Hastings Law Journal

Volume 6 | Issue 3 Article 5

1-1955

Criminal Law--Attempted Perjury is a Crime

Gerald N. Hill

NOTES

CRIMINAL LAW ATTEMPTED PERJURY IS A CRIME

Can a person be convicted for attempting to lie under oath? On May 31, 1954, the Supreme Court of Louisiana in *State v. Latiolais*,[1] became the first court of appellate jurisdiction in American legal history to sustain a conviction for the crime of *attempted* perjury In fact, it is the first appellate court to be faced with a lower court conviction for the crime. The defendant *apparently* had met all the requisites for perjury· 1) intentionally 2) lying 3) under oath 4) on a material matter in a deposition 5) to be used in a properly-constituted judicial proceeding. It was then discovered that, unknown to the defendant, the notary before whom the defendant had sworn did not have a valid commission. The prosecution obtained a conviction for attempted perjury on a perjury indictment.[2]

There is nothing unusual about the Louisiana statutes defining perjury, defining attempt, or describing indictment procedures that would cause this case to be decided differently from a comparable case in another state.[3] In fact, a reference is made[4] in the Louisiana annotations which specifically puts perjury under the common law definition, although Louisiana is a civil law state.

In this case defendant argued that perjury was akin to assault in that its very nature precluded attempt. The court points out that perjury might be frustrated in just such manner as in this case and still meet the statutory definition of attempt. This is correct, for the actual basis of the defendant's general contention "that there is no such crime as attempted perjury" is founded on the absolute dearth of cases on attempted perjury Although it may be an indication, mere absence of cases is no foundation for the proposition that there is no such crime.

---

[1] 225 La. 878, 74 So.2d 148 (May 31, 1954, rehearing denied July 2, 1954) Some early cases used the term "attempted perjury" to define solicitation to commit perjury, but this meaning is no longer applied.

[2] 15 LA. STAT. ANN. § 406: "Verdict where crime charged includes lesser crime. When the crime charged includes another of lesser grade, a verdict of guilty of the lesser crime is responsive to the indictment, and it is of no moment that the greater offense is a felony and the lesser a misdemeanor."

[3] 14 LA. STAT. ANN. § 123. "Perjury Perjury is the intentional making of a false written or oral statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony In order to constitute perjury the false statement must be made under the sanction of an oath or an equivalent affirmation and must relate to matter material to the issue or controversy

It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe true is equivalent to a statement of that which he knows to be false "

CALIF. PEN. CODE § 118 is analogous.

14 LA. STAT. ANN. § 27 "Attempt. Any person, who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended, and it shall be immaterial whether under the circumstances he would have actually accomplished his purpose

An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such persons in pursuance of such attempt "

CALIF. PEN. CODE § 664 is analogous.

And see 15 LA. STAT. ANN. § 406, *supra* note 1.

[4] CLARK AND MARSHALL, CRIMES, § 114(d)

It only shows that no one has been convicted and appealed. The crime of attempted perjury may have been committed many times and gone unpunished.

The appellant's contention that an attempted perjury conviction does not answer an indictment for perjury was succinctly disposed of by the court by reference to the statutory definition of attempt.[5]

A leading case in which the notary public's commission was invalid is *State v. Jackson.*[6] In that case the defendant was acquitted of perjury and no attempt was made to get a conviction for attempted perjury Some other technical escapes are listed in Corpus Juris Secundum:[7] *e.g.,* the taking of evidence on a felony trial in the absence of the accused; requiring a witness to testify without service of process or some valid court order; a sworn accusation made to commence a prosecution, which is deficient in facts required by statute to give the tribunal jurisdiction. It should be noted that in all these cases the defendant most likely would be unaware, at the time of his falsification, of these bars to a perjury conviction.

It should also be noted that technically faulty indictments in which a technical factor is omitted from the charge will have the same effect on the prosecution as the actual absence of the element in the substantive crime. There are two technical factors which have caused indictment trouble: (1) alleging oath-giver's authority and (2) alleging that the body before which the alleged perjury took place had jurisdiction to hold the judicial proceeding in which the falsification occurred.

The general rule, and that of California, is that a perjury indictment requires a statement of the authority of the party giving the oath;[8] Missouri requires a specific statement that the oath was administered;[9] Arizona requires only a statement that there was authority to administer the oath, but not a definition or explanation of that authority;[10] Louisiana's rule appears to be one of the most flexible, requiring only a statement that the oath was given,[11] which is also a recently-stated federal rule.[12]

On the jurisdictional allegation in the indictment, California seems to represent the general rule that at least a general statement of the jurisdiction of the body be given;[13] Georgia is in the middle ground, stating that the jurisdiction can be "inferred";[14] while Oklahoma says specifically that only the name of the jurisdictional body need be stated in the indictment.[15]

Under the rule in *State v. Latiolais,*[16] a conviction could be had for attempted

---

[5] 14 LA. STAT. ANN. § 27, *supra* note 3.

[6] 36 Ohio St. 281 (1880).

[7] 70 C.J.S. Perjury § 22(b), p.480.

[8] People v. Dunlap, 113 Cal. 72, 45 Pac. 183 (1896), People v. DeCarlo, 124 Cal. 462, 57 Pac. 383 (1899), People v. Agnew, 77 Cal.App.2d 748, 176 P.2d 724 (1947).

[9] State v. Martin, 317 Mo. 313, 295 S.W 543 (1927), see also State v. Biedermann, 342 Mo. 957, 119 S.W.2d 270 (1938).

[10] State v. Broshears, 18 Ariz. 356, 161 Pac. 873 (1916).

[11] State v. Sweat, 159 La. 769, 106 So. 298 (1925), State v. Smith, 149 La. 700, 90 So. 28 (1928).

[12] U.S. v. Debrow, 346 U.S. 374 (1953), reversing a previous rule, requires only an allegation that defendant had "duly taken" an oath.

[13] People v. Paden, 71 Cal.App. 247, 234 Pac. 920 (1925), People v. Howland, 112 Cal. 655, 44 Pac. 342 (1896).

[14] Williford v. State, 53 Ga.App. 334, 185 S.E. 611 (1936).

[15] Bennet v. District Court of Tulsa County, 81 Okla. Cr. 35, 162 P.2d 561 (1945).

[16] See note 1 *supra.*

perjury even if an element necessary for a perjury conviction were omitted when such omitted element was outside the knowledge of the attempter. For example, if in a jurisdiction requiring it, the charge failed to state the source of the oath-giver's authority, then such an omission would not be fatal to an *attempted perjury* indictment. This is true because the usual attempted perjurer would not be aware of the source of the oath-giver's authority If the indictment failed to state a factor within the actor's knowledge (which would almost always include the essentials of the substantive crime) then, of course, the indictment would be insufficient.

It may seem obtuse to mention these relatively rare cases of failure to gain a perjury conviction due to the vagaries of the law, but perjury has become increasingly important in the light of the mass of Congressional hearings and sworn statements required by government agencies. The threat of a perjury conviction is the only weapon, in this life at least, to compel the telling of the truth. Making attempted perjury a crime removes some chances that a defendant may escape any and all punishment.

The rule should be that all attempts that fail due to forces beyond the actor's knowledge should be punishable on the basis of the public policy in deterring crime and confining persons with criminal intents.[17] *State v. Latiolais*[18] fits well into this suggested rule.

California, apparently adopting this rule, has been quite strict in convicting parties who attempt to commit substantive crimes but who are frustrated by circumstances outside of the attempter's control.[19] Examples include the recent case of *People v. Van Buskirk*,[20] in which the defendant aimed a gun pointblank at his intended victim and failed to kill him only because the cocking mechanism failed. Defendant was readily convicted of attempted murder. Convictions for attempts have been sustained when a pick-pocket reached into an empty pocket,[21] when a robbery victim was penniless,[22] in an attempted rape when the act could not be consummated because the automobile was too small,[23] and when an intended murder victim was out of range of a shotgun blast.[24] Certainly, *State v. Latiolais*[25] is analogous to these attempt cases, for in each of them, unknown or uncontrollable frustration was no defense to a conviction for an attempt to commit the substantive crime.

By an extension of the *Latiolais* case and the analogous attempt cases involving other crimes, we are logically forced to the conclusion that absence of *any* element unknown to, or beyond the control of, the attempted perjurer which would prevent a conviction for perjury would not frustrate a charge of attempted perjury, but on the other hand, is the proper occasion for such a charge.

The most substantial contrary argument appears to be that if, in fact, there is

---

[17] See John Barker Waite, *Crime Prevention and Judicial Casuistry*, 5 HAST. L.J 169 (1954)

[18] See note 1 *supra*.

[19] The leading case is People v. Lee Kong, 95 Cal. 666, 30 Pac. 800 (1892).

[20] 113 Cal.App.2d 789, 249 P.2d 49 (1952).

[21] People v. Fiegelman, 33 Cal.App.2d 100, 91 P.2d 156 (1939).

[22] People v Lee, 125 Cal.App. 623, 13 P.2d 943 (1932).

[23] People v Welsh, 7 Cal.2d 209, 60 P.2d 124 (1936).

[24] Smith v State, 8 Ala.App. 187, 62 So. 575 (1913) an Alabama case citing the California rule.

[25] See note 1 *supra*.