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Constitutional Law: The "No Evidence" Doctrine Revived--New Directions for Due Process Adjudication by the United States Supreme Court?

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CONSTITUTIONAL LAW: THE "NO EVIDENCE" DOCTRINE REVIVED – NEW DIRECTIONS FOR DUE PROCESS ADJUDICATION BY THE UNITED STATES SUPREME COURT?

Johnson v. Florida, 88 S. Ct. 1713 (1968)

Defendant, having been convicted under Florida's vagrancy statute[1] and having had that conviction affirmed by the Florida supreme court,[2] appealed, asserting that the vagrancy statute was void for vagueness. The United States Supreme Court, in a per curiam decision, granted motion to proceed in forma pauperis, reversed and HELD, that there was *no evidence* to show that eighteen-year-old defendant, discovered by police sitting on a bench at a bus stop at 4:25 a.m., was guilty of "wandering or strolling around from place to place without any lawful purpose or object."[3] Judgment reversed, Justices Black and Stewart would dismiss the appeal, Justices White and Harlan dissenting from the Court's opinion but would note probable jurisdiction on defendant's void for vagueness claim.

Simply stated, the "no evidence" doctrine is that a violation of procedural due process under the fifth and fourteenth amendments occurs if a state convicts where absolutely no evidence has been shown for one or more essential elements of a crime. In the present case, for example, no evidence of "*wandering or strolling* around from place to place without any lawful purpose or object" as charged was shown when defendant was found *sitting* on a bus stop bench early in the morning and was unable to explain to the satisfaction of police why he was there. In the first "no evidence" case, *Thompson v. Louisville*,[4] as in the instant case, defendant asserted that he was waiting for a bus and was arrested for loitering. In both cases the fact of previous arrests (fifty-four for Thompson; Johnson was on probation for breaking and entering) may have influenced the conviction and may have substituted for proof of the necessary elements of the crime charged.

In the present case the United States Supreme Court revives the "no evidence" doctrine first enunciated as a constitutional requirement of due

1. FLA. STAT. §856.02 (1967).

2. Johnson v. State, 202 So. 2d 852 (Fla. 1967) (per curiam) (Ervin, J., dissenting in part, regarding only the application of the vagrancy statute and not the statute itself as being unconstitutional).

3. FLA. STAT. §856.02 (1967). The present case is the first to attack the Florida statute as being void for vagueness, although municipal vagrancy ordinances have been held invalid. Headley v. Selkowitz, 171 So. 2d 368 (Fla. 1965). The Florida supreme court was unanimous in its finding that the Florida statute was constitutional. Such statutes, however, have been widely criticized. *See, e.g.*, Hicks v. District of Columbia, 383 U.S. 252 (1966) (Douglas, J., dissenting from dismissal of certiorari as improvidently granted); Edelman v. California, 344 U.S. 357, 362 (1953) (Black, Douglas, JJ., dissenting); Douglas, *Vagrancy and Arrest on Suspicion*, 20 YALE L.J. 1 (1960); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Lacy, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1207 (1953) (noting that Florida's statute with its twenty categories is among the most complex).

4. 362 U.S. 199 (1960).

process in *Thompson v. Louisville*[5] in 1960. The rule was applied in seven reversals in the subsequent six years.[6] Then the Court moved away from a clear holding of the doctrine in *Brown v. Louisiana*,[7] found other grounds for reversal in five cases where the doctrine was invoked,[8] and refused to reverse on the asserted basis of "no evidence" in two others.[9] Until the present case, it appeared that the doctrine had been abandoned in *Adderley v. Florida*,[10] late in 1966. Three times since *Adderley* the argument has been

5. 362 U.S. 199 (1960), 80 A.L.R.2d 1355 (1961); *see* Note, *Constitutional Law — Due Process — Conviction Without Evidence of Guilt*, 59 MICH. L. REV. 306 (1960). Earlier the Court had touched on the doctrine. Fiske v. Kansas, 274 U.S. 380 (1927); Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246, 261 (1912). State courts had developed the doctrine only in Mauldin v. State, 28 Ala. App. 30, 177 So. 309 (1937), where after a charge of larceny had been nol-prossed, a conviction of embezzling eleven hogs was held to lack any evidence of an agency relationship, which is a necessary element of the crime.

6. The first and chief reversal based on *Thompson's* "no evidence" doctrine is Garner v. Louisiana, 368 U.S. 157 (1961) (breach of peace conviction reversed where Negroes had sat peacefully at segregated lunch counter). Other reversals were, in chronological order: Taylor v. Louisiana, 370 U.S. 154 (1962) (per curiam) (breach of peace conviction reversed where Negro defendants merely waited peacefully in bus station waiting room); George v. Clemmons, 373 U.S. 241 (1963) (mem.) (contempt order reversed where based on supposed fact that mere presence of Negroes in courtroom had tendency to disrupt court proceedings); Wright v. Georgia, 373 U.S. 284 (1963) (reversal partly based on lack of any evidence to show breach of peace by Negroes peacefully playing basketball in segregated park); Fields v. City of Fairfield, 375 U. S. 248 (1963) (mem.) (contempt order reversed because no evidence was shown that injunction prohibiting meeting at specific location had been violated when defendants held meeting across the street from prohibited location); Barr v. City of Columbia, 378 U.S. 146 (1964) (breach of peace conviction overturned when no evidence was shown that Negro defendants' conduct at lunch counter was disorderly); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 94 (1965) (second case) (conviction of Negro for disobeying lawful order of traffic officer reversed because no evidence was present that officer had been directing traffic; Douglas, J., concurring, would add that a second conviction of obstructing sidewalk should be reversed, not on the void for vagueness finding of the majority, but because one person standing alone cannot block a walk). *See* Note, *No Evidence To Support a Conviction — The Supreme Court's Decision in Thompson v. Louisville and Garner v. Louisiana*, 110 U. PA. L. REV. 1137 (1962).

7. 383 U.S. 131 (1966). In the 3-1-1-4 decision, Justices Fortas, Warren, and Douglas reversed in part because no evidence had been shown that breach of peace occurred when Negroes held peaceful sit-in in library.

8. A ground for a "no evidence" decision was present in five cases, but the Court applied a more far-reaching doctrine in reversing: Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (freedom of speech, assembly, and petition); Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963) (first case) (one cannot aid and abet an act held innocent in a companion decision); Hamilton v. Alabama, 376 U.S. 650 (1964) (equal protection applies in courtrooms) (Black, J., concurring would find *inter alia* no evidence of contempt where Negro witness refused to answer questions addressed to her as "Mary" rather than as "Miss Hamilton"); Bouie v. City of Columbia, 378 U.S. 347 (1964) (improper retroactive judicial interpretation applied); Cox v. Louisiana, 379 U.S. 536, 545 (1965) (first case) (statute overbroad).

9. The Court found "some" evidence present in the second case of Cox v. Louisiana, 379 U.S. 559, 566 (1965), but found other grounds for reversal. In Drews v. Maryland, 381 U.S. 421, 423 (1965) (per curiam dismissal of appeal and denial of certiorari), Justices Warren and Douglas dissented from the denial of certiorari saying no evidence was present to support Negro defendants' conviction of disorderly conduct.

10. 385 U.S. 39 (1966). From the second Shuttlesworth opinion, 382 U.S. 87 (1965),

raised and the Court has instead found some evidence directly or implicitly.[11]

Two principles underlie the "no evidence" doctrine: the presumption of innocence of the accused, and the necessity that the state must bear the burden of proof in criminal trials. Further, it embodies several aspects of due process — the fundamental fairness test and protection from arbitrary state action. The rule does not judge the *quality* of evidence (such as perjured testimony, suppressed evidence, illegal search and seizure) nor the *sufficiency* of evidence, but only the question of whether any evidence at all was presented. Analytically, this may mean (1) that no evidence was adduced except the charge itself, (2) that no reasonable inference can be drawn as to defendant's guilt from the evidence presented, or (3) that acts A and B do not constitute the crime of C. This last meaning is evident in the present case where "sitting" did not constitute the crime of wandering or strolling without lawful purpose. As the majority noted, "The bench where he sat was made for sitting and he was using it for that purpose in the precise place where the bench had been placed."[12] In the decision the United States Supreme Court acted as a higher court of review of a state finding and characterization of fact.[13]

The "no evidence" doctrine must be considered in light of its usefulness

handed down Nov. 15, 1965, until the present case, June 3, 1968, no Supreme Court majority used the "no evidence" doctrine as a basis for reversal.

11. Cameron v. Johnson, 88 S. Ct. 1335, 1343 (1968) (Fortas, Douglas, JJ., dissenting) (in *Cameron* the dissenting justices find "no evidence" that the state of Mississippi was motivated by a bona fide belief that courthouse doorways were obstructed and finds an improper state purpose was to stop a constitutionally protected, peaceful demonstration. *Id.* at 1343-44, *citing Thompson*). Walker v. City of Birmingham, 388 U.S. 307, 312 n.4 (1967) (sufficient circumstantial evidence present in record); Temple v. United States, 386 U.S. 961, 962 (1967) (Black, Douglas, JJ., dissenting from denial of certiorari).

12. 88 S. Ct. at 1715 (1968).

13. In the initial cases under the doctrine the Court did not have to overturn the factfinding of the highest state court. In *Thompson* no appeal was possible from the police court, and in Garner v. Louisiana, 368 U.S. 157 (1961), the state supreme court denied writs of certiorari, mandamus, and prohibition. In recent years the federal courts have greatly expanded the possibility of an independent evidentiary hearing or review of a state finding of fact, particularly where constitutional issues are raised in a habeas corpus proceeding. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Brennan, *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 233-36 (1966). In Florida the post-conviction review by federal courts has been somewhat restricted by the adoption of "Rule One," FLA. R. CRIM. P. 1.850; *see* Brown, *Collateral Post Conviction Remedies in Florida*, 20 U. FLA. L. REV. 306 (1968), but may be expanded in the preconviction area under the anti-harassment provisions of Dombrowski v. Pfister, 380 U.S. 479 (1965). *But see* Cameron v. Johnson, 88 S. Ct. 1335 (1968) (Fortas, J., dissenting, criticizes the *Cameron* majority for limiting *Dombrowski* so as not to apply when a valid statute is applied to discourage protected activities. *Id.* at 1341). It was partly the expansion of federal review over state courts that gave rise to the recent attempt in the United States Senate to abolish federal habeas corpus jurisdiction over state criminal convictions and also remove federal power to review the validity of confessions used in state criminal trials. Title II, Omnibus Crime Control and Safe Streets Bill, S. 917, 90th Cong., 2d Sess. (1968). *See* 114 CONG. REC. 5998-99 (daily ed. May 21, 1968) (remarks of Senator Fong); 114 CONG. REC. 5830-47 (daily ed. May 17, 1968). The attempt to restrict the federal courts' jurisdiction failed. 114 CONG. REC. 6037-39, 6043-45 (daily ed. May 21, 1968).

as a tool of judicial decisionmaking. Professor Kadish has suggested that due process adjudication can be either flexible or fixed.[14] If one accepts his conclusion that the flexible approach is desirable, one finds that the doctrine could have been better formulated to give it a broader and more fully articulated application. A "fixed" standard is one having precise common law and constitutional limitations. Accordingly, since the requirement of "due process" is explicitly itemized in the fifth amendment, that term cannot comprehend other mentioned rights of the first eight amendments.[15] A variant of this fixity principle is that the fourteenth amendment *incorporated* each and every right of the Bill of Rights to the states[16] and *only* those specifically enumerated rights are so incorporated. Since Mr. Justice Black, a proponent of this "fixed" incorporation approach, spoke for the Court in formulating the "no evidence" doctrine in *Thompson*, he must feel that the principle is inherent in the fifth amendment's guarantee of due process. In that decision, the strong emphasis that the Court will not pass on the *sufficiency* of evidence but only on whether *some* evidence is present in the record underlines the fixity of the doctrine[17] and points up the mechanistic manner in which it was conceived to work.

Opposed to this fixed view is the "flexible" approach to due process adjudication that sees "due process" as having no precise or fixed meaning but rather as a fundamental principle adaptable to new conditions. Under its dictates the judge does not decide cases by personal whim or predilection but looks to precedent, the demands of fairness, and the "moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history,"[18] for guidance in determining the contours of due process. Such an approach requires greater sensitivity to the underlying purposes of due process in a novel application than a mechanistic method of fixed due process. Mr. Justice Black has stated that he fears the flexible approach would permit the Court "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."[19] Professor Kadish, on the other hand, sees the chief virtue of due process in its adaptability to changing societal attitudes "incompatible with changeless meanings."[20] Moreover, he criticizes the fixed approach because it obscures the value choices lying beneath decisions made according to its more rigid conceptions of due process.[21]

14. Kadish, *Methodology and Criteria in Due Process Adjudication*, 66 YALE L.J. 319 (1957).

15. *Id.* at 324, *See, e.g.*, Note, *The Warren Court: A Study of Selected Civil Liberties*, 20 U. FLA. L. REV. 201, 223-28 (1967).

16. The most recent "incorporation" is the right of trial by jury. Duncan v. Louisiana, 88 S. Ct. 1444 (1968).

17. "Decision of the question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." Thompson v. Louisville, 362 U.S. 199 (1960).

18. Solesbee v. Balkcom, 339 U.S. 9, 14, 16 (1950) (dissenting opinion).

19. Adamson v. California, 332 U.S. 46, 68, 90 (1947) (dissenting opinion).

20. Kadish, *supra* note 14, at 340-41.

21. *Id.* at 344.

Seen from this perspective, the "no evidence" doctrine would be more flexible and hence both more useful and more articulate in revealing underlying value choices if it had been stated differently. A better formulation would have been to have prohibited *unreasonable* or *illogical* interpretations of state law contrary to the plain meaning of the language (where no prior interpretations had reasonably modified its meaning) as violations of due process, instead of proscribing applications of law where "no evidence" of an element of the crime had been introduced. This suggested modification in the doctrine would not have changed the result in any of the "no evidence" cases—for example in the present case "sitting" logically is not "strolling" as required by the statute. This change, however, would have shifted the emphasis from the *quantum* of evidence present,[22] which provoked the dissenting justices to strain to find "some" evidence. The dissent states, "Most inhabitants of park benches reach their bench by wandering or strolling,"[23] despite the fact that there was *nothing* in the record to show *how* defendant had reached the bench.[24] By focusing on the logicality or reasonableness of the characterization of the evidence, the Court would have avoided an objectionable review of state findings of fact and would have instead disclosed its underlying choice not to strike down the often-useful vagrancy statute as overly vague but instead holding only this particular application of the law invalid as being unreasonable.[25]

It is apparent from an analysis of the decisions in which the "no evidence" doctrine has been applied[26] that the rule has generally been used for two purposes: (1) to avoid a sweeping holding that would invalidate a statute the Court is presently unwilling to invalidate for vagueness or, more broadly, to avoid precluding an area from statutory treatment as an area constitutionally protected from any legislation under the first amendment, and (2) to dramatize abusive police practices or the lack of availability of appeal. The factual context present in nearly all of the cases shows remarkable similarity and reveals a distinctly purposive use of the doctrine for these two aims.

22. The dissent stated that "constitutionally sufficient amounts of evidence were presented." 88 S. Ct. at 1715 (1968).

23. Both the Florida supreme court's opinion and Justice Ervin's dissent found that defendant had "wandered." Johnson v. State, 202 So. 2d 852, 853, 855 (Fla. 1967). In reversing, the United States Supreme Court did not use the grounds suggested by Justice Ervin's dissent, which maintained that failure to account for one's self is not equivalent to "no lawful purpose." *Id.* at 855. On that point, the Court majority held that the fact that defendant was violating a 10 p.m. curfew for being on probation for breaking and entering established the necessary lack of lawful purpose. 88 S. Ct. at 1714 (1968).

24. Johnson v. Florida, 88 S. Ct. 1713 (1968).

25. A clearer case where this principle of logicality would have freed the Court from having to accept a clearly illogical finding of fact was Edwards v. South Carolina, 372 U.S. 229 (1963), where, in spite of the Court's statement that there was "no evidence at all of any threatening remarks, hostile gestures, or offensive language on the part of any member of the crowd," *id.* at 231, it accepted the South Carolina supreme court's determination that defendants' conduct was a breach of the peace. *Id.* at 235. It then went on to hold the statute unconstitutional as infringing on defendants' first amendment freedoms.

26. Cases cited in notes 4, 5, 6, 7, 12 *supra.*

Usually the defendant is a Negro[27] charged with a minor crime (vagrancy, loitering, breach of the peace, contempt, or disorderly conduct),[28] and given a minor sentence (here probation) by a state court of a Southern state on uncontested evidence with a judge sitting as sole trier of fact. Usually also, there are overtones of possible police harassment,[29] violation of equal protection, infringement on first amendment freedoms, challenges that the law is void for vagueness (as in the present case), or claims that the statute gives inadequate notice of an offense not in herently illegal.

Because of its use chiefly in cases involving Negro demonstrators or harassment of individual Negroes by police, the doctrine seems to have been abandoned, as noted earlier, when the Court majority shifted in *Adderley v. Florida*[30] and began restricting civil rights demonstrations. Until the appointment of Mr. Justice Marshall, the *Adderley* majority prevented use of the doctrine. Indeed, the present case is a 5-4 decision, with the remaining four justices from the *Adderley* majority in the minority here. Consequently, the case may be a harbinger of further willingness by the present Court to be

27. Johnson, defendant in the instant case, is Caucasian. Letter to William Knight Zewadski from Office of Public Defender, Eleventh Judicial Circuit of Florida, October 1, 1968. In all other cases involving the "no evidence" doctrine, except Fields v. City of Fairfield, 375 U.S. 248 (1963), defendants have been Negroes.

28. Major crimes generally do not come before the Court on a no evidence claim because they usually are not subject to abusive application since counsel is more frequently present and because there is either a finding of not guilty or a successful motion for judgment notwithstanding the verdict.

29. Significantly, the Court did not question the constitutionality of Florida's vagrancy statute, which is a useful police tool to prevent crime, despite its general wording and often archaic categories. The Court here directed its objections more to the failure to meet the literal requirements of the statute than to police abuse of it. Perhaps this approach resulted from facts in the record, which may have revealed reasonable grounds for police suspicion. Notice was taken, although it was minimized, of the fact that several businesses were located near the bench on which defendant sat in the dark, that Johnson had been convicted of breaking and entering, and that at the time of arrest he was violating his probation. Two other facts were ignored by the Court's summary of the record: Johnson was accompanied by a "male companion" and that he could not remember the last name of the girl he assertedly had been out with earlier. Johnson v. State, 202 So. 2d 852, 853 (Fla. 1967). In spite of the Court's failure to reach the void of vagueness attack on the Florida statute, the fact that it granted certiorari to an attack on the Florida vagrancy statute may constitute a muted warning to state legislatures, police, and state courts that such statutes and ordinances may successfully be attacked in the future as being void for vagueness. The Florida supreme court, in accepting the case on remand from the United States Supreme Court, ignored this implicit warning and humorously tried to justify the absence of the statutory evidence in the record. It stated: "The officers did not testify the accused wandered or strolled and did not query as to how he had reached his seat in the dark. Perhaps pedestrian in occult abstrusities they just assumed he had not been wafted there by teleportation or telekinesis." Johnson v. Florida, No. 35,705 (Fla. S. Ct., filed Nov. 20, 1968). In response to the Florida court's reluctant acceptance of the United States Supreme Court's decision, at least one state newspaper urged revision of the vagrancy statute to eliminate its vague and archaic terminology. Editorial, St. Petersburg Times, Nov. 22, 1968, at 18-A, col. 1.

30. 385 U.S. 39 (1966). *See, e.g.*, Kipperman, *Civil Rights at Armageddon — The Supreme Court Steps Back: Adderley v. Florida*, 3 L. IN TRANSITION Q. 219 (1966); Note, *Constitutional Law, The Right of Peaceful Protest — Adderley v. Florida*, 55 CALIF. L. REV. 549 (1967).

more lenient to civil rights demonstrators and more restrictive in its readings of often-vague vagrancy statutes and, barring replacement of the present majority by more conservative justices, the instant case marks the revitalization of the "no evidence" doctrine seemingly buried thirty-one months before.