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CRIMINAL LAW: ACCUSATORY PLEADINGS AS DETERMINING NECESSARILY INCLUDED OFFENSES

The California state constitution provides that no person shall twice be put in jeopardy for the same offense.[1] Because a defendant on trial for a specified crime may be convicted of any offense necessarily included in that crime,[2] the legislature extended the double jeopardy rule to prohibit a subsequent prosecution for an offense necessarily included in a charge previously prosecuted.[3] Also, by judicial determination it has been held that a conviction of a lesser offense, necessarily included in a higher offense for which the defendant is tried, is an acquittal of the higher offense.[4] This extension made it necessary to develop a test to determine what is a necessarily included offense.

The test currently utilized by the courts is that if a defendant in the commission of acts made unlawful by one statute must necessarily violate another statute, the latter offense is necessarily included in the former.[5] The courts in developing this test did not clearly state where to look to determine whether a particular offense was necessarily included in another within the meaning of section 1159 of the Penal Code.[6] Since the courts neglected this clarification, the question of whether to look to the accusatory pleadings or to the statutory definitions was bound to come before the Supreme Court of California for decision. This question was presented in *People v. Marshall*[7] and the court held that they would look to the specific language of the accusatory pleading, and not the statutory definition.

In this case the defendant pleaded not guilty to a charge alleging robbery in violation of section 211 of the Penal Code which defines the crime as:

> "[T]he felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will accomplished by means of force or fear."

The information charged that the defendant did "willfully, unlawfully, feloniously and forcibly take from the person and immediate presence of Jack J. Martens . . . seventy dollars . . . and an automobile . . . ." The defendant was found guilty of theft of an automobile, a violation of section 503 of the Vehicle Code, a lesser offense, but necessarily included within section 211 of the Penal Code. The defendant appealed contending that section 503 of the Vehicle Code was not necessarily included in the offense defined in section 211 of the Penal Code, since the elements of the two offenses were different. The defendant said that one could commit robbery without taking an automobile and that therefore charging the defendant with

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[1] CAL. CONST. art. 1, § 7. See also CAL. PEN. CODE § 657 for a narrower view than that of the Constitution.

[2] CAL. PEN. CODE § 1159.

[3] CAL. PEN. CODE § 1023.

[4] People v. Greer, 30 Cal. 2d 589, 184 P.2d 512 (1947); People v. McDaniels, 137 Cal. 192, 194, 69 Pac. 1006, 1007 (1902); People v. Defoor, 100 Cal. 150, 34 Pac. 642 (1893).

[5] People v. Chester, 138 Cal. App. 2d 829, 292 P.2d 573 (1956); *In re* Hess, 45 Cal. 2d 171, 288 P.2d 5 (1955); People v. Babb, 103 Cal. App. 2d 326, 229 P.2d 843 (1951); People v. Kehoe, 33 Cal. 2d 711, 204 P.2d 321 (1949); People v. Greer, 30 Cal. 2d 589, 184 P.2d 512 (1947); People v. Krupa, 64 Cal. App. 2d 592, 598 149 P.2d 416, 420 (1944).

[6] "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

[7] 48 Cal. 2d 392, 309 P.2d 456 (1957).

the "words of the statute"[8] would not be charging the defendant with a violation of section 503 of the Vehicle Code. The Supreme Court affirmed the judgment of the trial court on the ground that when *examining the accusatory pleading*, section 503 of the Vehicle Code was a lesser offense necessarily included in the crime specifically charged. Therefore, a conviction for violation of section 503 of the Vehicle Code could be upheld even though a violation of that statute did not come within the statutory definition of the crime of robbery.

Since *People v. Marshall* was a first decision on the point of law involved, the purpose of this note is to show that the reasoning of the court was sound and that the case, therefore, presents an excellent solution to a heretofore legal dilemma.

The purpose of an accusatory pleading is to inform the defendant of the charge which he must meet at the trial.[9] The reason for this objective is to comply with the due process of law requirement that an accused be advised of the charges against him so that he may prepare and present his case and not be taken by surprise by the evidence offered against him at his trial.[10] The liberalizing of pleading by the amendments to section 952 of the Penal Code in 1927 and 1929,[11] has resulted in the declaration that the pleading is sufficient if it be worded in such a manner as to give the accused notice of the offense of which he is accused.

In *People v. Dant*[12] the court held that an information (accusatory pleading) that set out a particular description of the acts constituting the crime charged, even though it did not charge the offense in the language of the statute, was sufficient. In *People v. Emmons*[13] the court held that the only correct way to determine the sufficiency of an information is to compare the statement therein of the acts committed by the defendant with the language of the statute alleged to have been violated, in order to determine whether or not the defendant is charged with the offense defined in the statute. The *Marshall* case is similar in that the information and its allegations described the acts which were made a crime by section 503 of the Vehicle Code without using the statutory definitions of the crime.

A misnomer or inaccurate designation of a crime in the caption or other part of the complaint, indictment, or information will not vitiate it where there is sufficient detailing of the facts constituting the offense in the body of the pleadings so that the defendant is fully apprised of the nature of the charge against him. In such a case the statement of the facts controls and the defendant stands charged with the offense specifically alleged.[14] The above statement of the law tends to support the holding of *People v. Marshall*, that it is the specifically pleaded allegations and not the statutory definition that is looked to to determine what is the offense charged. The mere fact that the *Marshall* case happens to be discussing "necessarily included offenses" should not remove the case from the theory that the offense specifically alleged is controlling in determining the crimes charged.

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[8] An accusatory pleading in such general terms is expressly permitted under CAL. PEN. CODE § 952.

[9] People v. Codina, 30 Cal. 2d 356, 359, 181 P.2d 881, 883 (1947); People v. Brac, 73 Cal. App. 2d 629, 634, 635, 167 P.2d 535, 537 (1946); People v. Yant, 26 Cal. App. 2d 725, 730, 80 P.2d 506, 508 (1938).

[10] *In re* Hess, 45 Cal. 2d 171, 288 P.2d 5 (1955).

[11] CAL. STATS. 1927, p. 1043 and STATS. 1929, p. 303.

[12] 68 Cal. App. 588, 590, 229 Pac. 983, 984 (1924).

[13] 13 Cal. App. 487, 491, 110 Pac. 151, 152 (1910).

[14] People v. Izlar, 8 Cal. App. 600, 97 Pac. 985 (1908); People v. Morely, 8 Cal. App. 372, 97 Pac. 84 (1908); People v. Eppinger, 105 Cal. 36, 38 Pac. 538 (1894); People v. Cuddihi, 54 Cal. 53 (1879); People v. Phipps, 39 Cal. 326 (1870); People v. Beatty, 14 Cal. 566 (1860).

When one looks at the allegations in the *Marshall* case, which stated that Martens was robbed of an automobile, it is obvious that the information did in fact charge a violation of section 503 of the Vehicle Code. The defendant was put on notice that he would have to defend against this crime. It follows, therefore, that as far as informing the defendant of the offenses charged and following the rules as to the sufficiency of pleading, the ruling in *People v. Marshall* is sound.

Having previously shown that the logic of the *Marshall* case is substantial, this writer will now show that as a practical matter the courts use the accusatory pleadings in determining what are necessarily included offenses.

Section 261 of the Penal Code defines the crime of rape in six subdivisions. These subdivisions describe the six different ways in which the crime of rape can be committed. In *People v. Craig*[15] the court held that no matter how many subdivisions of section 261 of the Penal Code are violated, there can only be one conviction of rape resulting from a single act of intercourse. Since there is only one crime of rape, a court, in order to determine what crimes are necessarily included in rape, must look to the accusatory pleadings. This is illustrated in the following cases. In *People v. Greer*[16] the defendant was charged with a violation of sections 261(1), statutory rape, and 288 of the Penal Code. The defendant pleaded former jeopardy due to a prior conviction of section 702 of the Penal Code, contributing to the delinquency of a minor, arising out of the same act. The court held that statutory rape could not be committed without violating section 702 and, therefore, section 702 was necessarily included in section 261(1) of the Penal Code. To try him for violating section 261 of the Penal Code would put him in double jeopardy. In contrast, *In re Hess*[17] held that, under an information charging "rape, a felony, or violation of section 261(3) forcible rape," section 702 was not a necessarily included offense, because it could be committed without contributing to the delinquency of a minor.

It would be difficult to see how the courts arrived at their conclusion in these two cases, unless they referred to the accusatory pleadings. In order for section 702 of the Penal Code to be an offense necessarily included in rape, a violation of section 261(1) of the Penal Code would have to be pleaded. This is because due process requires that the defendant be put on notice of the offense he is charged with and the definition of rape does not include the elements of section 702 of the Penal Code, but the definition of statutory rape does. Although the defendant in the *Hess* case might have committed rape on a girl under 18 years of age, the pleading of section 261(3) of the Penal Code would not inform the defendant that he was being charged with the crime of contributing to the delinquency of a minor.

In *People v. Mendoza*[18] the defendant was indicted for attempt to commit rape. The allegation stated "that defendant did with force and violence attempt to have and accomplish an act of sexual intercourse." The defendant pleaded once in jeopardy due to a prior conviction of battery out of the same act. The court held that the crime of attempt to commit rape does not necessarily include an assault and battery, but that an analysis of the allegations contained in the information show a battery (i.e. "with force and violence") and therefore battery was specifi-

[15] 17 Cal. 2d 453, 457, 110 P.2d 403, 404, 405 (1941).

[16] 30 Cal. 2d 589, 184 P.2d 512 (1947).

[17] 45 Cal. 2d 171, 288 P.2d 5 (1955).

[18] 55 Cal. App. 2d 625, 628, 629, 131 P.2d 622, 624, 625 (1942).

cally pleaded and became necessarily included in the crime charged. The court held that the defendant was once in jeopardy.

The above cases point out the fact that, although the statutory definitions of the crimes of rape and attempted rape do not necessarily include the lesser offenses of contributing to the delinquency of a minor and battery, respectively, the courts will hold that they are necessarily included offenses. This is only true if the facts alleged in the accusatory pleadings show that the specific rape charged could not have been committed without committing the lesser offense.

The reasoning of these cases is buttressed by out of state decisions which use the same criteria for the determination of necessarily included offenses. In *Barton v. State,*[19] a Georgia case, the court held that the offense of assault with intent to commit rape does not necessarily include the offense of assault and battery, but that an indictment for such offense may so describe the manner of its commission as to constitute a charge of the lesser crime of assault and battery. In *State v. Wall,*[20] an Idaho case, the court held that "even though sodomy wasn't charged, the acts alleged in the information were sufficient to charge sodomy." Both of these cases, though not expressly holding what criterion is used to determine necessarily included offenses, do use the accusatory pleading as the determining factor and not the statutory definition.

Assault with the intent to commit murder[21] and assault with a deadly weapon[22] are different offenses.[23] However, the courts of California have determined that an assault with a deadly weapon is in certain cases an included offense in assault with intent to commit murder.[24] To do so they have had to look to the accusatory pleadings. For example, in *People v. Gordon*[25] the court held that an assault with a deadly weapon is necessarily included in assault with intent to commit murder when the information charges the greater offense to have been committed with a deadly weapon. Since these two crimes by statutory definition are not necessarily included offenses, it is apparent they could only become so when the accusatory pleading charged them as such.

Until the *Marshall* case the courts have had to feel their way in trying to find a criterion to determine when a lesser offense is necessarily included in the crime charged. Through such groping they began a trend toward the result, culminating in *People v. Marshall.*

By thus clearly defining the law, this decision is of great benefit to the court and the accused in that both can now be assured that to determine whether or not a particular offense is a "necessarily included offense," they will merely look to the accusatory pleadings.

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[19] 58 Ga. App. 554, 199 S.E. 357 (1938).

[20] 73 Idaho 142, 248 P.2d 222 (1952).

[21] CAL. PEN. CODE § 217.

[22] CAL. PEN. CODE § 245.

[23] *Ex parte* Moore, 29 Cal. App. 2d 56, 84 P.2d 57 (1938); People v. McNeer, 14 Cal. App. 2d 22, 57 P.2d 1018 (1936).

[24] People v. Gordon, 99 Cal. 227, 33 Pac. 901 (1893) People v. Lightner, 49 Cal. 226, 228, 229 (1874).

[25] 99 Cal. 227, 33 Pac. 901 (1893).