Trial by Jury—Waiver—Trial Before Eleven Jurors

Alan F. Austin

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Trial by Jury—Waiver—Trial Before Eleven Jurors. D was indicted for second-degree burglary. During the course of the trial one of the jurors became ill, and on motion of D's counsel, with approval of the prosecutor and the court, the ailing juror was excused and the trial proceeded with eleven jurors. The jury of eleven subsequently brought in a verdict of guilty against D. Appeal. 

Held: Affirmed. An accused may waive his privilege of trial before a jury of twelve and submit it to eleven jurors if he acts intelligently, voluntarily, and free from improper influences. State v. Lane, 40 Wn. 2d 734, 264 P. 2d 474 (1952).

While it must be said that the majority in the instant case reaches a socially desirable result the dissent cogently suggests that it is one not consistent with the State constitution. Because of the polysided nature of the question involved it would seem helpful to examine historically the law in Washington prior to the instant case. Basically, the Washington constitution provides: "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record and for waiving of the jury in civil cases where the consent of the parties interested is given therefor." (Italics added) Art. I, § 21.

In 1900, State v. Ellis, 22 Wash. 129, 60 Pac. 136 construing the phrase, "The right of trial by jury shall remain inviolate," held that right to trial by jury contemplated a common law jury of twelve and that a court was without jurisdiction to proceed with only eleven jurors.

In 1901 the legislature passed RRS § 2309 which provides that: "No person informed against or indicated for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by verdict of a jury, accepted and recorded by the court." The next major development was the case of State v. Karsunky, 197 Wash. 87, 84 P. 2d 390 (1938), in which it was held that RRS § 2309 meant that unless the accused used one of the two methods cited in the statute, i.e. confession in open court or admission of the truth of the charge in his plea, he could not, by waiver, confer jurisdiction on the court to proceed without a jury. In 1939 the rule of the Karsunky case was held to apply not only to felonies, but also to both misdemeanors and gross misdemeanors, excluding only "certain petty crimes and minor offenses." State v. McCaw, 198 Wash. 345, 88 P. 2d 444. Then in 1951, the legislature added to RRS § 2309 the proviso: "That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court." RCW 10.01.060 [RRS § 2309] (The original statute shall, for the purpose of clarity, be referred to hereafter as RRS § 2309 and the amended statute as RCW 10.01.060.) Hence, before the 1951 amendment and the instant case, in Washington where the defendant pleaded not guilty, he could not waive a jury trial, and there was no provision for an eleven man jury. Therefore, a trial in either of those two instances exceeded the court's jurisdiction.

The Lane case holds that RCW 10.01.060 allows voluntary waiver, interpreting it as a personal privilege of the accused, and Art. I § 21, the court states, is intended only to assure that the privilege of trial by jury shall not be impaired by legislative or judicial action.

The instant case relies heavily on Patton v. U.S., 281 U.S. 276 (1930), which is closely analogous to the Lane case. The Patton case holds that the right to jury trial under the Federal constitution was a right which an accused "may forego at his election." The dissent attacks this reliance arguing that the constitutional provisions which were construed in the Patton case simply assure the accused "the right to a speedy and public trial, by an impartial jury," U.S. Const. Amend. VI; and that the "Trial
of all Crimes ... shall be by jury,” U.S. Const. Art. III § 2 (3), and give no provision for waiver as the Washington constitution so expressly does. The rules of statutory construction expressio unis est exclusio alterius is applied by the dissent to the portion of the Washington provision which reads: “but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.” (Italics added). Then, only under those certain circumstances as set down in the above quoted portion may the legislature provide for the waiver of a jury and is thereby precluded from doing so in other cases. This would mean that only in civil cases and in cases before courts not of record is the legislature given the prerogative of providing for waiver. That reasoning would therefore infer that RCW 10.01.060 is outside the limits of the constitutional authority of the legislature and hence, void.

The Patton case expressly holds that waiver of one juror and complete waiver amount to the same thing and the instant case impliedly follows that analysis. The majority in the Lone case overrules the Ellis case, saying that the trial court was not divested of jurisdiction by lack of a twelfth juror, as the question of waiver goes not to the jurisdiction of the court but rather to the form and manner of the trial. The dissent attacks this reasoning saying that waiver of a whole jury is not the same question as trial before eleven jurors. There is no provision at law for a jury of eleven, the dissent argues, as a common law jury of twelve is implicit in the unqualified use of the word “jury” in the Washington constitution. Thus, the action of such a tribunal is void. Therefore, it is the waiver of the whole jury that is intended in both Art. I § 21 and RCW 10.01.060 and not the waiver of one juror.

A more extensive use of RCW 10.49.070, 080, and 090, [RRS 2137-1] which provides for the selection and utilization of alternate jurors in felony cases would have avoided the problem of waiver of a twelfth juror. Under these provisions one or two alternate jurors may, at the discretion of the judge, be selected in the usual manner to sit with the regular jurors during the hearing of the case and be readily available to intelligently fill in for an ailing juror.

It would seem that it should be possible for an accused to waive a jury trial. There may be times when the accused would feel it necessary to do so in order to obtain a fair trial, as where his past criminal history is bad, where the public is unusually aroused, or where he fears local prejudices of race, religion, or otherwise. The aid to increasingly overcrowded court dockets is obvious. Possibly these considerations influenced the court in giving a liberal construction of the constitution.

ALAN F. AUSTIN