INDEX

TABLE OF CASES

STATUTES

No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1964

B. ELTON COX,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana

PETITION FOR RE-HEARING FROM THE DECISION OF THIS HONORABLE COURT REVERSING THE JUDGMENT OF THE SUPREME COURT OF LOUISIANA HEREIN

SPECIFICATION OF ERROR NO. 1

It is respectfully submitted that the judgment of this Honorable Court herein reversing the judgment of the Louisiana Supreme Court based upon the premise that the appellant relied upon an administrative interpretation of the word, "near", and that to sustain his conviction would be tantamount to an "indefensible sort of entrapment" of him by the State, is erroneous.

ARGUMENT

Now into this Honorable Court comes the State of Louisiana, through counsel, and respectfully prays for a re-hearing of this case before a full bench for the reasons hereinafter stated.

It is stated in the majority opinion,

> ". . . It is clear that the statute, with respect to the determination of how near the courthouse a particular demonstration can be, foresees a degree of on the spot administrative interpretation by officials charged with responsibility for administering and enforcing it. It is apparent that the demonstrators, such as those involved here, would justifiably tend to rely on this administrative interpretation of how 'near the courtroom a particular demonstration might take place . . .' The record here clearly shows that the officials present gave permission for the demonstration to take place across the street from the courthouse . . . this testimony is not only uncontradicted, but is corroborated by the State's witnesses who were present. Police Chief White testified that he told Cox 'he must confine' the demonstration 'to the west side of the street.' " Majority Opinion, Justice Goldberg, pages 10 and 11.

This record does not reflect that Cox ever sought or relied upon any administrative interpretation of how near to the courthouse this particular demonstration might take place. Just prior to this conversation that Chief White had with Cox, and within two blocks from where the conversation which he had with White took place, Cox had a prior conversation with Captain Font of the City Police Department and Chief Kling of the Sheriff's Office, wherein this court correctly interpreted what happened.

> "Kling asked Cox to disband the group and 'take them back from whence they came.' Cox did not

> acquiesce in this request but told the officers that they would march by the courthouse, say prayers, sing hymns and conduct a peaceful program of protest. The officer repeated his request to disband and Cox again refused. Kling and Font then returned to their car in order to report by radio to the Sheriff and Chief of Police who were in the immediate vicinity; while this was going on, the students, led by Cox, began their walk toward the courthouse." See Majority Opinion, Mr. Justice Goldberg, *B. Elton Cox v. State of Louisiana*, No. 24, October Term, 1964, this Court's docket, page 3.

It is unrefuted that at that particular time and point Cox did not seek permission as to where to hold this demonstration, and he informed these officers that they were going to march by the courthouse. This record does not contain any evidence whatsoever of any reliance upon any administrative advice given by anyone.

> "They walked in an orderly and peaceful file two or three abreast one block east, stopping on the way for a red traffic light. In the center of this block, they were joined by another group of students. The augmented group now totaling about 2,000, turned the corner and proceeded south, coming to a halt in the next block opposite the courthouse.
>
> "As Cox, still at the head of the group, approached the vicinity of the courthouse, he was stopped by Captain Font and Inspector Trigg and brought to Police Chief Wingate White, who was standing in the middle of St. Louis Street.

> The Chief then inquired as to the purpose of the demonstration. Cox, reading from a prepared paper, outlined his program to White, stating that it would include a singing of the Star Spangled Banner and a freedom song, recitation of the Lord's Prayer and a Pledge of Allegiance, and a short speech. White testified that he told Cox that he 'must confine' the demonstration 'to the west side of the street.' White added, 'This, of course, was not—I didn't mean it in the import that I was giving him any permission to do it, but I was presented with a situation that was accomplished, and I had to make a decision.' "
>
> Further testifying, Cox said:
>
> "My understanding was that they would be allowed to demonstrate if they stayed on the west side of the street and stayed within the recognized time. And this was agreed to by White."

This Honorable Court erred herein in accepting the testimony of Cox with reference to his reliance upon alleged permission by Chief White and in rejecting the testimony of Chief White with reference to the fact that he didn't mean to import that he was giving any permission to do anything, but that he was presented with a situation that was accomplished and that he had to make a decision. This court erred in accepting the self-serving declaration of Cox with reference to permission, because to do so, would be in complete disharmony with what this record shows had previously happened. See Majority Opinion, *Cox v. Louisiana*, Mr. Justice Goldberg No. 24, October Term, 1964, pages 3 and 4. This court accepts the evidence

that applied to Cox's and White's short conversation, and also the evidence that a short distance therefrom when confronted by Captain Font and Chief Kling and ordered to disband and go from whence they came, that Cox, not once but on two occasions, stated his declared intention of going to demonstrate, to protest the illegal arrest of several of their people who were being held in jail, and they would march by the courthouse. This testimony is not consistent with the acceptance of the self-serving declaration by Cox that he relied upon Chief White's statement. Not only did Cox not seek permission from Captain Font and Chief Kling with reference to where he might demonstrate, but no permission was sought from Chief White. In order to further corroborate Cox's statement to Captain Font and Chief Kling that he was going to the courthouse to demonstrate, he actually left them, and before he was actually intercepted by Chief White, he was on the same street that runs next to the courthouse, headed toward the courthouse, and when intercepted by White was in the next block opposite the courthouse. It is also significant to note that Cox did not seek White out, rather White intercepted Cox and had Cox brought to him. At that time, of course, White had received a communication by radio from Captain Font and Chief Kling which was made immediately after their conversation with Cox. It is stated in the majority opinion in this case, Mr. Justice Goldberg, at page 11:

> "The record shows that at no time did the police recommend or even suggest, that the demonstra-

tion be held further from the courthouse than it actually was."

The simple answer to that observation of the record is that evidence does show, without refutation, that Cox was asked "to disband the group and take them back from whence they came." Majority Opinion No. 24, October Term, 1964, Mr. Justice Goldberg, page 3.

The Majority Opinion herein states that it would be an indefensible sort of entrapment by the State to sustain this conviction of a citizen for exercising a privilege which the State has clearly told him was available to him.

The rationale of the legal concept of entrapment is that officers of the law shall not incite crime merely to punish the criminal. In keeping with this philosophy which sustains it, the defense of this entrapment has a limited application. It is restricted to those instances in which the defendant is induced or incited to commit a crime, not originally intended or contemplated by him for the purpose of arresting and prosecuting him. The fact that an opportunity is furnished or that the defendant is aided in the commission of a crime which originated in his own mind constitutes no defense. There is a clear distinction between inducing a person to commit a crime and setting a trap to catch him in the execution of the criminal designs of his own conceptions. In the judicial formulation of this doctrine, the primary emphasis is on the defendant's predisposition to commit the crime. The limitations implicit in the doctrine itself have been uni-

versally recognized. *State of Louisiana v. Jim Turner and Seymour Wheeler*, 127 So. 2d 514, 241 La. 95. 22 Corpus Juris Secundum, Section 45, page 99. This record, of course, does not meet the preceding criterion in order to constitute entrapment.

This idea of the demonstration near the courthouse originated with this appellant during the early morning hours preceding this demonstration which occurred during the noon hour of that date at a distance of some five miles north of the courthouse. The execution of this plan to demonstrate at the courthouse commenced some five miles north of the courthouse and proceeded to the Old State Capitol Building, which is situated about three blocks from the courthouse. At that place and at that time, appellant, Cox, declared to Officers Kling and Font his intention to demonstrate at the courthouse. His actions thereafter confirmed his declared intention, for he and his group started toward the courthouse until they were intercepted by Chief White in the block next to the courthouse while walking along the west sidewalk of St. Louis Street, which runs parallel and adjacent to the courthouse. After the public declaration of their intention to demonstrate at the courthouse that morning, at the noon hour when they were intercepted by Chief White, they had come within one block of their declared destination. In view of the foregoing, as supported by this record, it could not be said that the activity in which this appellant was engaged did not originate in his mind. It could not be said that Cox, at a time which the execution of this

predeclared plan was practically culminated, was induced by Chief White. Cox could not have gotten any further away from the courthouse than on the west sidewalk along St. Louis Street, which is where he was and which is where he intended to stay, prior to his interception by Chief White. Additionally, this court in its phraseology "indefensible sort of entrapment by the State" ostensibly recognizes that this is not a case of legal entrapment as universally known. This phraseology is taken by this court from *Raley v. Ohio*, 360 U.S. 423, which this court submits as authority for its holding in this case. In *Raley*, the setting of the alleged criminal acts, contempt of the commission, were held in a commission hearing room pursuant to prior notice of hearing and matter to be investigated. The Commission, or one of its members, expressly informed the accused that they enjoyed the privilege under the Fifth Amendment to refuse to answer questions that might tend to incriminate them. The privilege was so claimed by these defendants. In no case did the commission direct that the defendants answer the questions to which they had pleaded the privilege. Thus, *Raley* presents a situation which occurred during a formal hearing of a legislative committee, whose members had specifically instructed some of the appellants therein that they were entitled to claim the privilege against self-incrimination; that these defendants so claimed said privilege, and that without any insistence or direction to the defendants to answer the particular questions to which they had claimed the privilege they were indicted for contempt

of the said Committee. The facts of *Raley* fully support the decision of this court that to sustain said convictions would be an indefensible sort of entrapment by the State. In *Raley*, the subject matter forming the basis of the charges were fully discussed in the quiet and formal environs of a committee hearing room.

The factual circumstances in the case at bar envisions a crowd of some 2,000, who had come from approximately five miles away toward their destination pursuant to the proclaimed declaration through the news media and to various law enforcement officers to demonstrate against the alleged illegal arrest of some of their members near the courthouse. It was while these marchers were out on the sidewalk marching toward their declared goal, when they were intercepted by White who informed them to keep the demonstration on the west sidewalk of St. Louis Street. This statement by White was not made in response to a request by Cox, but it was apparently made on White's own initiative in an atmosphere of apprehension, and; as White himself so testified, he did not intend that it be giving Cox permission to hold this demonstration.

It is respectfully submitted that in all due deference to this court's holding in its Majority Opinion, the *Raley* case is not applicable to the case at bar.

In order to arrive at its decision herein and the premises upon which it is based, the Majority Opinion holds that Louisiana Revised Statute 14:401 en-

visions and foresees a degree of administrative interpretation, which, in effect, was sought by Cox, made by Chief White, and relied upon by Cox to his detriment in the form of this State conviction. This court upholds the validity of the authority giving right to make such an administrative interpretation, citing *Cox v. New Hampshire*, 312 U.S. 569.

In the foregoing cited case, the statute therein, with which this court was concerned, specifically delegated authority to a licensing committee who had the authority under specific guidelines to issue permits for various theatrical and dramatic exhibitions. LSA-R.S. 14:401, of course, refers to no agency dutybound to make any administrative decision with reference to its application. Any time an officer makes an arrest for a misdemeanor which he deems to have been committed within his presence, he must make a determination as to whether the misdemeanor is or is not being committed, and, therefore, as to whether he should or should not make the arrest. The interpretation for the alleged violation resulting in a conviction is for the judiciary, and not the police officer making the arrest. To nullify this conviction as this court has done on the basis of what some officer has said under the circumstances of this case would be to relegate the effective enforcement of State laws to the action of some police officer rather than to the judiciary after a full hearing on the merits of the case.

SPECIFICATION OF ERROR NO. 2

This Honorable Court in reversing herein based

its decision upon the grounds that the Louisiana State Supreme Court could not consider.

Article 7, Section 10 of the Louisiana Constitution of 1921, provides that the appellate jurisdiction of the Supreme Court of Louisiana shall extend in criminal cases to questions of law alone. Thus, the Louisiana Supreme Court is powerless to consider and does not pass upon the sufficiency of evidence in a criminal case. *State v. Alnerico*, 232 La. 847; 93 So. 2d 334. *State v. Hand*, 228 La. 405, 82 So. 2d 691; *State v. Hilliard*, 227 La. 288, 78 So. 2d 835; *State v. Paternostio*, 225 La. 369, 73 So. 2d 177. Since the Louisiana Supreme Court is limited in its review of criminal cases to questions of law only, and is prohibited by the Louisiana Constitution from passing upon the sufficiency of evidence, this court under its own mandate of review of state criminal cases should consider itself so constrained. If there is some evidence, no matter how little, to support a conviction, the Louisiana Supreme Court is constitutionally constrained to accept it, the question of sufficiency being beyond the scope of its constitutional right and power to review. Also, this court has held that whether a conviction was unconstitutional under the due process of law clause depended upon whether such conviction rested upon any evidence at all rather than upon the sufficiency of evidence. *Thompson v. City of Louisville, Kentucky*, (1960) 80 Sup. Ct. 624, 360 U.S. 199, 4 Law Ed. 2d 654.

This is not a case where the record herein is so totally devoid of evidentiary support of the state con-

viction as to be unconstitutional under the due process clause. There is a difference between a conviction based upon evidence deemed insufficient as a matter of state law and one so totally devoid of evidentiary support as to raise the due process issue, and it is only in the latter situation that there is a violation of the due process clause. *Grundlur v. North Carolina*, C.A.N.C. (1960) 283 F. 2d 798.

It is respectfully submitted that to maintain the holding of this court with reference to this reversal would be to do violence to the foregoing laws as enunciated in the cited cases.

It is respectfully submitted that this petition for re-hearing should be granted and that a re-hearing of this case should be had before a full bench.

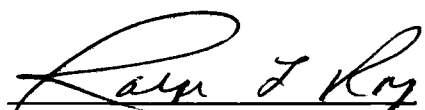
Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Baton Rouge, Louisiana.

SARGENT PITCHER, JR.,
District Attorney,
19th Judicial District,
Baton Rouge, Louisiana.

RALPH L. ROY,
Assistant District Attorney,
19th Judicial District,
Baton Rouge, Louisiana.

By:



RALPH L. ROY

CERTIFICATE

I CERTIFY that this petition is presented in good faith and not for delay.

I further certify that a copy of this petition for re-hearing has been served upon counsel of record for the defendants herein, prior to filing of same, by U. S. Mail, with sufficient postage affixed thereto, properly addressed to their respective offices.

Baton Rouge, Louisiana, this 3rd day of February, 1965.

Ralph L. Roy

RALPH L. ROY
Counsel for Petitioner

B-112, 2-65