

Criminal Law - Constitutional Law - Imprisonment for Non-Payment of Prosecution Costs and the Thirteenth Amendment - *Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158 (1968)

Harry Saunders

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Criminal Law—CONSTITUTIONAL LAW—STATUTES PERMITTING IMPRISONMENT FOR NON-PAYMENT OF PROSECUTION COSTS AND THE THIRTEENTH AMENDMENT. Having served his sentence on a conviction for nine counts of statutory burglary, the indigent defendant, Wright, was further confined solely for his failure to pay the costs of his criminal prosecution. In accordance with a Virginia statute,¹ defendant's confinement was extended approximately three years or until these costs were paid.² In a habeas corpus proceeding,³ petitioner maintained that the confinement for nonpayment of costs was a violation of the thirteenth amendment to the United States Constitution which prohibits involuntary servitude except as a punishment for a crime.⁴ Since costs are not a part of the punishment for a crime in Virginia,⁵ petitioner contended that such imprisonment was unconstitutional.

In issuing the writ of habeas corpus, the Virginia Supreme Court of

1. VA. CODE ANN. tit. 53 § 221 (1967 Repl. vol.):

Every person held to labor in the State convict road force, or in a chain gang, or State farm, or State Industrial Farm for Women, for the non-payment of fine and costs, shall be entitled to a credit on such fine and costs, or costs, of seventy-five cents for each day he shall work, and of twenty-five cents for each other day of confinement The prisoner shall work out the fine and costs, or costs, and shall thereupon be discharged from custody, provided no person shall be held for the nonpayment of fine and costs, or costs, in the State convict road force, chain gang, State farm, or State Industrial Farm for Women for a longer period than six calendar months, although the credit due shall not discharge the fine and costs, or costs, in full.

2. The court applied the statute to Wright's total costs of \$1064.75, allowing \$1 for each day of imprisonment.

3. *Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158 (1968).

4. U. S. Const. amend. XIII, § 1:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

See Pollock v. Williams, 322 U.S. 4, 17 (1944); *U.S. v. Reynolds*, 235 U.S. 133, 149 (1914); *Bailey v. Alabama*, 219 U.S. 219, 233-34 (1911).

5. *Ex parte Wilson*, 89 Ohio L. Abs. 575, 183 N.E.2d 625 (1962); *Commonwealth v. McCue*, 109 Va. 302, 304, 63 S.E. 1066, 1067 (1909) where the Supreme Court of Appeals of Virginia stated:

Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense. Indeed our statute expressly declares that the laws of costs are not to be interpreted as penal laws; they are to be construed as remedial statutes. . . .

See Anglea v. Commonwealth, 51 Va. (10 Grat.) 696, 701 (1853).

Appeals held that the defendant's incarceration for nonpayment of costs was contrary to the thirteenth amendment.⁶

While at common law costs were not assessed against a convicted defendant in a criminal prosecution,⁷ they have since been imposed by statutory provisions.⁸ The statutes vary as to the liability imposed for these costs and the method by which they are enforced.⁹ In Virginia, a defendant who is unable to pay such costs is imprisoned until they are paid or are waived by statutory provision.¹⁰

Statutes allowing for such imprisonment have been challenged on several constitutional grounds. The most frequent basis for attack has been that incarceration for nonpayment of costs violates state constitutional mandates against imprisonment for debt.¹¹ By and large, courts have not found this argument convincing, declaring this constitutional safeguard applicable to contract debts and not to penalties imposed by the punitive powers of the law.¹² It has also been argued

6. *Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158 (1968).

7. *Lowe v. Kansas*, 163 U.S. 81, 85 (1896); *Saunders v. People*, 63 Colo. 241, 165 P. 781, 782 (1917); see generally 17 VAND. L. REV. 1572 (1964).

8. *Cramer v. Smith*, 350 Mo. 736, 739, 168 S.W.2d 1039, 1040 (1943). Six states that do not assess a convicted defendant with prosecution costs are: California, Connecticut, Massachusetts, Michigan, New Hampshire, New York. VAND. L. REV., *supra* note 7 at 1572 n.3.

9. 17 VAND. L. REV., *supra* note 7 at 1572-74 (1964). Eight states have either no statutory provision for assessing costs or specifically exempt the convicted defendant from the liability for such costs. Several states exempt the indigent from assessment of cost and the imprisonment for nonpayment thereof. Eleven states, including Virginia, allow the trial judge discretion in assessing costs to the criminal defendant.

10. VA. CODE ANN. tit. 53, § 221 (1967 Repl. vol). The code provides that persons held at the State farm for nonpayment of costs are credited with one dollar per day with a maximum of six months confinement for each offense.

11. Oklahoma and Wyoming have typical constitutional provisions. OKLA. CONST. art. 2, § 13 (1952):

Imprisonment for debt is prohibited, except for the non-payment of fines and penalties imposed for the violation of law.

WYO. CONST. art. 1, § 5 (1959): "No person shall be imprisoned for debt except in the case of fraud."

12. *Ex parte Morris*, 171 Okla. Crim. 499, 352 S.W.2d 125, 128 (1961), where the court said:

It is elemental in criminal law that the provisions of our State Constitution prohibiting imprisonment for debt has no application to criminal proceedings nor to imprisonment meted out as a punishment for violation of the law, and that costs accruing under criminal prosecution and conviction are not a debt within the meaning of Article I, Section 18, Constitution of Texas, which provides: "No person shall ever be imprisoned for debt."

In *Colby v. Backus*, 19 Wash. 347, 53 P. 367 (1898), the court viewed the subject of costs, saying:

that these statutes violate due process of law,¹³ impose cruel and unusual punishment,¹⁴ deny equal protection of the law,¹⁵ and violate the right to trial by jury.¹⁶

The principal case provides a new means with which to challenge the constitutionality of statutes that allow incarceration if a convicted

These costs are cast upon him as a penalty. They do not constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery is a debt.

See *Lavender v. Tuscaloosa*, 29 Ala. App. 502, 198 So. 459 (1940); *Lee v. State*, 75 Ala. 29 (1883); *Ex parte John Hardy*, 68 Ala. 303 (1880); *Caldwell v. State*, 55 Ala. 133 (1876); *Morgan v. State*, 47 Ala. 34 (1872); *State v. Montroy*, 37 Idaho 684, 217 P. 611, 613 (1923); *Kennedy v. People*, 122 Ill. 649, 13 N.E. 213 (1887); *State v. Kilmer*, 31 N.D. 442, 153 N.W. 1089 (1915); *Ex parte Barnes*, 67 Okla. Crim. 235, 93 P.2d 765 (1939).

13. U. S. CONST. amend. XIV, § 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . .

The Court held in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), that a Pennsylvania statute, which allowed the jury to assess costs of prosecution against the defendant even though they found him innocent of the crime, was invalid under the due process clause, because of its vagueness.

In another case constitutional rights became an issue where the criminal trial lingered on and the number of witnesses mounted until the final costs assessed against the defendant became disproportionate to the crime. Had the defendant been unable to pay the nine hundred dollars cost, he would have been confined for an additional two and one half years. *Arnold v. State*, 76 Wyo. 445, 306 P.2d 368 (1957). See *Ex parte Young*, 209 U.S. 123 (1908).

14. U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." In *Ex parte Smith*, 110 Tex. Cr. R. 335, 8 S.W.2d 139 (1928), a statute which did not allow for a specified rate at which to work off costs while incarcerated was held unconstitutional as a cruel and unusual punishment since the defendant would be kept in jail a lifetime.

15. U.S. CONST. amend. XIV, § 1:

". . . nor deny to any person within its jurisdiction the equal protection of the laws."

In *Dillehey v. White*, 264 F. Supp. 164 (M.D. Tenn. 1966), the Court invalidated a Tennessee imprisonment for nonpayment of costs statute on the ground that it violated the equal protection clause because an indigent, unable to post bond, was required to work off his jail fees plus the sentence while a rich person, able to post bond, would never incur these costs.

16. U.S. CONST. amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The court in *Arnold v. State*, 76 Wyo. 445, 306 P.2d 368 (1957), held that costs of a jury trial became so great that the indigent, who must work off these costs, is deterred from pleading innocent. See also *Jenkins v. State*, 22 Wyo. 347, 134 P. 260 (1913).

defendant is unable to pay his prosecution costs. Previous constitutional attacks have depended upon nebulous interpretations of such far-reaching clauses as "due process" and "equal protection." These cases look into and depend upon the administration of the statute in question and therefore have often been limited in scope to particular fact situations which arise under specific phraseology of the statute. But in *Wright v. Matthews*,¹⁷ the thirteenth amendment is applied directly to the full scope of such a statute, making it inherently unconstitutional. The court declares that in Virginia the inability to pay prosecution costs is not a crime, and that a person can be imprisoned only as punishment for a crime. Imprisonment for nonpayment of prosecution costs is therefore unconstitutional. Defendants in Virginia, at least, can now be assured that their economic status will no longer be a factor in the determination of their period of incarceration.

HARRY SAUNDERS

Libel and Slander—PRIVILEGE—CIA COVERT AGENT'S STATEMENT ABSOLUTELY PRIVILEGED. At three Estonian gatherings, defendant, National Commander of the Legion of Estonian Liberation, stated that plaintiff was a Soviet agent or collaborator and should not receive the Legion's cooperation during plaintiff's anti-communist film and lecture tour of the United States.¹ Plaintiff thereafter instituted a slander action, alleging that defendant's statements were untrue, malicious, and defamatory.² Defendant asserted an absolute privilege, supported by affidavits executed by the Central Intelligence Agency (CIA) Deputy Director.³ These documents revealed CIA's covert employment of

17. 209 Va. 246, 163 S.E.2d 158 (1968).

1. Plaintiff, a Canadian citizen, active in Estonian groups, earned a portion of his livelihood through exhibition of "Creators of Legend," a film portraying Communist brutalities, and by lecturing on his personal experiences as a guerilla fighter and a Russian prisoner. *Heine v. Raus*, 261 F. Supp. 570, 571 (D. Md. 1966). Defendant was overtly employed as a highway research engineer for the Office of Research and Development, Bureau of Public Roads, United States Department of Commerce. *Id.* at 572.

2. *Id.* at 571.

3. *Id.* at 572-73. A defense of absolute privilege in slander actions is a complete immunity from liability even where actual malice is alleged; a qualified privilege is conditional immunity, and is defeated when actual malice is shown. "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).