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Constitutional Law--Cruel and Unusual Punishment--Criminal Prosecution of a Chronic Alcoholic for Public Drunkenness

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ment that allegations be made of substantial error such that an appeal would have been of some benefit. The decision relied on *Tipton v. Commonwealth*,[11] a pre-Hammershoy case which said that failure of appointed counsel to perfect an appeal could not be reached under RCr 11.42, but "could under appropriate circumstances, become the basis for an appeal which otherwise would have been foreclosed as too late."[12]

The procedural confusion attending these cases could be dispelled by the approach mentioned in *Tipton*. If the time for appeal has run while an indigent is relying on appointed counsel to bring an appeal, and counsel did not bring an appeal because he felt it was without merit, then allow a late appeal to be made. The indigent could petition the sentencing court for a record and appointed counsel; if the court refused to grant them because time had run, he could seek mandamus from the Court of Appeals to force the trial court to grant him such assistance. Then, or after perfection of the appeal, if the Commonwealth argues that time for appeal has run, he could claim special facts justifying the late appeal. This would be more direct and sensible than the present, uncertain back-door approach to obtaining an extension of time in which to appeal.

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CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—CRIMINAL PROSECUTION OF A CHRONIC ALCOHOLIC FOR PUBLIC DRUNKENESS.—Joe B. Driver, 59, was arrested and sentenced for public drunkenness. Driver's first conviction for public intoxication occurred at the age of twenty-four, and he had been convicted of this same offense more than 200 times. The state court held that imposition of the sentence did not constitute cruel and unusual punishment even though defendant was allegedly an alcoholic.[1] A petition for habeas corpus was denied in federal district court even though Driver was found to be a chronic alcoholic.[2] From this denial, defendant appealed. *Held*: Reversed. The public appearance of a chronic alcoholic while intoxicated is a compulsive act symptomatic of the disease of chronic alcoholism, and to criminally punish one for such conduct is cruel and unusual punishment. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

A general rule of the common law, and one usually followed under

[11] 398 S.W.2d 493 (Ky. 1966).
[12] *Id.* at 495.

[1] State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).
[2] Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965).

statute, is that voluntary drunkenness is no defense to a crime. Even though one becomes drunk from an uncontrollable desire caused by long indulgence in alcohol, not amounting to insanity, the courts have generally regarded this as self-inflicted and therefore no defense. Involuntary intoxication, such as that induced by fraud or duress of another party, constitutes a valid defense.[3]

The court here affirms the proposition that voluntary drunkenness is no excuse for crime but concludes that the person who has indisputably been proven a chronic alcoholic does not drink voluntarily. By rejecting the contention that the drinking was originally voluntary and one must suffer the consequences, this decision represents a significant point of departure from existing law. Thus the defense of involuntary intoxication, previously limited to situations where the intoxicated state was produced by another party, may now be used where one suffers from an uncontrollable, internal desire for alcohol.

Although the *Driver* decision represents a change in existing law, emphasis must be placed on the court's limitation of its decision, first, to a particular class of offender, and second, to the types of behavior of that class exempt from criminal prosecution. Referring to the class brought within the scope of the decision, the court said: "It is known that alcohol can be addicting, and it is the addict—the involuntary drinker—on whom our decision is now made. Hence we exclude the merely excessive—steady or spree—voluntary drinker."[4] Since Driver had been proved to be an involuntary drinker, the first requirement was met. Regarding the exempt types of behavior, the court stated: "However, our excusal of the chronic alcoholic from criminal prosecution is confined exclusively to those acts on his part which are compulsive as symptomatic of the disease."[5] Violation of the public drunkenness statute was categorized by the court as a compulsive symptom of chronic alcoholism, and thus Driver's behavior is of that type which the court has chosen to exempt. Such conduct should not be punished because the function of the criminal law is not to punish those acts over which a party has no control.

Excusing the chronic alcoholic from criminal prosecution for public drunkenness rests on extra-legal as well as legal authority. The extra-legal authority comes from the medical profession, which unanimously agrees that alcoholism is an illness.[6] Medical experts have also recognized that chronic alcoholism is a symptom of mental illness or

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[3] 22 C.J.S. *Criminal Law* §§ 66-70 (1961).
[4] 356 F.2d 761, 764.
[5] *Ibid.*
[6] KY. COMM'N ON ALCOHOLISM, SOME FACTS ABOUT ALCOHOL AND ALCOHOLISM 8 (1960).

personality disorder.[7] Previously, the judiciary generally has not approached the problem of alcoholism with understanding born of recent scientific knowledge and experience. In *Driver*, however, the Fourth Circuit Court of Appeals used extra-legal material to support its decision and readily accepted medical authority in the absence of legal precedent.[8]

The only significant legal authority relied on in *Driver* is *Robinson v. California*.[9] In reversing a conviction for being addicted to the use of narcotics, the Supreme Court stated in that case:

> We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.[10]

The Supreme Court rationalized its decision on the fact that drug addiction is a disease, not a crime. The Fourth Circuit Court of Appeals used a similar analysis in ruling that chronic alcoholism, noted in *Robinson* as closely related to narcotic addiction,[11] is also a disease, not a crime. However, the *Driver* decision must be considered a moderate extension of the *Robinson* doctrine within the Fourth Circuit because *Driver* dealt with punishment of an involuntary symptom of a status, public intoxication, whereas *Robinson* was concerned only with punishment of a status, narcotic addition. Just as the Supreme Court in *Robinson* did not hold punishment of the actual use or possession of narcotics unconstitutional, the *Driver* court did not explicitly rule on the extent to which the alcoholic could use or possess the substance his body craves prior to, or separate from, this public display. Thus the need is increased for the Supreme Court to clarify its position as originally established in *Robinson*.

Next, it is appropriate to examine the tool, cruel and unusual punishment, by which these results were accomplished. Historically, the judiciary has been reluctant to develop standards by which to

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[7] MacDonald, *Alcoholism and Drug Addiction*, 21 OHIO ST. L.J. 96, 98 (1960). One study has found that 42.8 per cent of the alcoholics observed suffered from well-defined diagnostic categories such as paranoid schizophrenia, manic-depressive reactions, and other mental disorders. DIETHELM, ETIOLOGY OF CHRONIC ALCHOLISM 20-38 (1955). Still others have found that continued excessive drinking may lead to serious alterations in the nervous system itself. GIBBINS, CHRONIC ALCHOLISM 16 (1953).

[8] It is significant to note that the Kentucky Court has recognized that one suffering from chronic alcoholism is actually suffering from a disease, and by reason of this fact is ill. However, this decision did not concern itself with the criminal responsibility of the chronic alcoholic. Peterson v. Commonwealth, 297 Ky. 148, 155, 179 S.W.2d 210, 214 (1944).

[9] 370 U.S. 660 (1962).

[10] *Id.* at 667.

[11] *Id.* at 667 n. 8.

determine whether a punishment is cruel and unusual. Originally, the amendment related to the method of punishment, whether brutal or torturous.[12] In a 1910 case,[13] the principle that the punishment must be in proportion to the crime was firmly established. A second development in the scope of the amendment is discernible in a 1958 case,[14] which recognized mental anxiety as a means of cruel and unusual punishment. Then, in 1962, the Supreme Court recognized that punishment of an illness fell within the scope of the eighth amendment.[15] The present decision follows the development initiated in 1962 of prohibiting punishment of conduct thought not to be the proper subject of criminal sanctions. Thus has the meaning of cruel and unusual punishment expanded as society's concepts of dignity and humanity have changed.

This interpretation of the eighth amendment could have significant future implications. Generally, constitutional limitations have not restricted the power of the states to define crime. However, a decision such as *Driver* could possibly form a basis for judicial invalidation of criminal legislation considered to be inappropriate. If such a liberalized construction of the eighth amendment is continued, this amendment may assume a more eminent role in safeguarding personal liberties. This would be in accord with the present trend to protect more fully personal liberties, as exemplified by recent Supreme Court decisions regarding other portions of the Bill of Rights.

Although the court based its decision solely on the eighth amendment, it is worthwhile to note the similarity between the test applied by the *Driver* court and the insanity defense established in *Durham v. United States*.[16] There the court held that one is not criminally responsible where the unlawful act is the product of mental disease or defect.[17] In *Driver*, the court held that one is not criminally respon-

[12] To the framers the amendment was adopted as an "admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 624 (4th ed. 1873).

[13] Weems v. United States, 217 U.S. 349 (1910).

[14] Trop v. Dulles, 356 U.S. 86 (1958).

[15] Robinson v. California, 370 U.S. 660 (1962).

[16] 214 F.2d 862 (D.C. Cir. 1954).

[17] In *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963), Kentucky established a new test of criminal responsibility. Under this rule one is excused from the criminal sanction if he is unable to resist the impulse to violate the law, provided such conduct is the result of mental disease. By regarding chronic alcoholism as a mental disease, such conduct, *i.e.*, public drunkenness, would not subject the actor to criminal responsibility. However, the *Model Penal Code* from which this test was adopted does not recognize intoxication as a mental disease for purposes of criminal responsibility. MODEL PENAL CODE § 2.08 (3) (Proposed Official Draft, 1962).

sible when the unlawful act results compulsively from the disease of chronic alcoholism. Thus in both cases, the unlawful conduct has resulted involuntarily from an involuntary status and as such escapes criminal punishment. Despite this similarity, it must be emphasized that the *Driver* court did not accept chronic alcoholism as a mental illness for purposes of criminal responsibility, nor has any court of significance. However, since many medical authorities regard alcoholism as a mental disease, the argument can be made that the insanity plea should be acceptable in the case of the chronic alcoholic. But until such an argument gains legal acceptance, the eighth amendment as expounded in *Driver* remains the sole defense resting on precedent which is available to the chronic alcoholic.

Although representing a sound decision in light of the facts of the case, *Driver* also creates several problems in regard to future application of its doctrine. No guidelines were set up as to when the use of alcohol becomes the disease of chronic addiction.[18] To avoid difficulty in distinguishing between the compulsive and volitional user, cooperation of the judiciary and the medical profession is essential.[19] A second problem pertains to the extent of immunity granted the chronic alcoholic for his unlawful acts. Although the court exempts conduct resulting compulsively from the disease, the question remains as to what conduct can be legally considered a compulsive symptom. The theft of liquor might be a compulsive act of the chronic alcoholic, but would it be exempt? Thirdly, intoxicated persons may be taken into custody for inquiry or prosecution. Only when the accused's helplessness comes to light may he not be criminally prosecuted. Thus, if this decision is to have any practical effect, the fact that alcoholism is a disease must be accepted by those who control the initial stages of the legal process.

The significance of this decision lies in the fact that a new approach is applied to the age-old problem of chronic alcoholism and its punishment under the criminal law. "Traditionally, we have tried to meet the problem of alcoholism by penal law. But there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the laws against drunkenness."[20] Perhaps

[18] However, it would seem that a long period of excessive drinking with recognizable syndromes would at least present a degree of objective evidence as to when the use had become actual addiction. Those who might otherwise be deterred by threat of the criminal sanction must be excluded from the reach of this decision.

[19] In the medical area, present facilities are insufficient and inadequate. Turning chronic alcoholics into our crowded mental hospitals would create further problems. Many in the profession might not wish to give any of their limited facilities to cases which they are not in a position to treat.

[20] GUTTMACHER & WEIHOFEN, PSYCHIATRY & THE LAW 319 (1952).

the *Driver* case best illustrates the truth of this statement. The number of times Driver was convicted indicates the futility of his prison terms. Neither deterred nor rehabilitated, he and others like him are daily released again into society. In attempting to solve this problem, the *Driver* court upholds civil commitment while refusing to allow criminal conviction. Given the fact that the criminal law should not punish an illness and that the chronic alcoholic is ill, the court's reasoning becomes persuasive. Although problems are necessarily associated with this type of decision, *Driver* represents a more realistic approach to this ancient problem of the criminal law[21] and manifests potential uses of the eighth amendment in other areas.

Charles R. Simons

CORPORATION — STOCKHOLDER'S DERIVATIVE SUITS — VERIFICATION REQUIREMENT OF FEDERAL RULE 23(b).—Plaintiff shareholder, a Polish immigrant with a limited knowledge of English, received from the management an offer to purchase her stock. Not understanding the import of the offer, she sought the advice of her son-in-law, an investment counselor who had originally procured the stock for her. The son-in-law immediately had misgivings about the offer, and he undertook a comprehensive investigation of the management's operations. He concluded that the directors were engaged in an illegal scheme to defraud the corporation of millions of dollars and decided that the best course for the plaintiff to follow would be to bring a derivative suit. This she did, following the instructions of her son-in-law and an attorney who had been hired by him. She made the affirmations in the complaint required by Rule 23(b) of the Federal Rules[1] and verified the complaint pursuant to the same rule. A deposition of the plaintiff taken by the defendants revealed that she was totally ignorant

[21] The influence of the *Driver* case is already being felt. See Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

[1] FED. R. CIV. P. 23(b) "Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain action or the reasons for not making such effort."