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MICHAEL KENT CURTIS

Constitutional Law—Chronic Alcoholism and the Eighth Amendment in North Carolina

A man gets up in the morning and the first thing he does is to "take a drink." From that point on throughout the day he is constantly "taking a drink." By mid-afternoon or early evening, he is picked up by the police for public drunkenness. Far from being his first "offense," this series of events has happened to him many times before—sometimes ending with arrest and sometimes not. This man is a chronic alcoholic; he suffers from a disease and has no control over his behavior.¹ Should he be punished as a "public drunk" or is it "cruel and unusual punishment" under the eighth amendment to do so? Recently several courts across the nation have faced this question and reached conflicting results. The following is a brief attempt to highlight these decisions and some future problems raised therein.

The first such case was *Driver v. Hinnant*.² Defendant had been found guilty of a violation of a North Carolina statute making it a misdemeanor for "any person . . . [to] be found drunk or intoxicated on the public highway, or at any public place or meeting,"³ and sentenced to two year's imprisonment. Driver had been convicted of the same offense over 200 times previously. On appeal, the North Carolina Supreme Court held in a per curiam opinion that the sentences were authorized by the statute and therefore that

¹ See authorities collected in *Driver v. Hinnant*, 356 F.2d 761, 764 n. 6 (4th Cir. 1966).

² 356 F.2d 761 (4th Cir. 1966). See also, 44 N.C.L. REV. 818 (1966).

³ N.C. GEN. STAT. § 14-335 (1953). As will be shown and discussed, *infra*, this statute underwent significant amendment in 1967.

conviction thereunder was not cruel and unusual punishment.⁴ The United States District Court for the Eastern District of North Carolina denied a writ of Habeas Corpus,⁵ but on appeal the Fourth Circuit held that the conviction was unconstitutional as cruel and unusual punishment.⁶ The court said that chronic alcoholism "is now almost universally accepted medically as a disease,"⁷ the symptoms of which may appear as "disorder or behavior."⁸ Since this includes unwilling and ungovernable appearances in public by the victim, no judgement of criminal conviction can be based thereon. It is cruel and unusual punishment to brand him a criminal, irrespective of consequent detention or fine, for those acts "which are compulsive as symptomatic of the disease."⁹

The *Driver* case was followed soon thereafter by the District of Columbia Circuit in *Easter v. District of Columbia*.¹⁰ Easter had been found guilty of being "drunk and intoxicated" on a Washington street in violation of D.C. CODE ANN. § 25-128(a) (1961)—the court ruling that chronic alcoholism was not a defense. He was given a 90 day suspended sentence.¹¹ Hearing the appeal en banc, the Court of Appeals held that chronic alcoholism is not itself a crime and is a defense to a charge of public intoxication in Washington, D.C.¹² Furthermore, since "it is the fact of criminal con-

⁴ State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).

⁵ Driver v. Hinnant, 243 F. Supp. 95, 96 (E.D.N.C. 1965).

⁶ 356 F.2d at 765.

⁷ *Id.* at 764.

⁸ *Id.*

⁹ *Id.* The Fourth Circuit felt that the decision of the United States Supreme Court in *Robinson v. California*, 370 U.S. 660 (1962), sustained, if not commanded, the view they enforced. In that case it was held that drug addiction was an illness and a statute punishing such an involuntarily assumed "status" was cruel and unusual punishment in violation of the eighth amendment. *Id.* at 667. See 27 LA. L. REV. 340, 346-47 (1967) where the foregoing conclusion is challenged as misplaced reliance. See also 12 S.D.L. REV. 142, 145 (1967) where it is pointed out that *Driver* extends the immunity from criminal prosecution from *status*—a passive state of being, to *acts* symptomatic of the disease—overt action. That is, the North Carolina statute punished an involuntary symptom of a status, public intoxication.

¹⁰ 361 F.2d 50 (D.C. Cir. 1966).

¹¹ *Id.* at 51.

¹² *Id.* While the entire court felt that Congress in passing the Rehabilitation of Alcoholics Act Ch. 472, 61 Stat. 744, c. 472 (1947), D.C. CODE ANN. § 24-501 to -514 (1967), intended that alcoholics not be punished for public drunkenness and therefore commanded the result reached, four of the eight judges also felt the result was constitutionally commanded, citing *Driver* as authority. 361 F.2d at 55.

viction that is critical,"¹³ it was immaterial that the sentence had been suspended.¹⁴

Although the *Driver* and *Easter* cases are perhaps indicative of a trend in judicial thought, more recent state court pronouncements have maintained the position that such a conviction is *not* cruel and unusual punishment. In *People v. Hoy*,¹⁵ the Michigan court said: "[W]hile we are aware that some courts have recently held it is cruel and unusual punishment to sentence to prison a chronic alcoholic on a charge of drunk and disorderliness, such decisions are not controlling precedent for this court and we decline to adopt them. . . ."¹⁶ One of the reasons given for this position was insufficient persuasion in the record that defendant was a chronic alcoholic. Therefore, since *Driver* and *Easter* did not hold that the punishment for public drunkenness was cruel and unusual, but rather that the conviction and punishment of a chronic alcoholic was unconstitutional, this Michigan case may not be a true test of the *Driver-Easter* principle.¹⁷ However, in *Budd v. California*¹⁸ the record involved was similar to that in *Driver* and *Easter*. There was testimony that Budd had been an alcoholic for over thirty years and that he had lost control over the use of intoxicating beverages. The trial court made no finding as to whether defendant was a chronic alcoholic, saying that such a finding was not pertinent. He was thus convicted under CAL. PENAL STAT. § 647(f) (Supp. 1967) providing in part that any person "found in any public place under the influence of intoxicating liquor . . . in such a condition that he is unable to exercise care for his own safety or that of others" is guilty of a misdemeanor. Budd then challenged the conviction and imprisonment as cruel and unusual punishment under the eighth amendment by seeking a writ of Habeas Corpus in the California Supreme Court. The writ was denied and the United States Supreme Court denied certiorari to review the California Supreme Court action.¹⁹ The possibility of final constitutional determination by the Supreme Court on this question was thus temporarily eliminated. However, another op-

¹³ 361 F.2d at 55.

¹⁴ *Id.*

¹⁵ 143 N.W.2d 577 (Mich. App. 1966).

¹⁶ 143 N.W.2d at 578.

¹⁷ See 11 St. Louis U. L.J. 250, 257 (1967).

¹⁸ *Cert. denied*, 385 U.S. 909 (1966).

¹⁹ *Id.*

portunity for the Supreme Court to rule on the question has been presented in *Powell v. Texas*, now awaiting decision—oral argument having been heard.²⁰

Regardless of the state of this issue in other jurisdictions, it is a settled question in North Carolina. The Fourth Circuit's decision in *Driver* is binding here unless and until the Supreme Court reaches a different result. Furthermore, the North Carolina General Assembly in 1967 amended its "public drunkenness" statute.²¹ As far as relevant here, that amendment reads:

(c) Chronic alcoholism shall be an affirmative defense to the charge of public drunkenness. For the purpose of this section, chronic alcoholism shall be as defined in article 7A of chapter 122. When the defense of chronic alcoholism is shown to the satisfaction of the trier of fact, and a judgment by reason of chronic alcoholism is entered, the court may follow the treatment procedures outlined in article 7A of chapter 122.²²

²⁰ *Powell v. Texas*, 36 U.S.L.W. 3353 (U.S. March 12, 1968). Counsel for appellant argued only that the chronic alcoholic cannot be convicted, expressly refusing to question the right of a police officer to arrest the chronic alcoholic, place him in jail, and have him subjected to trial. Amici curiae argument against constitutionality agreed with appellant's counsel with the one qualification that, when a police officer is familiar with the chronic alcoholic, questions concerning probable cause for arrest may arise. Counsel for the state of Texas attempted to impress upon the court the "revolutionary implications" of holding that the conviction is unconstitutional. Appellee suggests that if a chronic alcoholic cannot be convicted of public intoxication, he will not be amenable to other criminal laws either. He concluded his argument by explaining that if a chronic alcoholic cannot be sent to jail, the court must either allow him to remain on the streets or subject him to involuntary civil commitment. The latter is neither wholly effective nor wholly constitutional, he argues, while the former would endanger the alcoholic's health and life and would be more cruel than sending him to jail.

²¹ N.C. GEN. STAT. § 14-335 (Supp. 1967).

²² *Id.* As defined in article 7A of chapter 122, a chronic alcoholic is any person found by any court to have the illness or condition known as chronic alcoholism. Chronic alcoholism is the chronic and habitual use of alcoholic beverages to the extent of losing the power of self-control with respect to the use of such beverages. Any court having jurisdiction over a chronic alcoholic may provide for treatment through any one or more of the following actions: (1) order the clerk of the superior court to commence judicial hospitalization as per article 7 of chapter 122, (2) direct, in cooperation with a family member or other responsible person, the making and following of plans for treatment in a private facility or program approved by the North Carolina Department of Mental Health, (3) refer him to a private physician or psychiatrist or to a hospital diagnostic center or to a private or social welfare organization, (4) request such as the local department of public welfare to work with the chronic alcoholic and make reports as to his treatment or condition as requested, (5) make or approve any other appropriate plan and require for as long as appropriate to treatment

Though obviously under some compulsion to bring the statute in line with the Fourth Circuit's ruling, this amendment demonstrates a praiseworthy understanding of the plight in which the chronic alcoholic has traditionally found himself.

The North Carolina Supreme Court also is to be commended for its application of this statute in *State v. Pardon*.²³ Prior to the passage of the above amendment, the defendant was arrested and charged with his fourteenth offense of public drunkenness within twelve months. Having pleaded guilty, he was examined in the superior court for the purpose of determining sentence. Though the examination and investigation revealed him to be a chronic alcoholic,²⁴ the court, seeing no alternative, sentenced him to eight months in jail.

On appeal, the North Carolina Supreme Court remanded for a new trial in light of the intervening statute. The court said that since judgment is not final as long as the appeal is pending, "the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."²⁵ The court reasoned that the rule prohibiting *ex post facto* legislation only prevents *aggravation* of punishment, not all changes. Therefore it is not an invalid *ex post facto* application of the amendment to allow defendant the defense of chronic alcoholism at this stage. The legislature may always *remove* a burden imposed upon citizens for state purposes.²⁶ Thus defendant was granted a new trial and an opportunity to prove the affirmative defense of chronic alcoholism.

Though North Carolina is now firmly committed to the more enlightened approach, the trial advocate's problems with the eighth amendment are just beginning. Numerous questions arise con-

submission of periodic reports as to his treatment or condition, in the courts discretion. N.C. GEN. STAT. § 122- 65.6 to -65.9 (Supp. 1967).

²³ 272 N.C. 72, 157 S.E.2d 698 (1967).

²⁴ He had been convicted of public drunkenness over fifty times; he had been in institutions for alcoholics in Missouri and Kentucky; he had a record of traffic violations, larceny, vagrancy, gambling, trespass, forgery and other offenses. At the time arrested he was a patient at the Veterans Hospital in Durham but was home on a "weekend pass." That hospital refused to readmit him after this conviction. *Id.*

²⁵ *Id.* at 76, 157 S.E.2d at 701, citing *Gulf, Col. & S. F. Ry. v. Dennis*, 224 U.S. 503, 506 (1912).

²⁶ *Id.* at 76, 157 S.E.2d at 701.

cerning the application and possible extensions of the Fourth Circuit's rationale. Must the defense be raised by counsel or may the judge raise it on his own motion?²⁷ The vagueness of the limiting factor of the *Driver* case, *i.e.*, "acts symptomatic of the disease," may be susceptible to unlimited interpretations.²⁸ What is the effect of the court's²⁹ likening the movements of an alcoholic to those of an imbecile or person in a delirium fever?³⁰ It has been said that an alcoholic's presence in public is not a willful act and thus evil intent and consciousness of wrong-doing, indispensable elements of a crime, are missing. This raises the question whether chronic alcoholism may be extended as a defense to crimes in general and, if so, when, to what crimes and to what extent.³¹ Once the chronic alcoholic is protected from criminal prosecution, it becomes a problem as to what treatment or handling is both possible and desirable,

²⁷ See, *e.g.*, Hutt, *Modern Trends in Handling the Chronic Court Offender: The Challenge of the Courts*, 19 S.C.L. REV. 305, 309-11 (1967).

²⁸ See, *e.g.*, Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S.C.L. REV. 349, 354 (1967); 1966 DUKE L.J. 545, 554-55 (1966); 27 LA. L. REV. 340, 346 (1967); 12 S.D.L. REV. at 146 (1967), See also argument of appellee, note 20 *supra*.

²⁹ 356 F.2d at 764; 361 F.2d at 54.

³⁰ See, *e.g.*, Deddens, *Volitional Fault and the Intoxicated Criminal Offender*, 36 U. CIN. L. REV. 258, 281-85 (1967); 20 ARK. L. REV. 365, 367 (1966); Note, 12 S.D.L. REV. 142, 147 (1967).

³¹ See, *e.g.*, Deddens, *supra* note 30; Hutt, *Modern Trends in Handling the Chronic Court Offender: The Challenge of the Courts*, 19 S.C.L. REV. 305, 306, 330-31 (1967); Hutt, *Recent Forensic Developments in the Field of Alcoholism*, 8 WM. & MARY L. REV. 343, 345-47, 350 (1967); Slovenko, *Alcoholism and the Criminal Law*, 6 WASHBURN L.J. 269, 279-81 (1967); Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S.C.L. REV. 349, 356-69 (1967); Tao, *Drunkenness and Criminal Law*, 13 WAYNE L. REV. 530, 539-540, 544-45 (1967); 20 ARK. L. REV. 365, 368-70 (1966); 16 DEPAUL L. REV. 493 (1967); 1966 DUKE L.J. 545, 555-56; 52 IOWA L. REV. 492, 495-97 (1966); 27 LA. L. REV. 340, 344-46 (1967); 12 S.D.L. REV. 142, 147-48 (1967). It is also interesting to note that "chronic alcoholic" as defined by the court may well come within the traditional definition of "involuntary drunk." Since drunkenness is presumed to be voluntary unless some special circumstance is established to remove it from that category, "involuntary drunkenness" is most easily defined in the negative. If the intoxicating character of the liquor or drug is not understood or known to be present or if the liquor or drug is taken under duress or medical advice, the resulting condition is usually said to be involuntary. This characterization is not all-inclusive. There are instances where a person has become intoxicated without doing so intentionally or recklessly, and though the above factors were missing, it was held to be involuntary. A state of involuntary intoxication establishes that the derangement is without culpability and hence is dealt with as if it were the result of mental disease or defect. R. PERKINS, CRIMINAL LAW 782-87 (1957).

i.e., compulsory or voluntary, where, how long, etc.³² Should a court be allowed discretion whether to *treat* such alcoholics civilly or criminally?³³ More general considerations which the General Assembly, the courts and counsel for chronic alcoholics must face involve the psychology of an alcoholic³⁴ and the use of alcohol and its relation to crime generally.³⁵ These questions will have to be met and solved through legislative action and the adversary system and it is hoped the articles here cited will be of some help to the legislator and trial advocate in this process.

SAM G. GRIMES

Constitutional Law—Freedom of Speech in the Military

On graduation from college Henry Howe was commissioned as a Second Lieutenant in the U. S. Army Reserve. After being on active duty about one year he found himself assigned to Fort Bliss in El Paso, Texas. While he was stationed there, on November 6, 1965, he participated in a demonstration opposing the war in Vietnam. The degree of his protest as well as the fact of his involvement caused him to be brought before a general court-martial, resulting in an end to his short military career and his imprisonment for one year.¹

The demonstration was planned and organized by a group of students and professors from El Paso State College as a protest "against American policy." The marchers had requested permission from the city council to conduct a side-walk demonstration

³² See, *e.g.*, Deddens, *supra* note 30; Hutt, *Modern Trends in Handling the Chronic Court Offender: The Challenge of the Courts*, 19 S.C.L. REV. 305, 312-23 (1967); Hutt, *Recent Forensic Developments in the Field of Alcoholism*, 8 WM. & MARY L. REV. 342, 351-58 (1967). Murtagh, *Arrests for Public Intoxication*, 35 FORDHAM L. REV. 1, 12-13 (1966); Myerson and Mayer, *Origins, Treatment and Destiny of Skid Row Men*, 19 S.C.L. REV. 332 (1967); Slovenko, *supra* note 31, at 281-84; Swarty, *Compulsory Legal Measures and the Concept of Illness*, 19 S.C.L. REV. 372 (1967); Tao, *supra* note 31, at 543, 545-47; 16 DE PAUL L. REV. 493, 495 (1967); 1966 DUKE L.J. 545, 557-61; 52 IOWA L. REV. 492, 497-99, 508-10 (1966); 27 LA. L. REV. 340, 344 (1967); 18 S.C.L. REV. 504, 506-08 (1966); 12 S.D.L. REV. 142, 148-50 (1967).

³³ See, *e.g.*, 12 S.D.L. REV. 142, 150 (1967).

³⁴ See, *e.g.*, Murtagh, *supra* note 32, at 9-10; 18 S.C.L. REV. 504, 505 (1966).

³⁵ See, *e.g.*, Slovenko, *supra* note 31, at 271-72.

¹ Court-Martial 413739.