

# Northern Illinois University Law Review



Volume 11

1990

Number 1

Waiver of Constitutional Issues in Criminal  
Cases: Confusion in the Illinois Supreme  
Court

*Timothy P. O'Neill*

# Waiver of Constitutional Issues in Criminal Cases: Confusion in the Illinois Supreme Court

TIMOTHY P. O'NEILL\*

## I. INTRODUCTION

If a criminal defendant does not challenge the constitutionality of a statute at trial, is he precluded from raising the issue on appeal? On December 30, 1988, the Appellate Court of Illinois, First District, decided *People v. King*.<sup>1</sup> The appellant, convicted under Illinois' Habitual Criminal Act,<sup>2</sup> challenged the constitutionality of that statute for the first time on appeal. The court found the appellant had waived the issue, stating "[i]t is well settled that the question of the constitutionality of a statute cannot be properly raised for the first time in a court of review, but must have been presented to the trial court and ruled upon by it, and the person challenging its validity must have preserved proper objections to such rulings."<sup>3</sup> In support of this proposition the court cited *People v. Amerman*,<sup>4</sup> a 1971 Illinois Supreme Court case.

The citation of *Amerman* came as no surprise. Over the previous two decades, *Amerman* had been the standard citation for the prop-

---

\* Associate Professor of Law, The John Marshall Law School; A.B. Harvard University; J.D. University of Michigan.

\*\* The author wishes to acknowledge the invaluable research assistance of Nicholas Geiorbano, Esq.

1. 178 Ill. App. 3d 340, 533 N.E.2d 520 (1st Dist. 1988) (defendant's failure to challenge constitutionality of statute at trial constitutes waiver of the issue on appeal).

2. ILL. REV. STAT. ch. 38, para. 33B-1 (1985).

3. 178 Ill. App. 3d at 347, 533 N.E.2d at 523-24 (citing *People v. Amerman*, 50 Ill. 2d 196, 279 N.E.2d 353 (1971); *People v. Pettigrew*, 123 Ill. App. 3d 649, 462 N.E.2d 1273 (1984)).

4. 50 Ill. 2d 196, 279 N.E.2d 353 (1971) (defendant's failure to challenge constitutionality of statute at trial constitutes waiver of the issue on appeal). In *People v. Bryant*, 128 Ill. 2d 448, 453-54, 539 N.E.2d 1221, 1224 (1989), the Illinois Supreme Court claimed to have overruled *Amerman* in its 1973 decision in *People v. Frey*, 54 Ill. 2d 28, 294 N.E.2d 257 (1973). See *infra* notes 107-116 and accompanying text.

osition that in Illinois a constitutional challenge to a statute could not be raised for the first time on appeal. Numerous appellate court decisions relied on *Amerman* in support of that proposition.<sup>5</sup>

What did come as a surprise was an Illinois Supreme Court case decided less than five months after *King*. In *People v. Bryant*,<sup>6</sup> a defendant convicted under a section of the Illinois Vehicle Code<sup>7</sup> challenged the constitutionality of that provision for the first time on appeal. The Illinois Supreme Court cited *Amerman*, but stated that it had *overruled that case in 1973*.<sup>8</sup> Since 1973, the court said, a constitutional challenge to a statute could "be raised at any time."<sup>9</sup>

Needless to say, the Illinois Supreme Court's observation that *Amerman* had not been good law for the last sixteen years may have come as a shock to those appellate courts which had regularly cited it during that period. Why would these courts have continued to rely on a case which had been overruled years before? Who was responsible for this confusion?

## II. THE ILLINOIS SUPREME COURT AND "JUDICIAL SIN"

Karl Llewellyn in *The Common Law Tradition*<sup>10</sup> described a practice of appellate courts which he characterized as "judicial sin."<sup>11</sup> It is a situation in which an appellate court produces "divergent lines of [decisions] which deliberately ignore each other."<sup>12</sup> This article

5. See, e.g., *People v. King*, *supra* notes 1-3 and accompanying text; *People v. Mays*, 176 Ill. App. 3d 1027, 1043-44, 532 N.E.2d 843, 853 (1st Dist. 1988); *People v. Kauffman*, 172 Ill. App. 3d 1040, 1043, 527 N.E.2d 645, 647 (1st Dist. 1988); *People v. Cannady*, 159 Ill. App. 3d 1086, 1088-89, 513 N.E.2d 118, 119-20 (1st Dist. 1987); *People v. Kokoraleis*, 154 Ill. App. 3d 519, 527 n.1, 507 N.E.2d 146, 151 n.1 (1st Dist. 1987); *People v. Strong*, 151 Ill. App. 3d 28, 35, 502 N.E.2d 744, 749 (3d Dist. 1986); *People v. Nester*, 123 Ill. App. 3d 501, 507, 462 N.E.2d 1011, 1016 (2d Dist. 1984); *People v. Denby*, 102 Ill. App. 3d 1141, 1146, 430 N.E.2d 507, 511 (5th Dist. 1981).

6. 128 Ill. 2d 448, 539 N.E.2d 1221 (1989).

7. ILL. REV. STAT. ch. 95 1/2, para. 4-103(b) (1985).

8. *People v. Bryant*, 128 Ill. 2d 448, 453-54, 539 N.E.2d 1221, 1223-24 (1989). The court said that *Amerman* was overruled by *People v. Frey*, 54 Ill. 2d 28, 294 N.E.2d 257 (1973). It also noted that *Frey* had overruled *People v. Luckey*, 42 Ill. 2d 115, 245 N.E.2d 769 (1969) (holding that the constitutionality of a statute could not be challenged in an appellate court unless the issue had been raised and ruled on by the trial court). See *Bryant*, 128 Ill. 2d at 453-54, 539 N.E.2d at 1223-24.

9. *Bryant*, 128 Ill. 2d 448, 454, 539 N.E.2d 1221, 1224 (1989).

10. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

11. *Id.* at 459.

12. *Id.* at 459-60. Earlier in the book Llewellyn characterized this as "Precedent Technique Number 39" and labeled it "[f]latly illegitimate." *Id.* at 85.

contends that Llewellyn's description perfectly characterizes the muddle created by the Illinois Supreme Court regarding whether the constitutionality of a statute can be challenged for the first time on appeal. As will be illustrated, the Illinois Supreme Court unthinkingly constructed two parallel lines of authority on this issue which arrived at exactly opposite conclusions.<sup>13</sup> If the court chose to characterize the issue as whether a constitutional challenge could be raised for the first time on appeal, it could point to a long line of authority exemplified by *People v. Amerman* stating that the issue was waived.<sup>14</sup> If, on the other hand, it chose to characterize the issue as one challenging the validity of an indictment predicated upon an unconstitutional statute, it could cite a similarly long line of authority holding that a void indictment could be challenged at any time.<sup>15</sup>

Thus, the Illinois Supreme Court in *Bryant* was being disingenuous when it stated that it had overruled *Amerman* in 1973. Instead of acknowledging its sloppy jurisprudence in creating parallel, contradictory lines of authority, it pretended that no such conflict existed. This article will discuss the consequences of the court's clumsy attempt to re-write history in *Bryant*. The *Bryant* opinion, however, cannot be understood without first considering *People v. Amerman* and its progeny.

### III. *PEOPLE V. AMERMAN* AND *PEOPLE V. FREY*: THE SEEDS OF CONFUSION

The defendant in *Amerman* had been convicted pursuant to the Firearm Owner's Identification Act.<sup>16</sup> He asked the Illinois Supreme Court to find that statute unconstitutional. The court noted that, although defendant's trial attorney's opening statement had included a claim that the statute in question was "totally unconstitutional," no other reference to this claim appeared in either the trial record or post-trial motions.<sup>17</sup> The court then held that a challenge to the constitutionality of a statute cannot be raised for the first time in a reviewing court, and that the comment in the opening statement was "obviously inadequate as a foundation for appeal."<sup>18</sup>

Illinois appellate courts immediately began to cite *Amerman* to support a finding that a defendant had waived a constitutional

---

13. See *infra* notes 16-26 and 46-52 and accompanying text.

14. See *supra* note 5 and accompanying text.

15. See *infra* notes 46-52 and accompanying text.

16. ILL. REV. STAT. ch. 38, para. 83-1 (1968).

17. *People v. Amerman*, 50 Ill. 2d 196, 197, 279 N.E.2d 353, 354 (1971).

18. *Id.*

argument by failing to raise the issue in the trial court.<sup>19</sup> This continued unabated until 1989, when the Illinois Supreme Court in *Bryant* claimed it had overruled *Amerman* in *People v. Frey*<sup>20</sup> in 1973.

In *Frey*, the Illinois Supreme Court had reviewed two consolidated cases dealing with criminal prosecutions under the Illinois Abortion Statute.<sup>21</sup> In one case, the defendant Frey had filed a motion to dismiss the indictment, alleging that the statute was unconstitutional. The trial court had granted the motion and the State appealed. During the pendency of the appeal, however, the United States Supreme Court decided *Roe v. Wade*.<sup>22</sup> On the basis of *Roe*, the Illinois Supreme Court affirmed the ruling of the trial court dismissing the indictment.

The consolidated case, *People v. Mirmelli*,<sup>23</sup> was different procedurally. There the defendant, Mirmelli, was tried and convicted under the statute. His conviction was affirmed by the Appellate Court of Illinois, First District.<sup>24</sup> The appellate court opinion notes that Mirmelli challenged the constitutionality of the abortion statute for the first time in his reply brief. Because he had failed to raise the issue in the trial court, the appellate court found the issue to have been waived.<sup>25</sup> The Illinois Supreme Court, however, made no mention of either the appellate court opinion or the waiver issue. Instead, the court simply reversed the conviction, tersely noting that because the statute creating the offense was invalid, "a judgment entered thereon [was] erroneous and void."<sup>26</sup>

Thus, *People v. Frey* — the case which *Bryant* said had overruled *Amerman* — not only does not even mention the *Amerman* case, but fails to discuss anything even approaching the waiver issue. The problem, then, was how courts could harmonize *Amerman*, which demanded that a constitutional challenge to a statute be raised at trial or waived, with *Frey*, which entertained a constitutional challenge

---

19. See *supra* note 5.

20. 54 Ill. 2d 28, 294 N.E.2d 257 (1973).

21. ILL. REV. STAT. ch. 38, para. 23-1 (1971).

22. 410 U.S. 113 (1973) (holding Texas criminal abortion statutes unconstitutional).

23. *People v. Mirmelli*, 130 Ill. App. 2d 1, 264 N.E.2d 470 (1st Dist. 1970) was consolidated with, and is known at the supreme court level as, *People v. Frey*, 54 Ill. 2d 28, 294 N.E.2d 257 (1973).

24. *People v. Mirmelli*, 130 Ill. App. 2d 1, 264 N.E.2d 470 (1st Dist. 1970).

25. *Id.* at 15-16, 264 N.E.2d at 478.

26. *People v. Frey*, 54 Ill. 2d 28, 32, 294 N.E.2d 257, 259 (citing *People v. Collins*, 50 Ill. 2d 295, 278 N.E.2d 792 (1972); *People v. Hudson*, 50 Ill. 2d 1, 276 N.E.2d 345 (1971); *People v. Eisen*, 357 Ill. 105, 191 N.E. 219 (1934)).

without even inquiring as to whether the issue was raised below.

#### IV. APPELLATE COURT ATTEMPTS TO RECONCILE *AMERMAN* AND *FREY*

A year after the Illinois Supreme Court's decision in *Frey*, the Appellate Court of Illinois, First District, faced a situation in which a defendant convicted of unlawful use of weapons<sup>27</sup> challenged the constitutionality of the statute for the first time on appeal. That case, *People v. Graves*,<sup>28</sup> held that the constitutional issue was properly before the court, finding that *Frey* had "impliedly overruled" *Amerman*.<sup>29</sup> It based this observation on the fact that the appellate court report of *Mirmelli* — the case consolidated with *Frey*<sup>30</sup> — had noted that Mr. Mirmelli had not raised the issue at the trial court level.<sup>31</sup> *Graves* thus concluded that *Frey-Mirmelli* must stand for the proposition that a defendant who has been convicted under an unconstitutional statute may raise the constitutional issue for the first time on appeal. Therefore, reasoned *Graves*, *Amerman* is no longer good law.

The *Graves* court's contention that *Frey-Mirmelli* implicitly overruled *Amerman* was rejected by at least four courts.<sup>32</sup> Perhaps the best reasoned of these cases is *People v. Koppen*,<sup>33</sup> in which the Second District explained how the Illinois Supreme Court could have decided *Mirmelli* without overruling *Amerman*. According to *Koppen*, the rule of *Frey* is that "[o]nly where the unconstitutionality of a statute has first been established [does] it become a matter of fundamental justice to apply to subsequent (*or consolidated*) cases on appeal even though the issue has not been raised in the trial court."<sup>34</sup> Thus, the finding of unconstitutionality in the *Frey* case applied to *Mirmelli*

---

27. ILL. REV. STAT. ch. 38, para. 24-1(a)(10) (1973).

28. 23 Ill. App. 3d 762, 320 N.E.2d 95 (1st Dist. 1974).

29. *Id.* at 765, 320 N.E.2d at 98.

30. See *supra* note 20 and accompanying text.

31. *People v. Graves*, 23 Ill. App. 3d at 765, 320 N.E.2d at 98 (quoting *People v. Mirmelli*, 130 Ill. App. 2d 1, 15, 264 N.E.2d 470, 478 (1st Dist. 1970)). Again, it should be emphasized that the supreme court's decision in *Frey* makes no mention of the *Mirmelli* decision at the appellate court level. See *supra* notes 23-26 and accompanying text.

32. *People v. Koppen*, 29 Ill. App. 3d 29, 329 N.E.2d 421 (2d Dist. 1975); *People v. Grammer*, 24 Ill. App. 3d 648, 321 N.E.2d 735 (3d Dist. 1974); *People v. Nelson*, 26 Ill. App. 3d 227, 324 N.E.2d 719 (5th Dist. 1975); *People v. Diaz*, 33 Ill. App. 3d 866, 338 N.E.2d 579 (3d Dist. 1975).

33. 29 Ill. App. 3d 29, 329 N.E.2d 421 (2d Dist. 1975).

34. *Id.* at 31, 329 N.E.2d at 423 (emphasis added).

by Treece had been decided adversely to his position by other courts, the court concluded that it was not a "substantial question" and therefore held that it had been waived.<sup>99</sup>

Note the circular reasoning in *Treece*: first, in order to decide if a question is "substantial" a court should consider the merits; second, if a defendant loses on the merits, it is not a substantial question; third, if it is not a substantial question, then a court can refuse to reach the merits by finding waiver; fourth, thus, waiver will be found where a defendant would lose on the merits. In a nutshell, according to *Treece* the court must answer the question before it chooses whether to consider the question! Why the Second District decided *Moorhead* and *Treece* in such disparate ways is a mystery.<sup>100</sup>

The Second District's confused, yet well-intentioned, attempts at harmonizing *Amerman* and *Wagner* culminated in its opinion in *People v. Hominick*,<sup>101</sup> decided merely five months before the Illinois Supreme Court's opinion in *Byrant*. Hominick challenged, for the first time on appeal, the constitutionality of Illinois' narcotics racketeering statute.<sup>102</sup> The *Hominick* court cited *Amerman*, of course, for the general proposition of waiver. Yet instead of following its *McNeal* approach of considering whether the constitutional question was "substantial,"<sup>103</sup> the court found waiver by citing the Second District decision in *Koppen*<sup>104</sup> — decided *seven years before* the supreme court's sentencing decision in *Wagner*<sup>105</sup> — for the proposition that only where the unconstitutionality of a statute had already been established would the waiver rule be relaxed.<sup>106</sup>

It is easy to criticize the legal gyrations used by the Second District in attempting to harmonize *Amerman* and *Wagner*. Yet the real culprit was the Illinois Supreme Court, which stubbornly refused

---

99. *Id.*

100. See also, *People v. Leonard*, 171 Ill. App. 3d 380, 385, 526 N.E.2d 397, 400 (2d Dist. 1988) (holding that a constitutional challenge was not a "substantial question" without providing any reason).

101. 177 Ill. App. 3d 18, 531 N.E.2d 1049 (2d Dist. 1988).

102. *People v. Hominick*, 177 Ill. App. 3d 18, 37-38, 531 N.E.2d 1049, 1062 (2d Dist. 1988) (citing ILL. REV. STAT. ch. 56 1/2, paras. 1652, 1654 (1985)).

103. See *supra* notes 71-77 and accompanying text.

104. *People v. Koppen*, 29 Ill. App. 3d 29, 329 N.E.2d 421 (2d Dist. 1975). See *supra* notes 33-40 and accompanying text.

105. *People v. Wagner*, 89 Ill. 2d 308, 433 N.E.2d 267 (1982). See *supra* notes 53-58.

106. *People v. Hominick*, 177 Ill. App. 3d at 38, 531 N.E.2d at 1062 (citing *People v. Gully*, 151 Ill. App. 3d 795, 502 N.E.2d 1091 (5th Dist. 1986); *People v. Koppen*, 29 Ill. App. 3d 29, 329 N.E.2d 421 (2d Dist. 1975)).

to recognize that it had spawned two irreconcilable lines of authority in a crucial area of constitutional criminal procedure. The misguided way in which it created the problem was matched by the equally misguided way it attempted to solve the problem in *People v. Bryant*.

#### VII. *PEOPLE V. BRYANT*: THE SUPREME COURT RECOGNIZES (AND EXACERBATES) THE PROBLEM

Interestingly, the first decision which appears to have simply declared that the *Amerman* and *Wagner* approaches were irreconcilable was the *appellate court opinion* in *People v. Bryant*.<sup>107</sup> There the First District described these approaches as representing "two divergent views."<sup>108</sup> Only in reviewing this decision did the Illinois Supreme Court finally claim that it had overruled *Amerman* through the *Frey* case in 1973.<sup>109</sup>

It is difficult to understand what compelled the court to make such a claim. As noted earlier, *Frey* contains no mention of *Amerman*.<sup>110</sup> The Illinois Supreme Court continued to cite *Amerman* throughout the 1970's and 1980's without any indication that it was no longer good law.<sup>111</sup> Moreover, its 1981 decision in *Myers*<sup>112</sup> implicitly showed that it considered the *Amerman* waiver rule to be sound.<sup>113</sup>

Furthermore, in the Illinois Supreme Court's haste to pretend that *Amerman* had been overruled sixteen years before, it may have conceded far more than it intended. Recall that the reason *Wagner* held that a defendant could raise the invalidity of the statute under which he was convicted for the first time on appeal was that a void indictment deprived the trial court of jurisdiction.<sup>114</sup> So, too, in *People*

---

107. 165 Ill. App. 3d 996, 520 N.E.2d 890 (1st Dist. 1988), *rev'd on other grounds*, 128 Ill. 2d 448, 539 N.E.2d 1221 (1989). Note that the First District cites *People v. Luckey*, 42 Ill. 2d 115, 245 N.E.2d 769 (1969), instead of *People v. Amerman*, 50 Ill. 2d 196, 279 N.E.2d 353 (1971), for the supreme court's view on waiver. *Luckey* and *Amerman* exhibit similar approaches to waiver. For a discussion of *Luckey*, see *supra* note 8.

108. *People v. Bryant*, 165 Ill. App. 3d 996, 998-99, 520 N.E.2d 890, 892 (1st Dist. 1988), *rev'd on other grounds*, 128 Ill. 2d 448, 539 N.E.2d 1221 (1989).

109. *Bryant*, 128 Ill. 2d at 453-54, 539 N.E.2d at 1223-24 (1989). Note that the supreme court also found that *Frey* overruled *People v. Luckey*. For a discussion of *Luckey*, see *supra* note 8.

110. See *supra* notes 20-26 and accompanying text. *Frey* also includes no mention of *Luckey*.

111. See *supra* notes 41-45 and accompanying text.

112. See *supra* note 45 and accompanying text.

113. See *supra* note 45 and accompanying text. Note that the *Myers* court did not cite *Amerman*.

114. See *supra* notes 53-58 and accompanying text.