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Conspiracy - Criminal Responsibility - Offenses - Guilty Plea of One Conspirator as Affected by Acquittal of All Other Conspirators

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RECENT CASES

CONSPIRACY — CRIMINAL RESPONSIBILITY — OFFENSES — GUILTY PLEA OF ONE CONSPIRATOR AS AFFECTED BY ACQUITTAL OF ALL OTHER CONSPIRATORS — A and B were indicted for conspiracy.[1] B was tried and acquitted. A then pleaded guilty and was sentenced. After serving a sentence for another charge, A petitioned for a writ of habeas corpus to be released from serving the sentence for conspiracy. The Arizona Supreme Court *held,* two justices dissenting, that although A entered his guilty plea to conspiracy after his alleged co-conspirator had been acquitted, acquittal of the co-conspirator operated to deprive the court of jurisdiction to render a judgment of conviction on A's guilty plea. *Eyman v. Deutsch,* 373 P.2d 716 (Ariz. 1962).

The general rule is that one defendant in a prosecution for conspiracy cannot be convicted where all of his alleged co-conspirators have been acquitted or discharged under circumstances that amount to an acquittal.[2] The basis of the rule is said to be that the acquittal is a judicial finding of fact which is binding on the state and bars prosecution of one conspirator when there is no one with whom he could have conspired.[3]

There are several situations where the courts have found that the circumstances did not amount to an acquittal. Thus a defendant may be convicted where his co-conspirators are unknown if the jury is convinced that there were other conspirators.[4] And where one co-conspirator has died, either before or after the indictment, a single remaining conspirator may be convicted.[5] When the only co-conspirator testifies for the state and is given immunity from prosecution for the of-

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1. See Ariz. Rev. Stat. § 13-331 (1956); N.D. Cent. Code § 12-03-01 subsection 1 (1961).

2. People v. MacMullen, 134 Cal. App. 81, 24 P.2d 794 (1933); State v. Tom, 13 N.C. 569 (1830); State v. McElroy, 71 R.I. 379, 46 A.2d 397 (1946); **accord,** Reg. v. Ahearne, 6 Cox Crim. Cas. 6 (Ir. Crim. App. 1852) wherein defendant was tried and convicted of conspiracy before his fellow conspirators had been tried. The court, while recognizing the general rule, held that the conviction was regular and that to avoid execution defendant must apply to the proper authorities for a respite until his fellow conspirators had been tried. See generally 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 91 (12th ed. 1957).

3. Delaney v. State, 164 Tenn. 432, 51 S.W.2d 845 (1932).

fense,[6] or where the co-conspirator is alive and known but is not tried for some other reason[7] the lone conspirator tried, may be convicted. It has been held that a *nolle prosequi* as to all but one conspirator does not prevent his conviction,[8] but there are decisions to the contrary.[9]

Where conspirators are tried separately, as in the instant case, there is a split of authority on the question whether the acquittal of one will require the acquittal of the other. The weight of authority seems to follow the general rule and holds that the fact the conspirators are tried separately is of no consequence and an acquittal of all but one requires an acquittal of that one.[10] A few jurisdictions have reached the contrary result. Thus where one of two conspirators was convicted and the other acquitted in a later trial, the conviction of the first was upheld.[11] Where one conspirator pleaded guilty and the other was subsequently acquitted after trial, the court refused to release the first from custody.[12] And the dismissal of the indictment as to all remaining defendants did not affect the conviction of one, who had previously pleaded guilty.[13] These holdings are based on the proposition that an acquittal may result from a failure of proof, rather than the non-existence of the conspiracy.[14] They contend that for an acquittal of one to be an acquittal of the other, the conspirators must be tried with essentially identical evidence.[15]

The decision of the court in the instant case seems to be an unwarranted extension of the general rule. A plea of guilty is not inconsistent with a verdict of acquittal. Acquittal results because the jury is not convinced of the defendant's guilt beyond a reasonable doubt.[16] It is submitted that the court

4. Donegan v. United States, 297 Fed. 641 (2d Cir. 1922).
5. State v. Aldridge, 206 N.C. 850, 175 S.E. 191 (1934).
6. People v. Cohn, 358 Ill. 326, 193 N.E. 150 (1934).
7. West v. United States, 161 F.2d 452 (5th Cir. 1947); Bryant v. United States, 120 F.2d 483 (5th Cir. 1941).
8. United States v. Fox, 130 F.2d 56 (3rd Cir. 1942).
9. State v. Jackson, 7 S.C. 283, 24 Am. Rep. 476 (1876).
10. Sherman v. State, 113 Neb. 173, 202 N.W. 413 (1925), **overruled by** Platt v. State, 143 Neb. 131, 8 N.W.2d 849 (1943); State v. Tom, 13 N.C. 569 (1830); Casper v. State, 47 Wis. 535, 2 N.W. 1117 (1879).
11. Platt v. State, **supra** note 10, See Jones v. Commonwealth, 31 Gratt. 836 (Va. 1878) where although both conspirators were tried in the same trial, A made an out of court confession and B did not. The court held that a new trial for B was not a basis for a new trial for A and by way of dictum supported the rule of the above case.
12. State v. Oats, 32 N.J. Super. 435, 108 A.2d 641 (1954).
13. State v. Lockhart, 241 Iowa 635, 39 N.W.2d 636 (1949).
14. Platt v. State, 143 Neb. 131, 8 N.W.2d 849 (1943).
15. See generally 27 Neb. L. Rev. 443 (1948).
16. This point of view is supported by Justice Struckmeyer, dissenting in Eyman v. Deutsch, 373 P2d 716 (Ariz. 1962).

in the instant case errored in blindly following the general rule without investigating the reason behind it. Inconsistency is the sole basis for the rule, because an inconsistent determination by the same jury necessarily reflects some defect in its function. Here there was no determination by the jury as to the defendant's guilt and thus there was no inconsistency.

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EVIDENCE — COMPETENCY OF EXPERTS — EFFECT OF DISCLAIMER BY THE WITNESS — The defendant was convicted of indecently molesting a child; such conviction primarily based on evidence given by an educated and experienced laboratory technician. The trial court admitted her as an expert witness and received her opinion that a slide prepared from a smear taken from the child's body contained human sperm. The technician stated that she felt the organism could have been nothing else but human sperm, but she also stated that she did not feel qualified to say whether it was human sperm or not. The Supreme Court of South Dakota in reversing the conviction *held,* two justices dissenting, that the admission of such testimony constituted prejudicial error. The dissent considered the evidence to be admissable and non-prejudicial; its weight and value to be determined by the jury. *State v. Percy,* 117 N.W.2d 99 (S.D. 1962).

A witness is established as expert and is qualified to give an opinion when it is shown that he has special knowledge, skill, experience, or training necessary to give an understanding answer to the subject of inquiry.[1] Without this special knowledge of the particular subject matter, the purported expert opinion would be a mere guess or conjecture.[2] It is expected that such testimony will aid the trier in the search for truth.[3] Neither special professional license[4] nor experience with identical circumstances[5] is required.

It is a general rule that the determination of a witness' qualification and competency to speak is within the province

1. State v. Riiff, 73 S.D. 467, 44 N.W.2d 126 (1950).
2. Gaddy v. Skelly Oil Co., 364 Mo. 143, 259 S.W.2d 844 (1953).
3. Woyak v. Konieske, 237 Minn. 213, 54 N.W.2d 649 (1952); State v. Nelson, 103 N.H. 478, 175 A.2d 814 (1961).
4. Cordero v. State, 164 Tex. Crim. 160, 297 S.W.2d 174 (1956).
5. Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953).