RECENT DEVELOPMENTS IN CRIMINAL LAW

Apprendi and Placing Combustible Materials

Frank and Patrick Palermo were charged by bill of information with one count each of violating La. R.S. 14:54, placing combustible materials, and two counts each of violating La. R.S. 14:107.2, the Hate Crimes Statute based on an allegedly racially motivated altercation with two African-American Males which culminated in the dousing of the victims' cars with gasoline while one of the victims' three-year-old son was in one of the vehicles. The jury returned verdicts of guilty on both defendants for violating La. R.S. 14:54, placing combustible materials, but found only Frank Palermo, the gasoline wielder, guilty of both counts of violation of the Hate Crimes Statute. Patrick Palermo was found not guilty of both counts of violation of the Hate Crimes Statute.

The defendants both filed motions challenging the constitutionality of La. R.S. 14:54, but the motions were denied. In accordance with La. R.S. 14:54, the trial judge sentenced the defendants by looking to La. R.S. 14:51 – 53, which define the various degrees of arson, and found that both had essentially intended to commit aggravated arson. The 5th Circuit Court of Appeal upheld the convictions and the constitutionality of the statute, finding that *Apprendi v New Jersey* did not apply because the sentences did not exceed the statutory maximum. The sentences were vacated and the cases remanded for sentencing based on other grounds.

Granting certiorari, the Louisiana Supreme Court found that La. R.S. 14:54 is unconstitutional, based on *Apprendi* and *Jones v. US*. The Court stated "While the legislature can validly define the elements of an attempt to commit arson under La. R.S. 14:54 as "the placing of any combustible or explosive material in or near any structure . . . with the specific intent eventually to set fire to such structure . . ." it cannot remove from the jury the consideration of the elements of the underlying arson offense. Indeed, it would be absurd if the state could avoid having to prove to a jury beyond a reasonable doubt that the defendant created a foreseeable risk to human life by charging a defendant with placing combustible materials under La. R.S. 14:54, rather than attempted aggravated arson under La. R.S. 14:27 and 14:51." The Court further reasoned that the underlying offense supporting the charge of placing combustible materials would dictate whether the defendants were tried by a six-person or twelve-person jury, underscoring the critical importance of the factual finding of creation of a foreseeable risk to human life, as required for aggravated arson, as opposed to ruling the risk a mere sentencing factor.

State v. Palermo, 2000-2488 (La. 5/31/02), 818 So.2d 745

Code of Evidence 412.2

Louisiana Code of Evidence Article 412.2, adopted in 2001, provides that when an accused is charged with a crime involving sexually assaultive behavior or with acts that constitute a sex offense involving a victim under the age of seventeen at the time of the offense, evidence of the accused's commission of another sexual offense may be admissible and considered on any matter for which it passes the Article 403 balancing test. The state is required to provide

reasonable notice in advance of the trial of the nature of the evidence it intends to use for these purpose.

Two defendants were indicted separately for aggravated rape, and both filed motions for an admissibility hearing on after the state gave notice of intent to use evidence of other sexual offenses pursuant to La. C.E. 412.2. The trial courts in the two cases split, one granting the motion and the other denying. The First Circuit Court of Appeal, reviewing both decisions, reversed the trial court granting a hearing and affirmed the trial court denying a hearing.

Certiorari was granted, and the Louisiana Supreme Court held that a pre-trial hearing on admissibility was not required prior to admission of past sexual offenses evidence under La. C.E. 412.2. The Court reviewed the legislative history of La. C.E. 412.2, comparing the article to Federal Rule of Evidence 413, which does not include a requirement that the evidence pass a 403 balancing test prior to introduction, and found no intent on the part of the legislature to require a Prieur hearing before trial. Justice Calogero, concurring, wrote separately to point out that a trial court could order a hearing on admissibility prior to trial and that the state would still have to prove that the evidence sought to be admitted under Article 412.2 would have to be relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or by considerations of undue delay or waste of time.

State v. Williams, 2002-1030 (La. 10/15/02), 2002 WL 31303323.

Miranda

The Louisiana Supreme Court reversed the Court of Appeal, reinstating the trial court decision to suppress evidence. The defendant had been detained and his apartment searched, where drugs were found in a drop ceiling panel. At trial, the detective stated that he read the *Miranda* warnings from a card he regularly kept in his pocket. However, the detective did not state exactly what rights he read to the defendant, did not produce a copy of the card, and could not recite the rights required by *Miranda* from memory. The trial court was unconvinced that the defendant had been properly *Mirandized* before making his statement and suppressed the evidence, despite the state's argument that the drugs would have been found pursuant to the inevitable discovery doctrine.

The Supreme Court held that the State's evidence introduced to demonstrate that *Miranda* warnings were properly given was equivocal at best and reiterated the state's burden to prove that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel as a "heavy burden." The Court held that the State failed to introduce any documentary evidence or other testimony suggesting that defendant made a knowing and voluntary waiver of his rights before making his statement.

State v. Vigne, 2001-2940 (La. 6/21/02), 820 So.2d 533.

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