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Traffic Cameras Legal in D.C., Illegal in Minneapolis

SUMMARY: A Minneapolis ordinance allowing automated ticketing for traffic light infractions was invalid because it created different presumptions from a state traffic statute. The District of Columbia's statute authorizing automated tickets, by contrast, did not violate due process because ticketed parties had full opportunity to challenge the ticket before the district imposed liability and a fine. The Minnesota Supreme Court decided *State v. Kuhlman* on April 5, 2007. The District of Columbia Court of Appeals decided *Agomo v. Funty* on February 1, 2007.

BACKGROUND: In 2001, the District of Columbia passed a statute allowing an automated system, using cameras and speed recording equipment, for detecting certain traffic infractions. Eighteen times, a car registered to Emelike Agomo tripped the cameras. The cameras also recorded infractions by automobiles owned by Auto Ward, Inc., a company that rents vehicles to taxi drivers. The city sent over 100 tickets to Auto Ward based on speeding and red-light infractions recorded by the cameras.

Agomo and Auto Ward challenged the District's statute, arguing that it violated their right to due process. The trial court ruled for the District and Agomo appealed.

The Minneapolis city council enacted an ordinance in September 2004, authorizing photo enforcement of traffic signals. In July 2005, police put the ordinance into effect. The following month, a camera photographed a vehicle that had run a red light. Based on the photographed violation, Minneapolis police mailed a ticket to the vehicle's registered owner, Daniel Kuhlman, based on the vehicle's license plate.

Kuhlman challenged the ticket and the state district court found in his favor. The state appealed and the court of appeals affirmed. The state then appealed to the state supreme court.

ANALYSIS: Kuhlman and Agomo raised similar claims. In each case, the drivers argued that a system that automatically found them guilty of a traffic infraction violated their right to due process. With a live officer, a motorist can discuss what the officer feels the driver did wrong, explain his or her position and perhaps convince the officer that there was no infraction or that a ticket is not appropriate. With an automated system, however, the driver gets no interaction before notice of a violation is mailed to the vehicle's registered owner. The drivers in both jurisdictions—Minneapolis, MN, and Washington, D.C.—argued that such a procedure violated due process. In other words, an automatically assigned infraction denied their ability to plead innocence, or wrongly created a presumption of guilt when the correct presumption for a violation of the law is a presumption of innocence.

The Minneapolis ordinance provided that once a vehicle was photographed running a red light, the vehicle's registered owner would be presumed liable for the infraction. The owner could rebut this presumption by providing proof that he was not the owner of the vehicle at the time of the infraction or providing the name and address of the person who was operating the vehicle. Likewise, the owner could rebut the presumption by showing that the car had been stolen before the violation. The ordinance further provided that if the city found the owner was not operating the vehicle at the time of the violation, it would issue a citation to the identified driver.

Kuhlman argued that the act was unconstitutional because it found the owner liable unless he proved he was not the owner or that the vehicle was stolen at the time of the infraction. The state conceded that if the owner showed that someone else was driving, he was still liable for the infraction under the statute. The state argued that in that circumstance, it would not issue a ticket to the owner, however, but to the identified driver; the driver would be ticketed under a Minnesota statute making it illegal to run a red light. Kuhlman said the finding of liability under the ordinance conflicted with the state statute, which did not presume liability in the vehicle owner; instead, liability fell to the driver.

The Minnesota Supreme Court agreed. State law is controlling over that of state subdivisions. A city ordinance that conflicts with a state law is void. Because the state statute addressing a traffic light violation did not automatically put a presumption of liability upon the vehicle owner, Minneapolis's ordinance could not do so. The court therefore invalidated the ordinance.

The District of Columbia occupies a unique place in the United States. It is not a state. It is a city, but it's a freestanding city. The District and the city are the same place, the same thing. There is no state law in the District of Columbia. There is only District law. Thus Agomo had no option to contrast state law with District law to show a conflict. Agomo argued that automated traffic devices established guilt automatically. Because American criminal law is based on the notion of presumed innocence, or "innocent until proven guilty," the automated system of establishing a violation and generating a ticket was unconstitutional. Agomo also complained of the District's connection to a private company. This company reviews all the photos generated by the automatic system, selecting those where the license plate and offending vehicle were clear. It then submits these to District police, who determine whether to issue a ticket. Agomo argued that this company and the District had a financial incentive to find violations; the system was therefore inherently biased against drivers and unfair.

The appeals court dismissed Agomo's arguments. The automated traffic system generated evidence, not guilt. Every motorist photographed by the District's cameras had the opportunity for a hearing to contest the claimed infraction. Only if the motorist failed to request a hearing, or let the period for requesting one lapse, did the ticket become final. Besides, the court noted, District law provides that the tickets at issue are civil infractions not criminal; thus, the standard protections applicable in a criminal proceeding did not apply.

As to Agomo's complaint about a private company's involvement in the District system, the court said it was not prejudicial. The company was only reviewing photographs for those clearly identifying offenders. From there, police officers reviewed them to determine whether to issue a ticket. The court noted that prior to 2000, the company had been paid based on the number of tickets issued. While that system was more suspect, it was no longer in place. At the time Agomo's tickets occurred, the company was paid a set fee each month and had no incentive to find more offenses than evidence might suggest.

Because the appeals court found no meaningful difference in a motorist's rights between tickets detected by cameras and those written by a police officer, the court let the system stand. The District had submitted evidence showing significant decreases in traffic violations and related deaths, which supported the public benefit of the automated system.

EXCERPTS FROM THE MN SUPREME COURT OPINION (By Justice Hanson): "The state's first argument—that the ordinance is a specific application of owner liability created generally by statute—must fail because the Act does not create general owner liability for traffic violations. Instead, the Act places liability for traffic violations on owners in only specific, limited circumstances.... The Act does not provide for owner liability for the failure of the motor vehicle to stop for a red light unless the owner requires or knowingly permits the driver to fail to stop. In this sense, the owner liability provided by the ordinance is more general, not more specific, than that provided by the Act.

"Additionally, the more limited owner liability under the Act applies equally throughout the state, whereas the broader owner liability created by the ordinance would apply only in Minneapolis. [The city ordinance] thus 'adds a requirement that is absent from the statute,' namely owner liability for red-light violations where the owner neither required nor knowingly permitted the violation."

EXCERPTS FROM THE D.C. COURT OF APPEALS OPINION (By Judge Nebeker): "[D.C. law] states that 'the owner of a vehicle issued a notice of infraction shall be liable for payment of the fine assessed for the infraction, unless the owner can furnish evidence that the vehicle was, at the time of the infraction, in the custody, care, or control of another person.' This language creates a rebuttable presumption that the car used in the infraction was in the custody, care, or control of the registered owner, and it imposes vicarious liability on that basis. Vicarious liability, in and of itself, is merely a legal concept used to transfer liability from an agent to a principal. If the factual predicate is established, *i.e.*, that the car was in the care, custody, or control of the registered owner, then liability is imposed on the owner without further inquiry into who specifically may have been driving.

"Appellants' argument that this liability system undermines the clear and convincing standard of proof...is misplaced. The statute provides that 'no infraction shall be established except by clear and convincing evidence.' Appellants confuse proof of the violation with the imposition of liability. The statutory mechanism for assessing liability once an infraction has been established in no way affects the requirement that the District prove the commission of a traffic infraction by clear and convincing evidence. As conceded by the appellants in this case, the Automated Traffic Enforcement System accurately captures and records traffic violations; thus there is no constitutional infirmity in the code provision that declares recorded images to be prima facie evidence of an infraction."

COMMENTS & QUESTIONS

1. What did Agomo and Auto Ward do wrong?
2. What did Kuhlman do wrong?
3. Did the photo devices prove a crime had been committed? Did the drivers have any recourse?

There is a hierarchy to U.S. law. The U.S. Constitution is superior to federal and state law. A law that conflicts with the Constitution is void. Likewise state laws that conflict with a state constitution are void. While lesser laws that conflict with a higher source of law are void, a lesser law can expand the rights generally provided by the higher source—they can define specifically what the higher source provides generally. Put another way, lesser laws can provide greater rights than a higher source of law, but they cannot erode rights protected by that law. In Kuhlman, a city ordinance conflicted with a state law—creating liability for a vehicle owner that a state law addressing the same violation did not provide. The ordinance therefore reduced a vehicle owner's rights for particular traffic violations and was void.

In *Agomo*, the driver argued that the automatic ticket system deprived him opportunity to challenge and infraction by making him guilty automatically. Automatic guilt violated his right to due process and the presumption of innocence. The court rejected this argument. Agomo could still challenge the ticket before it became final, just as he could if an officer had written it.

If Agomo and Kuhlman did the same thing, why did Kuhlman beat the ticket and Agomo have to pay it? Since the District is not a state, can it pass any law it wants, making anything a crime and finding anyone guilty under whatever terms it prescribes?

If we had computerized tax forms that were reviewed by machine for compliance with tax laws, and the machine had the power to issue citations for tax evasion, would this be legal? What's the difference between that and this situation?

What if traffic meters detected the presence of your car along with the paid time remaining on the meter and automatically generated a ticket when time ran out, would this be fair? Would it comport with due process?

Could Minneapolis pass an ordinance saying that drivers issued a ticket by a photo detection device were automatically guilty with no opportunity for a hearing or to challenge the ticket?

Just how do you feel about new technologies and type of surveillance? Do you think the government should be watching us this way? Should you be guilty of crimes based on cameras, without a chance of explanation? Even if you have a chance to explain, how do you do so? Cameras don't lie, do they? Can digital technology be made to show just about anything? How can we be sure what is in the picture actually happened?

Passenger in Police Chase was not Innocent Third Party

SUMMARY: A young woman killed when the driver of the stolen car in which she was a passenger attempted to flee police and crashed was not an innocent third party and therefore could not recover against the police. The Nebraska Court of Appeals decided *Jura v. City of Omaha* on February 27, 2007.

BACKGROUND: About 4 a.m. on December 8, 2002, Amanda Jura and two friends got into a Lincoln Continental with Jacob Witt. They had been at a party, at which they used drugs including marijuana and methamphetamine. Their reason for getting in the car with Witt was to go out and buy more drugs. Jura did not know that the Lincoln was a stolen car.

During the trip from the party to the intended drug source, Witt passed a police cruiser driven by Officer Thomas Deignan. Witt was not violating any traffic law when Deignan saw them. Deignan testified that he followed them, nonetheless, because four young people cruising the streets in an expensive car in the middle of the night seemed strange. The officer called his dispatcher to check the Lincoln's license plate for any reported illegal activity. The dispatcher informed Deignan that the Lincoln was stolen. Deignan testified that the car started to take off and he made chase, with his lights and siren on. Witt lost control during the chase, went over an embankment and the Lincoln struck a tree. Jura and one of her friends were killed in the crash.

Under Nebraska law, an innocent third party injured or killed in a police chase may recover damages. Jura's estate sued Deignan and the city of Omaha, alleging that Jura had been an innocent third party and seeking compensation for her death. The district court dismissed the suit and Jura's estate appealed.

ANALYSIS: Jura's estate argued that she was not driving, she didn't know the Lincoln was stolen, and therefore she was blameless in the events that took her life. Nebraska law sets two conditions for someone to be considered an innocent third party in a police-chase accident: the passenger "must not have promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel"; and the passenger must not be a person whom the police are seeking to apprehend. The city argued that Jura failed both requirements.

Following the accident Witt described what had happened at least twice. The first time, he said that his passengers tried to give him instructions as he drove, such as not to hit a curb. He also said that Robin Abraham, one of the passengers, told him that she had two outstanding warrants and that Witt should "hurry up and get away." Other statements by Witt indicated that his passengers were aware that the officer behind them would or did check their license plate. Witt gave that account during the hours after the accident. Later, Witt said that his passengers had urged him not to flee. Another passenger, Tiffany Bruce, likewise testified that Witt's passengers had told him not to flee.

The district (trial) court concluded that between the two accounts, the one Witt gave closer to the event itself, in which no passenger told him to stop and one passenger told him to get away, was likely the more accurate of the two. The trial court acknowledged that the innocent third party question was toughest with Jura, whom no one said had urged Witt to flee. Yet Jura was aware that they were fleeing and why, the court reasoned. She had therefore acquiesced in Abraham's request that Witt flee. Jura therefore failed the first test for innocent third party status.

The district court also noted that Jura had been using drugs along with the other young people. She had gotten into the car with others for the purpose of securing additional illegal drugs. Although she was not aware the Lincoln was stolen, she did know that Witt was a young man without a job and thus she might have questioned how he acquired such a vehicle. Jura also knew that at least one of the people in the car—Bruce—had drugs in her possession. These facts made Jura subject to arrest on drug charges. Jura therefore failed the second part of the innocent third party test as a person whom the police are seeking to apprehend.

The appeals court disagreed with the trial court's reasoning that Jura had been subject to arrest on drug charges. Although Jura had used drugs, she was not in possession of any—it was Tiffany Bruce who had drugs in her purse. More important was the fact that Deignan had no evidence of drug use when he initiated pursuit of the vehicle. It therefore was not proper under the statute to conclude that Jura was someone the police wanted to apprehend for drug activity. Drugs were simply not a factor in Deignan's decision to follow, then chase, the Lincoln.

Another factor moved the appeals court. Jura was a passenger in a stolen car. Although she was not the thief, was not involved in the theft and did not even know it was a stolen car, she nonetheless was subject to arrest on that basis. Officer Deignan and two other police officers testified at trial that they would seek to arrest all occupants of a stolen car because they have no way of knowing who, exactly, was involved. They would not simply conclude that the driver, and only the driver, was the perpetrator. Because Jura was a person Deignan was seeking to apprehend, she was not an innocent third party.

EXCERPTS FROM THE COURT'S OPINION (By Judge Sievers): "As to Amanda, the district court said:

> Amanda Jura comes as close as any of the three to an "innocent third party". She may not have been subjectively aware that Witt was driving a stolen vehicle, although a young man without a job behind the wheel of such an expensive car would prompt questions for most people. [Amanda] did not have any outstanding warrants, and she may not have been carrying drugs. Nevertheless, at 4:00 A.M. when this journey began, the four had agreed to drive Witt from the house at which they were smoking methamphetamine to another location, and to continue their drug use or to purchase additional drugs. All were aware that the group possessed controlled substances, and were subject to arrest if stopped and searched. They were all aware, including [Amanda], that they were taking a circuitous route to their destination, to avoid encountering police in the early morning hours. The confluence of all of these facts exceeds acquiescence. [Amanda], together with her friends Bruce and Abraham, promoted or advocated Witt's flight, at the time when they all became aware of and discussed the first officer's data check on their license plates, and the arrest warrant.
>
> None of these girls consented to, or encouraged Witt to drive erratically, or to crash. They just wanted him to get away. They knew that it would be better for them if he did elude police....

"Part of the district court's rationale for its conclusion on the

issue of apprehension was that '[a]ll were aware that the group possessed controlled substances, and were subject to arrest if stopped and searched.' To the extent that the district court meant that everyone in the group was subject to arrest for the drugs in Bruce's purse, we reject that conclusion. All of the passengers knew that Bruce had drugs in her purse, but such fact did not make Amanda necessarily subject to arrest, because the purse was not her property and she was not in possession of the drugs. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. There was no evidence to show actual or constructive possession of the drugs by Amanda. However, of greater significance is the simple fact that possession of drugs was not the officer's basis for starting or continuing the pursuit, and seeking to apprehend the vehicle's occupants, because he had no knowledge of such circumstance until after the pursuit ended.

"Officer Deignan ... testified: 'When you have a stolen vehicle with multiple occupants, you don't know who stole the vehicle, where it was taken from, who might have been driving it earlier. You don't have that information before you stop the vehicle and question the occupants." Also, two other Omaha police officers testified that in a situation involving a stolen vehicle, proper police procedure requires the officer to "catch" all occupants in the car, because not knowing when the vehicle was stolen, it is possible that everyone in the vehicle could have been involved in the auto theft.

"Given the testimony of the police officers, we find that Amanda was a person sought to be apprehended in the fleeing vehicle. A police officer's grounds for seeking to apprehend occupants in a vehicular chase situation must have a reasonable basis in the law and facts. Such a basis clearly exists in this case, because the vehicle was a stolen vehicle, as opposed to, for example, a chase starting with a traffic violation. Thus, Amanda was not an innocent third party and her estate is barred from recovering."

COMMENTS & QUESTIONS

1. What was Jura doing when she died? What kind of car was involved?
2. Was she to blame for the incident that took her life? Who was to blame?
3. Did Jura know that the car she was riding in was stolen? Was it her responsibility to know?

In the criminal context, our judicial system has a presumption of innocence. Persons accused of a crime are "innocent until proven guilty." The standard for proving someone guilty is "beyond a reasonable doubt." This is a high standard. For example, in the murder trial of O.J. Simpson, there was some evidence linking him to the crime. Still, the prosecution failed to show that Simpson was a murderer beyond a reasonable doubt. The defense team raised enough unanswered questions that the jury could not conclude there was no reasonable doubt Simpson had done it.

Civil trials use a lower standard. To prevail in a civil trial, the standard is typically "a preponderance of the evidence." This basically means that the evidence tends to favor one side's position over the other's.

This case involves both criminal and civil issues. The police were chasing the Lincoln because it was reported stolen, a crime. But Jura's suit against the police was a civil suit. So what does "innocent third party" mean here? Because it's a civil statute it does not mean that Jura was innocent unless the state could show she was guilty beyond a reasonable doubt. The appeals court apparently concluded that the mere belief by police that Jura may have been involved in a car theft was enough for them to defeat her civil claim that she was an innocent third party.

Whose perception of events, Jura's or Officer Deignan's, was controlling for determining whether Jura was an innocent third party? The appeals court rejected the district court's reasoning that Jura was not innocent because she could be arrested for drug charges. The appellate judges disagreed that there was enough evidence in the car to arrest her on that basis; further, Deignan had no knowledge of that activity and therefore could not have been seeking to apprehend her on that basis at the time of the crash. So the use of illegal drugs, which Jura willingly engaged in, did not disqualify her as an innocent third party, but riding in a stolen car—something she was unaware she was doing—meant she was not innocent under the statute. Is that fair? Is it a denial of due process?

Did Jura steal the car? Can a person be guilty of something of which she has no knowledge? Which is a fairer measure of innocence, what a person does and thinks, or what police suspect you have done?

Studies from many jurisdictions have shown that non-white drivers tend to get pulled over much more often than police. If it's a pursuing police officer's impressions, rather than the vehicle occupant's, that control the definition of innocent third party, is this statute subject to abuse?

Once a car takes off and is fleeing police pursuit, which is a crime, do all occupants lose innocent third party status? Can anyone recover under the law Jura's estate tried to use?

Was Witt most likely responsible for stealing the car he took Jura and her friends in? Was he responsible for the crash? Did Jura tell him to steal the car or to run from police? If she didn't help Witt, and she didn't tell him to break any laws, how can she not be innocent in the crash that killed her? What evidence did police have that Jura may have been involved in a crime? What evidence did her estate present suggesting that she deserved to recover? Did a "preponderance of the evidence" show that she was not an innocent third party? If not, is it right for her claim to fail?

Convict Had Right not to Wear Prison Garb at Trial

SUMMARY: A convicted felon may not routinely be compelled to wear prison garb during the penalty portion of a bifurcated trial. The Supreme Court of Appeals of West Virginia decided *State v. Finley* on December 1, 2006.

BACKGROUND: In March 1999, MH, a 92-year-old woman, was physically and sexually assaulted and murdered in her home. Jeffrey Finley was charged with the crime. In the first part of the trial, the guilt-innocence phase, a jury found him guilty of first-degree murder and second-degree sexual assault. In the second, penalty phase of the trial, the jury considered whether to recommend "mercy." A West Virginia murder conviction with mercy allows for the possibility of parole. A defendant convicted without mercy is ineligible for parole and will spend the rest of his life behind bars.

During the first phase of trial, defendant Finley wore civilian clothes. At the second, penalty phase, Finley the convicted felon appeared in the bright orange prison garb worn by inmates. The jury recommended no mercy during the penalty phase.

Finley appealed. (West Virginia is one of a few states that has no intermediate court of appeals. Thus, his appeal from the trial court was heard by the West Virginia Supreme Court of Appeals.)

ANALYSIS: Finley argued that his due process rights were infringed during the penalty phase of the trial because he was forced to appear before the jury in prison garb. This clothing, he reasoned, branded him as a criminal and influenced the jury not to show him mercy. The state countered that Finley wasn't, and could not have been, prejudiced during the penalty phase because the jury had already found him guilty of the crimes charged. Jurors could not be wrongly influenced to perceive him as a criminal when they had, in a fair trial on the issue of guilt, found him to be one.

Finley argued that his situation was analogous to a case decided by the U.S. Supreme Court. In that case, *Deck v. Missouri*, the Court ruled that forcing a convicted murderer to appear before the jury in visible shackles for the penalty phase of a trial violated his right to due process. Finley argued that his orange prison garb had the same effect on the jury's perceptions as Deck's shackles—it reminded them of his criminal status and encouraged them to withhold mercy. The state argued that Deck was distinguishable. Shackles are a form of restraint. Deck therefore appeared to the jury as an inherently dangerous person, one unsafe to return to society. Prison garb, by contrast, was simply the basic clothing issued to all prisoners; it did not convey anything other than the fact that Finley had been convicted and incarcerated, a fact the jury knew because they had found him guilty of the crimes that put him behind bars.

A majority of the West Virginia Supreme Court of Appeals agreed with Finley. Because Finley was entitled to a recommendation for or against mercy, a determination that would affect his later ability to secure parole, he had an interest in not appearing inherently bad or unworthy, even though he had been found guilty of the crimes charged. Like the shackles in *Deck*, the prison garb conveyed the impression that Finley deserved no favorable treatment. Prison dress encouraged the jury to deny mercy and thus infringed Finley's right to due process during the penalty phase of the trial.

Two judges dissented. They denied that prison garb and shackles were equivalent for due process purposes. Shackles prevent a convicted criminal known to be dangerous from lashing out in the courtroom and injuring the judge, jurors or members of the public, or escaping. The orange prison jumpsuit Finley, and all other prisoners, wore had no such purpose. A tool for restraint was different from an article of clothing. The jury that found Finley guilty of serious and violent crimes could not be misled by the clothing he wore in the courtroom when they determined the extent of his punishment for those crimes.

EXCERPTS FROM THE MAJORITY OPINION (By Justice Albright): "[W]e find no discernable difference in the prejudicial effect upon a jury of seeing a person in prison garb versus seeing that person in shackles in light of the decision the jury is obliged to make at this portion of the trial. At the penalty phase, the jury is no longer looking narrowly at the circumstances surrounding the charged offense. In order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant's character – examining the defendant's past, present and future according to the evidence before it – in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom. The jury must be as impartial in reaching this decision as it was in reaching the conviction decision.... While the court in Deck decided that the compelled use of visible shackles at the penalty phase impugns the integrity of the proceedings and manifests a violation of due process because the practice essentially puts a thumb on one side of the scale, we find the same degree of unfairness results when a criminal defendant is forced to wear jail or prison clothing during the penalty phase of a bifurcated murder trial. It matters not as far as this analysis goes that the Deck case involved a decision regarding the death penalty because the parallel degree of punishment which may be levied for the same crime in West Virginia is life without mercy. Accordingly we hold that the due process afforded by the West Virginia and United States Constitutions demands that a criminal defendant may not routinely be compelled to appear in jail or prison clothing at the penalty phase of a bifurcated murder trial. We also adhere to the conclusion reached in *Deck* that the constitutional requirement is not absolute in that "[i]t permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns." We have adopted the same view regarding the use of restraints at trial. Thus we find that the decision regarding whether a criminal defendant be required to wear identifiable prison or jail clothing at the penalty phase of a bifurcated murder trial is within the sound discretion of the trial court, subject to an evidentiary hearing that establishes an essential state interest which justifies imposing the requirement."

EXCERPTS FROM THE DISSENTS (By Justices Davis and Maynard): "*Deck's* prohibition against routine use of visible physical restraints during a death penalty sentencing phase is clearly distinguishable from the facts of the instant case. During the death penalty sentencing phase, the jury is asked to decide whether a defendant should be executed or remain in prison for life. Obviously, if the jury sees the defendant sitting in court wearing leg irons, handcuffs and a belly chain, there is a possibility that they would conclude that the defendant is too dangerous to even be in prison. Deck recognized this prejudicial possibility. It therefore found that, in the absence of a justified need, a capital defendant may not be compelled to wear visible physical restraints during the sentencing phase. In the instant case, the issue before the jury was not whether the defendant should be sentenced to death or life imprisonment. West Virginia does not have the death penalty.

Instead, the jury was asked to decide whether the defendant should be sentenced to prison with, or without, the possibility of parole. Additionally, the issue in the instant case does not involve wearing leg irons, handcuffs or a belly chain. In this case the defendant complained about having to wear jail clothing in front of the sentencing jury. I am unable to conclude that any measurable prejudice resulted from wearing jail clothing under these circumstances.

"All courts that have addressed the issue have concluded that no prejudice results from requiring a defendant to wear jail clothing during a separate sentencing proceeding. The majority opinion makes our Court the only court in the nation that believes a defendant is prejudiced by wearing jail clothing during the sentencing phase. As a result of the majority opinion, I am compelled to agree with a recent commentary which stated that '[t]his is the kind of [decision] that makes courts look silly.' This observation is all the more telling considering the fact that the 92-year-old victim in this case was beaten, raped anally and vaginally, forced to drink a caustic liquid, had her back broken, and was strangled. Under this set of facts, it is totally unreasonable to conclude that the jury did not grant the defendant mercy because he was wearing jail clothing.

"The use of shackles informs the jury that an offender is so dangerous and prone to violence that he or she must be restrained in order to ensure the safety of everyone in the courtroom. Because the offender's danger to the community is a relevant factor in determining whether or not he or she should receive mercy, one can see how the use of shackles may adversely affect the jury's perception of an offender. In contrast, the appellant's wearing of jail clothing communicated to the jurors the one thing that they already knew – the appellant is an incarcerated convict. The jurors already knew this because they convicted the appellant of two counts of sexual assault and one count of first degree murder. As a result, there is no possibility that the appellant's attire during the penalty phase of trial could have in any way adversely affected the jury's perception of him. The fact is the jury's perception of the appellant had already been sufficiently adversely affected by the fact that he brutally beat, terrorized, tortured, raped, and strangled a 92-year-old woman. Thus, the appellant's clothing during the penalty phase was irrelevant to the jury's refusal to grant mercy. Doubtless, the appellant could have appeared in court wearing an Armani suit and Italian leather shoes and the jury's decision would have been the same."

COMMENTS & QUESTIONS

1. What did Finley object to?
2. What was the state's position?
3. Which side did the dissent agree with?

Our legal system incorporates customs and practices that are centuries old, developed and refined by our courts and by England's before that. Inherent in our legal system is the notion that the proceedings be fair to those before the court. This sense of fairness in judicial proceedings is encompassed by the phrase, *due process*. Due process means fair process. Court proceedings do not produce justice if the proceedings themselves are unfair or prejudicial to a party before the court.

Murder trials are often divided into two parts. Such a trial is called "bifurcated." The jury in Finley's case first decided whether the facts indicated that he was guilty or innocent of the charges. The jury found him guilty of first degree murder plus violent sex crimes, which meant a life sentence. But those sentenced to life in prison in West Virginia may be sentenced with or without what the state calls "mercy." (A sentence with mercy allows for parole; without mercy precludes parole.) The mercy issue is decided by the jury in a second trial phase. A majority of the West Virginia Supreme Court agreed with Finley that this second phase could not be decided fairly if he had to attend the proceedings in prison garb. In other words, forcing him to wear prison clothes in the absence of any special showing that it was necessary for, e.g., public safety, violated Finley's right to due process.

What were the basic facts in the *Deck* case, on which Finley relied? Do you think that situation is the same as or different from Finley's?

Isn't a West Virginia jury always going to be thinking of the nature of the crime committed when it decides whether to allow for possibility of parole? If so, how is the convicted person's clothing relevant? If you agree with the dissent—clothing different from shackles—what if Finley's prison suit had ties at the ends of the sleeves, which they secured like a straightjacket in the courtroom?

If all prisoners in West Virginia had to have crew cuts for hygienic reasons—e.g., to combat head lice—would this case allow a convicted murderer like Finley to keep long hair until after the second phase of trial?

If the state can't make Finley wear prison attire, can it mention that he is in prison? Can it call him "convict" or "defendant" or "murderer?" Because the jury found "Finley" guilty, does due process require that he be called by some other name in the penalty phase, like "Mr. Doe?" How do you distinguish the outfit issue from these incriminating concepts?

The jury that Finley was appearing before was the same jury that just voted to convicted him of a heinous crime. They knew he was a bad guy. Why does it matter what he was wearing?

Liability For Serving Alcohol to Minors

SUMMARY: A social host who serves alcohol to a person under 21 may now be held liable in South Carolina for any damage or injury the underage drinker causes or sustains under the influence. The South Carolina Supreme Court revised its common law in *Marcum v. Bowden*, decided on February 1, 2007.

BACKGROUND: In this case, South Carolina's highest court reviewed two decisions involving social hosts. Social hosts are private citizens, rather than commercial establishments. Social host liability governs those who serve alcohol to minors with fatal consequences. In the *Marcum* case, the Bowden family hosted a cookout at their home. Most of the guests, including a 19-year-old, worked for the same company. During the party this underage guest consumed a large amount of alcohol. While driving afterward, he had a one-car accident in which he was killed. His mother sued the hosts, arguing that they were negligent in serving her minor son alcohol and permitting him to drive away intoxicated.

The second case, *Barnes*, was similar. A 19-year-old attended a party at a private home. Most of the guests were from the same business. This minor guest likewise drank alcohol, became intoxicated and left at the wheel of a car. He collided with another car. Both he and a passenger in the other car died in the accident. The passenger's estate sued the host (and the business for which the guests worked) for negligence in facilitating a minor's intoxication and subsequent operation of a vehicle.

Both cases were appealed after trial. The state supreme court consolidated them and reviewed them together because the same issue was involved.

ANALYSIS: A social host in South Carolina is not liable for injuries caused by an adult guest (someone 21 or older) who becomes intoxicated and injures himself or others. A bar or restaurant that serves an adult who is or becomes intoxicated, however, can be held liable for injuries to third parties (someone other than the server or drinker), but not to the drinker himself. This approach punishes bars who send drunk patrons into the world to hurt others, but does not remove each adult's responsibility to look after himself by allowing the intoxicated patron to recover for his own injuries.

Minors are a special case. Bars and other alcohol sellers are prohibited from selling alcohol to minors. Those who do are subject to criminal penalties. A bar that serves a minor who causes injury while intoxicated is liable for the drunken minor's injuries to others or himself. The reason the bar is liable even for the minor's injuries is that minors are unfamiliar with alcohol, its effects on their actions, and their own tolerance.

The lower courts in the cases consolidated here reached different results. The *Marcum* decision had held no liability for social hosts; the *Barnes* case had determined that state statutes reached social hosts. In this case, the state supreme court rejected both of those approaches. If the legislature had wanted statutes governing the sale of alcohol and service of alcohol to minors by commercial establishments to apply to hosts in private homes, it could have done so. Other statutes, allowing minors to consume alcohol in a private home with their parents' consent, or to do so as part of religious ceremonies, weighed against the interpretation that the laws prohibiting commercial sale and service included minors.

Instead, the court determined that public policy supported holding a social host who makes a minor intoxicated liable for injuries resulting to the minor or others. Public policy is one of the factors influencing the common law—which is the law derived from judicial decisions rather than statutes. Sometimes courts make a decision at odds with their prior holdings, which changes the common law, if the new direction reflects important changes in public attitudes. The South Carolina Supreme Court determined that it was time to hold social hosts who make minor guests intoxicated liable for the injuries these minors cause. The same principles behind the commercial sale and service laws applied—minors are not familiar enough with drinking and its effects to do so responsibly. Thus, they are susceptible to drinking to excess and getting hurt or hurting others. It is an adult social host's responsibility to do whatever is necessary to prevent this risk of serious injury or death.

Even though the majority changed the common law and created social host liability, the court did not apply it in the cases before it. The majority determined that doing so would be unfair to the hosts in those cases because they were not liable under the common law at the time they hosted their parties. Henceforth, however, social hosts who make minors intoxicated will be liable in South Carolina for resulting injuries. One judge dissented in part. He felt it was unfair to the families of the deceased in these cases to use their situations to change the law then disallow them from recovering under the new position.

EXCERPTS FROM THE MAJORITY OPINION (By Justice Pleicones): "While underage persons have full social and civil rights, we find the public policy of this State treats these individuals as lacking full adult capacity to make informed decisions concerning the ingestion of alcoholic beverages. Accordingly, we hold that adult social hosts who knowingly and intentionally serve, or cause to be served, alcoholic beverages to persons they know or should know to be between the ages of 18 and 20 may incur liability where, under the same circumstances, they are immune for service to persons aged at least 21 years old.

"As Wisconsin Chief Justice Hallows said over 35 years ago in dissent, 'The time has arrived when this court should again exercise its inherent power as the guardian of the common law and [impose liability for service of alcohol]....[T]he common law in this state…has been to the contrary…but the basis upon which these cases were decided is sadly eroded by the shift from commingling alcohol and horses to commingling alcohol and horsepower."

EXCERPTS FROM THE DISSENT (By Chief Justice Toal): "In my view, we should extend our decision to impose limited first and third party social host liability to the cases before us today and all future cases which arise after the filing of our opinion. Resolving the cases in this manner would, in my opinion, allow the plaintiffs the benefit of the change in the law which they induced without making our decision retroactive.

"[T]o expect litigants to bear the burdens associated with effecting a needed change in the law without the expectation that they will receive the benefits of the change in the law is...offensive to our notions of fairness as well as crippling to our legal system."

COMMENTS & QUESTIONS

1. Where were the parties held in the two cases consolidated for this appeal?

2. Did the hosts intentionally serve alcohol to minors? Did minors drink? What happened?

3. How is a social host having a party in their home with dozens of people supposed to control who drinks alcohol? Do they have to check id's, watch the bar all night, have a bartender?

There are several sources of law in the United States. The supreme law of the land is the U.S. Constitution. State constitutions are sources of law, as are federal and state statutes. But constitutions and statutes do not address every legal conflict that arises in society. Sometimes courts must decide a fair outcome to a dispute legislators and drafters of the federal and state constitutions have not spoken to. The body of law that derives from court opinions is known as the common law, a term that traces back to England, on whose legal system ours is based.

Neither South Carolina's constitution nor its statutes address a social host's liability for serving alcohol to someone under the legal age. At the time the two cases resolved here arose, South Carolina's courts did not hold social hosts liable in this situation. The majority suggests that this position reaches back to the days when an intoxicated youth's transportation was a horse, not an automobile. With this case, the court recognized that that position was out of touch with the severity and frequency of such injuries, and society's increasing concern over underage drinking. The court therefore changed course from its prior opinions and declared that henceforth social hosts providing alcohol to minors can be held liable for resulting damage and injuries.

Persons injured by a drunk driver in South Carolina can sue a restaurant or bar that served the alcohol rendering the driver intoxicated. The driver, however, cannot sue the bar that served him or her. Why not?

Minors, under the age of twenty one can vote, serve in the military and shoot guns. Are alcohol laws out of touch in finding these young people "in over their heads" when it comes to drinking?

Everyone who drinks alcohol knows that it will make them intoxicated. There are warnings right on the bottles or cans. Why does the law treat people under and over 21 differently where alcohol is concerned? If a person never drinks before 21, does he or she have more knowledge or control when exposed to it than someone 18, 19, or 20? Are other factors involved where younger people are concerned?

Once courts have decided a particular question a given way, is it right for them to change their minds? Does this create inconsistency in the law? Did the majority opinion address this issue? Should it be the legislature's job to make the change, not a court's?

The Court changed the law in this case, but did not make the change applicable to this case. Is that fair? Do you agree with the dissent that the parties in these cases should have been allowed to recover?

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