Kentucky Law Journal

Volume 47 | Issue 2 Article 10

1958

Legal Ethics--Disbarment Proceedings--Conviction for Willful Evasion or Avoidance of Federal Income Taxes as Grounds

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relied on. The difficulties of a perjury prosecution against the turncoat witness who suddenly developes a convenient loss of memory are obvious. Perhaps a better result is found in those decisions which allow the introduction of prior inconsistent or contradictory statements to impeach the calling party's own witness where the party is *actually surprised* by the turncoat statement. Such an approach was examined at length in *Young* v. *United States*.[15] The test of actual prejudicial surprise would seem to be a more workable rule than any artificial distinction between negative and affirmative statements. It would appear that the merely negative statement, where it is actually surprising to the calling party, may be as devastating as any positive assertion.[16]

Conclusion

The present case epitomizes the Kentucky rule as to impeachment of a party's own witness on the grounds of prior inconsistent statements. The cases dating back for almost a century draw a clear line of departure between the impeachibility of affirmative and negative statements by such a witness. It is suggested that the adoption of a rule which would allow the calling party to impeach his own witness by proof of prior contradictory statements where the party was *actually surprised,* without regard for the negative or affirmative quality of the witness's present testimony, would better provide both an adequate protection for the nerves of prosecutors and an adequate check against the unwarranted introduction of hearsay testimony.

Donald D. Harkins

LEGAL ETHICS—DISBARMENT PROCEEDINGS—CONVICTION FOR WILLFUL EVASION OR AVOIDANCE OF FEDERAL INCOME TAXES AS GROUNDS.—Subsequent to the conviction of an attorney in the United States District Court of willfully and knowingly failing to make his federal income tax return for 1952 in violation of federal law,[1] the Kentucky State Bar Association brought disbarment proceedings. The attorney con-

[15] 97 F. 2d 200 (5th Cir. 1938). It was the factual disposition of this case that the calling party had not in fact been surprised, and was, indeed, using the turncoat witness as an artifice to introduce irrelevant and hearsay evidence. For this reason impeachment was not allowed.

[16] The Kentucky Court of Appeals in Model Drug Co. v. Patton, 208 Ky. 112, 270 S.W. 998 (1925) allowed impeachment by proof of prior inconsistent statements of the witness where the party calling him was surprised. The rule there used was not defined, but the statements of the turncoat witness on the stand were affirmative and prejudicial. Maddox v. Commonwealth, 311 Ky. 685, 225 S.W. 2d 107 (1949) which held that actual surprise of the calling party was not enough to allow impeachment by prior contradictory statements where the statements of the witness on the stand were not prejudicial or affirmative.

[1] Int. Rev. Code of 1954 sec. 7201.

tended, among other things, that the offense of which he was convicted involved no moral turpitude. *Held:* Attorney not disbarred. The court concluded that a conviction under the federal income tax statute was not sufficient ground upon which to disbar him. *Kentucky State Bar Association* v. *McAfee,* 301 S.W. 2d 899 (Ky. 1957).

The problem presented is whether the conviction of an attorney of willfully evading or avoiding federal taxes is sufficient ground for disbarment, and this requires consideration of the question whether conduct which results in such conviction necessarily involves moral turpitude.

Since this was a case of first impression before the court, outside sources of authority were considered. As its main authority the court relied on *In re Hallinan,*[2] wherein the Supreme Court of California said:

> Although the problem of defining moral turpitude is not without difficulty . . . it is settled that whatever else it may mean, it includes fraud and that . . . a crime in which an intent to defraud is an essential element is a crime involving moral turpitude. . . .[3]

The California Court held that an intention to defraud the United States government is not an essential element in the offense of willfully failing to pay taxes. Thus, a conviction under the above tax statute does not involve moral turpitude *per se.*

In a later review of the *Hallinan* case,[4] the Supreme Court of California adhered to its prior statement of the law, but it sustained the subsequent finding of the Board of Governors that the *facts* and *circumstances* surrounding the commission of the offense of which petitioner was convicted involved moral turpitude.[5] If the latter holding of the court is sound, then the Kentucky Court in the *McAfee* case is to be critized for considering only the conviction and not the circumstances surrounding it. A determination of the soundness of the California Court's holding involves a short review of the relevant law and court holdings.

As preliminary matter, it should be noted that the purpose of disciplinary proceedings is not to punish the attorney, but rather "to preserve the courts from the ministration of persons unfit to serve therein as attorneys."[6] In futherance of this idea, courts have said that dereliction of an attorney in his personal capacity which involves moral turpitude may be made the basis of disciplinary proceedings.[7]

[2] 43 Cal. 2d 243, 272 P. 2d 768 (1954).
[3] *Id.* 272 P. 2d at 771.
[4] 48 Cal. 2d 52, 307 P. 2d 1 (1957).
[5] Mr. Hallinan had failed to record or report his cash fees for the express purpose of evading income taxes.
[6] *In re* Burrus, 364 Mo. 22, 258 S.W. 2d 625, 627 (1953).
[7] Bryant v. State Bar of California, 21 Cal. 2d 285, 131 P. 2d 523 (1942); Matter of Moon, 310 S.W. 2d 935 (Mo. 1958).

As Judge Cardozo has said:

> [T]he charlatan and rogue may assume to heal the sick. The knave and criminal may pose as a minister of justice. Such things cannot have been intended, and will not be allowed.[8]

The majority of courts have adhered to the rule followed in the *Hallinan* case,[9] that a conviction under the federal tax statute does not *per se* involve moral turpitude as grounds for disbarment.[10] The primary consideration of the courts has been whether the element of fraud was involved in the violation itself regardless of the facts and circumstances. A minority of courts have found that it was, and have held that a conviction was sufficient for disbarment on the ground of moral turpitude.[11]

Several courts have concluded that if the indictment charges a willful evasion of taxes under the federal tax statute by *fraudulently* and *falsely* failing to pay taxes, the fraud element exists and that such conviction involves moral turpitude as grounds for disbarment.[12] As to this, the majority view has been well stated:

> Whether a particular crime involves moral turpitude depends on its description as set out in the statute defining it and upon the material essentials in the indictment charging it. It certainly does not depend upon unnecessary adjectives a zealous and over careful prosecutor may have added in the indictment to the essentials required by law nor upon the elequent, perhaps even lurid description of the offense by the prosecutor to court or jury.[13]

Even if fraud were an essential element in a conviction for violation of the tax statute, there is serious doubt whether this would necessarily be the "fraud" required for purposes of disbarment. A different concept of "fraud" is tenable in each instance, and this might easily lead a court to two different findings on the same set of facts. At any rate, moral turpitude may exist apart from the fact that a statute has been violated. It has been said:

> [I]f the crime is one involving moral turpitude it is because the act denounced by the statute grievously offends the moral code of mankind and would do so even in the absence of a prohibitive statute.

[8] *In re* Rouse, 22 N.Y. 81, 99, 116 N.E. 782, 786 (1917).
[9] *Supra* note 2.
[10] United States v. Schartan, 285 U.S. 518 (1932); United States v. Carollo, 30 F. Supp. 3 (W.D. Mo. 1939); McGregor v. State Bar, 24 Cal. 2d 283, 148 P. 2d 865 (1944); *In re* Diesen, 173 Minn. 297, 215 N.W. 427, 217 N.W. 356 (1927); Matter of Moon, 310 S.W. 2d 935 (Mo. 1958).
[11] Tseung Chu v. Cornell, 247 F. 2d 929 (9th Cir. 1957); Chanan Din Khan v. Barber, 147 F. Supp. 771 (N.D. Cal. 1957).
[12] *In re* Seijas, 318 P. 2d 961 (Wash. 1958); Matter of Kindschi, 319 P. 2d 824 (Wash. 1958).
[13] United States v. Carrollo, 30 F. Supp. 3, 7 (W.D. Mo. 1939).

> The moral code of mankind was not enacted and it cannot be amended by legislatures.[14]

In view of the above discussion, it would seem that the Kentucky Court in the *McAfee* case followed the better reasoned cases in holding that a conviction under the federal income tax statute for willfully failing to make a federal income tax return did not involve moral turpitude in disbarment proceedings. However, it appears that the court erred in failing to consider that, though the minimum requirements for a conviction did not involve moral turpitude *per se,* the *facts* and *circumstances* under which the conviction was obtained may have involved moral turpitude. This short-sighted holding by the court, which it followed in a later decision,[15] might permit a person convicted for violation of the federal income tax laws under *any* circumstances to continue the practice of law in Kentucky. On this basis, the holding of the principle case is unsound in theory and in practice.

Wilbur D. Short

PLEADING—WHEN IS AN ACTION COMMENCED?—On January 2, 1956, plaintiff, a resident of Virginia, was injured in an automobile collision in Kentucky involving defendant, a Kentucky resident. On December 31, 1956, plaintiff's attorney filed a complaint with the deputy clerk of the United States District Court for the Eastern District of Kentucky. The attorney submitted typed copies of the summons, along with the complaint, and suggested to the clerk that she issue the summons that day. However, the clerk did not issue the summons until January 3, 1957. Defendant interposed the statute of limitations as a defense,[1] arguing that the cause of action did not accrue within one year next before the commencement of the action since the Kentucky Rules of Civil Procedure require the filing of a complaint *and* issuance of summons for the commencement of an action.[2] *Held:* Since failure to issue the summons was due solely to a matter over which the plaintiff had no control, and since he had done everything humanly possible to cause the summons to be issued, the cause of action was saved. *Hagy* v. *Allen,* 153 F. Supp. 302 (E.D. Ky. 1957).

[14] *Id.* at 6.
[15] Kentucky State Bar Association v. Brown, 302 S.W. 2d 834 (Ky. 1957).

[1] Ky. Rev. Stat. sec. 413.140 (1959) provides that an action for an injury to the person of the plaintiff shall be commenced within one year after the cause of action accrued.

[2] Kentucky Rules of Civil Procedure 3 (1953) provides: "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."