Hastings Law Journal

Volume 10 | Issue 3 Article 9

1-1959

Criminal Law: Slight Movements within an Enclosure Constitute Kidnaping

George B. Hendry

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the Law Commons

Recommended Citation

George B. Hendry, *Criminal Law: Slight Movements within an Enclosure Constitute Kidnaping*, 10 Hastings L.J. 323 (1959).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol10/iss3/9

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

they will be received. These grounds bear scrutiny, although the Uniform Rules suggest a guide.

It should be borne in mind that there is great injustice to the party who is forced to hear the court say:[38]

> The affidavits disclose gross and inexcusable misconduct . . . but the evil, if any, is established in this state by the legislative authority, and can only be cured by amendment.

The problem seems beyond the court's solution in the light of the rationale behind the present judicial exception, particularly in view of the decision in *Kollert*. Therefore the legislature should again modify the severity of the exclusionary rule as it was disposed to do almost a century ago.[39]

William E. Johnston

CRIMINAL LAW: SLIGHT MOVEMENTS WITHIN AN ENCLOSURE CONSTITUTE KIDNAPING

Can one be kidnaped without being removed from his house or dwelling? In *People v. Wein*,[1] the California Supreme Court held that the crime could be committed under precisely those circumstances.

The defendant gained admittance to the victim's apartment under a ruse, intending to commit a robbery, menaced her with a knife, tied her hands with wire, and forced her to walk 25 feet to a desk. Finding no money there he told the victim to crawl about 50 feet into the bedroom where there was money in a dresser drawer. The intruder found the money, about $18, and put it in his pocket. Thereafter, while brandishing the knife, he forced the victim to submit to an act of sexual perversion,[2] after which she was raped.[3]

This incident is typical of the defendant's attacks on eight women, for which he was convicted on five counts of kidnaping for the purpose of robbery under Penal Code Section 209 and seventeen other felonies.[4] As noted above, the victim was forced to move a total of 75 feet. The other victims of the defendant's attacks were forced to move lesser distances within their dwellings, the smallest of which was four or five feet onto a bed. This is the only known case reported in California where the victim was moved less than six feet and the word "kidnap" was used to describe the act.[5]

For the convictions under Penal Code Section 209 the jury prescribed the death penalty. This section was originally enacted in 1901.[6] It was amended in 1933 and 1951. In its present form it provides:

> Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away any individual by any means whatsoever with intent to hold or detain

[38] See note 13 *supra*.

[39] See the Laws of 1862, at 38, amendment to the Practice Act; to the effect that jurors may impeach their own verdicts when arrived at by chance.

[1] 50 Cal. 2d....., 326 P.2d 457 (1958).

[2] Violation of CAL. PEN. CODE § 288a.

[3] Violation of CAL. PEN. CODE § 261(3).

[4] 50 Cal. 2d at....., 326 P.2d at 461 (1958).

[5] People v. Thompson, 133 Cal. App. 2d 4, 284 P.2d 39 (1955); People v. Hunter, 49 Cal. App. 2d 243, 121 P.2d 529 (1942).

[6] Cal. Stat. 1901, ch. 83, § 1, p. 98.

> or who holds or detains such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, *or any person who kidnaps or carries away any individual to commit robbery* . . . is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole . . . . (Emphasis added.)

The death penalty is at the discretion of the jury if the victim suffers bodily harm. If the bodily harm factor is not present then only life imprisonment without possibility of parole is prescribed.

It can be seen that when robbery is involved the victim must be kidnaped or carried away for the crime to come within the definition of this section. Section 209 itself does not define kidnaping. This is defined in Penal Code Section 207 which therefore becomes pertinent in applying the above robbery provisions to the facts of a particular case.

Section 207 originally was declaratory of the common-law requirement that the victim be carried across a county or state line. It was later modified with the addition of the words "or into another part of the same county."[7] It is significant that, when the words "into another part of the same county" were added, the legislature did not amend or abolish Penal Code Section 236 which defines the crime of false imprisonment as the "unlawful violation of the personal liberty of another." The punishment for violation of Section 207 is not less than one nor more than twenty-five years imprisonment.[8] Violations of Section 236 are punishable by a fine of $500 or up to one year imprisonment if the crime does not involve the use of violence, menace, fraud or deceit and one to ten years if any of the above factors are present.[9]

It may be inferred that the legislature intended Section 236 to punish transgressions of personal liberty which were not of the type which the words "carries . . . into another part of the same county" reasonably imply. It can be seriously doubted that small movements of a victim within one enclosure were contemplated by the legislators when they amended Section 207.

Prior to the principal case kidnaping has usually been confined to cases where the asportation was from one enclosure to another, into or out of an enclosure, or some distance in a vehicle. It is noteworthy, however, that in none of the convictions under Section 207 had the asportation been entirely within one enclosure.

As mentioned above, Section 207 necessarily becomes pertinent when the robbery provisions of Section 209 are invoked. Section 209 was first enacted in 1901 with no express mention being made of the word kidnaping. Later, in 1933, it was amended to read, "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual with intent to hold or detain . . . for ransom, reward or to commit extortion or *robbery* . . . is guilty of a felony." (Emphasis added.)[10] Under this amendment there were convictions where the victims were only moved a short distance,[11] the courts relying upon the words "seize" and "confine."[12] The so-called "standstill"

---

[7] Cal. Stat. 1905, ch. 493, § 1, p. 653.
[8] CAL. PEN. CODE § 208.
[9] CAL. PEN. CODE § 237.
[10] Cal. Stat. 1933, ch. 685, § 1, p. 1757.
[11] People v. Dugger, 5 Cal. 2d 337, 54 P.2d 707 (1936).
[12] People v. Tanner, 3 Cal. 2d 279, 44 P.2d 324 (1935).

kidnaping became possible[13] and *any* act of robbery could be prosecuted under Section 209.

In *People v. Tanner* (victims forced to move about within house),[14] and in *People v. Knowles* (victims moved about within store),[15] both decided on the basis of the 1933 amendment to Section 209, the court held that movement was not necessary for conviction when the victims were robbed. But in both cases the court relied not on the words "kidnaps or carries away," but on the words which require a minimum of movement. These cases should not, therefore, be used as the basis for a judicial definition of kidnaping.

In 1951, subsequent to the *Knowles* decision, the legislature again amended Section 209 to its present form. As amended, the robbery victim *must* be kidnaped or carried away for the offense to come within the requisites of Section 209.

In *People v. Chessman*[16] the California Supreme Court first reviewed the 1951 amendment. The court held that mere detention was not enough, but that the movement of the victim twenty-two feet from the car of her escort to that of her abductor fulfilled the kidnaping requisites. Justice Schauer, writing the majority opinion, ruled, "It is the fact, not the distance, of *forcible removal* which constitutes kidnaping in this state . . . ."[17] (Emphasis added.)

Is forcing a victim five feet onto a bed an act of *forcible removal*? In the *Wein* case the court did not further explain the meaning of forcible removal but merely adopted it as descriptive of the defendant's acts. The court relied entirely on the authority of the *Chessman* case. Justice Spence said, referring to the amount of movement required, that "under the reasoning and language of the *Chessman* case, any of these distances sufficed for a conviction."[18]

In the *Chessman* decision the court cited California cases in which the issue of distance was not raised or which were decided under the 1933 amendment to Section 209.[19] A North Dakota case, also cited, employed the same words as did Section 209 prior to the 1951 amendment.[20] The above cases, however, are not sound authority for the decision in the *Wein* case because they were decided under statutes which required no movement whatsoever.

Moreover, the fact situation in the *Wein* case can be clearly distinguished from that of the *Chessman* case where the victim was removed from one enclosure into another (automobiles). In the *Wein* case the victims were *not* removed from an enclosure, a factual dissimilarity sufficient to warrant distinctions between the natures of the crimes.

Since neither the authority relied upon in the *Chessman* decision nor that decision itself are applicable in deciding the instant case, the reasoning used there should not be applied to the *Wein* case. Justice Carter, as the lone dissenter,

---

[13] Comment, 3 STAN. L. REV. 156 (1951).

[14] 3 Cal. 2d 279, 44 P.2d 324 (1935).

[15] 35 Cal. 2d 175, 217 P.2d 1 (1950). Criticized in 38 CALIF. L. REV. 920 (1950) and in 24 So. CALIF. L. REV. 310 (1950–51).

[16] 38 Cal. 2d 166, 238 P.2d 1001, *cert. denied,* 343 U.S. 915 (1951).

[17] *Id.* at 192, 238 P.2d at 1017.

[18] 50 Cal. 2d at....., 326 P.2d at 466.

[19] People v. Oganesoff, 81 Cal. App. 2d 709, 184 P.2d 953 (1947); People v. Shields, 70 Cal. App. 2d 628, 161 P.2d 475 (1945); People v. Melendrez, 25 Cal. App. 2d 490, 77 P.2d 870 (1938); People v. Cook, 18 Cal. App. 2d 625, 64 P.2d 449 (1937); People *v.* Raucho, 8 Cal. App. 2d 655, 47 P.2d 1108 (1935).

[20] State v. Taylor, 70 N.D. 201, 293 N.W. 219 (1940), *citing* People v. Melendrez, 25 Cal. App. 2d 490, 77 P.2d 870 (1938).

argued *inter alia,* that the word "kidnaps" should be defined in Section 209 as it has been under Section 207.[21]

In his dissent in the *Knowles* case, Justice Edmonds expressed his belief that if the control of the victim's location is transitory or incidental to the effective completion of other criminal acts, there is no kidnaping.[22] Surely such reasoning would be valid when the victim is not even removed from a single room, as in the principal case. It would seem to be doing violence to the plain meaning of the words to describe such a situation with the phrase "kidnaps or carries away."[23]

It would have been reasonable for the court to have held that the legislative intent in the 1951 amendment was to change the requisites of Section 209 where robbery was involved, contemplating the more lengthy type of asportation.[24] It will be noted that this amendment did not abolish the standstill type of kidnap altogether. In cases of ransom, reward or extortion the words, "seizes, confines, inveigles, entices, decoys, abducts, conceals," are still effective. With this decision it can be seen that if the above was indeed the intent of the legislature, it has not been carried out by the courts. In his dissent in the *Wein* case Justice Carter stated:[25]

> As a result of the *Chessman* and the instant decision, while robbery is not per se a violation of Section 209, if the robber moves his victims one inch he is subject to the death penalty.

The court explains that it is not its duty to place some uncertain distance limitations upon the language of the statute.[26] There is, however, nothing to prevent the court from distinguishing between different *types* of crime. Every kidnaping includes the offense of false imprisonment, but it does not logically follow that the converse is true. Should there not, then, be some effort made to distinguish the requisites of kidnaping from those of false imprisonment? It is difficult for one to conceive of a robbery where the victim is not required to move about to some extent. Under the reasoning of this case, the perpetrator will have subjected himself to a minimum penalty of life imprisonment, if the prosecuting attorney invokes Section 209. This is not comparable to the minimum penalty for first degree robbery, which is five years imprisonment.[27] It does not seem possible that the legislature would intend such a discrepancy in punishment between two similar crimes.

The latest decision of the California Supreme Court has apparently obviated the 1951 amendment insofar as it applies to robbery. Future legislative action seems to be the only solution to an intolerable situation which will not otherwise be cured. As Justice Spence said when speaking of Section 209 in the *Wein* case:[28]

> If this section, as interpreted by this court, is regarded as too harsh, the remedy is for the legislature to redefine kidnaping . . . .

George B. Hendry

---

[21] 50 Cal. 2d at....., 326 P.2d at 476.
[22] 35 Cal. 2d at 203, 217 P.2d at 18.
[23] See People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950).
[24] See People v. Knowles, 35 Cal. 2d 175, 189, 217 P.2d 1, 9 (1950) (dissenting opinion).
[25] 50 Cal. 2d at....., 326 P.2d at 479.
[26] *Id.* at....., 326 P.2d at 466.
[27] CAL. PEN. CODE § 211.
[28] 50 Cal. 2d at....., 326 P.2d at 466.