Opinion No. 14-1384

November 13, 1914

BY: FRANK W. CLANCY, Attorney General

TO: Hon. F. B. Hutton, Abingdon, Virginia.

Criminal Procedure: (1) on new trial, defendant cannot be tried for higher offense than that of which he has been convicted; (2) courts hold counsel must not comment on defendant's failure to testify; (3) as to number of peremptory challenges.

OPINION

*{*244}* I have just received your letter of the 6th inst. asking for information as to the condition of the law in New Mexico with regard to three questions as to which your Committee on Revision of the Code of the State of Virginia, of which you are a member, is divided in opinion, and I take pleasure in giving you the desired information.

The first question as to which such difference of opinion has arisen is as to whether, upon the granting of a new trial in a criminal case, the defendant shall or shall not be tried for any higher offense than that of which he was convicted on the last trial, and you say, as an illustration, that in Virginia under an indictment for murder in the first degree, the accused can be found guilty of murder in the first degree, murder in the second degree, voluntary manslaughter, involuntary manslaughter or of common assault. The law in New Mexico is the same, as under an indictment for murder *{*245}* in the first degree, the defendant might be convicted of any of the lower degrees of criminal homicide, or even of an assault. This question has been distinctly settled by the Constitution of our state which went into effect in January, 1912. Section 15 of Article II of the Constitution, reads as follows:

"No person shall be compelled to testify against himself in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted."

While you do not ask my opinion as to the merits of this controversy, I trust you will not think me officious if I venture to point out what may be the consequence of such a condition as our Constitution has created, and will illustrate it by reference to a case which has been decided in our Supreme Court and is reported as Territory v. Lobato, 134 Pac. 222. In that case, the defendant, having been indicted for murder in the first degree, was found guilty of manslaughter, and, upon appeal, his contention was that the evidence did not justify any instruction by the court as to manslaughter, because under

the evidence, he was guilty in the first degree, or not guilty, and that if the jury had been limited to the first degree, he might have been acquitted. There was much plausibility in his contention as the record seemed to indicate that he was really guilty in the first degree. If he could have secured a reversal, it is obvious that upon the same state of facts, it would be useless to try him again as, under the constitution, he could not be convicted of an offense greater than manslaughter, and certainly could not be convicted of manslaughter when the facts were such as to show that he was guilty of murder in the first degree, or not at all. With the law in this condition, atrocious criminals have an additional possible avenue of escape.

Your second question is as to whether our law allows the prosecuting attorney to comment on the failure of the accused to testify. Our statute on this subject is to be found in Section 3431 of the Compiled Laws of 1897, which reads as follows:

"In the trial of all indictments, informations, complaints and other proceedings, against persons charged with the commission of crimes, offenses and misdemeanors in all courts of this territory, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him."

With this statute in force, in the case of Territory vs. Donahue, 16 N.M. 25, it appears that the trial judge, after quoting the statute, instructed the jury that the statute had been construed by courts generally to mean that attorneys for the prosecution have not the right to comment adversely on the failure of the defendant to become a witness in his own behalf, and that if anything had been said by the prosecuting attorneys which amounted to adverse comment, *{*246}* the jury should disregard it. The Supreme Court held that this instruction narrowed the terms of the statute and that an instruction requested by the defense correctly construed the statute, and the court committed error in refusing to give it. The instruction which appellate court said should have been given was as follows:

"The court instructs the jury that the defendant may, if he sees fit, become a witness in his own behalf; but the law imposes no obligation upon him to testify in his own behalf, or as to any material fact in the case, and the fact that the defendant may not take the stand and testify as a witness in his own behalf as to any material fact, is not to be taken or considered by you in arriving at your verdict, and no presumption whatever to be raised against him on account of the accused not testifying in his own behalf."

It is, however, the fact that our trial courts have uniformly held that prosecuting attorneys should not be permitted, under this statute, to comment upon the failure of the defendant to testify.

When defendants are permitted to testify in their own behalf in criminal cases, the only argument which I can see against comment upon their failure to go on the witness stand, is that under such circumstances defendants would feel compelled to testify and that this might be a violation of the constitutional provision that "No person shall be

compelled to testify against himself in a criminal proceeding." I might add that such a statute as ours prescribes something like an impossibility. Courts may instruct that the failure of the defendant to testify must not raise any presumption against him, but practically when jurors know that he could testify if he chose, the fact that he does not, will inevitably create in their minds some presumption or bias against him.

Your third question is as to the number of peremptory challenges allowed the prosecution in a felony case, some of your commission desiring the same number for both the Commonwealth and the accused, and some desiring the accused to have twice as many as the Commonwealth, and you desire to know what is the statute in this state on this subject.

Our statute is to be found in Section 3404 of the Compiled Laws of 1897, and is as follows:

"The defendant in every indictment for a criminal offense shall be entitled to a peremptory challenge of jurors as follows: First, if the offense charged be punishable with death, to the number of twelve; second, in all cases not punishable by death, to the number of five, and no more: Provided, That where two or more persons are jointly indicted and jointly tried, each additional person shall be entitled to two more peremptory challenges and the territory shall be entitled to six peremptory challenges in capital cases, and to three peremptory challenges in other cases, and no more: Provided, further, That no defendant shall be required to exercise any peremptory challenge as to any particular juror until the territory shall have finally passed upon and accepted such juror."

It will be seen that in capital cases, the defendant is given twice *{*247}* as many challenges as the prosecution and in other cases, nearly twice as many. It appears to me that this difference in favor of the defendant must be considered as due to the lingering idea in many minds, which actuated the courts of England, during the time when all felonies were punishable by death and when there was great danger of unjustifiable prosecutions by the crown, to create every possible safeguard for the protection of the almost helpless defendant who could not testify for himself, and that the reason for such protection no longer exists. At the present time there is not the same danger of improper prosecutions on behalf of the state, and throughout the whole of our country as the law is now administered, the chances of guilty defendants escaping punishment are immensely greater than the danger of convicting innocent men. There has been here recently considerable discussion as to whether we ought not to change our statute so as to put the prosecution and defense on an equal footing as to the number of peremptory challenges.