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## *Defense of an Intoxicated Motorist*

Carl H. Miller\*

IN CONSIDERING PROBLEMS CONNECTED with the defense of an intoxicated motorist, practicality dictates a careful examination of the specific situation. The attorney who assumes such a task must realize immediately that to defend an intoxicated driver is to subject himself to a certain amount of public criticism. The ever increasing traffic death toll has resulted in a focusing of public attention on this specific problem, and anyone who attempts to tamper with the swift and unerring administration of justice will feel the wrath of public opinion. This is primarily due to the laymen's lack of appreciation for the function of an attorney, that is, to safeguard the constitutional rights of his client, and not to cast himself in the role of judge and jury. However, to deny that drunken driving is responsible for a goodly portion of our traffic fatalities<sup>1</sup> is impossible. Defense of a drunk-driving case must be handled by some attorney in order to preserve the freedoms guaranteed by our Constitution.

### **Under the Influence of an Intoxicating Liquor**

The statutes involved in this situation are quite uniform throughout the country. Basically, they seek to prohibit the operation of a motor vehicle by anyone who is so influenced by an intoxicating liquor as to impair his normal driving ability.<sup>2</sup> The degree of intoxication required to constitute being "under the influence" varies within certain limitations.

In *People v. Weaver*<sup>3</sup> a New York court held that it was not sufficient to constitute an intoxicated condition, within its statute, that the mind of the driver was slightly stimulated or exhilarated as a result of his drinking of intoxicants. Similarly,

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<sup>1</sup> The National Safety Council estimates that at least 20% of all traffic fatalities (approximately 8000/year) are a direct result of the intoxicated driver.

<sup>2</sup> The Ohio statute is typical:

4511.19 R. C. Operation of vehicle while intoxicated.—No person who is under the influence of intoxicating liquor, narcotic drugs, or opiates shall operate any vehicle, streetcar, or trackless trolley within this state.

<sup>3</sup> 188 App. Div. 395, 177 N. Y. S. 71 (1919).

it has been decided<sup>4</sup> by a California court that not any and every "influence" produced by intoxicants will subject the operator of a motor vehicle to a penalty. In *Steffani v. State*<sup>5</sup> the mere taking of a drink was held not to place the driver under the ban of the statute. Conversely though, in *People v. Leiby*,<sup>6</sup> the court maintained that even though a man can walk straight, attend to his business, and not give any outward and visible sign to the casual observer that he is drunk, he is intoxicated if he is so under the influence of liquor as not to be entirely himself, as to be excited, and as not to possess that clearness of intellect that he would otherwise have.

The Ohio courts have followed the proposition, first stated in *State v. Steel*,<sup>7</sup> that to be under the influence of alcohol means that the accused must have consumed some intoxicating beverage in such quantity as to adversely affect his actions, reactions, conduct, movements or mental processes, or to so impair his reaction as to deprive him of normal clearness of intellect and control.

In view of the Ohio proposition, a rather anomalous situation has arisen as to what constitutes an intoxicating liquor. Intoxicating liquor is defined,<sup>8</sup> under the Liquor Control Act,<sup>9</sup> as any liquor containing more than 3.2 percent of alcohol by weight. Beer is defined<sup>10</sup> as any malt beverage containing one half of one percent or more of alcohol by weight but not more than 3.2 percent of alcohol by weight. The importance of this definition becomes clear when we consider the individual who has been arrested for driving while under the influence of an intoxicating liquor, who subsequently is able to show that his condition was solely due to the consumption of "low power" or "3.2 beer." This exact situation has come before the Ohio courts on two different occasions and their resulting decisions stand diametrically opposed.

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<sup>4</sup> *People v. Dingle*, 56 Cal. App. 445, 205 P. 705 (1922).

<sup>5</sup> 45 Ariz. 210, 42 P. 2d 615 (1935); *State v. Noble*, 119 Ore. 674, 250 P. 833 (1926).

<sup>6</sup> 346 Ill. App. 550, 105 N. E. 2d 776 (1952).

<sup>7</sup> 95 Ohio App. 107, 117 N. E. 2d 617 (1952). Approved and followed in *State v. Titak*, 144 N. E. 2d 255 (Ohio 1955); and *State v. Neff*, 104 Ohio App. 289, 148 N. E. 2d 236 (1957).

<sup>8</sup> § 4301.01-A1, Ohio Rev. Code.

<sup>9</sup> § 4301 R. C.

<sup>10</sup> § 4301.01-B2.

In *State v. Hale*,<sup>11</sup> the Ohio Court of Appeals held that the definition of "intoxicating liquor" as found in the Liquor Control Act is restricted to that same act, and has no reference or application to any other section of the Ohio Code. A county court, in *State v. Mikola*,<sup>12</sup> however, held that in the section of the Code providing that no person under the influence of intoxicating liquor shall operate a motor vehicle, the phrase "intoxicating liquor" has the same meaning as is given to that phrase in the Liquor Control Act. Therefore, the court concluded, one intoxicated on 3.2 beer cannot be said to be under the influence of intoxicating liquor, and consequently cannot be convicted for violating the drunken driving statute.<sup>13</sup>

While the first impression from these two cases leads one to believe they can be rationalized, due to the hierarchical arrangement of the state judicial system, yet it must be noted that in the *Mikola* case the judge relied upon two decisions, one an appellate court decision<sup>14</sup> and the other a state Supreme Court decision,<sup>15</sup> both of which held that 3.2 beer was not an intoxicating liquor.<sup>16</sup>

### Operating a Motor Vehicle

Some of the drunken driving statutes specify that the intoxicant must be "driving" a motor vehicle, instead of "operating" a motor vehicle. This has given a narrower meaning to the statute, and where such a statute is under consideration, it is generally accepted that the vehicle must actually be in motion<sup>17</sup> before there is a violation of the statute. However, motion of

<sup>11</sup> 74 Ohio L. Abs. 274, 133 N. E. 2d 104 (1956), appeal dismissed 165 Ohio St. 104, 140 N. E. 2d 55. Accord: *Commonwealth v. Bridges*, 285 Mass. 572, 189 N. E. 616 (1934); *Drew v. State*, 71 Okla. Crim. 415, 112 P. 2d 429 (1941); *State v. Parquette*, 54 R. I. 283, 172 A. 613 (1934).

<sup>12</sup> 82 Ohio L. Abs. 517, 163 N. E. 2d 82 (1959).

<sup>13</sup> The court stressed the need for legislation to correct this situation and in indicating its unhappiness left little to the imagination by stating:

Ben Johnson, when told that a particular fact was true because it was the law is said to have replied, "Then sir, the law is an ass." The decision of this court may well be cited as authority for his observation.

<sup>14</sup> *Kaufman v. Village of Paulding*, 92 Ohio App. 169, 109 N. E. 2d 531 (1951).

<sup>15</sup> *City of Akron v. Scalera*, 135 Ohio St. 65, 19 N. E. 2d 279 (1939).

<sup>16</sup> It is interesting to note that the 104th General Assembly of Ohio took no legislative action on this problem in the last session.

<sup>17</sup> *Underwood v. State*, 24 Ala. App. 191, 132 S. 606 (1931); *Line v. State*, 191 Tenn. 380, 234 S. W. 2d 818 (1950); *Bradman v. State*, 191 Tenn. 626, 235 S. W. 2d 801 (1950).

only a few feet has been found extensive enough to charge the intoxicated driver with a violation of the statute.<sup>18</sup> The majority of the states utilize the word "operating" in their respective statutes. That this term has been considered as all inclusive can be seen by a quick review of several decisions.

In *State v. Webb*,<sup>19</sup> it was held that starting the motor and permitting it to idle were sufficient to constitute "operating" a motor vehicle. The same conclusion has been reached where the automobile has been towed or pushed with an intoxicated person behind the steering wheel,<sup>20</sup> or where he merely started the motor while parked with the front wheels against the curb,<sup>21</sup> or manipulated the gear lever of an automobile on a grade so that it moved several feet through the operation of gravity.<sup>22</sup> In *State v. Roberts*<sup>23</sup> the intoxicated defendant's automobile was being towed up an icy grade by a tow truck. The only contact with the road was with the rear wheels, but the defendant's conduct, consisting of running the motor to help the truck up the grade, was sufficient to constitute a violation of the prohibition against operating a motor vehicle while intoxicated. The only element that prevents this from being a "cut and dried" situation stems from the fact that it is essential that the prosecution establish that the driver was in an intoxicated condition while he was operating the vehicle.<sup>24</sup>

In *State v. Sanford*<sup>25</sup> the defendant was found asleep in the front seat of his car, which was partially in a ditch. When revived, he appeared so intoxicated that he was unable to stand. The court held that it was a matter of conjecture as to whether or not the defendant was under the influence of intoxicating liquor when he operated the automobile. Similarly, in *State v. De Coster*<sup>26</sup> the intoxicated defendant was found slumped over the steering wheel of his vehicle, which was stopped on a public street. The key was in the switch, but the ignition was turned

<sup>18</sup> *Tenino v. Hyde*, 138 Wash. 251, 244 P. 550 (1926); *State v. Magdich*, 105 W. Va. 585, 143 S. E. 348 (1928); *Collins v. State*, 132 Tex. Crim. 327, 104 S. W. 2d 860 (1937); *State v. Hazen*, 176 Kan. 594, 272 P. 2d 1117 (1954).

<sup>19</sup> 202 Iowa 633, 210 N. W. 751 (1926).

<sup>20</sup> *State v. Tacey*, 102 Vt. 439, 150 A. 68 (1930).

<sup>21</sup> *People v. Domagala*, 123 Misc. 757, 206 N. Y. S. 288 (1924).

<sup>22</sup> *Commonwealth v. Clarke*, 254 Mass. 566, 150 N. E. 829 (1926).

<sup>23</sup> 139 Me. 273, 29 A. 2d 457 (1942).

<sup>24</sup> *State v. Kissinger*, 343 Mo. 781, 123 S. W. 2d 81 (1938).

<sup>25</sup> 118 Vt. 243, 108 A. 2d 516 (1954).

<sup>26</sup> 147 Conn. 502, 162 A. 2d 704 (1960).

off, and both tires on the right side were flat. Held, that the defendant was not operating a motor vehicle within the meaning of the statute.<sup>27</sup> The Ohio Court of Appeals in *City of Toledo v. Burks*<sup>28</sup> held that a person steering a vehicle being towed by another vehicle was not guilty of driving an automobile without a license. Whether this case can be applied as analogous to drunken driving remains to be seen.

In some jurisdictions, the statutes specify that the commission of the act must take place on a public street or highway in order to constitute an offense. In such instances, lack of that element will prove fatal to the prosecution.<sup>29</sup>

### Prejudicial Argument and Judicial Bias

It is a credit to the American judicial system that there are so few cases of reversible error due to judicial bias or prejudicial argument by the prosecution. One of the rare reports of judicial interest found sufficient to disqualify the judge is in *State v. Muraski*,<sup>30</sup> where an allegedly intoxicated motorist narrowly avoided striking the magistrate with his automobile. Thereupon, the hapless motorist was taken, by the judge and a police officer, to a doctor for an examination, and then was returned to the court house, where the judge subscribed to the police officer's complaint for driving while under the influence, and the driver was convicted on that charge. The appellate court reversed on the ground that the judge should not have presided at the trial because of his "interest" in the case.

It has been held<sup>31</sup> to be prejudicial error where the judge, after charging the jury that the defendant had a constitutional

<sup>27</sup> See also *People v. Kelley*, 27 Cal. App. 2d 771, 70 P. 2d 276 (1937) (moving car off highway after an accident); *State v. Sullivan*, 146 Me. 381, 82 A. 2d 629 (1951) (starting motor at request of mechanic and then permitting car to roll a short distance).

<sup>28</sup> 100 Ohio App. 127, 136 N. E. 2d 150 (1955).

<sup>29</sup> *Commonwealth v. Paccia*, 338 Mass. 4, 153 N. E. 2d 664 (1958); *State v. Swaringen*, 249 N. C. 38, 105 S. E. 2d 99 (1958); *State v. Anderson*, 247 Minn. 469, 78 N. W. 2d 320 (1956); *Banks v. State*, ---- Okla. Crim. ----, 285 P. 2d 455 (1955); *Morris v. State*, 161 Tex. Crim. 648, 280 S. W. 2d 255 (1955); *City of Milwaukee v. Richards*, 269 Wis. 570, 69 N. W. 2d 445 (1955); *State v. Michaud*, 98 N. H. 356, 100 A. 2d 899 (1953); *Chandler v. State*, 96 Okla. Crim. 344, 255 P. 2d 299 (1953); *Jones v. State*, 94 Okla. Crim. 15, 229 P. 2d 613 (1951); *Rainey v. State*, 31 Ala. App. 66, 12 S. 2d 106 (1943); *Snider v. State*, 145 Tex. Crim. 59, 165 S. W. 2d 904 (1942).

<sup>30</sup> 6 N. J. Super. 36, 69 A. 2d 745 (1949).

<sup>31</sup> *City of Columbus v. Mothersbaugh*, 104 Ohio App. 180, 147 N. E. 2d 132 (1957).

right to refuse to give a sample of his blood or urine, commented to the effect that the courts consistently hand down not guilty verdicts where people have taken the tests and the alcoholic content has been below that showing a person to be under the influence.

The voir dire has, generally speaking, provided little reversible error,<sup>32</sup> and arguments by the prosecutor also have provided little. In the later instance, continuous reference to the killing of little children by drunken drivers, where the fact situation did not warrant it, was held to constitute error in *Holcomb v. State*.<sup>33</sup> Seemingly in direct contradiction though, is *State v. Willard*,<sup>34</sup> where the prosecutor, in his argument to the jury, made the statement "Don't kill my child." Even though there was absent any factual setting for the remark, it was said not to be an abuse of fair debate. An appeal from a driving while intoxicated conviction, in *Wichita v. Hibbs*,<sup>35</sup> was based on certain photographs and other papers which were not used in the prosecution of the case but were left on the counsel table during trial and argument. The court held, that since objection was not made during the course of trial, there was no reversible error.

### Sufficiency of the Evidence<sup>36</sup>

In considering the sufficiency of the evidence required to convict one of driving while intoxicated, it might be best to start with a statement made by the court in *People v. Bobczyk*<sup>37</sup>:

Medical science recognizes 60 pathological conditions which produce symptoms similar to those produced by alcohol, yet the law permits nonexpert lay witnesses to testify to objective symptoms commonly associated with alcoholic intoxication on the theory that sobriety or intoxication are matters of common knowledge.<sup>38</sup>

<sup>32</sup> *State v. Miller*, 60 Idaho 79, 88 P. 2d 526 (1939); *State v. Chealey*, 100 Utah 423, 116 P. 2d 377 (1941).

<sup>33</sup> 239 P. 2d 806 (Okla. Crim. 1952).

<sup>34</sup> 241 N. C. 259, 84 S. E. 2d 899 (1954).

<sup>35</sup> 158 Kan. 185, 146 P. 2d 397 (1944). See also *Deny v. State*, 204 Ind. 21, 182 N. E. 701 (1932) where objection was timely made and a reversal of conviction was had under similar circumstances.

<sup>36</sup> Generally, as to cases where the evidence was held to be insufficient, see 61 C. J. S. Motor Vehicles § 633 (1960).

<sup>37</sup> 343 Ill. App. 504, 99 N. E. 2d 567 (1951).

<sup>38</sup> *Id.* at 570.

The court went on to state that the lack of unanimity<sup>39</sup> in the medical profession as to whether intoxication can be determined by a person's breath goes to the weight of the evidence and not to its admissibility.<sup>40</sup> The pathological conditions discussed in the *Bobczyk* case<sup>41</sup> are best illustrated in *State v. Brisson*,<sup>42</sup> where the prosecution based its case on the faulty locomotion and coordination of the defendant, and the case was reversed when it was found that the defendant was suffering from multiple sclerosis. *People v. Hellwig*<sup>43</sup> resulted in a reversal on the possibility, among other things, that defendant's unsteady walk was due to an arthritic condition. In *People v. Owen*<sup>44</sup> the court held that where intoxication is claimed to have been the cause of certain conduct, it is proper to show that the cause for such conduct was other than intoxication, *i.e.* insanity or habitual eccentricity.

The odor of liquor upon the defendant motorist's breath is generally admissible, but is not alone sufficient to prove intoxication.<sup>45</sup> However, joined with other facts it may well become relevant.<sup>46</sup> In *Naier v. Minidoka County Motor*<sup>47</sup> evidence of the odor of alcohol on a defendant's breath one to two and a half hours after the occurrence in question was admissible, the fact of remoteness in point of time going to the weight of the evidence rather than to its admissibility.

The time element becomes important when the prosecution can show intoxication at some time before or after the time in question. Generally, if the intoxication that can be shown was at a point of time after the incident in question, the prosecutor must be able to show nonaccess to liquor for the

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<sup>39</sup> In this regard see Haggard, *The Alcohol of the Lung Air as an Index of Alcohol in the Blood*, 26 *J. of Lab. & Clin. Med.* 1527 (1958).

<sup>40</sup> See also *People v. Knutson*, 17 *Ill. App. 2d* 251, 149 *N. E. 2d* 461 (1958); *State v. Olivas*, 77 *Ariz.* 118, 267 *P. 2d* 893 (1954); *McKay v. State*, 155 *Tex. Crim.* 416, 235 *S. W. 2d* 173 (1950).

<sup>41</sup> *Supra*, n. 37.

<sup>42</sup> 119 *Vt.* 48, 117 *A. 2d* 255 (1955).

<sup>43</sup> 22 *Misc. 2d* 286, 199 *N. Y. S. 2d* 107 (1960).

<sup>44</sup> 80 *Cal. App.* 248, 251 *P.* 686 (1926).

<sup>45</sup> *State v. Hainbuch*, 74 *Ohio App.* 193, 57 *N. E. 2d* 940 (1943). See also *Holder v. State*, 100 *Ga. App.* 215, 110 *S. E. 2d* 708 (1959); *Laughlin v. Rose*, 200 *Va.* 127, 104 *S. E. 2d* 782 (1958); *Rainey v. State*, *supra*, n. 29; *People v. King*, 28 *N. Y. S. 2d* 460 (*N. Y.* 1941); *People v. Fox*, 256 *App. Div.* 578, 10 *N. Y. S. 2d* 694 (1939); *Critzler v. Donovan*, 289 *Pa.* 381, 137 *A.* 665 (1927).

<sup>46</sup> *Commonwealth v. Phillips*, 169 *Pa. Super.* 64, 82 *A. 2d* 587 (1951).

<sup>47</sup> 61 *Idaho* 642, 105 *P. 2d* 1076 (1940).



intervening period. In *Phillips v. State*,<sup>48</sup> absence of proof of nonaccess to liquor proved fatal to the prosecutor's cause.

In *State v. Kelley*,<sup>49</sup> a twelve hour period between the incident in question and the time of the alleged intoxication was too remote. In *People v. Trantham*,<sup>50</sup> showing of intoxication several hours before the accident was excluded as being too remote in time when the prosecutor failed to show causal connection between such intoxication and the collision.

The time element takes on another role of importance when it is considered as an element of the propriety of admitting, as evidence, the results of Intoximeter tests. In *Commonwealth v. Hartman*,<sup>51</sup> the court maintained that the results of the tests were improperly admitted where there was evidence that the alcohol might not have completely entered the defendant's bloodstream at the time of the arrest, but that subsequent delay in administering of the test allowed a sufficient passage of time to permit the complete ingestion of the alcohol into the bloodstream. Paradoxically though, in *Toms v. State*,<sup>52</sup> the evidence of a breath test was admitted where it was shown that the accident in issue occurred about five minutes after the last drink was taken, and the breath test was not given until about an hour and a half thereafter.

As a rule it is competent to show the refusal of the defendant to submit to intoxication tests.<sup>53</sup> However, where the defendant has refused to submit unless his own physician is present at the examination, and when there is no showing that the physician is unavailable, the defendant's refusal is a reasonable one. The refusal to submit to a test, in such a case, does not raise an inference of guilt, and comment thereon to the jury is improper.<sup>54</sup> Submission to the test, though, will result in a waiver of this privilege,<sup>55</sup> and subsequent objection will be to no avail.

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<sup>48</sup> 25 Ala. App. 286, 145 S. 169 (1932).

<sup>49</sup> 227 N. C. 62, 40 S. E. 2d 454 (1946).

<sup>50</sup> 24 Cal. App. 2d 177, 74 P. 2d 851 (1937).

<sup>51</sup> 47 Berks. 181 (Pa. 1955), reversed 179 Pa. Super. 134, 115 A. 2d 820, reversed 383 Pa. 461, 119 A. 2d 211.

<sup>52</sup> 95 Okla. Crim. 60, 239 P. 2d 812 (1952).

<sup>53</sup> *City of Columbus v. Waters*, 124 N. E. 2d 841 (Ohio 1954); *People v. McGinnis*, 123 Cal. App. 2d 945, 267 P. 2d 458 (1953).

<sup>54</sup> *City of Columbus v. Mullins*, 162 Ohio St. 419, 123 N. E. 2d 422 (1954).

<sup>55</sup> *State v. Chavis*, 116 A. 2d 453 (R. I. 1955).

An inference of guilt, in *People v. Petersen*,<sup>56</sup> was not raised by defendant's failure to state to authorities his claim that someone else had been driving at the time of the alleged offense. The court held that the defendant had no duty to speak when in the custody of the police, but could subsequently raise the matter as a defense.

### Instructions to the Jury

A classic example of instructions that should not be given were developed in *Commonwealth v. Milligan*,<sup>57</sup> a bitterly contested action which saw the first trial thrown out due to misconduct on the part of the Commonwealth. In the second trial a considerable amount of evidence was presented which indicated that the defendant had not been intoxicated, but the judge told the jury that if they were convinced beyond a reasonable doubt of the guilt of the defendant, they,

should have no hesitancy whatsoever, as jurors in the grand, old American system, of bringing in a verdict of guilty.<sup>58</sup>

The appellate court held that the overemphasis on bringing in a verdict of guilty resulted in prejudicial error. A charge to the jury that they might consider personal injury judgments arising out of the same incident was held to be reversible error in *Hodges v. State*.<sup>59</sup> A charge, in *Bartley v. State*,<sup>60</sup> that it was the jury's duty to convict the defendant if it found that he was under the influence of intoxicating liquors, without a further charge that the jury must find that the defendant, because of the intoxicating liquors, was a less safe driver, gave the jury the "to any extent whatsoever" rule, and was error. Failure to charge on proximate cause,<sup>61</sup> or on comparison with normal driving ability,<sup>62</sup> or in conflict with correct special instructions,<sup>63</sup> or on the error of certain presumptions,<sup>64</sup> have all been held to

<sup>56</sup> 4 N. Y. 2d 992, 177 N. Y. S. 2d 510 (1958).

<sup>57</sup> 172 Pa. Super. 607, 94 A. 2d 64 (1953).

<sup>58</sup> *Id.* at 65.

<sup>59</sup> 92 Okla. Crim. 176, 222 P. 2d 386 (1950).

<sup>60</sup> 95 Ga. App. 422, 98 S. E. 2d 110 (1957).

<sup>61</sup> *Espinoza v. People*, 349 P. 2d 689 (Colo. 1960).

<sup>62</sup> *City of Lyndhurst v. Beaumont*, 170 N. E. 2d 291 (Ohio 1959).

<sup>63</sup> *State v. Jennings*, 176 N. E. 304 (Ohio App. 1959).

<sup>64</sup> *City of Toledo v. Gfell*, 107 Ohio App. 93, 156 N. E. 2d 752 (1958).

represent reversible error.<sup>65</sup> Error has been found in charging the jury in matters that do not concern them,<sup>66</sup> or in an incomplete, erroneous and prejudicial manner.<sup>67</sup>

### Conclusion

This examination into the various aspects of defending an intoxicated driver is by no means complete. Its purpose has been to indicate the problem areas in which the most care must be taken in order to insure the constitutional rights of the client. The great majority of individuals charged with operating a motor vehicle while under the influence of an intoxicating liquor are convicted, and in most cases, rightly so. It is that small percentage of individuals wrongfully charged, or if rightfully charged, wrongfully convicted, that concerns the writer.

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<sup>65</sup> See 61 C. J. S. Motor Vehicles § 634 (1960) for a more comprehensive coverage of instructions.

<sup>66</sup> *Megown v. State*, 300 P. 2d 673 (Okla. Crim. 1956).

<sup>67</sup> *Supra* note 63.