UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 36 | Number 2 Article 12

2-1-1958

Evidence -- Privileged Governmental Records -- Production and Examination by Trial Judge

Laurence A. Cobb

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

Laurence A. Cobb, *Evidence -- Privileged Governmental Records -- Production and Examination by Trial Judge*, 36 N.C. L. Rev. 210 (1958).
Available at: http://scholarship.law.unc.edu/nclr/vol36/iss2/12

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

no other competent evidence to support the witness's testimony the trial judge could refuse to permit the witness to testify as to his opinion of the speed of the vehicle when it alone would not be sufficient evidence on which the jury could base a finding of speed.

Neither of the two previously discussed North Carolina cases[25] specifically stated that such opinion testimony could not be used to corroborate other evidence, but from the language of those two cases it would seem that North Carolina might altogether reject such evidence.[26] Yet in *State v. Fentress*,[27] the North Carolina court allowed a witness who did not see the automobile in motion or the accident to testify that in his opinion the car was traveling eighty-five miles per hour, based on the sound of the engine and the loud crash. The court stated: "The evidence of Foster who testified that he heard the car passing with a great noise and at a rapid rate of speed does not lack circumstantial support, since its roaring progress stopped with a loud crash at the point where he found it a moment later, torn to pieces and its occupants lying on the ground about the wreck."[28]

Would not one who actually sees the vehicle in motion and the collision have a better opportunity to judge the speed of the vehicle than one who only hears the sound of the motor and the following crash? It seems that when there is other competent evidence to support a witness's opinion as to the speed of a vehicle, the jury should be allowed to hear such opinion unless the witness's observation was so limited that his opinion is totally lacking in probative value.

ROBERT L. GRUBB, JR.

Evidence—Privileged Governmental Records—Production and Examination by Trial Judge

The recent decision of the United States Supreme Court in *Jencks v. United States*[1] has caused a great deal of criticism and controversy. This Note will be limited to evidentiary questions concerning privileged governmental records, their production, and examination of them by

[25] See text at notes 1 and 2 *supra*.

[26] *But see* Jones v. Bagwell, 207 N.C. 378, 177 S.E. 170 (1934), where witnesses who testified that they saw the automobile immediately after it struck deceased and while it was coming to a stop were allowed to testify that in their opinion the automobile was traveling thirty to forty miles per hour when they saw it for the purpose of inferentially showing a greater speed at the time of impact, and in corroboration of other evidence.

[27] 230 N.C. 248, 52 S.E.2d 795 (1949).

[28] *Id.* at 251, 52 S.E.2d at 797. *But see* Tyndall v. Hines Co., 226 N.C. 620, 623, 39 S.E.2d 828, 830 (1946), where the court stated: "Conversely, one who did not see a vehicle in motion will not be permitted to give an opinion as to its speed. The opinion must be a fact observed." In Campbell v. Sargent, 186 Minn. 293, 299, 243 N.W. 142, 144 (1932), it was stated: "We do not know of any way by which one can determine the speed of a car by the noise."

[1] 353 U.S. 657 (1957).

the trial judge. No attempt will be made to discuss the constitutional ramifications of the decision.

The Court's determination, that where the government in a criminal prosecution elects not to comply with an order to produce material in its possession on the ground of privilege, it must drop the prosecution, was in accordance with existing law.[2]

The Court's holding as to the foundation necessary to support a motion for the government to produce reports made by the witness to the government is open to criticism. It was held that the motion need only be for specific documents that constitute relevant, competent material which is outside any exclusionary rule, and that there was no need to show inconsistency between the testimony at trial and the reports requested. The relevancy and materiality of the reports are established when they are shown to relate to testimony of the witness.[3]

In reaching this conclusion, the Court stated that *Gordon v. United States*[4] was not intended to limit production of reports to a case where there has been a showing of inconsistency between the testimony of the witness and the reports requested. It is submitted that this is an untenable position. The *Gordon* opinion, in considering whether the defendant has a comprehensive right to see documents in the hands of the prosecution merely because they might aid in the preparation or presentation of his defense, stated, "We need not consider such broad doctrines in order to resolve this case which deals with a limited and definite category of documents to which the holdings of this opinion are likewise confined."[5] In addition, *Goldman v. United States*[6] was distinguished in *Gordon* because the former did not concern notes used in court nor was there any proof that the requested documents would show prior inconsistent statements. Six cases were cited in the *Gordon* opinion as supporting its decision. Five of them[7] concerned inconsistency or contradiction in the testimony and the sixth[8] concerned letters, the contents of which the witness testified she had no knowledge. In the light of these circumstances, it is difficult to support the Court's

[2] United States v. Reynolds, 345 U.S. 1, 12 (1953) (dictum); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944).

In Arnstein v. United States, 296 Fed 946 (D.C. Cir. 1924), the privilege was granted in a criminal prosecution, but apparently no consideration was given to the fact that there might be a distinction between criminal and civil cases, and the civil rule was applied.

[3] 353 U.S. at 669.

[4] 344 U.S. 414 (1952).

[5] *Id.* at 418.

[6] 316 U.S. 129 (1942).

[7] United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); People v. Davis, 52 Mich. 569, 18 N.W. 362 (1884); State v. Bachman, 41 Nev. 197, 168 Pac. 733 (1917); People v. Schainuck, 286 N.Y. 161, 36 N.E.2d 94 (1941); People v. Walsh, 262 N.Y. 140, 186 N.E. 422 (1933).

[8] Asgill v. United States, 60 F.2d 776 (4th Cir. 1932).

conclusion in *Jencks* that *Gordon* was not intended to be so limited in application.

Moreover, this holding cannot be justified under the provisions of the Federal Rules of Criminal Procedure. Under these rules, documents may be obtained by motion at any time after the filing of the indictment or information[9] or by subpoena duces tecum.[10] Under the former, it is necessary that the things sought be objects belonging to the defendant or taken by seizure or process from the defendant or others[11] and FBI reports have been held not to be included.[12] Furthermore, the granting of such motion is not mandatory, but is within the discretion of the trial judge.[13] Similarly, it has been held that the use of the subpoena duces tecum under Rule 17(c) is only a method to shorten trial by allowing examination and inspection of documents before trial.[14] It cannot be used to circumvent the above rule that statements to government agents are not within the scope of the limited discovery permitted under these rules.[15]

The great majority of both federal and state cases prior to the *Jencks* case had required a showing of contradiction between testimony and the records sought as a foundation for a motion to produce the records.[16] This rule has been continued almost without exception up to the time of the *Jencks* decision.[17] One reason for denying such motions is to prevent "fishing expeditions" into the case of the prosecution.[18]

Other state[19] and federal[20] cases have denied motions for production

[9] FED. R. CRIM. P. 16.

[10] FED. R. CRIM. P. 17(c).

[11] Shores v. United States, 174 F.2d 838 (8th Cir. 1949); United States v. Chandler, 7 F.R.D. 365 (D. Mass. 1947).

[12] United States v. Black, 6 F.R.D. 270 (N.D. Ind. 1946).

[13] United States v. Schiller, 187 F.2d 572 (2d Cir. 1951).

[14] United States v. Maryland & Va. Milk Producers Ass'n, 9 F.R.D. 509 (D. D.C. 1949).

[15] United States v. Gogel, 19 F.R.D. 107 (S.D.N.Y. 1956).

[16] United States v. Rosenfeld, 57 F.2d 74 (2d Cir.), *cert. denied*, 286 U.S. 556 (1932) (papers of the district attorney); State v. Zimnaruk, 128 Conn. 124, 20 A.2d 613 (1941) (stenographer's copy of statements made by a witness under questioning by a county detective); State v. Lee, 173 La. 966, 139 So. 302 (1932) (police reports and written statements of witnesses in possession of the state); State v. Arnold, 84 Mont. 348, 275 Pac. 757 (1929) (statements of witnesses made in the office of the county attorney, even though the defendant contended that there were variances in the statements).

[17] Scales v. United States, 227 F.2d 581 (4th Cir.), *cert. denied*, 350 U.S. 992 (1955), *rev'd per curiam*, 78 Sup. Ct. 9 (1957); Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); United States v. Lebron, 222 F.2d 531 (2d Cir.), *cert. denied*, 350 U.S. 870 (1955); Shelton v. United States, 205 F.2d 806 (5th Cir. 1953); United States v. Simmonds, 148 F.2d 177 (2d Cir. 1945); United States v. Cohen, 145 F.2d 82 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945); United States v Rosenberg, 146 F. Supp. 555 (E.D. Pa. 1956).

[18] United States v. Rosenfeld, 57 F.2d 74 (2d Cir.), *cert. denied*, 286 U.S. 556 (1932).

[19] Vaughn v. State, 25 Ala. App. 204, 143 So. 211 (1932); People v. Nields, 49 Cal. App. 4, 192 Pac. 552 (1920); Padgett v. State, 59 So. 946 (Fla. 1912); People v. Gatti, 167 Misc. 545, 4 N.Y.S.2d 130 (N.Y. County Ct. Gen. Sess. 1938);

of documents and records at trial on the ground that allowance of such motion is within the discretion of the trial judge. In 1942, the Supreme Court stated:

> We hold there was no error in denying the inspection of the witnesses' memoranda . . . . We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge.[21]

The *Jencks* opinion impliedly overruled this language.[22]

Only a few cases have been found where a motion for production of records has been granted absent a showing of inconsistency or contradiction.[23] In an 1807 decision it was held that it was necessary to aver only that it "may be material" to compel production of a letter to the President in the hands of the prosecution.[24] No precedent was cited. Two federal cases allowed that no contradiction was necessary, but refused a new trial in one because examination by the trial judge showed no relevant material[25] and denied the motion for production in the other because it was not for specific material.[26] Other recent federal cases granting motions to produce concerned either inconsistent material or possible entrapment.[27]

The *Jencks* decision disapproved the practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused. It was held that since only

State v. Clark, 21 Wash. 2d 774, 153 P.2d 297 (1944), *cert. denied,* 325 U.S. 878 (1945).

[20] United States v. Lightfoot, 228 F.2d 861 (7th Cir. 1956), *cert. granted,* 350 U.S. 992, *rev'd per curiam,* 78 Sup. Ct. 10 (1957); Simmons v. United States, 220 F.2d 377 (D.C. Cir. 1954); Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951); Kaufman v. United States, 163 F.2d 404 (6th Cir.), *cert. denied,* 333 U.S. 857 (1947).

[21] Goldman v. United States, 316 U.S. 129, 132 (1942).

[22] 353 U.S. at 668.

[23] State v. Murphy, 154 La. 190, 97 So. 397 (1923) (only witnesses for state were present when statement sought had been made); Sprinkle v. State, 137 Miss. 731, 102 So. 844 (1925) (dying declaration which district attorney testified that he possessed); State v. Tippett, 317 Mo. 319, 296 S.W. 132 (1927); Gaffney v. Kampf, 182 Misc. 665, 49 N.Y.S.2d 151 (Sup. Ct. 1944); People v. Radeloff, 140 Misc. 690, 252 N.Y.S. 290 (N.Y. County Ct. Gen. Sess. 1931). The three previous cases all granted motions to produce documents on the ground that justice required no less for a fair trial.

[24] United States v. Burr, 25 Fed. Cas. No. 14694, at 191 (C.C.D. Va. 1807).

[25] Boehm v. United States, 123 F.2d 791 (8th Cir. 1941).

[26] United States v. Mesarosh, 116 F. Supp. 345 (W.D. Pa. 1953), *Aff'd,* 223 F.2d 449 (3d Cir. 1955), *rev'd on other grounds,* 352 U.S. 1 (1956).

[27] United States v. Coplon, 185 F.2d 629 (2d Cir. 1950); United States v. Alper, 156 F.2d 222 (2d Cir. 1946); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946).

the defense is adequately equipped to determine use of reports for discrediting witnesses, the defense rather than the court must initially be entitled to see them to determine what use may be made of them. In so determining, the Court ordered that the reports be delivered to the defense, despite the fact that the original motion had been for their production to the court to examine and determine whether they would be useful to the defense.[28] The only thing that can be said concerning this is that it is a complete reversal of prior practice. Wigmore discusses with approval the practice of examination by the trial judge.[29] The Court failed to cite a single case where this former procedure had been deemed improper. Its conclusion is supported simply by stating that "justice requires no less."[30] On the other hand, there are innumerable cases allowing such an inspection by the trial judge.[31]

The effect of the *Jencks* decision is yet to be measured, but several things should be noted. As an almost immediate result, Congress passed the Jencks Bill[32] to protect FBI files. In brief, it calls for the trial judge to first examine the material sought if the government contends that it contains any material not related to the subject matter of the testimony. He will remove such unrelated portions and then deliver it to the defendant. If the government refuses to deliver up such material, the entire testimony will be stricken or a mistrial granted if the circumstances of the testimony require it.

Another immediate effect of the *Jencks* decision has been the dismissal of a host of cases. According to a magazine summary,[33] 13 cases involving 19 defendants on such charges as kidnapping, fraud and bribery, tax evasion, draft evasion, narcotics violations, forgery, embezzling, and bootlegging were dismissed at various stages of trial.

Thus far, the effect of the *Jencks* decision has not been as far-reaching as was originally thought by some. Its application to the field of pre-trial discovery has not yet been determined, according to a recent state decision[34] which notes that such discovery was allowed

[28] 353 U.S. at 669.
[29] WIGMORE, EVIDENCE § 2200, at 117-18 (3d ed. 1940).
[30] 353 U.S. at 659.
[31] *E.g.*, United States v. Lebron, 222 F.2d 531 (2d Cir. 1955); Shelton v. United States, 205 F.2d 806 (5th Cir. 1953); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Cohen, 145 F.2d 82 (2d Cir. 1944); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); Boehm v. United States, 123 F.2d 791 (8th Cir. 1941); Vause v. United States, 53 F.2d 346 (2d Cir.), *cert. denied*, 284 U.S. 661 (1931); United States v. Rosenberg, 146 F. Supp. 555 (E.D. Pa. 1956); United States v. Flynn, 130 F. Supp. 412 (S.D.N.Y. 1955); United States v. Mesarosh, 116 F. Supp. 345 (W.D. Pa. 1953), *cert. granted*, 350 U.S. 922 (1955); United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952).
[32] Pub. L. No. 85-269, 85th Cong., 1st Sess. (Sept. 2, 1957).
[33] U.S. News & World Report, Aug. 30, 1957, p. 58.
[34] State v. Thompson, 134 A.2d 266 (Del. 1957).

in two recent federal cases,[35] but denied in a third.[36] It cannot be denied that the case will involve new procedure and more latitude in preparation of the defendant's case. However, the pessimistic predictions of doom present in the dissenting opinion of Justice Clark would appear without foundation, since the decision, in restricting defendant's right of examination to specific and relevant material, never afforded the defendant a "Roman holiday."[37]

LAURENCE A. COBB

Federal Jurisdiction—Enforcement of Collective Bargaining Agreements Under Section 301 of Labor-Management Relations Act

Much of the confusion and uncertainty as to the constitutionality and proper application of section 301 of the Labor-Management Relations Act of 1947 (Taft-Hartley Act),[1] created, at least in part, by the Supreme Court's treatment of the *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.* case,[2] has now been somewhat alleviated. By its decision in *Textile Workers Union v. Lincoln Mills,*[3] the Court has clearly upheld the constitutionality of section 301. It is not so clear how the Court reconciles its extension of federal jurisdiction with article III, section 2 of the Constitution[4] which limits

[35] United States v. Frank, D.D.C., June 20, 1957; United States v. Hoffa, D.D.C., June 20, 1957.
[36] United States v. Benson, 20 F.R.D. 602 (S.D.N.Y. 1957).
[37] 353 U.S. at 680-81.

[1] 61 STAT. 156 (1947), 29 U.S.C. § 185 (1953).
"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."
[2] 348 U.S. 437 (1955).
[3] 353 U.S. 448 (1957). The case involved an action brought by a labor union in the United States District Court for the Northern District of Alabama seeking specific performance of the arbitration provisions of a collective bargaining agreement. The district court exercised jurisdiction and ordered the employer to comply with the arbitration provisions. The court of appeals, in a split decision, reversed, holding that although the district court had jurisdiction to entertain the suit it lacked authority founded on either state or federal law to grant the relief sought. 230 F.2d 81 (5th Cir. 1956). On certiorari, the Supreme Court reversed the decision of the court of appeals.
[4] U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . ."