Michigan Law Review

Volume 52 | Issue 2

1953

Criminal Procedure - Juries - Effect of Disqualified Juror on the Verdict

Joseph M. Kortenhof S.Ed.
University of Michigan Law School

CRIMINAL PROCEDURE — JURIES — EFFECT OF DISQUALIFIED JUROR ON THE VERDICT—Defendant was convicted of selling whiskey and imprisoned in the county jail. After the time for appeal had elapsed he discovered that one jury member had been an unpardoned convict. In a habeas corpus proceeding the defendant urged that the judgment was void and subject to collateral attack. The county court refused to discharge the defendant. On appeal, *held*, affirmed. Discovery after the verdict that a convict sat on the jury, contrary to statute,[1] gives an automatic right to a new trial. However, since the defect only renders the verdict voidable and not void it must be challenged within the time allotted for appeal or motion for a new trial and it cannot be the subject of a collateral attack in a habeas corpus proceeding. *Ex parte Bronson*, (Tex. Crim. App. 1952) 254 S.W. (2d) 117.

The discovery after the verdict that a disqualified person sat on the jury is generally held not an automatic ground for a new trial.[2] However, the defect may be a sufficient basis for a new trial in the discretion of the court where it appears that reasonable diligence was exercised to discover the defect on voir dire,[3] and that the defect probably caused an unjust verdict.[4] These two requirements must be proved by compelling evidence. The majority of

[1] Tex. Code Crim. Proc. (Vernon, 1941) art. 616.

[2] See annotation, 126 A.L.R. 518 (1940).

[3] Piper v. Flagg, 92 N.H. 405, 32 A. (2d) 324 (1943); Cottman v. Federman Co., 71 Ohio App. 89, 47 N.E. (2d) 1009 (1942).

[4] James v. State, 68 Ark. 464, 60 S.W. 29 (1900); Commonwealth v. Johnson, 213 Pa. 432, 62 A. 1064 (1906).

the courts are reluctant to set aside verdicts and grant new trials because of a disqualified juror, because it is feared that should they do so "as soon as the accused was convicted the trial of jurors would begin."[5] Some courts, however, will grant a new trial merely upon the showing that a disqualified person sat on the jury and that the defect was urged on the court within the time allotted for a new trial or appeal.[6] Of the courts following the minority approach, some distinguish among the various statutory disabilities concerning jury service and hold that there is an automatic right to a new trial only where the juror was physically or mentally incompetent or an unpardoned convict.[7] No reason has been advanced for the inclusion of unpardoned convicts in this class beyond the old common law requirement that a jury be composed of twelve "good and true" men.[8] A very few courts have ventured the theory that the participation of a juror who is not qualified to sit completely voids the verdict.[9] However, the cases in which this theory was presented were decided on direct appeal and not on collateral attack.[10] Furthermore, later cases in these jurisdictions have largely explained away the dicta in the earlier decisions.[11]

The operation of the majority and minority approaches can best be explored in the light of three different fact situations. (1) The party who subsequently complains about the defect may have failed to question the juror in regard to the disqualification on voir dire. The majority of the courts, in this instance, would probably deny the motion for a new trial on the ground that reasonable diligence has not been shown by the moving party.[12] The minority view, on

[5] Commonwealth v. Flanagan, 7 W. & S. (Pa.) 415 at 422 (1844). Motions for new trial have been denied where it was discovered after the verdict that some of the jurors were not on the jury list as selected by the jury commissioners, Morgan v. State, 43 Tex. Crim. 543, 67 S.W. 420 (1902), or were not citizens of the state, People v. Evans, 124 Cal. 206, 56 P. 1024 (1899), or were aliens, Neal v. Neal, 181 Mich. 114, 147 N.W. 624 (1914), or were interested in the outcome of the suit, Daniels v. Lowell, 139 Mass. 56, 29 N.E. 222 (1885), or had expressed completely prejudicial statements prior to and during the trial, Hepworth v. Covey Bros. Amusement Co., 97 Utah 205, 91 P. (2d) 507 (1939), or were related to the opposing party, Lumber Co. v. Moss, 186 Ark. 30, 52 S.W. (2d) 49 (1932), or were younger than the statutory age limit, Johns v. Hodges, 60 Md. 215 (1883), or older, Blair v. Paterson, 131 Mo. App. 122, 110 S.W. 615 (1908), or were unpardoned convicts, Goad v. State, 106 Tenn. 175, 61 S.W. 79 (1900); State v. Wilson, 230 Mo. 647, 132 S.W. 238 (1910).

[6] See Netter v. Louisville R. Co., 134 Ky. 678, 121 S.W. 636 (1909), for a representative decision. See also 126 A.L.R. 518 (1940).

[7] Wright v. Davis, 184 Ga. 846, 193 S.E. 757 (1937). See also State v. Levy, 187 N.C. 583, 122 S.E. 386 (1924).

[8] Williams v. State, 12 Ga. App. 337, 77 S.E. 189 (1913).

[9] Williams v. State, note 8 supra; Garrett v. Wienburg, 54 S.C. 127, 31 S.E. 341 (1898). The court in the principal case overruled dicta to the same effect in Johnson v. State, 129 Tex. Crim. 162, 84 S.W. (2d) 240 (1935).

[10] See note 9 supra.

[11] E.g., State v. Kennedy, 177 S.C. 195, 181 S.E. 35 (1935), explaining Garrett v. Wienburg, note 9 supra.

[12] Morley v. Cranmore Skimobiles, (D.C. N.H. 1946) 67 F. Supp. 812; Alexander v. R. D. Grier & Sons Co., 181 Md. 415, 30 A. (2d) 757 (1943). There may be a possible exception to the rule where questioning would have been fruitless. See Moore v. Farmers' Mutual Ins. Assn., 107 Ga. 199, 33 S.E. 65 (1899). See also Sinsheimer v. Edward Weil Co., (Tex. Civ. App. 1910) 129 S.W. 187, where the court held that denial of a new trial was within the trial court's discretion even though counsel was prohibited by statute from asking the juror whether he had ever been convicted of a crime.

the other hand, would not deny the motion for this reason, since diligence need not be shown.[13] (2) The complaining party may question the disqualified juror but receive a false answer. Clearly in this situation the minority courts will grant a new trial.[14] However, the matter is still not free from difficulty under the majority rule. A few courts adhering to the majority view insist that the falsification be intentional,[15] while others require that the question asked on voir dire be specific and not general.[16] Further, the majority rule requires that the verdict be "probably unjust" before a new trial will be granted.[17] (3) The complaining party's challenge for cause may be erroneously overruled by the trial court. The minority courts grant a new trial in this situation without hesitation,[18] while the majority will grant a new trial if some prejudice to the complaining party can be shown.[19] Seemingly, the majority approach operates as fairly to the complaining party in every instance as does the minority view, and carries with it none of the disadvantages of trial inconvenience and uncertainty of verdict that follow in the wake of the minority view. The requirement that the verdict must be at least "probably unjust" appears eminently sound. The requirement that the unsuccessful party must show that he exercised reasonable diligence to discover the defect on voir dire is based upon the principle that in the absence of such diligence the party has waived any right he may have to complain.[20] Some courts have attacked this requirement on the theory that a party cannot waive what he does not know.[21] The answer to this contention is simply that negligent ignorance works a waiver in the same manner as actual knowledge.[22] In the principal case the court held that the defendant could not complain about the disqualified juror after the time for direct appeal had elapsed, since the defect only made the verdict voidable and not void. However, had the defendant made a timely appeal or motion for new trial, the court indicates that it would have been granted "without

[13] See 1 THOMPSON, TRIALS §116 (1912).

[14] Olympic Realty Co. v. Kamer, 283 Ky. 432, 141 S.W. (2d) 293 (1940).

[15] Waeckerly v. Colonial Baking Co., 228 Mo. App. 1185, 67 S.W. (2d) 779 (1934); Lane v. Vaselius, 137 Misc. 756, 244 N.Y.S. 585 (1930).

[16] Lankford v. Thompson, 354 Mo. 220, 189 S.W. (2d) 217 (1945); Priest v. Cafferata, 57 Nev. 153, 60 P. (2d) 220 (1936).

[17] Meier v. Edsall, 192 Okla. 529, 137 P. (2d) 926 (1943); Kuzminski v. Waser, 314 Ill. App. 438, 41 N.E. (2d) 1008 (1942).

[18] Klyce v. State, 79 Miss. 652, 31 S. 339 (1902); Chicago, B. & Q. R. Co. v. Krayenbuhl, 70 Neb. 766, 98 N.W. 44 (1904).

[19] A usual requirement is that the complaining party's peremptory challenges were exhausted, since otherwise he might have removed the offensive juror, or that upon the removal of the offensive juror by peremptory challenge he had none left to use upon other jurors. See Goad v. State, note 5 supra.

[20] Turley v. State, 74 Neb. 471, 104 N.W. 934 (1905); Queenan v. Territory, 11 Okla. 261, 71 P. 218 (1901).

[21] Bristow v. Commonwealth, 15 Gratt. (56 Va.) 634 (1859).

[22] State v. Matheson, 130 Iowa 440, 103 N.W. 137 (1905); State v. Clarke, 34 Wash. 485, 76 P. 98 (1904).

regard to a showing of injury or probable injury or of consent or waiver."[23] While the result in the principal case seems sound, the reasoning is based upon the minority view and is therefore subject to question.

Joseph M. Kortenhof, S.Ed.

[23] Principal case at 121.