Criminal Law Notes: The Preliminary Hearing as a Constitutional Requirement

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Criminal Law Notes

By F. Thomas Schornhorst

THE PRELIMINARY HEARING AS A CONSTITUTIONAL REQUIREMENT

The Supreme Court of the United States has granted certiorari in a case that, should the action of the lower federal courts be affirmed, could have a heavy impact upon the pre-trial criminal process in Indiana. The question presented in Gerstein v. Pugh, cert. granted 14 Cr. L. Rep. 4107, December 3, 1973,1 is whether a person who is arrested and held for trial upon an information filed by the prosecuting attorney is entitled constitutionally to a post-arrest preliminary hearing on the issue of probable cause.

The case comes out of Florida which, like Indiana, permits a wide range of criminal charges to be brought by direct information where-by the prosecutor is the sole determiner of whether the formal processes of the criminal law are to be invoked against an individual. Indeed, as the result of recent statutory changes, IC 1971, 35-3.1-1-1, Ind. Ann. Stat. § 9-903 (Supp. 1973), Indiana prosecutors are under no restrictions as to the types of crimes that may be charged by information.

The Florida suit is a class action initiated in a federal district court by and on behalf of pre-trial detainees who alleged a violation of their civil rights under 42 U.S.C. § 1983. Their most serious objection went to the prosecutor’s practice of filing an information on the basis of a police report and then, without any preceding or succeeding judicial intervention, issuing an order for the arrest of the defendant, thereby causing lengthy pre-trial detention of persons unable to make bond. Of course, this is the very practice that was held to be unconstitutional in Kinnard v. State, 251 Ind. 506, 242 N.E.2d 500 (1958), on the ground that arrests and searches incidental thereto are unlawful unless the issuance of the warrant is preceded by a judicial determination of probable cause. Also, Indiana statutes now provide: “Whenever an information is filed and the defendant has already been arrested or otherwise brought within the custody of the court, the court shall proceed to determine whether probable cause existed for the arrest of the defendant unless the issue of probable cause has previously been determined by a court issuing a warrant for the defendant’s arrest or by a court holding a preliminary hearing after the defendant’s arrest.” IC 1971, 35-3.1-1(d), Ind. Ann. Stat. § 9-903(d) (Supp. 1973).

While the Indiana procedure described above would appear to meet the minimum requirements of the Fourth Amendment, both the federal district court and court of appeals found in Pugh that the due process clause of the Fourteenth Amendment, apart from the incorporated Fourth Amendment standards, requires the states to afford a person arrested with or without a warrant a preliminary hearing within a reasonable time after he has been deprived of his freedom. The basis for this distinction, while not fully articulated in the courts’ opinions, seems to be the concern that neither lengthy pre-trial detention nor the damaging notoriety of being formally charged with a crime should occur without giving the accused a meaningful opportunity to contest the existence of probable cause.

It seems clear from their reliance on cases such as Morrissey v. Brewer, 408 U.S. 471 (1972), and Goldberg v. Kelly, 397 U.S. 254 (1970) (both of which stressed the need for a hearing in which the person who stands to be deprived of a significant interest is provided a fair opportunity to participate), that the federal courts in Pugh had in mind as a constitutional prerequisite to further criminal proceedings an adversarial hearing. Also, in this context, minimum due process standards would include the right to counsel (Coleman v. Alabama, 399 U.S. 1 (1970); the right to confront and cross-examine adverse witnesses; and the right of the accused to introduce evidence on his or her own behalf. While the essential issue in such a hearing would be whether there is probable cause to believe that an offense has been committed and the person arrested has committed it, the preliminary hearing also aids the defendant’s pre-trial discovery. Coleman v. Alabama, supra.

According to Pugh, a preliminary hearing must be made available to the accused within a reasonably short time after arrest, and after the accused has had a reasonable opportunity to prepare. The hearing could take place as early as the initial post-arrest appearance of the accused before a committing magistrate, but no later than a few days after the arrest. Of course, the accused may knowingly and voluntarily waive the preliminary hearing.

Of equal significance to the recognition of the right to a preliminary hearing itself is the district and circuit courts’ extension of that right to persons charged with misdemeanors who, like those who are entitled to court-appointed counsel under Argeringer v. Hamlin, 407 U.S. 25 (1972), face the possibility of imprisonment. According to the Fifth Circuit, “except where misdemeanants are out on bond or are charged with violating ordinances carrying no possibility of pre-trial incarceration, they must be accorded preliminary hearings.” 13 Cr. L. Rep. at 2526.

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OBITUARIES—

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HON. CLARENCE G. POWELL, former Parke County Circuit Judge and his wife, Emma Powell, residents of Montezuma, Ind., died Saturday evening, December 8. Judge Powell, 92, died in Vermillion County Hospital at Clinton, and Mrs. Powell, 87, died in Holiday Home in Clinton.

Judge Powell received his legal education from Indiana University and had practiced law more than 40 years. He served on the Parke Circuit Court Bench from 1956 to 1968. He was a former Parke County Circuit Judge and member of the Indiana State Bar Association, 1941-1972. In addition to his legal training and law practice, he was an authority in the fields of mining and ceramics. At different times he managed a South American mining operation for the Aluminum Company of America, and the operations of the Colorado Coal & Iron Co., in Colorado. Also he had operated the former Marion Brickworks at Montezuma, once the world's largest manufacturer of face brick for residential construction.

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Judge Powell is survived by a nephew and Mrs. Powell by one sister.

WALTER E. PRENTICE, 87, retired Jeffersonville attorney and father of Dixon W. Prentice, a Justice of the Supreme Court of Indiana, died December 7 at his Jeffersonville residence. The deceased obtained his legal education, L.L.B. 1926, from the old Jefferson School of Law, now the law school of the University of Louisville, Kentucky. He had engaged in general practice until his retirement some years ago. Two of his three sons, Robert J. Prentice and Justice Dixon W. Prentice practiced with him several years prior to his retirement.

The deceased had been a member of the Clark County, Indiana State and American Bar Associations. His other memberships included the Wall Street United Methodist Church, of Jeffersonville, the Buckner Masonic Lodge, of Sellersburg, Scottish Rite and Murat Shrine, at Indianapolis.

Also he was past president of the Jeffersonville Lions Club and a past district Governor of the Lions organization.

Additional to the two lawyer sons, survivors are the wife, Maude Wilson Prentice; the third son, Dr. Wilson E. Prentice, also of Jeffersonville; two daughters, Mrs. Evelyn Joy Goodwin, Thousand Oaks, Calif., and Mrs. Edith Alice Dolian, Stamford, Conn.; 14 grandchildren and 14 great grandchildren.

GEORGE H. OSWALT, 64, of Indianapolis, state manager of the claims department of Travelers Insurance Company, where he had been employed in legal work for 32 years, died December 19 of a heart condition while awaiting arrival of a bus at 88th and Meridian Streets, Indianapolis. Mr. Oswalt received his preparatory education and his degree in law, LL.B. from Indiana University in 1934. He was a member of the Indiana State Bar Association and of Delta Epsilon fraternity, Oriental Masonic Lodge, Scottish Rite and Murat Shrine. He was a member and deacon of Irvington Presbyterian Church. Survivors include the wife, Helen; daughter, Mrs. David Denison; son, Larry, and brothers, Dr. James T. and Warren W. Oswalt.

EARL WOLFINGER, 79, North Vernon attorney and minister, died December 1 in the Extended Health Care Center at Columbus, Ind., after an illness of approximately one year. A native of the community of Alert, in Decatur County, he was admitted to the practice of law in June, 1925, without having the benefit of formal legal training in a law school. He had maintained his law office at North Vernon.

In June 1956 he was ordained as a minister of the Christian Union Church and had held pastorates at the Wilson's Chapel, Alert and Mt. Pleasant churches.

The wife, Vera Nicholson Wolfinger, and a son Lawrence Wolfinger, of Vernon, Ind., survive.

IND. JUDICIAL CONFERENCE WILL BE AT MERRILLVILLE

Dates for the 1974 Indiana Judicial Conference to be held this spring at Merrillville are to be decided soon. The annual meeting, a study conference of the Hoosier judiciary required by Act of the Indiana General Assembly, is expected to be convened in April or early May at the Lake County location.

Several weeks ago a premature announcement had advised that the conference would be held in 1974 at Fort Wayne. Preliminary arrangements of the Allen County Bar to cooperate in providing hospitality for the meeting have been cancelled.

New rules of judicial procedure, new laws, affective decision of the United States and the Indiana Supreme Court and Court of Appeals, are likely to be among subjects to receive attention. Also, there may be discussions of a proposed new Code of Judicial Ethics.

CRIMINAL LAW NOTES

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Since Indiana has not incorporated the preliminary hearing as a necessary step in its criminal process (IC 1971, 35-4-1-1, Ind. Ann. Stat. § 9-704a requires a preliminary hearing only when a special "preliminary charge" procedure is invoked), Indiana trial courts should make contingent plans to make available preliminary hearings to all persons charged with felonies, and, at the very least, to make probable cause determinations in cases of misdemeanants held in pretrial detention.

Of course the Supreme Court may overrule the Fifth Circuit in whole or in part, or it may find that federal jurisdiction was improperly invoked in light of the necessary interference with state criminal procedure. (Younger v. Harris, 401 U.S. 37 (1971)). However, it would seem prudent to be prepared for an affirmance of the lower courts' actions and the necessary changes in Indiana's pretrial criminal procedure that will, in such event, be required.

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