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Edward A. Stern

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CRIMINAL LAW: LARCENY FROM SEVERAL OWNERS IN A SINGLE ACT

Hearn v. State, 55 So.2d 559 (Fla. 1951)

Within the space of a few minutes, defendant stole nine cows and two calves from the field in which they were grazing. All the animals were loaded on one truck and transported to a cattle market where the defendant was apprehended while attempting to sell them as a single lot. One of the cows was the property of owner *A* and the others were the property of owner *B*. The defendant was convicted of the larceny of *A's* cow, and in a subsequent proceeding was convicted of the larceny of *B's* cows. The defendant appealed from the conviction on the ground of double jeopardy. HELD, the first conviction was a bar to any further prosecution of the defendant. Judgment reversed.

This is a case of first impression in Florida. The decision follows the majority of American jurisdictions in holding that stealing property belonging to more than one person, if in one act, at the same time and place, constitutes but one larceny.[1] There are two other views, adhered to by a few courts. Two jurisdictions hold that the state has the option of treating the act as one larceny or as separate and distinct larcenies,[2] while another small minority takes the position that the larceny from each owner necessarily constitutes a separate and distinct crime.[3]

The decisions that allow the option to remain in the state reason that the courts will act as a check and not allow unreasonable multiplicity of prosecutions.[4] Such a position is open to criticism because it leaves a question of law to the discretion of the prosecuting authorities while giving them no judicial guide other than a prohibition

[1]Henry v. United States, 263 Fed. 459 (D.C. Cir. 1919); Hoiles v. United States, 10 D.C. (3 MacArth.) 370, 36 Am. Rep. 106 (1880); Dean v. State, 9 Ga. App. 571, 71 S.E. 932 (1911); State v. Sampson, 157 Iowa 257, 138 N.W. 473 (1912); State v. Toombs, 326 Mo. 981, 34 S.W.2d 61 (1930); 2 BISHOP, CRIMINAL LAW §888 (9th ed. 1923). For a detailed discussion of double jeopardy in Florida see Note, 2 U. OF FLA. L. REV. 250 (1949).

[2]Commonwealth v. Sullivan, 104 Mass. 552 (1870); Long v. State, 43 Tex. 467 (1875).

[3]*In re* Allison, 13 Colo. 525, 22 Pac. 820 (1889); State v. Bynum, 117 N.C. 749, 23 S.E. 219 (1895); Phillips v. State, 85 Tenn. 551, 3 S.W. 434 (1887).

[4]Commonwealth v. Sullivan, 104 Mass. 552, 553 (1870).

against unreasonableness. The other minority view, holding the act of taking to be divided into separate larcenies, is based on the theory of a separate trespass to the property of each owner.[5] This position is criticized on the ground that the crime of larceny is an offense against the public and not against the owner of the property stolen.[6] A prosecution for larceny is not based on the trespass to the owner; although the indictment sets out ownership its purpose is merely to identify the property in evidence.[7]

The Court in the instant case states that "each case of this nature must be determined by the facts and circumstances of the particular case."[8] This allows the court wide discretion in determining what constitutes "at the same time and place."[9] Other courts, while adhering to the majority view, have held, for example, that taking live stock situated about two hundred yards apart constitutes two separate acts in both time and place,[10] and also that stealing property from different rooms of a hotel constitutes taking in separate acts.[11]

The rationale of the instant case is preferable in the light of the purpose of criminal prosecutions — to punish for offenses against the public.[12] Admittedly it is difficult, if not impossible, to reconcile the instant decision with *McHugh v. State,*[13] in which the accused killed two children at the same time by the same act and yet acquittal of manslaughter of one was held no bar to prosecution for manslaughter of the other. It may well be that our Supreme Court is in the process of reinstating the practical benefit of the plea of double jeopardy; the injury to the public, though deemed greater in instances of death than in thefts, is increased no more by two deaths from the same wrongful act than by the existence of two owners of several items of stolen property. The division of a single act of larceny into many larcenies would allow unwarranted multiple prosecutions for what is in fact but a single act. To permit this would violate the spirit of the Anglo-American prohibitions against double

[5]Phillips v. State, 85 Tenn. 551, 3 S.W. 434 (1887).

[6]*See* State v. Sampson, 157 Iowa 257, 263, 138 N.W. 473, 475 (1912).

[7]Henry v. United States, 263 Fed. 459 (D.C. Cir. 1919).

[8]At p. 560.

[9]*Ibid.*

[10]Nichols v. Commonwealth, 78 Ky. 180 (1879).

[11]Hudson v. State, 9 Tex. App. 151, 35 Am. Rep. 732 (1880).

[12]BISHOP, CRIMINAL LAW §888 (9th ed. 1923).

[13]36 So.2d 786 (Fla. 1948).

jeopardy, yet without benefit to the public by way of discouraging the type of activity designated as a crime in any given instance.

EDWARD A. STERN

CRIMINAL LAW: RIGHT TO BAIL PENDING APPEAL FROM CONVICTION OF CAPITAL OFFENSE.

Gray v. State, 54 So.2d 436 (Fla. 1951)

Defendant was convicted of rape. On recommendation of mercy, a sentence of fifteen years' imprisonment was imposed. Pending appeal, defendant applied to the trial court for supersedeas bond. The application was denied. On review of the denial of bail, HELD, reduction of sentence to fifteen years indicated extenuating circumstances warranting granting of bail pending appeal. Order reversed, Justice Hobson and Associate Justice Lewis dissenting.

There are two conflicting theories as to the right to bail pending appeal from conviction of a capital offense. The more prevelant view is that there is no absolute right to bail after such conviction despite recommendation of mercy and reduction of the death penalty to imprisonment.[1] Under these circumstances the matter of bail lies in the discretion of the trial court.[2] The opposing view is that, despite conviction of a capital offense, a recommendation of mercy with a sentence of life imprisonment or a lesser term of years entitles one to bail as a matter of right.[3]

Previous Florida decisions have consistently been in line with the former rule.[4] The Florida Constitution provides that all persons shall be bailable except in capital offenses when the proof is evident or the presumption great.[5] The Florida Court, in line with most

[1]*Ex parte* Voll, 41 Cal. 29 (1871); State v. Christensen, 165 Kan. 585, 195 P.2d 592 (1948); *Ex parte* Carey, 306 Mo. 287, 267 S.W. 806 (1924); *Ex parte* Berry, 198 Wash. 317, 88 P.2d 427 (1939); *Ex parte* Hill, 51 W. Va. 536, 41 S.E. 903 (1902).

[2]See note 1 *supra*.

[3]Walker v. State, 137 Ark. 402, 209 S.W. 86 (1919).

[4]*Ex parte* Hyde, 140 Fla. 494, 192 So. 159 (1939); Stalnaker v. State, 126 Fla. 407, 171 So. 226 (1936); *Ex parte* Lamb, 89 Fla. 481, 104 So. 855 (1925); *Ex parte* McDaniel, 86 Fla. 145, 97 So. 317 (1923).

[5]FLA. CONST. Decl. of Rights §9.