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Criminal Law - Chronic Alcoholics Can Not Be Convicted for Public Drunkenness. Driver v. Hinnant, __ F.2d __ (1966)

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rule peculiar to the first category of abandoned property,[16] and employed it without distinction to a case which properly falls within the second.[17]

However, by upholding the admissibility of the evidence on the sole ground that the car was abandoned by Hawley, without a finding that consent had been secured from the subsequent lawful possessor; the Virginia court has found as reasonable a search without a warrant that does not lie within the construction which the courts have established defining the limits to which a search and seizure should be permitted.[18] Consequently, abandoned property in Virginia on the basis of this decision is no longer, under any circumstances, related to reasonable search and seizure, but lies rather within that area to which the Fourth Amendment has no application.

Robert E. Scott

Criminal Law—CHRONIC ALCOHOLICS CAN NOT BE CONVICTED FOR PUBLIC DRUNKENNESS. In the case of *Driver* v. *Hinant*,[1] the United States Court of Appeals for the Fourth Circuit overruled earlier holdings of the North Carolina State Supreme Court[2] and a United States

16. *Supra*, note 7. In this case where property had been abandoned by the owners in open fields (to which the fourth Amendment guarantees do not extend), the court held that, "there is no seizure in the sense of law" where the officers examined the contents of the property after it had been abandoned.

17. For a discussion of the rule that automobiles are protected from unreasonable search under the Fourth Amendment see Weller v. Russell, *supra*, note 9.

18. From this finding follows the presumption that the search cannot be justified as being reasonable on the basis of any previous federal precedents. If consent is not required by the Virginia courts in order to make the search reasonable, on what basis can it be held to be such. Abandonment as a general abstract does not justify a search. For after property has been abandoned either: (1) it is found in some area outside the protection of the Fourth Amendment, or (2) it is found in an area secured from unreasonable search by constitutional guarantees. Therefore, some other factors must be present. Logically, if a right to possession is abandoned some others' rights must accede. Under the second possibility above these new possessory rights would be protected from unreasonable search. If so, how can a search be reasonable which is conducted, in the absence of probable cause, without the consent of the acceding possessor?

1. ———F.2d———(1966).

2. State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).

District Court[3] and decided that a chronic alcoholic can not be criminally convicted and sentenced for public drunkenness.

Driver, an uncontested alcoholic,[4] had been convicted in accordance with a North Carolina statute[5] on his fifth charge of public drunkenness in twelve months and sentenced to two concurrent two year terms. The District Court upheld this conviction and concluded that Driver's sentence did not constitute cruel and unusual punishment in violation of the Eighth Amendment.[6]

In reaching this decision the District Court noted that alcoholism is a disease[7] but stated that the North Carolina Statute only punished public drunkenness as an anti-social-criminal-act and did not punish either the disease or the symptoms of the disease. Relying on past North Carolina cases, the court ruled that the Statute was not unconstitutional;[8] nor was the punishment prescribed and consequently inflicted cruel and

3. Driver v. Hinant, 243 F.Supp. 95 (E.D.N.C., 1965).

4. *Ibid*, at p. 97- The testimony of Driver's physician, asserting that Driver was and had been a chronic alcoholic, was not challenged by respondent and the court accepted as fact that Driver was a chronic alcoholic.

5. N.C. GEN. STAT., section 14-335 (1907): "If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting . . ., he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section: (12) In . . . Durham (County) . . . for the third offense within any twelve months period such offense is declared a misedmeanor, punishable as a misdemeanor within the discretion of the court."

6. Ample precedent exists for the contention that the Eighth Amendment ("Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted." U.S.C.A., Const. Amend. 8.) does not apply to the states, *supra*, note #3; In re Kemmler, 136 U.S. 436, 10 Sup. Ct. 930, 34 L.Ed. 519 (1890); O'Neil v. State of Vermont, 144 U.S. 323, 12 Sup. Ct. 693, 36 L.Ed. 450 (1892). However, later decisions have reserved deciding on the point, stating only where the punishment is "inherently cruel," such as a restriction imposed in addition to and after one has served a prison term, Weems v. United States, 217 U.S. 349, 30 Sup. Ct. 544, 54 L.Ed. 793 (1910); or where one is tortured before executed, example given in Francis v. Resweber, 329 U.S. 459, 67 Sup. Ct. 374, 91 L.Ed. 91 L.Ed. 422 (1947); or where one is persecuted severely by state officials while serving a prison term, Johnson v. Dye, 175 F.2d 250 (3rd Cir.) (reversed on other grounds 338 U.S. 864, 70 Sup. Ct. 146, 94 L.Ed. 530 (1949)). In the latter case it was stated ". . . we entertain no doubt that the Fourteenth Amendment prohibits the infliction of cruel and unusual punishment by a state." Ibid, p.255.

7. The court accepted the definition of the United States Congress that an alcoholic is "any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages." D.C. Code, section 24-502 (1947). See also, Manfred S. Guttmacher and Henry Weihofen, *Psychiatry and The Law*, at 318-322 (1952 ed.).

8. ". . . passed in good faith to remedy . . . some evil not reached or corrected by previous legislation . . . and not repugnant to the constitution of North Carolina." State v. Dew, 248 N.C. 188, 102 S.E.2d 774, 777 (1958).

unusual.[9] The court further ruled that an application of the various tests and definitions of insanity[10] precluded a finding that the chronic alcoholic fulfills the requirements exonerating one from criminal responsibility. The court stated that "an alcoholic is capable of understanding what he does and his lack of control is not the product of mental disease or defect." [11] In other words he lacks control over his drinking but he maintains sufficient cognition to know it is wrong to drink in public.[12]

Although the District Court comes to the proper conclusion that voluntary drunkenness, even in an alcoholic, does not offer an excuse to defendant for his criminal acts,[13] the Court of Appeals formed an exception to this general rule. It stated that for the act of public drunkenness the alcoholic is neither motivated by evil intent nor conscious of any wrongdoing which are indispensable ingredients of a crime.[14] Furthermore, freedom of volition is non-existent in the alcoholic when confronted with liquor; for this reason he is insane for the particular

9. State v. Farrington, 141 N.C. 845, 53 S.E. 954 (1906).

10. "An accused is not criminally responsible if his unlawful act was a product of mental disease or mental defect." In what seems to supersede the test constructed by the District Court for dismissing Driver's plea of insanity, this case further states that "In determining whether accused was suffering from diseased or defective condition, . . . range of inquiry may include but *is not limited to* (italics added) whether accused knew right from wrong, . . . or had been deprived of or lost power of his will." Durham v. United States, 214 F.2d 862, 863 (D.C. Cir. 1954).

"Test for determining criminal responsibility of insane defendant . . . (that he) lacked substantial capacity to conform his conduct to requirements of the law which he violated." United States v. Currens, 290 F.2d 751, 752 (3rd Cir. 1960).

". . . though conscious of the nature of his act and able to distinguish between right and wrong and know that the act is wrong . . . yet his actions are not subject to his will" and he would be declared insane. Davis v. United States, 165 U. S. 373, 17 S. Ct. 360, 41 L. Ed. 750 (1897) at p. 374.

Note well that all of these cases expressly state that a test of whether the accused can distinguish right from wrong can not be an exclusive determinant of insanity.

11. Driver v. Hinant, supra, note 3 at p. 102.

12. This test standing alone has come into widespread disrepute in recent times." . . . . the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind." Glueck, "Psychiatry and The Criminal Law", 12 Mental Hygiene 575, 580 (1928), as quoted in Deutsch, *The Mentally Ill in America*, p. 396 (2nd ed. 1949); and see e.g., Menninger, *The Human Mind*, at p. 450 (1937).

13. "Generally, voluntary intoxication affords no defense to a charge of crime committed while under its influence especially where no particular motive, purpose or intent is a necessary element of the crime charged." 22 C.J.S. section 66, p. 214, and cases cited therein, especially Cody v. Commonwealth, 23 S.E.2d 122, 180 Va. 449; Jordan v. Commonwealth, 25 S.E.2d 49, 181 Va. 490.

14. Morisette v. United States, 342 U.S. 246, 250, 52 (1952).

act of drinking, whether it be in public or not[15] and cannot be held criminally responsible.

While this decision holds that a chronic alcoholic cannot be convicted and punished by imprisonment for public drunkenness, it does not overturn the myriad of court decisions establishing culpability of an intoxicated person for his criminal acts. Only for the particular act of public drunkenness is the chronic alcoholic excused from criminal responsibility. In addition, the court does not rule the North Carolina Statute unconstitutional; punishment for public drunkenness is valid as long as the drunkard is not suffering from the disease of alcoholism.

To corroborate its decision, which represents a significant change in the judicial view of the alcoholic, the court uses *Robinson* v. *California*.[16] In that case the Supreme Court of the United States ruled that a statute[17] punishing the status of narcotic addiction was unconstitutional, because it was punishing a disease and as such, was in violation of the Eighth and Fourteenth Amendments.[18] In the present case, the court maintains that public drunkenness is a symptom of the disease of alcoholism and any punishment of this symptom is not different from punishing the disease itself. Drinking in public is merely an outward manifestation of the alcoholic's disease; the compulsion to drink is equally uncontrollable whether in public or private and the power of

15. The prohibited act must result from mental disease or defect either *singly* (italics added) or in various combination with the "defendant's *cognition*, his *volition* and his *capacity to control* his behavior." Dusky v. United States, 295 F.2d 743, 759 (8th Cir. 1961); *cert denied*, 368 U.S. 998, 82 S.Ct. 625, 7 L.E.2d 536. Note that this case states that absence of volition alone may be sufficient grounds for escaping criminal responsibility.

16. 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). In this case, the conviction that the Supreme Court overruled was based on proof via circumstantial evidence, *i.e.*, scars, physical characteristics, that the accused was a narcotic addict.

17. California Health and Safety Code, section 11721, as amended (1957); in part: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, ... Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail." As amended in 1963, the "or be addicted to the use of" clause no longer exists. No case as to the constitutionality of its present form has arisen.

18. The court circumvented the issue of applicability of the Eighth Amendment to the state courts by stating that "the cruel and unusual punishment is in violation of the Fourteenth Amendment," Robinson v. State of California, *supra* note 16 at 667, 82 S.Ct. at 1421. That is to say, punishment of a disease denies the defendant due process of law because it inflicts cruel and unusual punishment. This approach does, as the lower court suggests in Driver v. Hinant, supra at p. 97, 243 F. Supp. 95 (E.D.N.C.), restrict the power of the states to define a crime, due to the fact that the states are bound to heed the due process clause of the Fourteenth Amendment.

an independent volition escapes the alcoholic for this one criminal act, making him insane.[19]

The court's rationale for its decision, despite dictum to the contrary, brings to bear an important consideration: Does a chronic alcoholic now fit into the category of an involuntary drunk, whose actions are almost universally excused by the courts?[20] The alcoholic has not been considered an involuntary drunk for purposes of excusing criminal actions[21] and the court expressly limits the scope of the case to the one criminal action of public drunkenness.[22] But two justifications are given by the court in reaching its decision: 1) the punishment of the symptoms of a disease is in effect a punishment of the disease and 2) when an alcoholic drinks it is not an act motivated or tempered by an independent volition. This second reason coincides markedly with accepted definitions of an involuntary drunk.[23] The court relies solely on the first reason as the basis for its refusal to extend exemption to the alcoholic for other criminal actions stating that other criminal actions are not recognized symptoms of the disease, yet it does state both reasons in concluding that for the act of public drunkenness an alcoholic is excused. Therefore, it would be fair to infer from this utilization of the second reason that an alcoholic does not drink voluntarily.

It can certainly be argued as a result of this case that the chronic alcoholic drinks with as little independent judgment and volition as one who is forced to drink by another. He has no control over his actions

19. The court likens the alcoholic's inability to refrain from drinking in public "to the movements of an imbecile or a person in a delirium of a fever. None of them by attendance in the forbidden place defy sic the forbiddance." Driver v. Hinant, supra at p.6,——F2d——.

20. People v. Stephens, 152 P.2d 1019, 66 C.A. 2d 755; Choate v. State, 197 P. 1060, 10 Okl. Cr. 169; Burrows v. State, 297 P. 1029, 38 Ariz. 99; see note 23, infra.

21. Choice v. State, 31 Ga. 424.

22. "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. With respect to other behavior—not characteristic of confirmed chronic alcoholism—he would be judged as would any person not so afflicted." Driver v. Hinant, supra at p.6, ——F2d——. The court offers no explanation as to why a chronic alcoholic would not be treated as any other involuntary drunk.

23. ". . . . . the absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant, as, for example, when he has been made drunk by fraudulent contrivance of others, by casualty or by error of his physician." Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673, 677, 30 A.L.R. 755. In all the cases where involuntary drunkenness was discussed, the courts felt that instigation by another person was required to establish drunkenness as a valid defense to the accusation. See note 20, supra.

and is "powerless to stop drinking." [24] He is apparently under the same disability as the person who is forced to drink and since the involuntary drunk is excused from his actions, a logical analogy would leave the chronic alcoholic with the same defense. However, the court refuses to either follow through, refute, or even mention the analogy and thus overlook the serious implication of the statements asserting that when the alcoholic drinks it is not his act. It is content with the ruling that alcoholism and its recognized symptoms, specifically public drunkenness, cannot be punished.

Charles McDonald

Criminal Law—MURDER—PROOF OF MALICE. In *Biddle* v. *Commonwealth*,[1] the defendant was convicted of murder by starvation in the first degree of her infant child and on appeal she claimed that the lower court erred in admitting her confession and that the evidence was not sufficient to sustain the first degree murder conviction. The evidence indicated that the defendant had the ability and means to feed the infant. An autopsy revealed that the infant had not been fed for several days as the entire intestinal tract and stomach were empty. There was no evidence of any disease and the infant when born was in perfect health.

The Supreme Court of Appeals of Virginia ruled that the confessions were admissible but reversed the lower court on the grounds that the Commonwealth had not proved beyond a reasonable doubt that the defendant wilfully or maliciously withheld food from the infant as required by Virginia Code Section 18.1-21, under which defendant had been convicted.

The Virginia statute states that:

> "Murder by poison, lying in wait, imprisonment, *starving* . . . is murder in the first degree. All other murder is murder of the second degree." [2]

Although both an intent to kill and malice are usually necessary

24. Public Health Service publication, No. 730, "Alcoholism", as prepared by the National Institute of Mental Health, National Institutes of Health, U.S. Department of Health Education and Welfare (1965).

1. 206 Va. 14, 141 S.E.2d 710 (1965).

2. VA. CODE ANN., § 18.1-21 (1964 Cum. Supp.).