SOME FACTORS INFLUENCING THE OUTCOME OF FELONY APPEALS IN MISSOURI*

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Recently I completed a study of all of the felony appeals decided by the Missouri Supreme Court during the two year period ending March 1, 1964.[1] Its purpose was to test the accuracy of the United States Supreme Court's assumption that the absence of a lawyer makes a "meaningless ritual" of a felony appeal.[2] That investigation uncovered other factors, notably prior convictions, which seemed to influence the outcome of appeals. But since they were unrelated to lawyer involvement they were not discussed.

This note presents the material omitted from the first study. Its purpose, however, is not to venture conclusions. The mere coincidence of two events does not prove a causal relationship between them. So, for example, the fact that affirmance rates vary directly with prior convictions does not prove that past records cause appeals to be affirmed. But it does suggest that an investigation into such a possibility might prove fruitful. The purpose of this note, then, is to offer a few suggestions for future research.

I

The data relied upon in both of these articles was obtained from the official files of the Missouri Supreme Court.[3] This causes some problems in identifying defendants with prior convictions. Since 1959, the sole purpose of Missouri's habitual criminal act has been to transfer the function of sentencing from the jury to the judge.[4] The act comes into play only when

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1. Gerard, *The Right to Counsel On Appeal in Missouri*, 1965 WASH. U.L.Q. 463.

2. See Douglas v. California, 372 U.S. 353, 357-58 (1963).

3. The research methods employed are described in detail in Gerard, *supra* note 1, at 464-65. They will not be repeated here.

4. The former statute provided that any person who had previously been convicted of a felony should, upon a subsequent felony conviction, be sentenced (1) to life imprisonment, if the subsequent conviction was for an offense punishable by life imprisonment or by a term which might extend to life, or (2) to the longest term possible, if the subsequent conviction was for an offense punishable by a term of years. MO. REV. STAT. § 556.280 (1949).

The old act was repealed on June 15, 1959 (effective August 28, 1959), and the present statute enacted to replace it. The present law reads:

> If the subsequent offense be such that, upon a first conviction, the offender could

the prosecutor alleges in the indictment or information that the defendant has previously been convicted of a felony. Its effect is to give to the prosecutor the decision whether the judge or the jury will impose sentence. If the prosecutor wants the jury to do the sentencing, he simply does not allege prior convictions. But this does not mean the jury will be unaware of them. If the defendant takes the stand, he still may be cross-examined about his previous record.

There are instances in which the prosecutor deliberately chooses not to allege prior convictions. So far as can be determined, these occur exclusively in cases, such as murder and forcible rape, in which he intends to ask for the death penalty. It is noteworthy, for example, that prior convictions were alleged in only 2 of 21 murders, and 2 of 8 rapes. By contrast, prior convictions were alleged in 20 of 27 robberies and in 15 of 24 larcenies.[5] A defendant in a capital case usually testifies in his own defense and subjects himself to cross-examination. His prior record thereby becomes known even though the prosecutor did not mention it in the information. But the prosecutor still has a scandalized and outraged jury to which he can appeal for a death sentence.

Because the data for this study was taken from official files, only those cases in which the indictment or information alleged prior convictions could be so classified. But it is certain that at least some of the defendants listed as first offenders in the tables actually had, and were known by the juries to have, prior records. All such cases were probably convictions of murder or rape, but this cannot be assumed.

The Missouri Supreme Court decided 163 felony cases during the two year period studied.[6] Five of these were collateral attacks, in the nature of habeas corpus, under Missouri Supreme Court Rule 27.26.[7] They were ignored because they were not true appeals. Additional information about 115 of the remaining 158 cases was secured from lawyers listed as attorneys of record in the official court files.

During this period, there were three ways of appealing a felony convic-

be punished by imprisonment in the penitentiary, then the person shall receive such punishment provided by law for the subsequent offense as the trial judge determines after the person has been convicted. Mo. Rev. Stat. § 556.280 (1959).

There is no legislative history on this statute, nor do the daily newspapers of the period carry any articles which throw light on the cause of the change.

5. See Table 2, *infra*.

6. Additional information about the cases, and research methods employed, will be found in Gerard, *supra* note 1.

7. The rule provides in pertinent part:

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution . . . or is otherwise subject to collateral attack, may file a motion at any time . . . .

Mo. Sup. Ct. R. 27.26.

Table 1[1]
COMPARISON OF AFFIRMANCES BY CRIME AND BY SENTENCE

Sentences	Assault	Burglary	Murder	Robbery	Stealing	Other	Total
1-2 years							
No. of cases	3	11	0	0	9	17	40
No. aff'd	2	7			5	13	27
% aff'd	67%	64%			56%	76%	68%
3-5 years							
No. of cases	4	16[2]	0	3	10	15	48
No. aff'd	1	15		2	8	13	39
% aff'd	25%	94%		67%	80%	87%	81%
6-10 years							
No. of cases	3	9	7	8	5[3]	11[4]	43
No. aff'd	3	7	6	7	5	7	35
% aff'd	100%	78%	86%	88%	100%	64%	81%
11 or more years							
No. of cases	4	0	7	14[5]	0	4	29
No. aff'd	4		4	13		4	25
% aff'd	100%		57%	93%		100%	86%
Life							
No. of cases	0	0	4	2	0	0	6
No. aff'd			1	2	0	0	3
% aff'd			25%	100%			50%
Death							
No. of cases	0	0	3	0	0	2	5
No. aff'd			2			1	3
% aff'd			67%			50%	60%
Total							
No. of crimes	14	36	21	27	24	49	171
No. aff'd	10	29	13	24	18	38	132
% aff'd	71%	81%	62%	89%	75%	77%	77%

1. This table excludes (a) two cases in which the state was the appellant, (b) one case in which the sentence was a fine only, and (c) five cases attacking convictions under the provisions of Rule 27.26. See text for further discussion.

The "total" figures in this table vary from those in other tables because 15 of the 163 cases studied involved more than one crime, and this table is prepared on the basis of crimes rather than cases. There were two defendants in another case; both are counted in this table.

2. Five cases were reversed solely because of errors made in connection with prior offenses. One was reversed because the information was defective in pleading prior convictions. Four were reversed because the method of proving prior convictions was faulty. Because it is reasonably clear that the sentences had nothing to do with the outcome of the appeals, the latter four cases are counted as affirmances in this table. One such case is included in the figure 16 above, and the others are pointed out in notes 3 and 5 below. The reversal because of a faulty information is *not* counted as an affirmance and is located by note 4.

3. Includes one affirmance of the kind discussed in note 2.

4. Includes the reversal discussed in note 2.

5. Includes two affirmances of the kind discussed in note 2.

tion.[8] One was to appeal on the motion for new trial. Under this method, the Missouri Supreme Court reviewed the trial transcript for the errors alleged in the motion for new trial. No brief was filed for the defendant, and no argument was made on his behalf. The second method was to appeal on a brief. This method was identical to the traditional appeal except that no oral argument was presented for the defendant. The third method, of course, was the usual one of filing a brief and making oral argument.

II

Table 1 breaks the cases down by crime and by sentence. It discloses a wide variation in affirmance rates between major types of crime. The highest rate was for robbery, 89 per cent, the lowest, 62 per cent, for murder. One was 12 points higher, the other 15 points lower, than the overall affirmance rate of 77 per cent. Whether these variations were due to the presence of eye witnesses, which the high rate for robbery suggests, or to the presence of other tangible evidence, which the rate for burglary (81 per cent) suggests, or to some other reason, such as peculiar rules of evidence, is unknown. The low figure for murder may be explainable by the fact that seven of the cases carried sentences of life or death, and four of these were reversed. If these seven cases are eliminated, the affirmance rate for murder convictions increases to 71 per cent (10 of 14).

It is generally believed that the chances of securing a reversal on appeal increase with the length of the sentence. Table 1 indicates this belief is mistaken unless the sentence is life or death. The affirmance rate climbed steadily from 68 per cent for sentences of 2 years or less to 86 per cent for sentences of 11 years or more. It then dropped to 50 per cent for life sentences, and 60 per cent for capital cases. This suggests that there may be a correlation between weak cases and light sentences.

One might expect the length of the sentence to increase if the defendant has prior convictions. Table 2 shows that this is what happened, except, interestingly, for the crime of burglary. This fact is hard to explain, unless it reflects a belief that burglars are relatively less dangerous to society.

Affirmance rates were then plotted as a function of prior convictions. The results were dramatic, as Table 3 testifies. Except for the atypical cases decided by the court en banc,[9] affirmance rates were uniformly higher for defendants with prior convictions. The difference in Division 1 was

8. A more detailed description of these procedures can be found in Gerard, *supra* note 1, at 465-68.

9. Only ten cases were decided by the court en banc, and the sentence was capital punishment in five of them. See Gerard, *supra* note 1, at 474.

Table 2

COMPARISON OF SENTENCES (IN YEARS) BY PRIOR CONVICTIONS (SELECTED CRIMES ONLY)

	Assault	Burglary	Murder	Rape	Robbery	Stealing
No priors						
No. of cases	(11)	(18)	(19)	(6)	(7)	(9)
Maximum	14	10	death[1]	death[2]	15	5
Minimum	1/4	2	10	2	5	1
Median	4	3	15	10	10	2
Prior Convictions						
No. of cases	(3)	(18)	(2)	(2)	(20)	(15)
Maximum	35	10	death	50	life[3]	10
Minimum	20	2	30	45	7	2
Median	25	5	—	—	15	5

1. Death penalties were imposed in two cases, life sentences in four cases.
2. Two cases.
3. Two cases.

Table 3[1]

AFFIRMANCES COMPARED TO PRIOR CONVICTIONS

	Division 1		Division 2		En banc		Total		
	No. cases	No. aff'd	No. cases	No. aff'd	No. cases	No. aff'd	No. cases	No. aff'd	% aff'd
MNT									
No priors	21	17	20	15	1	1	42	33	79%
Priors	18	16	18	18	—	—	36	34	95%
Brief only									
No priors	9	7	8	7	—	—	17	14	82%
Priors	5	4	4	3	1	1	10	8	80%
Full argument									
No priors	10	7	15	7	6	3	31	17	55%
Priors	11	10	2	2	2	0	15	12	80%
Total no. cases	74	61	67	52	10	5	151	118	78%
No priors	40	31	43	29	7	4	90	64	71%
Priors	34	30	24	23	3	1	61	54	89%

1. Excludes (a) five attacks under Rule 27.26, (b) two cases in which the state was the appellant, and (c) five cases in which the only error found on appeal was one concerning the pleading or proof of prior convictions. The latter are omitted because it was impossible for the court to determine, under the circumstances, whether or not the defendants actually had previous convictions.

Table 4[1]
AFFIRMANCES: PRIOR CONVICTIONS AND TYPE OF ATTORNEY

	Retained Attorney			*Other Attorney*		
	No. cases	No. aff'd	% aff'd	No. cases	No. aff'd	% aff'd
MNT						
No priors	20	15	75%	5	4	80%
Priors	4	3	75%	14	14	100%
Brief Only						
No priors	9	7	78%	0	0	—
Priors	3	3	100%	3	1	33%
Full Argument						
No priors	16	8	50%	6	4	67%
Priors	7	5	71%	6	6	100%
Totals						
No priors	45	30	67%	11	8	73%
Priors	14	11	79%	23	21	91%
Total, all cases	59	41	70%	34	29	85%

1. Excludes (a) two cases in which state appealed, (b) five attacks under Rule 27.26, and (c) five cases in which the only error found was one concerning the pleading or proof or prior convictions. See Table 3, note 1.

between 88 per cent (30 of 34) and 77 per cent (31 of 40). The difference was even more striking in Division 2, dropping from 96 per cent (23 of 24) for those with prior convictions, to 67 per cent (29 of 43) for those without. Overall, the difference in affiirmance rates between those with prior convictions and those without was 18 points.

The data reviewed in the earlier study suggested that lawyers who were retained were more likely to be successful in handling their appeals than lawyers who were not.[10] Table 4 was an effort to compare the success rates of each in handling the different types of defendants, first offenders and repeaters. The absolute numbers derived from making this comparison were small because the categories were so numerous. They may be too small to be statistically reliable. Assuming reliability, the figures tend to support the implications of the first study.

10. There were some difficulties in classifying attorneys as "retained." Briefly, the category of "retained attorney" included all lawyers who said they were retained (on the questionnaires they returned) (a) either at the trial or for the appeal, (b) whether or not they were paid, and (c) irrespective of who retained or paid them. "Other attorneys" were all other lawyers, except those who were also defendants. See Gerard, *supra* note 1, at 472.

The salient feature of Table 4, however, is reliable[11] and it appeared unexpectedly. The table reveals that only 14, less than 25 per cent, of the 59 cases handled by retained attorneys involved defendants with prior convictions. By contrast, 68 per cent (23 of 34) of the clients of other attorneys were repeaters. What this means is anybody's guess; the possibilities are manifold. One is that defendants who have been through the mill are likely to believe that one lawyer is as good (or as poor) as the next, and therefore that there is no point in paying for something they can get for free.

11. Subject, of course, to the *caveat* expressed in Section I of the text, *supra,* concerning the identification of cases involving first offenders.