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Error in Charging a Misdemeanor as a Felony - Whittington v. State

ERROR IN CHARGING A MISDEMEANOR AS A FELONY

Whittington v. State[1]

The defendant-appellant was tried on an indictment which charged that he "did then and there feloniously steal and take away forty pounds of tobacco" of the value of ten dollars. The trial court overruled a demurrer to the indictment which was based on the ground that it was improper to charge that the act was "feloniously" committed. On defendant's appeal from a conviction, *Held:* Reversed. The larceny of goods under the value of $25 is a misdemeanor[2] and an indictment which charges the commission of a misdemeanor as felonious is invalid.

The case presents two points for consideration: The distinction in Maryland between felonies and misdemeanors; and the fatal effect of placing the word "feloniously" in a misdemeanor indictment.

At early common law the distinction between felony and misdemeanor was almost impossible of definition. "Neither of the words, felony or misdemeanor, of themselves have any exactness or precision of definition. At common law felony was an offence which occasioned a total forfeiture of land or goods or both, and a misdemeanor was an offence less than a felony."[3] The status of the felony has, today, become more complex, and its *general* definition in this country may be stated to be: A felony is an offence which by the statutes or by the common law is punishable with death alone, or to which the old English law attached the total forfeiture of lands or goods or both, or which a statute expressly declares to be such.[4] As, in this country, there is no forfeiture of property upon conviction of crime, that means of determining what is a felony is extinct. Nevertheless, it is a recognized fact that the general law of this country will include within the definition of "felony" all the common law felonies.[5] Since the outmoding of forfeiture and since many states have, by statute, declared new crimes to be felonies, it is now more accurate to say that a felony is any crime which was one at common law, which

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[1] 196 Atl. 314 (Md. 1938).
[2] Md. Code Supp., Art. 27, Sec. 319.
[3] State v. Biggs, 52 Ore. 433, 435, 97 Pac. 713 (1908).
[4] 1 Bishop, Criminal Law (9th Ed.) Sec. 615.
[5] Dutton v. State, 123 Md. 373, 378, 91 Atl. 417 (1914). Clark and Marshall, Crimes, Sec. 3.

has been declared one by statute, or which is punishable by death alone.[6]

At this point it is convenient to inquire why there should be any distinction between felonies and misdemeanors. It must be admitted that crimes should be classified according to the gravity of the anti-social conduct, for it is desirable to deal more strictly with those persons who have committed the greater crimes than with those who have committed lesser ones. For example, there is no need for arraignment in misdemeanor cases.[7] Lesser crimes may be tried before justices of the peace more freely than more serious ones.[8] In Maryland, evidence illegally obtained is not admissible in misdemeanor cases.[9] It is easier to make a lawful arrest for a felony. There may be misprision of felony but not of misdemeanor.[10] In Maryland it is criminal to solicit a felony but not to solicit a misdemeanor.[10a]

Many jurisdictions have recognized the difficulty in limiting felonies to the common law felonies,[11] and "in most, if not all of the United States, the word felony has either by statute or judicial construction acquired the meaning of a crime punishable by death or imprisonment in a state prison."[12] Very often it is provided that one convicted of a crime punishable by a sentence of one year must be placed in the penitentiary.[13] Since the only purpose in dividing crimes is to segregate them into the greater and the lesser, the best possible method would seem to be a separation on the basis of the punishment for the crime, for the greater the crime, the more severe the punishment. We see, therefore, that the great majority of the states use a practicable method, and one that still meets the definition of a felony by including the common law felonies which are, still, the more serious crimes.

[6] Bishop, op. cit. *supra* note 4, Sec. 615 (3). There is, today, no crime in Maryland punishable only by death.

[7] Salfner v. State, 84 Md. 299, 35 Atl. 885 (1896); Dutton v. State, *supra*, note 5.

[8] Crawford v. State, 197 Atl. 866 (Md. 1938).

[9] Md. Code Supp., Art. 35, Sec. 4-A.

[10] Marbury v. Brooks, 7 Wheat. 556, 5 L. Ed. 522 (1822).

[10a] Lamb v. State, 67 Md. 524, 10 Atl. 208, 298 (1887); Bittle v. State, 78 Md. 526, 28 Atl. 405 (1894).

[11] The common law felonies were: Murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny (both grand and petit). The statute cited *supra* note 2 made petit larceny only a misdemeanor and raised the distinguishing sum from five dollars to twenty-five dollars. Prior to that Maryland had the common law rule that petit larceny was also a felony.

[12] 1 Wharton, Criminal Law, (12th Ed.) Sec. 26, n. 16. See also Benton v. Comm., 89 Va. 570, 16 S. E. 725 (1893); People v. Hughes, 137 N. Y. 29, 32 N. E. 1105 (1893).

[13] People v. Hughes, *supra* note 12.

In Maryland we have no such method of distinction but, on the contrary, limit our felonies to the common law felonies and those made so by statute, while a misdemeanor is any crime other than a felony.[14] Our Court has said:[15]

> "The distinction made in some jurisdictions that crimes punishable by death or confinement in the penitentiary are felonies, and others misdemeanors, has never existed in this State, but here only those are felonies which were such at common law, or have been so declared by statute. The fact that a crime is punishable in the penitentiary or is infamous does not make it a felony in this State."

The result of this obsolete method of ascertaining what is a felony has been the absurd proposition that some of the most heinous crimes in the state are misdemeanors. For examples: assault to rob, murder, or have carnal knowledge are misdemeanors. Assault with intent to rape is one also, although it carries a possible death sentence.[16] As pointed out by Wharton in his work on Criminal Law:[17] "It is impossible not to be amazed at a system which made perjury a misdemeanor and larceny a felony; which while making it a felony to steal five shillings, made it only a misdemeanor to conspire to rob a bank."

It would seem that in the light of the difficulties caused in Maryland by the common law definition of a felony, it would be desirable to have a statute drawing a definite line between a felony and a misdemeanor, one that really separates the higher and more serious from the lesser crimes. In the opinion of many authorities, this should be done on the basis of the possible length of imprisonment or the possibility of incarceration in a State penitentiary or to receive the death penalty.[18]

In the principal case the Court decided that to place the word "feloniously" in a misdemeanor indictment was fatal error. The overwhelming weight of authority is against this view, although it was the common law rule, still followed in England, Vermont and, possibly, Massachusetts. Outside these jurisdictions the courts generally hold that it

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[14] State v. Phelps, 9 Md. 21 (1856).

[15] Dutton v. State, *supra* note 5, 123 Md. 373, 378. See also *supra* note 11.

[16] Ibid, Md. Code Supp., Art. 27, Sec. 17.

[17] 1 Wharton, Criminal Law, (12th Ed.), Sec. 26.

[18] For a discussion of the common law distinctions under the Bouse Act, see Note (1938) 2 Md. L. Rev. 147, 155 et seq.

is mere surplusage to include the word "feloniously" in a misdemeanor indictment.[19]

The Court, in the principal case, relied on the decision in *Black v. State.*[20] The two cases lay down the same proposition, that to allege that one did "feloniously" commit an act which is a misdemeanor is to convict him of felony if he be found guilty. The Court said in the *Black* case:[20a] "The prisoner has been convicted of an infamous crime, to-wit, a felony, when the offense proved against him according to legal definition was not of that character."

In the *Black* case the Court relied heavily on *Commonwealth v. Newell,*[21] a Massachusetts case of 1810. The *Black* case was decided in 1852 and failed to mention the later Massachusetts case of *Commonwealth v. Squire,*[22] decided in 1840, which reached a contrary result and held that the word could be treated as surplusage.[23]

Although the *Black* case[24] rejects an Ohio case[25] also holding that the word amounted to mere surplusage, and said of it: "We cannot adopt that decision, unsupported by a single authority" and although at that time the Ohio court was advancing a new principle of law, today the great weight of case and secondary authority supports a rule contrary to the Maryland law on the point.[26] Upon reflection, and in the light of the holdings adverse to our Maryland cases, it does cause one to wonder why there should be such magic property in so modest an adverb as "feloniously" as to give it the power of transforming into a felony a well described act already defined as a misdemeanor. The result of the Maryland decisions, as in the principal case, is to make it necessary for the prosecution to go to the time, trouble, and expense of re-indictment and new prosecution.

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[19] Conversely, however, it is usually held error to omit the word from a felony indictment.

[20] 2 Md. 376 (1852).

[20a] *Ibid*, 2 Md. 376, 380.

[21] 7 Mass. 245 (1810).

[22] 1 Metc. 258 (Mass. 1840).

[23] See also Comm. v. Philpot, 130 Mass. 59 (1880). It might be pointed out that statutes in Massachusetts may vary the rule from time to time.

[24] *Supra*, note 20

[25] Hess v. State, 5 Oh. 5, 22 Am. Dec. 767 (1831).

[26] State v. Parks, 78 Ind. 166 (1881); Comm. v. Philpot, *supra*, note 23; Comm. v. Squire, *supra*, note 22; State v. Connerry, 17 Minn 72 (1871); State v. Hogard, 12 Minn. 293 (1866); State v. Jones, 19 Mo. 224 (1855); State v. Edwards, 90 N. C. 711 (1884); Stager v. Comm., 103 Pa. 469 (1883); Hess v. State, *supra*, note 25; State v. Howes, 26 W. Va. 110 (1885); State v. Satterfield, 29 Del. 443, 100 Atl. 473 (1917); Hoagland, et al., v. U. S., 28 Fed. (2nd) 871 (1928). See also 1 Bishop, Criminal Law (8th Ed.), Sec. 810; Wharton, Criminal Pleading and Practice, Secs. 26, 742; Hochheimer, Crimes and Criminal Procedure, Sec. 103.

Advanced legal minds, recognizing the need for swift and certain conviction of criminals and realizing that some of our procedural, as well as substantive, law has become so obsolete as to be a clog on the wheels of justice, recommend the abolition of technicalities which prevent the punishment of wrongdoers. As so well expressed by the Pennsylvania court: "Mere technical matters which do not affect the merits receive much less consideration than they did a century ago."[27]

There is need for statutory reform, both of the distinction between felony and misdemeanor, and concerning the fatal effect on indictments of such insignificant errors.

[27] Staeger v. Comm., *supra*, note 26.