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Lane v. Warden, Maryland Penitentiary, 320 F.2d 179 (4th Cir. 1963)

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2. The definition of moral turpitude adopted by the court is broad enough to include any unjust, immoral, or dishonest act by the attorney.

3. Subdivision 2. of R.C.M. 1947, sec. 93-2026 provides for disciplinary action for any wilful violation of the attorney's oath of office.

4. The court has the inherent power to regulate its officers and to promulgate and enforce all necessary and appropriate rules for such regulation.

SAM E. HADDON

INFORMING JURY OF DEFENDANTS' PRIOR CONVICTIONS AT COMMENCEMENT OF TRIAL PURSUANT TO HABITUAL CRIMINAL STATUTE VIOLATED DUE PROCESS.—Defendant was charged in three separate indictments for state narcotics violations. As defendant had previously been convicted for narcotics violations, the state sought to increase punishment under Maryland's habitual criminal statute.¹ Each of the three indictments alleged the facts of the principal offense and also the details of the prior convictions. At the beginning of the trial the complete indictments were read to the jury, and during the trial the prior convictions were proven. The jury convicted the defendant of the principal crimes, and found the prior convictions to exist as an historical fact. Pursuant to these findings, the trial court sentenced defendant as a third offender. Appealing these convictions to the Maryland Court of Appeals, defendant contended that it was improper to acquaint the jury with his criminal record at the outset of the trial. This contention was rejected,² and the United States Supreme Court denied certiorari.³ Defendant then petitioned the federal district for a writ of habeas corpus, alleging that he had been deprived of a fair and impartial trial as required by the due process clause of the Fourteenth Amendment. The petition was denied on the basis of Maryland decisions upholding the procedure of informing the jury of previous convictions during the trial of the principal offense.⁴ On appeal to the Fourth Circuit Court of Appeals, *held*, reversed. Informing the jury of defendant's prior criminal record at the outset of the trial destroyed the jury's impartiality. Such procedure is prejudicial to the defendant and renders the conviction invalid. *Lane v. Warden, Maryland Penitentiary*, 320 F.2d 179 (4th Cir. 1963).

Nearly all states have enacted habitual criminal statutes which provide that prior convictions can be used to increase punishment for a subsequent offense.⁵ In Montana, for example, if a person has a previous conviction for an offense punishable by five years imprisonment, his sentence for a subsequent conviction is increased to a minimum of ten

¹MD. ANN. CODE art. 27, § 300 (1957) provides that a sentence is to be increased on a subsequent conviction for narcotics, where defendant has prior narcotics convictions.

²This was one of ten assignments of error presented on appeal. The convictions were affirmed in *Lane v. State*, 226 Md. 81, 172 A.2d 400 (1961).

³368 U.S. 993 (1962).

⁴*Lane v. Warden Md. Penitentiary*, 207 F. Supp. 780 (D.C. Md. 1962).

⁵For a list of these jurisdictions see 2 WHARTON, CRIMINAL EVIDENCE § 645 (12th ed. 1955).

years.⁶ In some jurisdictions, a "three-or-four-time-loser" may be imprisoned for life.⁷ The purpose of these statutes is to impose more severe penalties on those who persist in violating the law after previous convictions.⁸

Utilization of habitual criminal statutes requires a procedure for the pleading and proof of the prior convictions in addition to the principal offense. The jury must be informed of the alleged prior convictions, and must find as an "historical fact" that the accused has committed them.⁹ To impose the increased penalty, this finding must be made before the defendant is sentenced. However, the question of at what point during the trial the procedure should be invoked has led to major differences in the procedure for prosecuting habitual criminals adopted by the various states.

In the instant case the Maryland court followed the common law procedure for prosecuting habitual criminals.¹⁰ Under the common law procedure, allegations of former convictions are set forth in the indictment or information charging the accused with the principal offense. At the commencement of the trial the entire indictment or information is read to the accused in the jury's presence. If the defendant pleads not guilty to the former conviction, it must be proved concurrently with the principal offense.¹¹ When the jury finds the defendant guilty of the principal offense, and further finds that the prior convictions have been established as an "historical fact," the additional sentence may be imposed as provided by statute.¹²

A majority of jurisdictions adhere to the common law procedure for prosecuting habitual criminals.¹³ Some courts interpret a statute to

⁶The Montana statute for increased punishment after conviction of a former state prison offense provides that if the second offense were punishable by more than five years as a first offense, as a second offense it is punishable by not less than ten years imprisonment (This clause provides no maximum sentence, and punishment thereunder can be equivalent to life imprisonment); if the first offense were punishable by five years or less, the second conviction is punishable by not more than ten years imprisonment; and if the second conviction is for petit larceny or an attempt to commit any offense punishable by not more than five years as a first offense, the second conviction results in a sentence not to exceed five years. REVISED CODES OF MONTANA, 1947, § 94-4713. See also § 94-4714. (REVISED CODES OF MONTANA are hereinafter cited R.C.M.)

⁷See, e.g., N.Y. PEN. LAW § 1942 (third offender); WYO. STAT. ANN. § 6-10 (1957) (fourth offender); see R.C.M. 1947, § 94-4713, note 6 *supra*.

⁸Joyner v. State, 158 Fla. 806, 30 So. 2d 304 (1947). Habitual criminal statutes have withstood attacks on their constitutionality, as they "do not create an independent crime but merely define a status, prescribing circumstances under which there is an enhanced penalty for the present crime." Comment, 33 N.Y.U.L. REV. 210 (1958). In this regard, it has been held that an accused cannot be charged as an habitual criminal as such status is not an independent crime. State v. Zeimer, 10 Utah 2d 45, 347 P.2d 1111 (1959). Prior convictions have no connection with the principal offense except to determine punishment in the event of conviction, and there is no question of former jeopardy. 5 WHARTON'S CRIMINAL LAW AND PROCEDURE § 2218 (1957).

⁹See note 12 *infra*.

¹⁰Maryland adopted the common law procedure in Maguire v. State, 47 Md. 485 (1878).

¹¹If defendant admits the commission of the former violations, some jurisdictions nevertheless allow the jury to be informed of them. See note 18 *infra*.

¹²"The jury do not find the person guilty of the previous offense; they only find that he was previously convicted of it, as a historical fact." Maguire v. State, note 10 at 497.

¹³Comment, 33 N.Y.U.L. REV. 210 (1958).

require the common law procedure, or, allow its application in the absence of statute.¹⁴ Pleading and proof of the prior conviction during the trial for the principal offense has been sanctioned for various reasons. The practice is often permitted on the theory that a prior conviction is not an *independent* offense which must be tried separately, but rather is an essential element of the offense charged which must be established before the imposition of the increased sentence.¹⁵ Many courts emphasize the jury's functions of determining facts and assessing punishment. These courts reason that the jury must be fully apprised of the exact nature of the charges in order to perform these functions.¹⁶

Why should not the whole indictment be read to the jury, including that part containing the allegations of the former convictions and judgement? The jury being the judges . . . as to whether the offense had been committed as charged, they should certainly be informed of what they are sworn to try; and for that purpose, no means are so proper as the reading of the indictment itself.

The Montana Supreme Court sustained the common law procedure in *State v. O'Neill*.¹⁷ In that case defendant admitted to the court, before the beginning of the trial, that he had committed the prior offenses, but contended that knowledge of the prior convictions would prejudice the jury against him, and requested that his record be withheld from the jury unless he was found guilty of the principal offense. The trial court denied the motion, and the Montana court affirmed,¹⁸ holding that a prosecutor is required by statute to state *the case* and offer evidence to support the allegations in the information.¹⁹ The previous convictions are considered part of the case to the extent of aggravating

¹⁴ARIZ. REV. STAT. ANN., RULES CRIM. PROC., RULE 134 (1956); IND. ANN. STAT. § 9-2208 (1956); IOWA CODE § 747.4 (1958); N.C. GEN. STAT. § 15-147 (1953); TENN. CODE ANN. § 40-2803 (1955); WYO. STAT. ANN. § 6-11 (1957). Maine interprets its state constitution to require the common law procedure. *State v. McClay*, 146 Me. 104, 78 A.2d 347 (1951). For states where the common law procedure is applied without interpretation of statute, see, e.g., *Coleman v. State*, 215 Ga. 865, 114 S.E.2d 2 (1960).

¹⁵*State v. Meyer*, 258 Wis. 326, 46 N.W.2d 341 (1951); *Doyle v. State*, 138 Tex. Crim. 502, 137 S.W.2d 26 (1940). Some courts argue that the common law procedure is essential in order to give notice to defendant of the nature of the charges against him. *State v. Laird*, 25 N.J. 298, 135 A.2d 859 (1957).

¹⁶*Maguire v. State*, note 10 *supra* at 495; *accord*, *State v. Holman*, 88 Ariz. 280, 356 P.2d 27 (1960); *Higgins v. State*, 235 Ark. 153, 357 S.W.2d 499 (1962); *State v. Waterhouse*, 209 Ore. 424, 307 P.2d 327 (1957); *State v. Ruble*, 77 N.D. 79, 40 N.W.2d 794 (1950); *People v. Lawrence*, 390 Ill. 499, 61 N.E.2d 361 (1945).

¹⁷6 Mont. 526, 248 Pac. 215 (1926).

¹⁸See, e.g., *Berry v. State*, 51 Ga. App. 442, 180 S.E. 635 (1935). Other states following the common law procedure do not permit the jury to be informed of the prior convictions if the accused admits them. This logically follows because the admission eliminates the need for proof of the prior convictions. *State v. Meyer*, 258 Wis. 326, 46 N.W.2d 341 (1951).

¹⁹The Montana court was interpreting R.C.M. 1947, § 94-7201 which prescribes the procedure for conducting criminal trials. In *State v. Gall*, 135 Mont. 131, 337 P.2d 932 (1959), the court held that the above statute was directory only, and therefore did not require reading an information to a jury. That case did not involve the prosecution of an habitual criminal, but it would seem to modify the *O'Neill* case to the extent that reading the information to the jury would be within the court's discretion. In *State v. Brown*, 136 Mont. 382, 351 P.2d 219 (1959), the trial court ordered withdrawal of prior convictions from the information because the prosecutor stated that they could not be proven.

the penalty, and it is necessary for the jury to be informed of the complete charge "in order intelligently to exercise the right to fix punishment to fit the crime."²⁰ In dismissing the contention of prejudice, the court noted that withholding such information also would deny the jury its right to fix punishment.

Several jurisdictions following the common law procedure have nevertheless recognized that prejudice may result from the jury's knowledge of prior convictions.²¹ These courts reason that any prejudice is overcome by admonitions or instructions to the jury that the prior convictions have no bearing on the principal issue, and are to be considered only for the purpose of imposing punishment if the accused is found guilty of the principal offense.²²

It may be true . . . that it is prejudicial If prejudice there be, it is a necessary result of setting forth [the charge] in the manner required by law Proper instructions by the court as to the purpose and effect . . . of former convictions will protect [defendant's] legal rights.

The assumption that prejudicial effects can be negated by admonitions or instructions to the jury "all practicing lawyers know to be unmitigated fiction."²³ It is readily apparent that the common law procedure for prosecuting the habitual criminal presents a great risk of creating prejudice in the minds of the jury; knowledge of the prior convictions may convey the impression that the accused has a propensity for committing crime. Whether or not the accused has this propensity should not impair his right to an impartial trial on the offense charged.

England recognized the prejudicial effects of the common law procedure over one-hundred years ago and abandoned it in favor of a statute providing that an accused must be found guilty of the principal offense before prior convictions can be made known to the jury.²⁴ This procedure was adopted by the Connecticut court in the leading case of *State v. Ferrone*:²⁵

It cannot be believed that an accused man would ever have a fair trial resulting in a verdict not affected by prejudice or by considerations by which the jury should not be influenced, if during that trial allegations that he has twice before been convicted of state prison crimes have been read to the jury, and evidence of his former convictions has been placed before them. It is beyond question that knowledge of such facts must necessarily prejudice the minds of his triers against the accused, and cause him. . . serious injury. . . .

²⁰*Supra* note 17 at 534.

²¹*Waxler v. State*, 67 Wyo. 396, 224 P.2d 514 (1950); *State v. Meyer*, note 18 *supra*.

²²*State v. McClay*, note 14 *supra* at 353. Most jurisdictions grant a mistrial if a defendant has been prejudiced by overemphasis on proof of prior convictions during the trial. See Annot., 144 A.L.R. 240 (1943).

²³*Krulewitch v. United States*, 336 U.S. 440, 453 (1949).

²⁴PREVIOUS CONVICTION ACT, 1836, 6 & 7 Will. 4, ch. 111.

²⁵96 Conn. 160, 113 Atl. 452, 457 (1921).

An accused is presumed innocent and a prosecutor must establish guilt with evidence material and relevant to the specific crime charged. Only on such evidence can the jury find a defendant guilty.²⁶ Therefore, the law excludes evidence of collateral issues tending to degrade or prejudice an accused; as such would divert the jury's attention from the specific issues, tend to assert that the accused is likely to have committed the crime, and thereby affect the verdict. Former crimes are never allowed for the purpose of supplying substantive evidence of the principal offense, because "a man is not to be convicted of one crime by proof that he is guilty of another."²⁷ Habitual criminal statutes were not intended to controvert these principals, but a procedure which informs the jury of defendant's prior convictions at the outset of the trial circumvents the policy considerations behind them.

The court in the instant case held that informing the jury of defendant's prior convictions pursuant to the common law procedure violated the due process clause of the Fourteenth Amendment. As applied to state criminal proceedings, that clause guarantees to the criminally accused the right to a fair trial before an impartial jury.²⁸ Violations of this right constitute a denial of due process and justify federal interference with a state criminal conviction. Due process is denied when "that fundamental fairness essential to the very concept of justice" is disregarded in the conduct of a criminal trial.²⁹ It is elementary that a jury's impartiality is one of the most essential ingredients of a fair trial.

The court in the instant case pointed out that the due process clause does not establish a criteria for determining impartiality. However, that clause has been held to contemplate a jury having "no fixed opinion concerning the guilt or innocence of the one on trial," and whose verdict is based on facts submitted to the court.³⁰ Impartiality is destroyed by such facts certain "to weight too much with the jury and to so overpersuade them as to prejudge one with a bad general record. . . ."³¹ In applying this general test, recent federal cases have held that a jury's knowledge of former crimes automatically destroys impartiality. In *Marshall v. United States*, a jury's exposure to newspaper stories concerning defendant's former convictions was held to preclude a fair

²⁶ "[T]he prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character." McCORMICK, EVIDENCE § 157 at 327 (1954). Exceptions to the rule are discussed in that section. The most widely recognized exception permits prior convictions for the purpose of impeaching defendant's character after he has placed it into issue. The court in the instant case observed that the effect of the common law procedure is to violate this exception because it attacks defendant's reputation before he has initiated the inquiry.

²⁷State v. Ferrone, note 25 *supra* at 457.

²⁸Irvin v. Dowd, 366 U.S. 717 (1961).

²⁹Chavez v. Dickson, 280 F.2d 727, 735 (9th Cir. 1960).

³⁰Instant case at 185. The court was quoting from *Baker v. Hudspeth*, 129 F.2d 779, 781-782 (10th Cir. 1942), *cert. denied*, 317 U.S. 681 (1942).

³¹Instant case at 185. The court was quoting from *Michelson v. United States*, 335 U.S. 469, 476 (1948).

trial.³² Prejudicial effects were also implied from a confession which referred to other crimes,³³ and from a statement made by an officer to a juror that the accused was serving time for another offense.³⁴ Thus, the federal courts recognize a tendency among jurors to subconsciously rationalize that *if the defendant did it before, he would do it again*. To assure impartiality, information regarding former offenses before determination of guilt or innocence on the principal charge should be withheld from the jury.

The court in the instant case noted that the disclosure of the prior convictions to the jury was unnecessary and could have been easily avoided. The court discussed methods of procedure adopted by other jurisdictions which are designed to eliminate the dangers of prejudice. These states also recognize that the habitual criminal statutes do not create an independent crime, but treat the pleading and proof of the prior convictions separately for the accused's protection. An increasing number of jurisdictions, either by statute³⁵ or judicial opinion,³⁶ have substantially adopted the following procedure for implementing habitual criminal statutes:

- (1) The indictment or information is divided into two parts: the first sets forth the principal charge; the second, separable from the first, contains the allegations of the prior convictions.
- (2) The entire indictment or information is read to the accused and his pleas are taken in the jury's absence.
- (3) Only the part containing the principal charge is read to the jury. During the trial, no mention is made of the prior convictions in the remarks of the prosecutor, by the evidence, nor by the court's instructions.³⁷
- (4) When the jury retires to consider the verdict, only the first part is given to them.

³²360 U.S. 310 (1959). The United States Supreme Court, exercising its supervisory powers over federal courts, declared a mistrial even though the jurors had asserted that they were not prejudiced by the information.

³³United States v. Jacangelo, 281 F.2d 574 (3rd Cir. 1960).

³⁴Holmes v. United States, 284 F.2d 716 (4th Cir. 1960).

³⁵CAL. PEN. CODE § 1025 (West); FLA. STAT. ANN. § 775.11 (1961); MINN. STAT. ANN. § 610.31 (1947); UTAH CODE ANN. § 76-1-19 (1953); W. VA. CODE ANN. § 6130 (1961). In the instant case, after defendant's convictions had been affirmed by the state court, the Maryland Legislature enacted a statute abandoning the common law procedure. See MD. CRIM. PROC., Rule 713 (1961). For a statute requiring the trial judge to determine the fact of the prior conviction, and then submit the finding to the jury for its determination of punishment see MO. ANN. STAT. § 556.280 (as amended 1959).

³⁶State v. Johnson, 383 P.2d 326 (Idaho 1963); Harris v. State, 369 P.2d 187 (Okla. 1962); Commonwealth v. Koczwarra, 397 Pa. 575, 155 A.2d 825 (1959); Beeler v. State, 206 Tenn. 160, 332 S.W.2d 203 (1959); Heinze v. People, 127 Colo. 54, 253 P.2d 596 (1953); State v. Kirkpatrick, 181 Wash. 313, 43 P.2d 44 (1953). Other jurisdictions hold that the trial judge must make the determination of whether the accused committed the prior offenses. Kennedy v. State, 171 Neb. 160, 105 N.W.2d 710 (1960); Walker v. State, 38 Ala. 204, 84 So. 2d 383 (1955); LeVell v. Simpson, 142 Kan. 892, 52 P.2d 372 (1935), cert. denied 297 U.S. 695 (1935).

³⁷This procedural requirement would not restrict the admissibility of evidence relating to prior convictions under recognized exceptions to rules of evidence. See note 26 *supra*.

- (5) If the jury returns a verdict of guilty on the principal charge, the judge explains that the defendant will then be tried as an habitual criminal for the purpose of increasing his punishment. The second part of the indictment or information is then read to the jury, and evidence is then presented to establish the historical fact of the alleged prior convictions.
- (6) The jury then retires to assess the punishment within the limits prescribed by statute for the principal offense. If defendant is also found to have committed the previous convictions, it may impose the enhanced penalty as provided by the habitual criminal statute.

If defendant admits the prior convictions and pleads not guilty to the principle offense, the same procedure is applied except that a separate hearing is not required for proof of the prior convictions.³⁸

It is submitted that the rationale of the court in the instant case gives those jurisdictions adhering to the common law procedure added impetus to consider the adoption of the foregoing procedure. As discussed above, Montana is included among the majority of states which apply the common law method to prosecute habitual criminals. The suggested procedure protects the accused from the prejudicial effects of prior convictions which the court in the instant case found violative of the due process clause. The case clearly indicates that federal courts will interfere with state criminal proceedings in order to protect the constitutional right to a fair and imparital trial.³⁹ Therefore, convictions procured under the common law habitual criminal procedure face invalidation by the federal courts.

In view of the supervisory power of the federal courts, an eventual change in the Montana procedure is inevitable. The most satisfactory way to accomplish this necessary change is by the enactment of a statute which clearly sets forth the suggested procedure. At present, the Montana Criminal Code⁴⁰ is undergoing revision by a Criminal Law Commission appointed by the Supreme court.⁴¹ That commission should take cognizance of the result in the instant case and propose a statute substantially identical to the procedure outlined above. The suggested procedure has proven successful in other jurisdictions, and its enactment by the Montana Legislature is strongly urged.

JOSEPH E. REBER

³⁸“While safeguarding the rights of the accused, such procedure does not offend any principle of orderly procedure nor tend to delay justice. In fact it may well expedite justice, for if a defendant is acquitted on the substantive charge, there is no occasion to take time to present evidence of prior convictions. If the jury renders a verdict of guilty, then the second phase of the trial should be conducted before the same jury unless the defendant waives a jury trial on such matters.” *State v. Stewart*, 110 Utah 203, 171 P.2d 383, 387 (1946).

³⁹*See, e.g., Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

⁴⁰R.C.M. 1947, tit. 94.

⁴¹The 1963 Montana Legislature empowered the Supreme Court to recommend changes in the Montana Criminal Code through the creation of a Criminal Law Commission. *Laws of Montana 1963*, ch. 103 at 202.

THE ESTATE OF TENANCY BY THE ENTIRETY IS NOT A RECOGNIZED MODE OF OWNERSHIP IN MONTANA.—A husband and his wife were conveyed real property “as joint tenants with the right of survivorship and not as tenants in common.” Subsequently, they were divorced. Two years after the divorce, the husband died. He was survived by his wife and various brothers and sisters. The latter, the appellants, brought the action to quiet title, contending that the deed created a tenancy by the entirety and that when the grantees were divorced, the tenancy was, by operation of law, converted into a tenancy in common. The trial court held that a joint tenancy was created and that the wife took by right of survivorship. On appeal, *held*, affirmed. The Montana Supreme Court stated that the tenancy by the entirety is not recognized in Montana. Thus, the deed could create but one type of estate, a joint tenancy. *Clark v. Clark*, 387 P.2d 907 (Mont. 1963).

Beginning in the 14th or 15th century in England, two or more persons were able to own concurrent interests in the same estate in land. Three types of these interests form the basis for the modern law of co-ownership of real property.

Tenancy in Common. In this co-ownership, there is but one unity, that of possession. The right to possession of the whole of the estate belongs to all of the cotenants, yet, each cotenant has a separate and distinct interest in the property. The interest of one tenant may either be unequal to that of the others, acquired at a different time and by a different instrument, or conveyed by one tenant without the consent of the others. Unlike the other two concurrent interests to be considered, the right of survivorship is not an incident to a tenancy in common. On the death of one of the cotenants his interest passes to his heirs.¹

Joint Tenancy. The creation of a joint tenancy requires four unities, that of time, title, interest and possession. There must be but one interest created by one instrument. The interest of all of the cotenants must commence at the same time and be held under one possession. If one of the four unities is lacking, the result is a tenancy in common. Thus, joint tenants are seized of a share and also of the whole. The right of survivorship is the most important aspect of the joint tenancy. When one of the tenants dies, the entire estate remains in the survivors. Neither the widow or heirs of the deceased tenant nor his creditors have any claim against the enlarged interest of the surviving tenants. One joint tenant, without the consent of the other tenants, may alienate his interest. This transfer severs the interest conveyed from the joint tenancy. The transferee holds as a tenant in common with the remaining joint tenants.²

¹MOYNIHAN, INTRODUCTION TO REAL PROPERTY 224-225 (1962); 2 AMERICAN LAW OF PROPERTY § 6.5 (Casner ed. 1952).

²MOYNIHAN, *supra* at 216-223; 2 AMERICAN LAW OF PROPERTY, *supra* §§ 6.1 — 6.4. Under the common law theory of the “title mortgage” where title to the property is transferred to the mortgagee, the execution of the mortgage severs the joint tenancy. A conflict has arisen as to the effect of a “lien mortgage” executed upon a joint estate. California has taken the position that the execution of a “lien mort-