and a refusal to execute a written

---

Hanes and Foreman and the potential and limited actual conflicts of interest did not cause Ray to plead guilty involuntarily.

392 F. Supp. at 620 (citations omitted).

150. 422 U.S. 225 (1975).

151. The fact that these statements of third parties were elicited by defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him.

Id. at ___, 95 S.Ct. at 2168.

152. The District Court did not bar the investigator's testimony. . . . It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system. One cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.

Id. at ___, 95 S.Ct. at 2171.

153. 384 U.S. 436 (1966).

154. *See* TRIAL RIGHTS, *supra* note 116, at § 83.

155. *See* Braziel v. State, 529 S.W.2d 501 (Tenn. Crim. App. 1975); Suggars v. State, 520 S.W.2d 364 (Tenn. Crim. App. 1975).

156. *See* TRIAL RIGHTS, *supra* note 116, at § 87.

waiver does not preclude the waiver from being effective.[157] While *Miranda* contains language suggesting that the warnings should be repeated in some situations,[158] in *Reaves v. State*[159] the Tennessee Court of Criminal Appeals held that "[w]hen a defendant has been fully advised of his *Miranda* rights, it is not necessary to repeat them on the following day before interrogation."[160] The admissibility of statements made to private parties is unaffected by *Miranda*.[161]

3. Statements and Silence Used for Impeachment

The Supreme Court has held that statements obtained in violation of the *Miranda* standard may still be usable for purposes of impeachment if shown to be voluntary.[162] The impeachment exception came before the Court in two cases in 1975. In *Oregon v. Haas*,[163] after the accused had been given proper warnings, he expressed the desire to telephone his attorney. The officer advised him that this would not be possible until they reached the station, and thereafter the accused made an incriminating statement. While ruling that the evidence was obtained in violation of *Miranda* and therefore was inadmissible in the prosecution's case in chief, the Court sustained the admission of the same evidence to impeach inconsistent testimony given by the accused at his trial.

In *United States v. Hale*,[164] the accused likewise was advised of his right to remain silent, and chose to exercise it. At trial the prosecutor asked the accused during cross examination why he had not given the police his alibi shortly after the arrest. The Court held that there was reversible error even though the trial judge had advised the jury to disregard the colloquy, stating that

157. *See* Tilson v. Rose, 392 F. Supp. 809 (E.D. Tenn. 1974).

158. *See* TRIAL RIGHTS, *supra* note 116, at § 89.

159. 523 S.W.2d 218 (Tenn. Crim. App. 1975).

160. *Id.* at 220.

161. Suggars v. State, 520 S.W.2d 364 (Tenn. Crim. App. 1974). In a yet-unpublished opinion, the Tennessee Court of Criminal Appeals held that it did not violate *Miranda* to admit testimony of an officer that the accused, after having been advised of his rights and after having begun to make a statement, stopped and refused to make a further statement. Jackson v. State, No. 432 Hamilton (Tenn. Crim. App. Apr. 11, 1975), *cited in* ABSTRACT (Office of the Attorney General), July/Aug. 1975, at 2.

162. *See* TRIAL RIGHTS, *supra* note 116, at § 98.

163. 420 U.S. 714 (1975).

164. 422 U.S. 171 (1975).

"the probative value of the respondent's pretrial silence in this case was outweighed by the prejudicial impact of admitting it into evidence."[165]

G. *Trial by Jury*

1. Exercise of Right

The right to trial by jury is guaranteed by the sixth amendment. As in the case of other constitutional rights,[166] it is improper to penalize the accused for availing himself of the right to a jury trial. In *United States v. Derrick*,[167] the Court of Appeals for the Sixth Circuit held it "improper for a trial judge to impose a heavier sentence as a penalty for the exercise of the right of jury trial, or as an example to deter others from exercising the right."[168]

2. Discrimination in Selection

In *Taylor v. Louisiana*,[169] the Supreme Court held that a jury system that operates to exclude women from service[170] deprives an accused of the sixth amendment right "to a jury drawn from a venire constituting a fair cross-section of the community."[171] In so holding the Court overruled *Hoyt v. Florida*,[172] in which a comparable statute had been sustained on the rationale that jury service would substantially interfere with the distinctive role of women in society. Avoiding a reappraisal of that assumption, the Court explained that *Hoyt* had been decided under a fourteenth amendment rational basis test, a justification it now found inadequate to limit a sixth amendment right to trial by jury.[173]

---

165. *Id.* at ___, 95 S.Ct. at 2135.

166. *See, e.g.*, Griffin v. California, 380 U.S. 609 (1965) (forbidding prosecutor to comment on defendant's invoking fifth amendment right to remain silent).

167. 519 F.2d 1 (6th Cir. 1975).

168. *Id.* at 4. "Such motives are objectionable because they are coercive and because they have little if any relevance to the proper objectives of sentencing." *Id.* at 4-5.

169. 419 U.S. 522 (1975).

170. While the statute did not exclude women from the jury, a woman would be included only upon "written declaration of her desire to be subject to jury service." LA. CODE CRIM. PROC., Art. 402 (1966), *repealed by* 1974 LA. ACTS, Ex. Sess., No. 20, § 1. The statute had been repealed prior to the decision in this case.

171. 419 U.S. at 526.

172. 368 U.S. 57 (1961).

173. In Daniel v. Louisiana, 420 U.S. 31 (1975), *Taylor* was held inapplicable to convictions returned by juries impaneled prior to the date of its decision. The Tennessee

3. Judicial Supervision of Jury Deliberations

In *Kersey v. State*,[174] a holding of substantial impact, the *Allen* charge was repudiated and guidelines were established for dealing with deadlocked juries. After the jury had deliberated on a homicide charge for an hour and forty-five minutes, it broke for supper and indicated to the judge that it was making progress. After eating, it deliberated for an undetermined period and then reported that it did not appear that a verdict would be reached. In response to a question from the trial judge, the foreman indicated that they were split eleven to one. The judge thereupon gave the *Allen* charge, instructing the jury, *inter alia*, that the minority should listen to the majority "with the disposition of being convinced,"[175] and the accused requested that the jury be instructed that any juror with a reasonable doubt as to guilt should vote for acquittal. This request was denied, and later in the evening the jury returned a verdict of guilty.

On appeal the conviction was upheld by the court of criminal appeals but reversed by the supreme court. First, the court held that the trial judge should never inquire of the jury about the

---

Court of Criminal Appeals has held that *Taylor* does not eviscerate indictments returned or pending on or before Jan. 27, 1975. State v. Daniels, No., 71 Shelby (Tenn. Crim. App. Sept. 11, 1975), cited in ABSTRACT (Office of the Attorney General), Nov./Dec. 1975, at 3.

For a discussion of *Taylor*, see Daughtrey, *Cross-Sectionalism in Jury Selection Procedures After* Taylor v. Louisiana, 43 TENN. L. REV. 1 (1975).

174. 525 S.W.2d 139 (Tenn. 1975), *noted in* 42 TENN. L. REV. 803 (1975).

175. The charge derives its name from Allen v. United States, 164 U.S. 492 (1896). In the present case, it was given as follows:

> While the verdict must be the verdict of each individual juror, and not a mere aquiescence in the conclusion of your fellows, yet you should examine the questions submitted with candor and with a proper regard and difference [sic] to the opinions of each other. It is your duty to decide the case if you can conscientiously do so. *You should listen with a disposition to be convinced to each other's arguments.* If the larger number are for conviction or acquittal, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many other men, equally honest, and equally intelligent with himself. The jury should not go contrary to their convictions, but they should properly give heed to the opinions of their fellow jurors and by reasonable concessions reach a conclusion which although not originally entertained by any of them, nevertheless, may be one to which all can scrupulously adhere. *In other words, the minority should listen to the views of the majority with the disposition of being convinced.* Now, with that addition we will work a few minutes longer.

525 S.W.2d at 140 (emphasis in original).

specifics of its split.[176] Second, the *Allen* charge was held no longer permissible:

> [W]hen the effort to secure a verdict reaches a point that a single juror may be coerced into surrendering the views conscientiously entertained, the jury's province is invaded and the requirement of unanimity is diluted. We view these charges as being tantamount to a judicially mandated majority verdict which is impermissible under Tennessee law.[177]

Instead, the court directed trial courts faced with deadlocked juries to follow section 5.4 of the ABA Standards Relating to Trial by Jury.[178] Moreover, the court articulated the proper instruction for such situations[179] and said "[s]trict adherence is expected

---

176. "The only permissive inquiry is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations." *Id.* at 141.

177. *Id.* at 144.

> [T]here is an inherent inconsistency in these charges in that the dissenters are urged to reconsider their verdict and simultaneously are reminded to make their decisions based upon their own convictions which they are cautioned not to sacrifice. They ask the dissenters to consider shifting their opinions, because the majority is of a different persuasion. We find no merit to any suggestion that might necessarily makes right. We take note of the classic lines: NOR IS THE PEOPLE'S JUDGMENT ALWAYS TRUE. THE MOST MAY ERR AS GROSSLY AS THE FEW. (J. Dryden, Absalom and Achitophel).

Id.

178. Length of deliberations; deadlocked jury. (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

> (i) that in order to return a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4 (1968).

179. The instruction approved by the court was as follows:

> The verdict must represent the considered judgment of each juror. In order

and variations will not be permissible."[180] The court added that if this instruction is originally given as part of the main charge, it may be repeated in the event of a deadlock.[181]

H. Fair Trial

1. Discovery

The Tennessee Supreme Court held in *State v. Gaddis*[182] that under the Tennessee discovery statute[183] an accused in a drug case is entitled to a sample of the subject drug for independent chemical examination and analysis.

2. Improper Argument

In *Smith v. State,*[184] in a prosecution for armed robbery, "the prosecutor addressed some jurors by name and asked if they were afraid to go out to dinner with their wives, or answer their doorbell, or stop at a street light for fear of the criminal element."[185] At another point he recommended a sentence of five hundred years, for reasons he suggested the defendant would not want divulged.[186] The court concluded that "[t]he cumulative impact

---

to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

525 S.W.2d at 145.

180. *Id.*

181. *Id.*

182. 530 S.W.2d 64 (Tenn. 1975).

183. TENN. CODE ANN. § 40-2044 (1975).

184. 527 S.W.2d 737 (Tenn. 1975).

185. *Id.* at 738.

186. The court commented:

These statements could have been taken by the jury to mean that they should set the punishment at a high number of years, rather than at a life sentence, in order to extend the time before the defendants could become eligible for parole. Any reference to parole possibilities during argument would have been improper. *See* Graham v. State, 202 Tenn. 423, 304 S.W.2d 622 (1957). We cannot condone any method, albeit an indirect one, that seeks to achieve that prohibited goal.

Id.

of the various statements . . . undoubtedly had a prejudicial effect on the jury."[187] The harmful effect, however, was seen to extend to punishment only, not to guilt, and thus the only relief granted was a reduction in sentence from twenty-five years to a minimum of ten years.[188]

I. Probation

In *Stiller v. State,*[189] the court held that the decision of a trial judge to suspend sentence and place the defendant on probation is subject to judicial review, a result the court deemed necessary to guard against abuse of discretion by sentencing judges. The defendant had pleaded guilty to charges of forging $26,000 in bank notes, embezzling $65,740, and making false entries showing fictitious loans of $45,000. The trial judge suspended sentence and placed the defendant on probation for ten years with the condition that all confiscated funds be restored within a year. The prosecution appealed the suspension of sentence, and the court of criminal appeals agreed that the trial court had abused its discretion. The supreme court, after holding that appellate review was appropriate, reversed, agreeing with Judge Russell, dissenting below, that the absence of the report of the probation and parole officer made it impossible to evaluate the decision of the trial judge.[190] In any event, the "enormity of this defendant's crime," upon which the court of criminal appeals principally relied, was but one of a number of factors to be considered in deciding whether to grant probation.[191]

187. *Id.* at 739.

188. In Beasley v. State, No. 1665 (Tenn. Crim. App. Aug. 5, 1975) the Tennessee Court of Criminal Appeals reversed the conviction because the district attorney had argued that the alibi witnesses were liars. The Tennessee Supreme Court subsequently reversed the decision. State v. Beasley, 536 S.W.2d 328 (1976), *noted in* 43 TENN. L. REV. 707 (1976).

189. 516 S.W.2d 617 (Tenn. 1974).

190. The court added:

> We should observe, parenthetically, at this point that attaching the probation report as an appendix to the brief filed by petitioner's counsel not only is ineffectual to bring it to the attention of the Court, it is improper and we admonish counsel against a repetition of this procedure. Since the report is not properly before us, no member of the Court knows its contents.

Id. at 622.

191. "Other statutory considerations are the defendant's criminal record, social history, present condition and, in proper cases, his physical and mental condition. Presumably these matters were discussed in the probation report." *Id.* at 621.

J. Double Jeopardy

1. Multiple Offenses

The Tennessee Supreme Court has been less than consistent in determining whether multiple offenses arising out of the same transaction may be separately prosecuted. In *Wells v. State*,[192] police seized heroin, cocaine and marijuana in a single search of the home and automobile of the accused. The court held that, although the possession of each substance was a separate felony, only one possession could be charged in the absence of proof that each was acquired by separate acts.

A novel issue was presented in *Pearson v. State*:[193] can the same felony convictions be used as a basis for separate habitual criminal convictions? In *Pearson* the accused was convicted of his third felony and of being an habitual criminal.[194] While free on bond pending appeal, he committed a fourth felony. He was convicted of this offense and also of being an habitual criminal even though the habitual criminal conviction rested in part upon the same two felonies that had been the basis for the earlier habitual criminal conviction. The court held that this did not subject the defendant to double jeopardy "[s]ince habitual criminality is a status or a vehicle for the enhancement of punishment, incidental to and dependent upon the most recent conviction, as opposed to an independent crime . . . ."[195]

2. Greater Charge Following Vacation of Guilty Plea

In *McGlothlin v. State*,[196] the accused had pleaded guilty to three indictments of third degree burglary but successfully attacked the judgment in federal court by establishing that he had entered the pleas under the mistaken impression that the sentences would run concurrently. He then went to trial and was convicted on one charge of first degree burglary. The court reversed the conviction, holding that prosecution should have been

192. 517 S.W.2d 755 (Tenn. 1974). For a discussion of Tennessee law regarding the identity of offenses, see Comment, *Identity of Criminal Offenses in Tennessee*, 43 TENN. L. REV. 613 (1976).

193. 521 S.W.2d 225 (Tenn. 1975).

194. TENN. CODE ANN. § 40-2801 to -2807 (1975).

195. 521 S.W.2d at 227.

196. 521 S.W.2d 51 (Tenn. Crim. App. 1975).

limited to the less serious crime to which he had originally pleaded guilty.[197]

3. Greater Sentence on Retrial

In *Sommerville v. State*,[198] at the second trial of the defendant, the jury convicted and imposed a sentence in excess of that imposed at the first trial. None of the jurors were aware of the previous sentence. While acknowledging that it was free to impose a higher standard of protection than that mandated by the United States Supreme Court, the Tennessee Supreme Court chose to follow the determination in *Chaffin v. Stynchcombe*[199] that the *Pearce* rule,[200] which precludes the imposition of a harsher sentence on retrial, is inapplicable to jury-determined sentences "absent knowledge of the prior sentence."[201] The court saw no reason to believe "that jurors are more immune to the human trait of vindictiveness than judges."[202] Thus the court held that any potential juror with knowledge of the prior verdict and sentence is subject to challenge for cause "unless the examination shows, unequivocally, that he can be impartial, and that his judgment will not be affected by such knowledge."[203] The examination is to take place outside the presence of other jurors and prospective jurors. Objection to the seating of a particular juror will not be heard on appeal if no challenge was made at trial, nor if a challenge was made and not sustained, unless all peremptory challenges had been used at the time. The court remanded the case for resentencing by the trial court pursuant to statute,[204] the sentence to be identical to that imposed by the first jury.

---

197. *Id.* at 54. Judge Oliver dissented, contending that third-degree burglary was not a lesser included offense of first-degree burglary. The majority considered this a matter of indifference under the authority of Blackledge v. Perry, 417 U.S. 21 (1974).

198. 521 S.W.2d 792 (Tenn. 1975).

199. 412 U.S. 17 (1973), *discussed in 1973 Survey, supra* note 1, at 249.

200. North Carolina v. Pearce, 395 U.S. 711 (1969).

201. 521 S.W.2d at 796.

202. *Id.* at 797.

> Granted a judge who has been reversed has a possible motivation for retaliation not attributable to jurors, but the prophylactic rule of *Pearce* is designed to eliminate the possibility of vindictiveness. At the conclusion of the second trial, having determined that defendant is guilty beyond a reasonable doubt, knowledge of a prior jury's sentence on the same charge is almost certain to be a factor given some consideration and providing potential vindictiveness.

Id.

203. *Id.*

204. TENN. CODE ANN. § 40-2701 (1975).

4. Appeal by Prosecution

Three United States Supreme Court decisions considered the propriety of appeals by the prosecution in criminal cases. In *United States v. Wilson,*[205] the accused was found guilty of converting union funds to his own use. Following the verdict, the trial judge reversed an earlier ruling and dismissed the indictment on the ground that there had been an unreasonable preindictment delay. The government sought to appeal this ruling, and the Supreme Court, reversing the court of appeals, held that it was entitled to do so. The Court was not prepared to recognize a right to appeal by the prosecution for all errors of law, particularly in cases in which a favorable ruling would result in a new trial.[206] No such possibility was raised in the present case, however, because a ruling favorable to the prosecution would merely have resulted in a reinstatement of the judgment of guilt.

On the same day the Court decided *United States v. Jenkins,*[207] in which, at the conclusion of a non-jury trial, the court had filed written findings of fact and then dismissed the indictment. Here the Court distinguished *Wilson* because in *Jenkins* there was uncertainty as to whether the dismissal was the result of a ruling on the law of the case or a determination that the statute in question was inapplicable to the defendant as a matter of fact. Even if no additional evidence would have to be taken, the trial court would have to make supplemental findings, and the Court concluded that any further proceedings would violate the protection against double jeopardy.

In *Serfass v. United States,*[208] the accused, who had not waived his right to a jury trial, was granted a pretrial motion to dismiss the indictment. The trial court reached its decision upon facts contained in a stipulation and in an affidavit supporting the motion. The Supreme Court held that an appeal of the ruling by the prosecution was not barred by the double jeopardy clause

205. 420 U.S. 332 (1975).

206. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen it in the second; and it would disserve defendant's legitimate interest in the formality of a verdict of acquittal. *Id.* at 352.

207. 420 U.S. 358 (1975).

208. 420 U.S. 377 (1975).

because the accused had never been "put to trial before the trier of facts."[209] Since the right to a jury trial had not been waived, the trial court could not make a determination as to guilt. Moreover, the reliance on extraneous facts by the trial court was not the functional equivalent of an acquittal, since jeopardy had never attached.

A recent Tennessee decision confirmed that the prosecution will not be permitted to appeal for a trial de novo following an adverse decision on the merits. In *Metropolitan Government of Nashville and Davidson County v. Miles,*[210] the accused was charged with interfering with a police officer. The case was heard on the merits in a general sessions court and dismissed. The prosecution appealed to the circuit court for a trial de novo. The circuit court dismissed the appeal under the double jeopardy clause, and the Tennessee Supreme Court affirmed.[211]

---

209. *Id.* at 389.

210. 524 S.W.2d 656 (Tenn. 1975).

211. [A] proceeding in a municipal court for the imposition of a fine upon a person for allegedly violating a city ordinance is criminal rather than civil in substance, in that, it seeks punishment to vindicate public justice and, therefore, constitutes jeopardy under the double-jeopardy clauses of the Tennessee and Federal Constitutions and, consequently, the alleged offender, whether acquitted or convicted, cannot again be tried for the same offense in a state trial court of general jurisdiction over the timely objection of the defendant.

Id. at 660.