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John M. Cave

PROFESSIONAL RESPONSIBILITY OF THE PROSECUTING ATTORNEY TO THE INDIGENT DEFENDANT IN A CRIMINAL CASE

JOHN M. CAVE*

Many prosecuting attorneys, I imagine, viewed with considerable consternation the decision of the United States Supreme Court in the case of *Gideon v. Wainwright.*[1] Visions—but not of sugar plums—danced in their heads. Visions of long hours of preparation for trial, of endless days spent in trial, and anguished moments of regret that a "felon" may have been acquitted to continue preying upon the public have, no doubt, haunted many dreams.

It is respectfully submitted, however, that the consternation is not as justifiable as it may appear on the surface.

First, let us examine the duty and the power of a prosecuting attorney in all criminal cases, and not necessarily those cases involving an indigent defendant. The statutory duty of the prosecuting attorney is to "commence and prosecute all . . . criminal actions in his county."[2] In addition, he has by implication other duties lying fairly within the scope of his office, including those essential to the accomplishment of the purpose for which the office was created and such other incidental and collateral duties as may serve to promote the accomplishment of the principal purpose.[3]

Among the duties essential to the accomplishment of the purpose of the office of prosecuting attorney are to make an investigation of matters which come to his attention, including the examination of the available evidence; to determine the credibility of the witnesses involved; to determine the applicability of the law to the facts and the facts to the law; and to assess the probabilities of acquittal or conviction. It would appear, therefore, that his basic duty is to the public who, by their election, have placed him in such a responsible position.

Commensurate with the duties are the powers vested in the office of

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*Attorney, Fulton, Missouri (former Callaway County Prosecuting Attorney); A.B., University of Missouri, 1938, LL.B. Harvard University, 1941.

1. 372 U.S. 335 (1963).
2. § 56.060, RSMo 1959.
3. State *ex inf.* McKittrick v. Wymore, 345 Mo. 169, 183, 132 S.W.2d 979, 987 (En Banc 1939).

the prosecuting attorney. Such powers include selecting the charge upon which a defendant is to be tried; making a determination thereof not by any hard and fast rule, but with regard to the special circumstances of each case; choosing a certain plan or policy of enforcement which, in the prosecutor's opinion, will best result in observance of the law; and filing complaints and instituting prosecution, or refraining from doing so—all in his sole discretion and not subject to the control of any other person.[4] Usually, the only recourse in the event of the failure to perform the duties of the office or for the abuse of the discretionary powers is defeat at the polls when the prosecuting attorney again becomes a candidate, or, in the most unusual and flagrant violations, a proceeding by quo warranto as in *State ex inf. McKittrick v. Wymore.*[5] Further, even after the prosecuting attorney has instituted a criminal action, it is within his power to enter a nolle prosequi if he, as a quasi judicial officer, in his sole discretion, desires the prosecution to be dismissed.[6] Neither the discretion to institute criminal proceedings nor the termination thereof by nolle prosequi can be controlled by any court.

The duties must not be fulfilled, nor the powers exercised, arbitrarily or capriciously, but they should be based upon sound discretion in accordance with the rights accorded to all persons by the Bill of Rights, the Canons of Ethics, prior decisions of our courts, and the utmost reason and wisdom possible.

With the obligation to receive and investigate complaints, to weigh each case, and to institute criminal proceedings in such cases as he, in his almost absolute discretion, may see fit, and with the power of virtually absolute control of the case, the sheer number of criminal cases which pass across his desk makes the studied determination of each case virtually impossible, in most counties. In addition to the number of cases, there is another factor which enters into the prosecution of complaints of criminal activity. This is the tendency to do things the easy way. It is often much easier, and much less time consuming, to obtain, or attempt to obtain, a confession from a likely suspect than it is to conduct the lengthy, detailed, and painstaking investigation that often is required to complete a case in the absence of a confession. The rack and thumbscrew, while very

4. State *ex inf.* McKittrick v. Wallach, 353 Mo. 312, 182 S.W.2d 313 (En Banc 1944).
5. *Supra* note 3.
6. State *ex rel.* Griffin v. Smith, 363 Mo. 1235, 258 S.W.2d 590 (En Banc 1953).

effective for obtaining confessions even to offenses which were not committed, have long since made their unlamented departure. However, there are cases, even of recent date, of violence in varying degrees which have led to confessions by those accused of crime. Often, the prosecuting attorney is not aware of methods which may be used prior to the submission to him of the confession, but with the power and the duty to prosecute goes the responsibility for proper methods of investigation.

Further, as all that glitters is not gold, so all confessions may not be what they seem. For example, in a case with which the writer had some familiarity, a complaint was received by the prosecuting attorney's office of the disappearance of certain cedar posts. The complainant had cut and stacked a pile of cedar posts some distance from his house. A few days later when he went in his truck to take the posts to market, he discovered that they were gone. He made a personal investigation of many sale barns, and at a sale barn several counties away from his home located a group of posts which bore a great deal of similarity to the posts which had been removed from his premises. Because of the lapse of time it was not possible to obtain even a reasonably accurate description of the individual who brought those particular posts to that sale barn for sale at auction. However, the records of the sale barn indicated that a resident of the same county as the complainant had sold cedar posts about the time the complainant had missed his posts. The check for the purchase price of some of the posts bore the name of the suspect, and witnesses recalled having seen a truck bearing that name at the sale barn at approximately that date. Observation of the endorsement and comparison with recorded chattel mortgages and other signatures of the suspect indicated that the endorsement and comparison signatures had been written by the same hand. In order to make as strong a case as possible, the complainant was requested to saw about three or four inches from the lower end of the posts which he had located, to match those sections with the stumps remaining on his farm, to saw a similar section from the stumps which matched the samples, and to return the sections to the sheriff's office for safe keeping. About twelve to eighteen samples from the posts located through the sale barn and from the stumps on the farm of the complainant were obtained and no sample from the posts failed to match a stump remaining on his property. Armed with this evidence, a warrant was issued for the arrest of the suspect. He was arrested and informed of the charge against him, and asked time to employ an attorney. After consultation with his attorney, preliminary hearing was waived and the suspect was

bound over to the circuit court for trial. Upon arraignment in circuit court, through his attorney, the defendant entered a plea of guilty and because of his past good record was placed on parole. He successfully served his parole and was duly discharged.

Several years later, and long after the statute of limitations had elapsed, you can imagine the astonishment of both the prosecuting attorney and the defense counsel to learn that the suspect was not in fact guilty, but that his truck had been borrowed without his knowledge, the check made to the name shown on the truck, and his endorsement expertly forged on the back of the check. Between the time of his arrest and the waiving of his preliminary hearing, the suspect had learned that another member of his family, whose record was not so satisfactory as his own, had actually been the culprit; and the suspect, out of a misguided sense of family loyalty, had taken the responsibility for the offense and the risk of possible refusal of parole, together with the other consequences which follow from conviction from a felony.

At the other extreme from the over-burdened prosecuting attorney who relies upon an unconfirmed confession, is the prosecuting attorney who becomes over-active either as an investigator or as an inquisitor. As long ago as 1901, the Missouri Supreme Court, in language indicating that the practice was apparently not only of long duration but widespread, criticized the practice of prosecuting attorneys acting as inquisitors and exacting admissions or confessions from persons accused of crime:

> The day seems to be distant in this State when prosecuting officers will learn that they are not *inquisitors* and that it is no part of their duty to endeavor to extort admissions or confessions from one accused of crime.[7]

In this case, the state had introduced into evidence the statement of the defendant which was taken by the prosecuting attorney after the defendant had been arrested and placed in jail.

It is not only permissible, but is desirable, for the prosecuting attorney to assist in the collection of evidence in the course of preparation for trial, and such assistance and counsel extends to the preparation and presentation of evidence in connection with the issuance of a search warrant. However, absent exceptional circumstances, the prosecuting attorney should not accompany the sheriff in the execution of the search warrant nor take an active part in the investigation to that extent:

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7. State v. Hagan, 164 Mo. 654, 675, 65 S.W. 249, 255 (1901).

> It is commendable for prosecuting attorneys to be deeply interested in enforcing the law and to use their utmost ability and knowledge to see that the state is properly represented, but it is also their duty to keep in mind the fact that the duty of a prosecuting attorney is not that of a partisan advocate, but it is his duty to treat the defendant fairly under all circumstances and to conduct trials on the part of the state in such a way as to leave no room for criticism as to the methods used in trying to secure convictions. It is much more desirable to retain confidence in the purpose of the courts and other officers to enforce the law by fair and just means than to try to secure convictions in all cases at all hazards.[8]

It is often difficult for a prosecuting attorney to determine his course of conduct in order to fulfill his duty of protecting the public and at the same time to protect the rights of an individual under investigation or accused of crime. The criteria set by the courts in the above cases, together with the provision of Supreme Court Rule 4.05 that:

> The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.[9]

seem, however, to establish a sufficiently well-defined area within which a prosecuting attorney can fulfill his dual obligations.

In this light, let us now examine the duty of an attorney for an individual accused of a criminal offense. This duty is also set forth in Supreme Court Rule 4.05:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.[10]

It would appear from the description of such duty, and it is generally recognized, that the attorney for the defendant is a partisan advocate, in

8. State v. Nicholson, 7 S.W.2d 375, 378 (Spr. Mo. App. 1928). Also see State v. McIntosh, 333 S.W.2d 51 (Mo. 1960) and cases cited there.
9. Supreme Court Rule 4.05.
10. *Ibid.*

contradistinction to the position of the prosecuting attorney. His sole duty is to his client, within the bounds of the law, and for the attorney to adopt any other attitude or approach to his defense would result either in the determination of guilt or innocence by his attorney and not by a judge or jury acting as a trier of fact, or of placing on the defense counsel also the dual burden of representing the public and the individual. While society has a direct interest in the punishment of persons who violate its laws, it has a corresponding interest in seeing that only those who do violate them are punished and that no man be caused to suffer the loss of his life, liberty or property unless it be established beyond a reasonable doubt within the general and well established rules of law that he is in fact guilty of the offense charged. The arbitrary and capricious taking of life, liberty and property by the Crown in early English history, the similar use of raw power by Hitler and Mussolini, and the purges of Stalin should serve as ample justification for the interest of society in the protection of the rights of individuals. It seems to be the theory of our form of criminal procedure that active and vigorous presentation of the evidence tending to show the guilt of the defendant, with due regard for his rights as a citizen, and the active and vigorous presentation of the evidence favorable to the defendant, by an attorney whose duty it is to advocate his client's cause within the limits of the law, will best achieve the balance, or accommodation, between the sovereign and the individual.

Under our theory of the administration of criminal justice and in view of the different attitude and approach which must be taken by the prosecuting attorney and by the counsel for the defendant, it would appear that any attempt by a single individual to exercise both functions would require him to assume approaches which are entirely inconsistent. It is entirely possible, though perhaps occasionally difficult, for a prosecuting attorney to investigate and prepare for trial his case on behalf of the state without infringing upon the rights of the defendant. However, for him then to assume the position of an advocate on behalf of the defendant and to go beyond the mere advising of rights into the realm of possible defenses, evaluation of the evidence and the law, and trial strategy and tactics would place him in the position of attempting to serve two masters with conflicting interests, which it is generally conceded, is virtually impossible. All too often, also, the defense also involves either an unpopular person or an unpopular cause, either of which would further serve to place an intolerable burden upon the prosecuting attorney should he be required, in theory or in practice, to assume a joint role in the

criminal process. Obviously, therefore, the prosecuting attorney cannot, and should not, in fairness to himself, and above all in fairness to the defendant, either place himself, or be placed, in such a position.

Obviously, also, the trial court, because of its function in the judicial process, cannot assume the role of an advocate in the representation of the individuals who stand accused before it.

Generally speaking, sufficient investigation as to the facts and research as to the law will have been undertaken by the prosecuting attorney prior to the apprehension of the defendant to have convinced the prosecuting attorney of a reasonable probability of guilt of the defendant and a reasonable expectation of obtaining a conviction. Because of the presumption of innocence, we must assume for further discussion that the defendant in question is legally innocent, but that there are sufficiently incriminating circumstances to persuade the prosecuting attorney of the guilt of the defendant. We find, therefore, an innocent defendant suddenly being placed under arrest and brought before a court and informed that he stands charged with a violation of the criminal law. The experienced criminal or the professional criminal is usually sufficiently versed in his rights as a person accused of crime to inform the court or the arresting officer that he desires to consult an attorney. Under those circumstances, the prosecuting attorney, knowing that the battle lines are drawn, can proceed with the case in the assurance that counsel for the defendant will provide adequate representation.

The inexperienced defendant, whether indigent or able to afford counsel of his own choosing, is often completely ignorant of his rights as an accused person; or, if aware of them, is so unnerved by the proceeding as to be unable to avail himself of them; is wholly unable to understand the situation in which he finds himself; and therefore is most in need of the protection of his legal rights. He finds himself standing, at that moment, alone and unarmed, under conditions totally foreign to him, the strength of his opponents not fully known, but apparently sufficient to justify the issuance of a challenge in which his life or his liberty shall be at stake. Remembering that our hypothetical defendant is innocent, and that all defendants are innocent until proven guilty beyond a reasonable doubt, can the prosecuting attorney do other than guarantee that no unfair advantage shall be taken of his opponent, by providing him at the earliest opportunity with an advocate capable of arming himself as the state is armed preparatory to the encounter?

Much has been said, undoubtedly in all sincerity, that the so-called rights of the defendant are nothing but devices used to protect the criminal. The essential point in relation to these rights, however, is overlooked in such a statement. The judicial process is but the procedure by which it is determined whether an individual is a criminal or not. The rights are the rights of the person accused of crime and must equally apply to all defendants whether guilty or not. A granting of those rights to the persons who are not guilty and a deprivation of those rights from the persons who are guilty would amount to a pre-judging of guilt and a substitution of another and different process for determining guilt or innocence. As the actual guilt or innocence of a defendant is immaterial to the rights to be accorded a defendant in a criminal proceeding so should his experience or inexperience and his financial condition or lack thereof be immaterial in being provided with a protector for those rights. As the obligation of a prosecuting attorney to prosecute all criminal actions in his county is balanced by his obligation to assure to a defendant due process of law, and as the judicial process is one for determining guilt or innocence, the obligation to prosecute all criminal actions carries with it the duty to see that all defendants are accorded the rights which are common to all.

Except that an indigent defendant does not have the scope of choice available to a defendant who can employ counsel of his own choosing, the professional responsibility of the prosecuting attorney is neither greater nor less to one than to the other. The rights of all defendants being inextricably bound together simply by reason of being a person accused of crime makes it impossible to designate any greater or less professional responsibility on the part of a prosecuting attorney.

A greater awareness of the obligation of all prosecuting attorneys to all defendants, applied equally in practice to the indigent as well as to the affluent defendant, would certainly serve to lessen to a great extent the very pressing problem of adequate representation of the indigent defendant.