PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 2 | Issue 2 Article 6

3-15-1975

The Right of the Prosecutor to Advance Notice of the Defendant's Alibi Defense

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Case Notes

The Right of the Prosecutor to Advance Notice of the Defendant's Alibi Defense

Introduction

In November, 1974, the Supreme Court of California, In Bank, handed down a decision in the case of *Reynolds v. Superior Court of Los Angeles County*.[1] Robert Reynolds had been charged with kidnapping, rape, drugging, sexual molestation, and attempted murder of a ten year-old girl. He was also accused of furnishing drugs to four of his step-daughters (who were minors), and of sexually molesting one of these children. Prior to trial, the superior court issued a discovery order at the request of the prosecuting attorney. This order directed Reynolds to give a three day warning to the prosecution before calling any alibi witnesses. This notice was directed to contain the names and addresses of alibi witnesses that the defense intended to call at trial. In turn, the prosecuting attorney was directed to supply Reynolds with any evidence he obtained, or already had in his possession, which impeached the alibi witnesses. The order further provided for the exclusion at trial of any evidence or testimony that did not comply with this order.

In line with his belief that the court lacked the authority to issue such an order, Reynolds petitioned the California Supreme Court for relief. The court agreed to grant relief saying:

> We have determined that the superior court erred in issuing its notice-of-alibi order, and herewith issue our peremptory writ of prohibition restraining the enforcement of that order.[2]

Criminal Discovery In California

In order to see the effect and significance of this decision, a short summary of California criminal discovery law will be beneficial. The law in this area is almost totally a creation of the

1. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).
2. *Id.* at 837, 528 P.2d at 46, 117 Cal. Rptr. at 438.

courts.[3] In *People v. Riser*,[4] the court allowed the defendant liberal discovery against the prosecution. The court stated that:

> [a]bsent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.[5]

In *Jones v. Superior Court*,[6] the California Supreme Court announced that discovery was not a "one-way street", and extended discovery privileges to the prosecution so long as the defendant's constitutional rights were not violated. Just what these rights are, has troubled and confused the court ever since.

In *Jones*, the defendant was charged with rape, and made it known prior to trial that his defense was a claim of impotence. Upon learning of this development, the prosecuting attorney motioned to discover the evidence that would support this claim. The court rejected some items which the prosecution had requested but stated that:

> The prosecution . . . is entitled to discover the names of the witnesses petitioner intends to call and any reports and X-rays he intends to introduce in evidence in support of his particular affirmative defense of impotence.[7]

The basis for this decision was that the defendant was going to disclose the information anyway, so, by merely making him do so at an earlier time, none of his rights were violated.[8]

Justice Peters vehemently dissented, arguing that discovery should be a "one-way street" and the defendant had a constitutional right to remain silent and wait until after the State had presented its case before selecting his defense.

The push for more and broader prosecutorial discovery in California went on for several years and eventually reached its outer limit in *People v. Pike*.[9] In this case, the court approved an order

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3. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, Section 271 (1963).
4. 47 Cal. 2d 566, 305 P.2d 1 (1956) (overruled on other grounds); People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964).
5. *Id.* at 586, 305 P.2d at 13.
6. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).
7. *Id.* at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.
8. *Id.*
9. 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969).

that required the defense to supply the *names* and *addresses* and *expected testimony* of defense witnesses.

The liberal prosecutorial discovery rule set forth in *Pike* was short-lived. It was rejected in *Prudhomme v. Superior Court*,[10] and a new rule was espoused. This new rule also limited the holding in *Jones*. The test in *Prudhomme* is that there can be no prosecutorial discovery unless the trial court finds that the information requested cannot possibly lighten the burden of the prosecution in proving its case-in-chief. In other words, no discovery unless the information cannot possibly have a tendency to incriminate the defendant.[11]

THE PROBLEM WITH PRUDHOMME

The *Prudhomme* case would seem to have set out a standard for California courts that would severely restrict, if not totally destroy, the prosecutor's right to discover an alibi in advance of its introduction by the defense at trial. But, the manner in which *Prudhomme* was decided, coupled with a United States Supreme Court decision only three months later, clouded the issue again.

The *Prudhomme* court based much of its rationale on the idea of an increased awareness by the United States Supreme Court for the constitutional rights of defendants. It points out that at the time *Jones* was decided, the 5th Amendment right against self-incrimination did not apply to the states. It was not until *Malloy v. Hogan*,[12] that the protection of the 5th Amendment was held to bind other than federal tribunals. While declining to overrule *Jones*, *Prudhomme* limits the case "virtually to its facts."[13] It then implies a prediction that the U. S. Supreme Court, which was studying a Florida notice-of-alibi statute, will declare the statute unconstitutional.[14] To the contrary, the U. S. Supreme Court upheld the statute in *Williams v. Florida*.[15]

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10. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).
11. *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.
12. 378 U.S. 1 (1964).
13. LOUISELL AND WALLY, MODERN CALIFORNIA DISCOVERY, at 895 (2d ed. 1972).
14. For an expanded discussion of this point *see* Kane, *Criminal Discovery—The Circuitous Road to a Two-Way Street*, 7 U.S.F. L. REV. 203 (1973) [hereinafter cited Kane].
15. 399 U.S. 78 (1970).

In *Williams*, the Court found no constitutional problem with the Florida statute which set out reciprocal discovery rights in a fair and just manner. The Court pointed out that if the defense "suprised" the prosecution with an alibi witness at trial, the prosecution would certainly be allowed a continuance in order to check the veracity of the alibi. Therefore, all the defendant was forced to do was accelerate the time when he must state his defense. The Court concluded that this did not force the defendant to incriminate himself. The Court cited the *Jones* case as one basis for its decision. In a vigorous dissent, Justice Black deplored the majority's infringement of 5th Amendment guarantees. In particular, he attempted to show the error of the majority in relying on *Jones*. He decried the dangerous implicatons of the *Jones* theory.[16]

Of course, one very significant difference between California and Florida is that the former does not have a notice-of-alibi statute while the latter does have one. The importance of this was recognized in *Reynolds*.

But, just as important, the Supreme Court of California had placed itself in the position of all but overruling *Jones*, a case that the U. S. Supreme Court placed great importance on in deciding *Williams* only three months later. The effect of this was to confuse the area of prosecutorial discovery in California.

The Confusion After Prudhomme And Williams

After *Prudhomme*, there have been two courts of appeal decisions on discovery of alibi. One was decided in the First District and the other in the Second District. Not surprisingly, the two courts came to opposite conclusions based on similar fact patterns.

In *People v. Hall*,[17] the defendant was accused of selling heroin. His offer of alibi at trial, was not allowed because of his failure to comply with a discovery order which demanded that he disclose his alibi witnesses in advance. While purporting to follow *Prudhomme*, the court distinguished this case because the order here was narrow and specific, while the order in *Prudhomme* was broad and sweeping.[18] It appears that the court downplayed *Prudhomme* in light of the *Williams* decision.

In *Rodriguez v. Superior Court*,[19] the defendant was charged

16. *Id.* at 114-15.
17. 7 Cal. App. 3d 562, 86 Cal. Rptr. 504 (1970) (disapproved on other grounds); People v. Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).
18. *Id.* at 566-67, 86 Cal. Rptr. at 507.
19. 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970).

with murder and burglary. Before the jury was selected, the judge ordered the defense to supply the prosecution with a list of alibi witnesses that would be called. Again, it looks as if the court was downplaying *Prudhomme*. Here, however, a different court of appeal went the opposite direction from *Hall*.

The defendant sought a writ of prohibition denying the prosecutors the right to the names of the alibi witnesses. The court of appeal issued the writ saying that an innovation such as requiring defendants to give advance notice of alibis, should be undertaken by the legislature and not by the courts. It also stated that the *Prudhomme* test had not been applied by the trial court, so the discovery order would also fail on that count.

AN END TO THE CONFUSION

In *Reynolds*, the California Supreme Court immediately notes the conflict between the two courts of appeal decisions based on similiar facts. While still upholding the validity of the "two-way street" idea of *Jones*, the court agrees with *Rodriguez* that a notice-of-alibi order is best left to the legislature to set out in statute form.

It has been argued by many that such a discovery statute is not necessary. In fact, one writer asserts that the result reached in *Rodriguez*, and therefore by implication the result reached in *Reynolds*, is, perhaps, not permitted by the decision in *Williams*. This position is based on the premise that the only impediment to prosecutorial discovery was the federal constitutional requirement against self-incrimination. Once this problem was removed in *Williams*, the state has an affirmative *duty* to develop rules of discovery which apply to both the prosecution and the defense. The author argues that the manner in which the defendant is required to give up the names of his alibi witnesses, whether by judicial or legislative rule, is unimportant. The important thing is that one of the two branches of state government perform the duty.[20]

THE CALIFORNIA CONSTITUTION

The court considers such arguments in *Reynolds*, but points out that California, in addition to the federal standard, has its own

20. Kane, *supra* n. 14 at 214.

protection against self-incrimination.[21] Therefore, *Williams* sets the outer limits but in no way precludes a state court from applying tighter restrictions based on its own constitution.[22] The *Reynolds* court approvingly cites *Scott v. State*,[23] an Alaska Supreme Court decision, to show its inclination:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court in the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.[24]

The court in *Reynolds* states that from *Prudhomme* on, it has shown its concern for the possible self-incrimination of defendants if they are required to give names and notice of alibis in advance. Therefore, while declining to go as far as the Alaska court did in holding all notice-of-alibi orders unconstitutional, it states that without a statute, court mandated notice-of-alibi orders will not be upheld.

In declining to uphold such orders, the court points out the difference between prescribing judicial procedures necessary to protect a fundamental constitutional principle or right, and the prescribing of judicial procedures which are not required by either the State or Federal Constitutions. In the first instance, it is under a duty to make rules. But, while conceding that court authorization of the latter procedures may be permitted by the two constitutions and may also be socially desirable in many instances, the court points out that such procedures are better left to the legislature to formulate. Because prosecutorial discovery is not a fundamental constitutional right, the court leaves the institution of such a procedure to the legislature.

The Effect Of Wardius In California

In order to deny the right of the prosecution to discovery of alibis, the court in *Reynolds* must deal with *Wardius v. Oregon*.[25]

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21. Cal. Const. art. I, § 13 (West 1974).
22. Reynolds v. Superior Court, 12 Cal. 3d 834, 842, 528 P.2d 45, 49, 117 Cal. Rptr. 437, 441 (1974).
23. 519 P.2d 774 (Alaska 1974).
24. *Id.* at 783.
25. 412 U.S. 470 (1973).

This case represents an indication by the U.S. Supreme Court that notice-of-alibi rules may more properly be judged on due process grounds, rather than on self-incrimination grounds. In *Wardius*, Oregon had a statute which required the defendant to disclose his alibi in advance. The Court emphasized the "two-way street" approach of *Jones* and *Williams* and declined to uphold the Oregon statute because of an absence of reciprocal discovery rights for the defendant. The Court said:

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.[26]

At first blush, it would seem that the order in *Reynolds* meets this reciprocity requirement. The superior court couched its discovery order in terms it thought would meet the *Wardius* test.[27] However, the California Supreme Court held that the order failed to meet the *Wardius* standard for the following two reasons:

> [f]irst, the order does not require the prosecution to furnish . . . [defendant] . . . with the names and addresses of the witnesses . . . [the prosecution] . . . will put on in rebuttal to . . . [defendant's] . . . alibi defense. Second, the order does not require the prosecution to name with all possible specificity the time and place of the alleged crimes as to which . . . [defendant] . . . might offer alibis.[28]

While the court concedes that reciprocity may indeed be met here, it points out the fact that it is also possible that reciprocity will not be extended. The order may turn out to be a tool that gives the prosecution an unfair advantage. The California Supreme Court's inability to ascertain all the circumstances surrounding the lower court's original discovery order, coupled with the lack of predictability as to whether the defendant would be given his reciprocal rights, is the key to the lack of due process. For example, if Reynolds had complied with the order and then asked for the name of a rebuttal witness, there is no guarantee that the lower court would compel the prosecution to give up that information. Without such a guarantee, which the court says can only be given

26. *Id.* at 476.
27. Reynolds v. Superior Court, 12 Cal. 3d 834, 843, 528 P.2d 45, 51, 117 Cal. Rptr. 437, 443 (1974).
28. *Id.* at 844, 528 P.2d at 51, 117 Cal. Rptr. at 443.

by statute, no prosecutorial discovery will be allowed. Thus, the California Supreme Court is telling the lower courts of California not to attempt to meet the *Wardius* test. The court is saying that all such attempts will be overruled, at least until the orders are based on a statute.

What Did The Discovery Order Mean?

The California Supreme Court states that one reason that it will require a statute is the great possibility of ambiguity when court ordered discovery is allowed. This possibility is shown vividly in *Reynolds*, where, as stated above, the superior court attempted to apply the *Wardius* test in ordering the disclosure of alibis. Both counsel agreed to the text of the order as amplified orally by the judge. But, on appeal, their respective interpretations as to what they had agreed to were radically different. Defense counsel stressed the limited language of the order as recorded by the court, while the prosecution argued the superior court's orally expressed attempt to comply with *Wardius*. It is submitted that this shows the possibility for abuse and mis-interpretation that is inherent when a tightly drawn statute is not in use.

The Absence Of Legislation In This Area

The California Supreme Court claims to draw no inference from the fact that notice-of-alibi legislation has repeatedly failed to be passed by the California legislature.[29] While this may be so, it is worth noting the attitude of the court of appeal in *Rodriguez*:

> But there is not merely the absence of a relevant statute in California. There has been a definite rejection of notice-of-alibi legislation. A rather elaborate statutory plan was recommended by the California Law Revision Commission and considered by the legislature in 1961, but was rejected. . . . Earlier bills had been introduced in 1959 . . . , and as far back as 1926. . . .[30]

The court then sums up a judicial attitude which this writer feels can be read into the California Supreme Court decision in *Reynolds*:

> The doctrine of judicial abstention should persuade courts not only to refrain from declaring statutes invalid except upon the most cogent reasons but also to forebear from adopting new and

29. *Id.* at 847, 528 P.2d at 53, 117 Cal. Rptr. at 445. At least five such bills have been introduced in the Legislature since 1959. This problem has been debated in California legal circles at least since 1926.

30. Rodriguez v. Superior Court, 9 Cal. App. 3d 493, 497, 88 Cal. Rptr. 154, 156 (1970).

important procedural devices which the Legislature has considered and rejected.[31]

CONCLUSION

It is submitted that *Reynolds* has laid to rest for the present the possibility of a prosecutor gaining advance knowledge as to the alibis of defendants. Because the court again refused to flatly reject *Jones*, some limited prosecutorial discovery is still permitted. However, *Reynolds* certainly clears up much of the confusion in this area.

The court has left open the possibility of a statute being enacted that will allow alibi discovery. It is certainly valid to read this case as a call for legislative action. But, it should be kept in mind that even such a statute may be unconstitutional based on Article 1, Section 13 of the California Constitution.[32]

At any rate, until the enactment of such a statute, a defendant's right to withhold his alibi until a time of his own choosing seems absolute in California.

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31. *Id.*
32. CAL. CONST. art. I, § 13 (West 1974).