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JUROR MISCONDUCT: AVAILABILITY OF A HEARING ON ALLEGED ILLEGAL VIEW

Defendants were convicted of attempted burglary in the third degree and possession of burglar's instruments.[1] Their counsel moved for a new trial, on his own affidavit, deposing that certain jurors had told him of an unauthorized visit during the trial to the scene of defendants' alleged crime, apparently in order to better understand the evidence. Denial of defendants' motion for a new trial was affirmed by the Appellate Division of the Supreme Court,[2] and—on appeal to the New York Court of Appeals—again affirmed. *Held:* Affidavit of defense counsel that certain jurors had reported an unauthorized visit during a trial to the scene of the alleged crime is not such competent proof of jury misconduct as to require a new trial. *People v. DeLucia,* 15 N.Y. 2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377, *cert. denied,* 382 U.S. 821 (1965.)[3]

A juror's unauthorized view of the scene of a crime is misconduct and, if prejudicial to the defendant, constitutes ground for a new trial.[4] In cases in which defendant claims that jury misconduct prejudiced his right to a fair trial, the prohibition against jurors impeaching their verdict by allegations of their own misconduct[5] may deny defendant his constitutionally guaranteed fair trial by excluding the only evidence establishing such misconduct.[6] Traditionally, enforcement of this prohibition has been justified on the need for certainty of jury verdicts, protection of jurors from harassment, and freedom of juryroom deliberation.[7]

The majority opinion in the principal case, after stating the rule excluding jurors' affidavits that attempt to impeach a verdict by alleg-

[1] One defendant was convicted of a felony and the other of a misdemeanor. The distinction results from a provision in the N.Y. PENAL CODE to the effect that a person convicted of possession of burglar's instruments shall be guilty of a misdemeanor, unless he has a prior conviction, in which case he is guilty of a felony. N.Y. PENAL CODE § 408.

[2] 21 App. Div. 2d 805, 252 N.Y.S.2d 259 (1964).

[3] 15 BUFFALO L. REV. 217 (1965).

[4] People v. Kraus, 147 Misc. 906, 265 N.Y. Supp. 294 (1933). *Cf.* Eastwood v. People, 3 Park 25 (N.Y. 1855), holding that, if an unauthorized viewing takes place in a capital case, there will be a mistrial declared without investigation as to whether prejudice was established.

[5] 8 WIGMORE, EVIDENCE § 2352 (McNaughton rev. 1961).

[6] "Many cases might occur where they [affidavits of jurors] ought to be admitted, and there was no other source from which the information they contained could be derived." Den *ex dem.* Popino v. McAllister, 7 N.J.L. 46, 52 (Sup. Ct. 1823) (Rosell, J., dissenting).

[7] McDonald v. Pless, 238 U.S. 264 (1915); *In re* Nunns, 188 App. Div. 424, 176 N.Y. Supp. 858, 38 N.Y. Crim. 7 (1919).

ing jury misconduct, reasoned that, since jurors' affidavits were excluded, the hearsay affidavit of defense counsel must also be excluded. The majority re-emphasized their holding by stating that, "absent any competent proof that the defendants were prejudiced in a substantial right affecting the verdict, the motion [for a new trial] was properly denied."[8] Defendants' obvious guilt was clear from the court's observation that "the proof adduced was sufficient as a matter of law to support the judgment of conviction."[9]

The exclusionary rule relating to jurors' affidavits was originated by Lord Mansfield in 1785,[10] in spite of the common prior practice of allowing jurors to testify about their own misconduct.[11] The rule gained wide acceptance in American courts, and the United States Supreme Court recognized it in 1915, stating that "unquestionably the general rule, [is] that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach the verdict."[12] The exclusionary rule, while suffering from diverse interpretation,[13] is usually justified on the premise that the jury system might suffer irreparable harm if jurors were allowed to testify about their own misconduct and thereby impeach their verdict.[14] Strict application of the rule can, however, result in injustice when evidence establishing jury prejudice against the defendant is excluded. Exclusion of such evidence would certainly occur in cases in which the misconduct took place during secret jury-room deliberations. The likelihood of important evidence being disregarded would also occur, though to a lesser degree, when the misconduct occurred outside the juryroom, since the establishment of such misconduct as grounds for a new trial may depend on whether or not disinterested third parties can be found to testify to the jurors' actions.[15]

Judicial exceptions to the exclusionary rule have been established in several jurisdictions in order to avoid the possible injustice arising from a blanket exclusion of jurors' affidavits alleging their own mis-

[8] 15 N.Y.2d at 296, 206 N.E.2d at 325, 258 N.Y.S.2d at 378.
[9] *Ibid.*
[10] Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (1785).
[11] Norman v. Beamont, Willes 484, 125 Eng. Rep. 1281 (1744); Phillips v. Fowler, Barnes 441, 94 Eng. Rep. 994 (1735).
[12] McDonald v. Pless, 238 U.S. 264, 269.
[13] 15 BUFFALO L. REV. 217, 218 & nn.5-11 (1965).
[14] See Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir. 1947) (majority vote, used by jurors to reach decision, considered insufficient reason to overturn verdict).
[15] A search for indifferent third parties to testify about the jurors' actions would never occur unless the court acted on the basis of the jurors' affidavit—an anomalous circumstance, at best, if the affidavits are adjudged inadmissable.

conduct. The most common exception, and one of the earliest, is the so-called "Iowa rule," which allows a juror to testify about any matter that does not "inhere" in the verdict.[16] The testimony admitted under this exception is generally limited to misconduct of a factual or objective character.[17] The juror may testify about anything which is physically discernible, but is precluded from testifying about misconduct which primarily relates to his or another juror's mental processes. This distinction attempts to prevent only testimony that relates to strictly subjective activity, such as a misunderstanding of the evidence, or personal prejudice.[18] Each juror exercises an individual method to determine his vote, which, though subject to possible influence from personal beliefs and dispositions,[19] nonetheless should not be subject to examination.[20] On the other hand, overt juror misconduct could deprive a defendant of a fair trial, and is a proper object of close scrutiny.

Another judicial exception to the exclusionary rule, advanced by the dissent in the principal case, would admit affidavits of jurors alleging their own misconduct if the misconduct took place outside the juryroom.[21] The justification for such a distinction would appear to be the desire to maintain the sanctity of the juryroom, along with a belief that misconduct outside the juryroom is more susceptible of confirmation without violating a juror's right to maintain silence about the decisional process undertaken in reaching a verdict. On the other hand, the dissenters do not elaborate their reasoning and only argue that the exclusionary rule was historically applicable only to juryroom deliberations.[22]

Legislative inroads have also been made on the rule against self-impeachment. Most common is the statute which allows jurors to testify about verdicts reached by chance.[23] Both the *Model Code of Evidence*[24] and the *Uniform Rules of Evidence*[25] would allow testimony

[16] Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866).
[17] Perry v. Bailey, 12 Kan. 539 (1874).
[18] Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866).
[19] Welshire v. Bruaw, 331 Pa. 392, 200 Atl. 67 (1938); State v. McChesney, 114 Wash. 113, 194 Pac. 551 (1921).
[20] MODEL CODE OF EVIDENCE rule 301 (1942); UNIFORM RULES OF EVIDENCE rule 41 (1953).
[21] 15 N.Y.2d at 297, 206 N.E.2d at 325, 258 N.Y.S.2d at 379, citing State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955).
[22] *Ibid.*
[23] CAL. CIV. PROC. § 657; IDAHO CODE ANN. § 10-602 (1948); MONT. REV. CODES ANN. § 93-5603 (1949); N.Y. CODE CRIM. PROC. § 33-1905; UTAH CODE ANN. rule 59 (1953); WASH. REV. CODE § 4.76.020 (1958).
[24] MODEL CODE OF EVIDENCE rule 301 (1942).
[25] UNIFORM RULE OF EVIDENCE 44.

by a juror as to any fact of misconduct, so long as such testimony does not encroach upon the proscribed area of the juror's personal motives and mental processes.

While the court in the principal case did not choose to recognize or apply any of the above exceptions to the exclusionary rule, its holding is sufficiently confused to raise a question of the circumstances in which the rule is to be applied in the future. In essence, the majority opinion stated that the affidavits would not be admitted in evidence, and upheld the denial of defendants' motion for a new trial because there was no "competent proof that defendants were prejudice...."[26] Taken literally, the court's position *prevented* defendants' use of what was apparently the only means of proving prejudice, *i.e.*, the affidavits alleging misconduct, while basing its denial of a new trial on a *lack* of "competent proof" of prejudice. Such a contradiction leads to the inference that the New York court may, in future cases, exclude only those affidavits which do not raise a presumption of prejudice on their alleged facts. It is submitted that any attempt to determine prejudice in the manner suggested would not sufficiently take the place of a hearing in which the jurors, themselves, could testify, and other evidence of prejudice could be adduced.

One possible explanation for the failure of the court in the principal case to relax the exclusionary rule may be found in the facts of the case itself. The affidavits attempting to impeach the verdict were hearsay, and would have had to be excluded on this ground under any circumstances. Too, the gravamen of the charge of attempted third degree burglary and possession of burglar's tools bears little relation to the scene of the attempted crime. Under New York law an attempted crime is, by definition, an uncompleted crime;[27] therefore, a view by the jury of the scene of the alleged crime could seldom create prejudice. Also, a view of the place where defendants were apprehended in possession of burglar's tools would seldom be prejudicial. Finally, other evidence of defendants' guilt was apparently overwhelming.[28] These considerations do not, however, justify an unqualified acceptance of the exclusionary rule. Such aggravating considerations may not be present in a future case, and blanket application of the rule would work an injustice. Because of the possibility of future injustice, and because application of the rule, as Judge

[26] 15 N.Y.2d at 296, 206 N.E.2d at 325, 258 N.Y.S.2d at 378.

[27] N.Y. PENAL CODE § 2 defines attempt as "an act, done with intent to commit a crime, and tending but failing to effect its commission."

[28] See text accompanying note 9 *supra*.

Learned Hand has said, "offers an easy escape from embarrassing chores,"[29] it is submitted that the decision in the principal case did not serve the ends of substantial justice.

It remains to be noted whether, when dealing with the exclusionary rule and jury misconduct which bears on the evidence considered by the jury, a distinction should be made between civil and criminal cases. In civil cases the quantum of proof is less than in criminal cases, and jury misconduct might reasonably be given less weight in determining if the verdict ought to be impeached. On the other hand, the requirement of proving guilt beyond a reasonable doubt in a criminal case would indicate that any misconduct which could reasonably affect a juror's vote should be thoroughly investigated. In addition, a unanimous verdict is seldom required in civil cases, and it would seem reasonable to disregard a civil juror's misconduct if his vote was not essential to the verdict. On the other hand, jurors who receive unauthorized evidence often communicate their misappropriated knowledge to other jurors, and the misconduct of one juror may taint the verdict of all. It is apparent that, in order to effectuate a distinction between civil and criminal cases in application of the exclusionary rule, a court would be required to undertake a close investigation of the jurors' activities both within and without the juryroom. It is doubtful that a court in either a civil or criminal case would be willing to undertake such an investigation, which might involve violations of juryroom secrecy.

LIMITING LANGUAGE IN UNPURCHASED POLICY PROVISION DOES NOT APPLY TO PURCHASED COVERAGE

Plaintiff's truck was hit by a tree felled by a logging contractor's employee. The truck was insured by defendant insurance company against damage due to collision,[1] but plaintiff had not purchased coverage under the comprehensive clause.[2] Plaintiff brought an action

[29] Jorgenson v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir. 1947).

[1] "Coverage E—Collision or Upset: To pay for direct and accidental loss of or damage to the automobile ... caused by collision of the automobile with another object...." Jones v. Virginia Sur. Co., 401 P.2d 570, 571 (Mont. 1965).

[2] "Coverage D—Comprehensive Loss or Damage to the automobile, Except by Collision or Upset: To pay for direct and accidental loss of or damage to the automobile ... except loss caused by collision of the automobile with another object .... Breakage of glass and loss caused by ... falling objects ... shall not be deemed loss caused by collision or upset." *Ibid.*