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Theodore Marois Jr.

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CRIMINAL LAW: MURDER BY LYING IN WAIT IN CALIFORNIA

Can a person be convicted of first degree murder committed by lying in wait when at the time of the murder he was in fact wandering about in the open? As anomalous as this question may sound, the California Supreme Court has not yet adequately answered it. *People v. Merkouris*,¹ only recently decided, has provoked an inquiry into the California view regarding the application of the *lying in wait* doctrine to murder.² However, analysis of this case will be deferred in this note until its application can be more readily appreciated.

The California Penal Code section 189 defines first degree murder as:

"All murder which is perpetrated by means of poison, *lying in wait*, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, burglary or robbery, mayhem"³ (Emphasis added.)

At Common Law, every unlawful killing of a human being with malice aforethought was punishable by death.⁴ As such killings varied from each other in the degree of atrocity, the manifest injustice of providing the same punishment for all led to the enactment of statutes dividing murder into two degrees and affixing milder punishment to the second degree. One of the first statutes of this kind was the Pennsylvania Statute of 1794, of which the California Penal Code section 21 was a copy.⁵

However, the meaning of this statute remained obscure until the California Supreme Court in *People v. Sanchez*⁶ drew the distinction between the two degrees of murder. Chief Justice Sanderson, speaking for the court, said:

"In dividing murder into two degrees, the legislature intended to assign to the first, as deserving greater punishment, all murders of a cruel and aggravating character: and to the second, all other kinds of murder which are murder at Common Law: and to establish a test by which the degree of every case of murder may be readily ascertained. The test may be thus stated: Is the killing wilful (that is to say, intentional) deliberate and premeditated? If it is, the case falls within the first, and if not, within the second degree. There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the legislature has enumerated in the statute and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder in the first degree. The cases are of two classes. First, where the killing is perpetrated by means of poison, etc. There the means used is to be conclusive evidence of premeditation"⁷

Although the degrees of statutory murder were delineated, an adequate practical definition of what constitutes *lying in wait* apparently has not yet been put into terms sufficiently clear to apply to a given set of facts. In other words, it is

¹ 46 Cal.2d 534, 297 P.2d 999 (1956).

² There have been several cases in California involving murder by lying in wait. *People v. Merkouris*, 46 Cal.2d 534, 297 P.2d 999 (1956); *People v. Byrd*, 42 Cal.2d 200, 266 P.2d 505 (1954); *People v. Decaillet*, 41 Cal.2d 708, 263 P.2d 141 (1953); *People v. Sutic*, 41 Cal.2d 483, 261 P.2d 241 (1953); *People v. Thomas*, 41 Cal.2d 470, 261 P.2d 1 (1953); *People v. Gibson*, 92 Cal. App.2d 55, 206 P.2d 375 (1949); *People v. Tuthill*, 31 Cal.2d 92, 187 P.2d 16 (1947); *People v. Vukich*, 201 Cal. 290, 257 Pac. 46 (1927); *People v. Mammilato*, 168 Cal. 207, 142 Pac. 58 (1915); *People v. Brown*, 59 Cal. 345 (1881); *People v. Miles*, 55 Cal. 207 (1880).

³ CALIF. PEN. CODE § 189.

⁴ CLARK AND MARSHALL, CRIMES, 5th ed. at p. 332.

⁵ Section 21 of the crimes and punishment act, as amended by the act of 1856, was changed to section 189 Calif. Pen. Code without any material change in the language.

⁶ 24 Cal. 17 (1864).

⁷ *Id.* at 29.

clear that if murder is committed by *lying in wait* the defendant is guilty of first degree murder. But the vital question is: What constitutes *lying in wait*? This inquiry is of manifest importance because recent California decisions⁸ have held that once lying in wait is shown to be the means by which a murder has been committed, deliberation and premeditation need not be shown.

A brief analysis of California cases in which murder was committed by *lying in wait* may help to show the confusion that has resulted.

*People v. Miles*⁹ was the first California case in which the doctrine was applied in a killing. As the deceased was unharnessing his team of horses in his corral, he was shot in the back by the defendant who was concealed behind a fence. The trial court instructed the jury that if the deceased was shot from behind by the defendant who was at the time concealed behind a fence, and if the deceased was unaware of the defendant's presence, the defendant was guilty of murder. In reversing the conviction, the Supreme Court held that this instruction was erroneous because:

"The question of deliberation and premeditation was wholly ignored and the trial court used the word 'concealed' as synonymous with *lying in wait*. If the defendant concealed himself for the purpose of shooting the deceased unawares, then he was lying in wait, which is evidence of deliberation and premeditation. But a person might, while concealed shoot another without committing the crime of murder." (Emphasis added.)¹⁰

It will be noted that in this case the court's definition of *lying in wait* required only two elements: *Concealment*, and *a purpose of shooting the victim unaware*.

The next case, *People v. Brown*,¹¹ was decided in 1881. The deceased was a member of a posse seeking a band of outlaws of which the defendant was a member. Upon arriving at the outlaws' camp, the posse was fired upon by the outlaws who were lying in ambush. The defendant was convicted of first degree murder by applying the *lying in wait* concept. This appears to be a situation in which the doctrine of *lying in wait* may be appropriately applied with little if any disagreement.

The next case, *People v. Mammilato*,¹² occurred almost thirty-five years later. The defendant, angered by vile epithets addressed to him by the deceased, left to procure a dagger. He then returned to the same place and waited in the dark for the deceased to appear, then stabbed him to death. Defendant was convicted of first degree murder without much discussion of *lying in wait*. It seems that even had these epithets been sufficient provocation to warrant the lesser offense of second degree murder, the defendant nevertheless was guilty of first degree murder because there was evidence of lying in wait.

The next case, *People v. Tuthill*,¹³ was the first California case in which the meaning of *lying in wait* was given serious consideration by the court. In this case the victim and a friend, returning to the former's cabin, found her estranged husband asleep. Upon awakening, the defendant (the husband) produced a rifle and frightened the deceased so that she left the cabin. However, she immediately re-

⁸ *People v. Byrd*, 42 Cal.2d 208, 266 P.2d 505 (1954); *People v. Thomas*, 41 Cal.2d 470, 261 P.2d 1 (1953).

⁹ 55 Cal. 207 (1880).

¹⁰ *Id.* at 209.

¹¹ 59 Cal. 345 (1881).

¹² 168 Cal. 207, 142 Pac. 58 (1915).

¹³ 31 Cal.2d 92, 187 P.2d 16 (1947).

turned and was shot by the defendant as she entered. The defendant was convicted of first degree murder under the doctrine of *lying in wait*. In analogous earlier cases, it seems that the court more or less assumed, without much recourse to definition, that the defendant committed murder under the theory of *lying in wait*. The circumstances of the killings had been easily susceptible to the application of the popular understanding of *lying in wait*; that is, in the sense of an ambush, with emphasis on surprise and concealment. And in all prior cases, the deceased had been completely unaware of his attacker's presence at the time of the killing. In this case, the court agreed that there was no California decision precisely defining *lying in wait*, but that it had been applied in other jurisdictions to a number of factual situations wherein the victim had been aware of the physical presence of the aggressor.¹⁴ This case, in effect, extended the scope of the doctrine to include situations where the defendant was not concealed, with respect to the victim, at the time of the killing. The court considered the decision of a Tennessee case which mentioned three elements of lying in wait. They were waiting, watching and secrecy.¹⁵ The California court held that these three elements were present here, and that therefore *lying in wait* was the means by which the defendant accomplished the murder. The court refused to apply "concealment for the purpose of killing a victim unaware" as had been used by California courts¹⁶ in defining *lying in wait*, and chose instead to apply the word "secrecy" along with "waiting" and "watching." It is not clear what the court intended when it said that the element of secrecy was present in a case where the presence of the potential murderer was known not only to the victim but to other bystanders. This was an extension of the meaning of *lying in wait* to include cases where the defendant was not concealed at the time of the murder. The court made this confusing, however, by using the word "secrecy," which implies concealment, especially since it appears from the facts that the element of secrecy was not present.

Then in 1953, the California Supreme Court decided the case of *People v. Thomas*.¹⁷ In this case the defendant, to satisfy a perverted sexual desire, shot at six women, at different times, and killed one of them. On the night of the murder, the defendant, on his way to work noticed a potential victim seated at a lunch counter. He drove down an alley and stopped the car in such a position that he could see his victim. He fired at the victim and killed her. The defendant contended that there was no proof of intent to kill and that a properly instructed jury would have returned a verdict of second degree murder. Affirming the conviction, the Supreme Court held that where a murder is shown to have been committed by *lying in wait*, a showing of intent is unnecessary to fix the degree. Mr. Justice Traynor, concurring with the majority, stated that standing alone, the evidence supplied no clue as to whether the defendant was waiting and watching for an

¹⁴ "As a general rule, to constitute lying in wait to commit murder, the perpetrator must be in ambush, or concealment for the purpose of taking his victim unawares. In some cases, however, the term has been applied to facts other than concealment in ambush . . . Ann. Cases 1916 C at page 971. See also *Jackson v. State*, 180 Tenn. 158 [172 S.W.2d 821]; *State v. Jackson*, 71 Mont. 421 [230 P. 370, 373]; *Williams v. State*, 130 Ala. 107 [30 So. 484]; *State v. Walker*, 170 N.C. 716 [86 S.E. 1055]; *State v. Dooley*, 89 Iowa 584 [57 N.W. 414]." *Id.* at 100, 187 P.2d at 21.

¹⁵ ". . . to constitute lying in wait, three things must occur, to wit: watching, waiting and secrecy—and these facts must be established beyond a reasonable doubt to authorize the conclusion that there was such lying in wait." *Riley v. State*, 28 Tenn. (9 Humph.) 438 (1849).

¹⁶ *People v. Brown*, 59 Cal. 345 (1881); *People v. Miles*, 55 Cal. 207 (1880).

¹⁷ 41 Cal.2d 470, 261 P.2d 1 (1953).

opportunity to shoot at any victim who might present herself, or formed the intent to shoot only after the opportunity presented itself. But because of the other five times that the defendant had fired at women, the jury could reasonably infer that the defendant drove about the city waiting and watching for whatever victims might present themselves.

This decision extends the traditional application of *lying in wait* even further than the *Tuthill* case, to cover cases where the defendant roams about at will in the search for a victim.

This case also had far-reaching implications in that it clearly affirmed the proposition that where the prosecution has satisfied the jury that the defendant was *lying in wait*, the existence of deliberation and premeditation or of a specific intent to kill need not be shown. In many first degree murder cases, the evidence used to prove that defendant lay in wait is the only evidence available to the state to show deliberation and premeditation. Therefore, the doctrine of *lying in wait* is a distinct advantage to the prosecution, because it is generally easier to describe the elements of lying in wait to the jury than it is to describe the state of mind of the defendant (deliberation and premeditation).

In the case of *People v. Sutic*,¹⁸ the defendant drove up in front of the victim's house at night, and when the victim's father looked out the window to see who was there, the defendant fired into the house, killing the deceased. The defendant had been seen waiting in his car near the victim's home shortly before the homicide. In affirming the conviction, the court held that there was ample evidence to support a conviction of first degree murder by *lying in wait*.

In *People v. Byrd*¹⁹ the court again applied the *lying in wait* theory to convict the defendant of first degree murder. The defendant waited for four hours in a car parked outside of his estranged wife's home. Immediately after the departure of her last visitor, he entered the house and after a short conversation with his wife, killed her. The court stated that the elements of watching, waiting and concealment were present. However, three justices dissented upon the ground that although there was a watching and waiting, there was no evidence that the shots were fired from a position of concealment. Thus again we have the element of concealment in dispute.

The latest case involving the issue of murder committed by *lying in wait* was *People v. Merkouris*.²⁰ The defendant and his wife had been divorced for about nine years. The wife had remarried and she and her husband were operating a

¹⁸ 41 Cal.2d 483, 261 P.2d 241 (1953).

¹⁹ 42 Cal.2d at 200, 266 P.2d at 505.

²⁰ Murder committed by lying in wait was one of several issues involved in this case. At the commencement of the trial, defendant's counsel presented to the court an uncontradicted affidavit of a duly licensed psychiatrist which stated that defendant was medically and legally insane at the time of the examination and at the time of the alleged act. The court appointed three doctors to examine the defendant and their reports showed that the defendant was sane. Penal Code section 1368 provides that "If at any time during the pendency of an action . . . a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by trial by the court without a jury or with a jury if a trial by jury is demanded . . ." The court refused to hold a trial as to defendant's sanity at this time and, after the jury returned a verdict of first degree murder without recommendation, the court permitted the defendant to withdraw his right to a sanity trial. The Supreme Court held that the trial court abused its discretion in not trying the issue of the defendant's insanity and in permitting the defendant, over the implied objection of his counsel, to withdraw his plea of not guilty by reason of insanity.

ceramics shop in Los Angeles. Defendant left Detroit, Michigan and came to Los Angeles by car. Soon thereafter he was seen by witnesses sitting in his car, parked where he could observe the victims' shop. The witnesses testified that the defendant was parked in his car every morning and evening for eleven days in succession (with the exception of two Sundays, one the day before the murder). On the day of the murder, he was seen driving his car in the vicinity of the shop immediately prior to the murder and also seen roaming about on foot. Shortly after the defendant was seen, the victims were discovered, shot through the head.

In reversing the conviction of first degree murder by *lying in wait*, the majority of the court, applying the three elements of watching, waiting and *concealment*, held that although watching and waiting were present, "the record is devoid of any evidence tending to show that the defendant made any attempt to conceal himself or keep his presence in the vicinity of the shop a secret."²¹

The court referred to the *Tuthill*, *Sutic* and *Byrd* cases, discussed previously in this article. In approving all three cases, the court stated that *lying in wait* was the means through which the defendant accomplished his purpose. It will be remembered that in each of those cases, the murderer's presence was known to the victim and others, yet the *lying in wait* doctrine was applied to convict the defendant of first degree murder in each instance. The facts in these cases are as equally devoid of any attempt on the part of the defendant to conceal himself as are the facts of the *Merkouris* case. In other words, if the court had applied *concealment* in the *Merkouris* case as it was applied in the three cases cited, to be consistent it would have had to hold that the element of concealment was in fact present. Therefore, the decision in the *Merkouris* case seems contra to the previous decisions. The court is reverting back to its earlier decisions and requiring complete concealment. Why? There are two principle reasons. First where *lying in wait* is shown to exist, there is no need to show specific intent to kill because lying in wait is conclusive of deliberation and premeditation. Therefore, it is essential that *lying in wait* existed. A killing through a watching and waiting in concealment infers that the defendant had the intent to kill before he concealed himself. But a killing through a watching and waiting without concealment infers that defendant may have been undecided until he actually killed, in which case the mental intent of deliberation and premeditation is questionable. Secondly, during the ninety years prior to the *Tuthill* case, there had been only three cases in which defendant had been found guilty of first degree murder under the *lying in wait* doctrine. In each of these cases, there had been complete concealment. However, in the nine years since the *Tuthill* case, there have been seven cases involving *lying in wait* to commit murder. This may indicate that because complete concealment has not been required since the *Tuthill* decision, first degree murder convictions are easier to obtain through the *lying in wait* doctrine. The court may have intended to put an end to the use of this highly advantageous prosecution tool.

Even though it be concluded that the California court is returning to its prior position and requiring full concealment, a complete solution to the problem has not been found.²²

In the *Merkouris* case, three justices dissented, stating that all that is required to sustain a conviction is evidence showing an attempt on the part of the mur-

²¹ 46 Cal.2d at 544, 297 P.2d at 1012 (1956).

²² See 42 CALIF. L. REV. 337, 6 STAN. L. REV. 345.