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NOTE

CHILDREN AS WITNESSES — COMPETENCY — AMENABILITY TO PUNISHMENT FOR PERJURY

A recent case, *Santillian v. State*, 182 South Western, 2d (Tex.) 812, presents an unusual problem. The defendant was convicted on the charge of selling marijuana. The indictment alleged that the defendant sold the drug to a 15-year old boy, and his testimony was necessary to sustain the conviction. On appeal, the defendant contended that the boy was an incompetent witness. Section 5 of Article I of the Texas Constitution provides: "No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury." A Texas statute, known as the Delinquent Child Act, establishes a juvenile court in every county and provides a procedure for the trial of delinquent children in such courts. Under the Act "a child" is a boy over the age of ten and under the age of seventeen years or a

girl over the age of ten and under the age of eighteen years. A "delinquent child" under the Act includes, *inter alia*, one "who violates any penal law of this state of the grade of felony." In Texas, perjury is a felony.

The defendant, in the case under discussion, argued that the provisions of the Delinquent Child Act are not for punishment but for custodial protection of the child for its own good and for the good of society generally, and that the procedure provided by the Act takes out of the Code of Criminal Procedure any handling of juveniles and, therefore, a juvenile committing perjury is not amenable to, or subject to, any criminal prosecution; and, hence, is not a qualified witness under Section 5, Article I of the Texas Constitution. The court conceded that one who is not amenable to punishment for perjury is not a competent witness. However, the court said that if a child within the age fixed by the Delinquent Child Act should commit perjury, the child would be proceeded against in the juvenile court, rather than the ordinary criminal courts, and might be sent to a reformatory instead of the penitentiary; that the Juvenile Court Act changed the manner of enforcing the law against children, but did not change the crime nor the necessary facts. It changes the manner of trying it and the manner of charging it, but the offence would be the same so far as the act of the child in testifying falsely is concerned; it would not relieve the child of punishment, but changes the place of punishment and the mode of trial. The court, therefore, concluded that the Delinquent Child Act does provide for "punishment" within the statutory provision relating to the qualification of witnesses, and that a child, sworn as a witness, does so "subject to the pains and penalties of perjury."

It is interesting to note how a similar contention against the competency of a child witness could be answered in Pennsylvania. The Preamble of the Pennsylvania Statute, Act of June 2, 1933, P. L. 1433, creating a Juvenile Court, sets forth that children should be guarded from association and contact with crime and criminals and that guidance and control over delinquent children should be clearly distinguished from those exercised in the ordinary administration of the criminal law. Section 19 of the Act provides, "No order made by any juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by the criminal laws of the Commonwealth, nor shall any child be deemed to be a criminal by reason of any such order or to be deemed to have been convicted of crime." Under the Act a "child" is a minor under the age of eighteen years and a "delinquent child" includes, *inter alia*, a child who has violated any law of the Commonwealth. Under Section 322 of the Penal Code of June 24, 1939, P. L. 872, perjury is a felony. If there were in Pennsylvania any constitutional or statutory provision similar to the Texas constitutional provision, making amenability to punishment for perjury a test of the competency of a witness, it might well be argued that a child of juvenile court age, in view of the purposes of the Juvenile Court Act and the provisions of Section 19 thereof, is not amenable to

punishment for perjury and is not a competent witness. However, as in the Texas case, any such contention could adequately be met by holding that a child under the age of eighteen who commits perjury and is proceeded against in juvenile court, may, under the Act, be placed on probation, committed to a suitable institution for the care, guidance and control of delinquents, committed to an industrial or training school, or, if over the age of sixteen years, committed to a state industrial school. Thus it could be held that a child would be amenable to "punishment" and, therefore, would be a competent witness.

What has just been said, however, is entirely supposition, for there is in Pennsylvania no constitutional or statutory provision similar to the Texas constitutional provision which makes amenability to punishment for perjury a test of competency of witnesses. In Pennsylvania the substantial test of competency of an infant witness is his intelligence and his comprehension of an obligation to tell the truth: *Commonwealth v. Goldman*, 127 Pa. Super. 523. In *Commonwealth v. Furman*, 211 Pa. 549, the court held that an infant witness is competent if he comprehends the difference between truth and falsehood and realizes his duty to tell the truth, and that in passing on the question of competency, the trial judge has a wide discretion. In that case a child of eight years was held to be competent. In *Piepkke v. Philadelphia & Reading Railroad*, 242 Pa. 321, the court said that the competency of a witness is not a question of years but of the capacity of the proposed witness to recollect the matter on which he is to testify, to understand the questions put to him, to give rational answers to these questions, and to know that he ought to tell the truth; that competency depends upon the sense and reason the child entertains and the danger of the impiety of falsehood. In this case the court held that it was error to exclude a child as a witness merely because he was seven years of age, without attempting to determine the applicability of the rule just stated. In *Commonwealth v. Troy*, 274 Pa. 265, a boy nine years of age, was held to be a competent witness because he met the usual test applied by courts to children to determine whether they understood the result of false swearing, by answering that he knew that if he did not tell the truth he would go to hell. Lower court cases to the same effect are *Bardell v. Searfoss*, 17 Luz. L. Reg. 343; *Sherkus v. Radbill*, 19 Del. 620; *Commonwealth v. Quinn*, 20 Dist. 85 .

The provisions of Section 19 of the Juvenile Court Act present other interesting points. Under the Act of May 23, 1887, P. L. 158, a person who has been convicted in a court of this Commonwealth of perjury or subornation of perjury is thereafter incompetent as a witness; but to be incompetent under this Act it is necessary that the person shall have been *convicted* of perjury. Accordingly, it has been held that a witness is not incompetent at the trial of a criminal case because he admits on the stand that he committed perjury before the committing magistrate, for the reason that he has not been convicted, that is, there has been no judgment by the imposition of sentence: *Commonwealth v. Lewandowski*,

74 Pa. Super. 512. In *Commonwealth v. Miller*, 6 Pa. Super. 35, one who had been found guilty of perjury, but not yet sentenced, was held to be a competent witness because there had been as yet no conviction. In *Commonwealth vs. Pearlman*, 126 Pa. Super. 461, a person who had pleaded guilty to perjury but had not yet been sentenced, was likewise held to be a competent witness. Suppose that a child under eighteen should commit perjury and was thereafter brought into juvenile court and perhaps, for his offence, sent to an industrial school; it is submitted that he would not thereafter be incompetent as a witness, because Section 19 of the Juvenile Court Act provides that a child shall not, by reason of any order made by the juvenile court, be deemed to be a criminal or be deemed to have been convicted of crime.

Nor, it is submitted, could the credibility of a child, committed to an institution by a juvenile court for perjury or any other crime, be attacked on the ground that he had been convicted of crime under the well known rule that the credibility of a witness may be attacked by showing that he has been convicted of a felony or a misdemeanor *crimen falsi*: *Commonwealth v. Spanos*, 153 Pa. Super. 547. Under the rule last stated, the credibility of a witness may be attacked by showing that he has been convicted of the type of crime mentioned, but it cannot be shown that he has committed a crime for which he was never convicted: *Commonwealth v. Varano*, 258 Pa. 442; *Commonwealth v. Quaranta*, 295 Pa. 264. Although a child may have committed perjury and been committed therefor to an institution, under Section 19 of the Juvenile Court Act he has not been convicted and the crime could not be shown to attack his credibility as a witness.

F. S. REESE