UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 37 | Number 4 Article 12

6-1-1959

Trial Practice -- Jury -- Taking of Notes

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Trial Practice—Jury—Taking of Notes

In a South Carolina case of first impression,[1] defendant, after a conviction of murder, moved for a new trial on the ground, *inter alia,* that two of the jurors took notes of the testimony and charge and took these notes to the jury room with them. Affirming the trial court's denial of the motion, the South Carolina Supreme Court held that whatever objection defendant may have had to the note taking was waived when he failed to make his objection known during the progress of the trial. The court went on to say, however, that the propriety of allowing jurors to take notes on their own volition was a question which rests within the sound discretion of the trial court.

The decision seems to put South Carolina in line with the majority of the courts which have decided the issue. The general rule is that whether jurors should be forbidden to take notes during the trial rests within the sound discretion of the trial court, and it is not improper to allow jurors to do so.[2] There is, however, a substantial body of authority which holds that the jury may not take notes of the trial proceedings.[3] Courts adopting this minority view reason that by taking notes a juror: (1) emphasizes to himself, and perhaps later to other jurors, one feature of the case over other equally important features;[4] (2) has his attention diverted from the natural progression of the evidence;[5] (3) leads the jury to rely on what might be imperfectly written;[6] and (4) obtains an unfair advantage, in case of disagreement, in persuading the other jurors to accept his version of the testimony.[7]

On the other hand, the majority points out: (1) that there is no legal reason for not allowing jurors to take notes;[8] (2) that the supposed

method of assuring that the interests of a minority group will be considered along with those of other workers, is to require the union to admit them to full membership in the union where their voice and vote will be felt in the determination of union policy and bargaining objectves. See notes 12-20 *supra* and accompanying text.

[1] State v. Trent, 106 S.E.2d 527 (S.C. 1959).

[2] Goodloe v. United States, 188 F.2d 621 (D.C. Cir. 1950); United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950); Chicago & N.W. Ry. v. Kelly, 84 F.2d 569 (8th Cir. 1936); United States v. Campbell, 138 F. Supp. 344 (N.D. Iowa 1956); United States v. Carlisi, 32 F. Supp. 479 (D.C. 1940); Denson v. Stanley, 17 Ala. App. 198, 84 So. 770 (1919); Tift v. Towns, 63 Ga. 237 (1879); Martin v. Atherton, 151 Me. 108, 116 A.2d 629 (1955); W. H. Davis Die Co. v. Beltzhoover Elec. Co., 40 Ohio App. 308, 178 N.E. 418 (1931).

[3] United States v. Davis, 103 Fed. 457 (C.C.W.D. Tenn. 1900); Long v. State, 95 Ind. 481 (1884); Cheek v. State, 35 Ind. 492 (1871); Gipson v. Commonwealth, 133 Ky. 398, 118 S.W. 334 (1909); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955); Commonwealth v. Fontaine, 183 Pa. Super. 45, 128 A.2d 131 (1956); Commonwealth v. Wilson, 19 Dist. Rep. 48 (Pa. 1910).

[4] Thornton v. Weaber, *supra* note 3.

[5] Cheek v. State, 35 Ind. 492 (1871).

[6] Cheek v. State, *supra* note 5.

[7] United States v. Davis, 103 Fed. 457 (C.C.W.D. Tenn. 1900); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955).

[8] United States v. Carlisi, 32 F. Supp. 479 (D.C. 1940).

dangers appear "far-fetched, if not imaginary";[9] (3) that there is less danger of erroneous notes than of erroneous memory;[10] and (4) that with modern court reporting there is no difficulty in ascertaining what a witness did nor did not testify.[11]

The North Carolina Supreme Court has considered the question of note taking by jurors only briefly in *Cowles v. Hayes*,[12] decided in 1874. In that case, over the defendant's objection, the trial court allowed the jury to copy a memorandum, made out by plaintiff's counsel, of articles sold and the prices thereof. On appeal, the court said this amounted only to a "note of the evidence taken down by a juror, which was not only proper, but often commendable."[13] Upon such authority as this case represents, it would seem that North Carolina agrees with the majority of the states that it is not error to permit a juror to take notes of the evidence.

It is hoped that if and when the issue is again raised, the North Carolina court will more adequately and firmly state its position in favor of allowing the jury to take notes. The cases which forbid the taking of notes do not seem well considered in the light of modern jurisprudence. In days gone by, when illiteracy was common, there may have been more substance to the argument that those jurors who were able to take notes would wield an undue influence in the consideration of the case. Today, fortunately, illiteracy is the exception rather than the rule. Moreover, whatever validity there is to the argument that the best note taker will be the most influential juror seems to lose weight when it is considered that in case of dispute as to what a witness said, the jury need not rely on the notes of a fellow juror, but may request that the testimony be read to them from the notes of the court reporter. In a long and detailed trial it cannot be denied that the use of notes to refresh the memory of the jury will be more likely to result in a just and proper verdict. The fact that some of the jurors may not have the ability or the desire to take notes is no reason to deprive the other jurors of an opportunity to do so.

The purpose of notes is not to replace the memory but rather to refresh it. If a witness in a case may use notes and memoranda of pertinent facts to refresh his memory, certainly this advantage should be available to the jury. At any trial the judge, counsel, and court reporter take notes of important facts and testimony. How can it be said that it is any less necessary for the jury to take notes than these persons who are trained and experienced in the trial of lawsuits? Of course

[9] United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950).
[10] W. H. Davis Die Co. v. Beltzhoover Elec. Co., 40 Ohio App. 308, 178 N.E. 418 (1931).
[11] United States v. Campbell, 138 F. Supp. 344 (N.D. Iowa 1956).
[12] 71 N.C. 230 (1874).
[13] *Id.* at 231.

there is the possibility of error in the taking of notes, but certainly it is no greater than the possibility of erroneous memory.

Some of the majority decisions recognize a distinction between the juror taking notes on his own volition and the jury taking notes at the request of counsel. These cases hold that while it is permissible for the juror to take notes on his own volition, it is improper for counsel to request that notes be taken.[14] The reason for the distinction seems to be that by such a request counsel is attempting to obtain an unfair advantage and curry favor with the jury.

It is submitted that there is no impropriety in a request by counsel that the jury be allowed to take notes. Most jurisdictions which allow the jury to take notes voluntarily also permit the practice at the request of counsel,[15] and some even permit counsel to furnish the jury pencil and paper with which to take notes.[16] Counsel may for a very good reason desire that the jury remember certain facts such as dates, amounts, and items of damages. It is difficult to see what advantage or favor counsel could gain in the eyes of the jury by such a request. Perhaps the trial court should, however, draw the line where the attorney attempts to furnish the jury with writing materials. This would seem to be a more proper duty of an impartial officer of the court.

There are at least two cases in which the trial court upon its own motion instructed the jurors that they might take notes. In both it was held that such an instruction was erroneous. One of the cases apparently followed the general rule in Pennsylvania that "writing of memoranda by jurors is not encouraged and is generally forbidden."[17] In the other case the trial judge, in a personal injury action, stated that he was going to permit the jury to take notes at their option and furnished them with writing materials for that purpose.[18] The Ohio Supreme Court held that this situation was far different from the case of a juror taking notes on his own volition.[19] The instruction made it appear to the jurors that

[14] Indianapolis & St. L. Ry. v. Miller, 71 Ill. 463 (1874); Kelley v. Call, 324 Ill. App. 143, 57 N.E.2d 501 (1944); Ettlesohn v. Kirkwood, 33 Ill. App. 103 (1889); Cahill v. Baltimore, 129 Md. 17, 98 Atl. 235 (1916).

[15] Chicago & N.W. Ry. v. Kelly, 84 F.2d 569 (8th Cir. 1936); (Here the court said that the request that the jury takes notes should first be addressed to the court and communicated by it to the jurors with suitable instructions if the court decides to allow the request.) Tift v. Towns, 63 Ga. 237 (1879); Vaughn v. State, 17 Ga. App. 268, 86 S.E. 461 (1915); Omaha Fire Ins. Co. v. Crighton, 50 Neb. 314, 69 N.W. 766 (1897).

[16] Tift v. Towns, *supra* note 15; Commercial Music Co. v. Klag, 288 S.W.2d 168 Tex. Civ. App. 1956). (The court said, however, that it would have been better practice for the attorney to have requested the court to have some officers of the court furnish the jury with writing materials so the attorney would not seem to be in the position of attempting to curry favor with the jury.)

[17] Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955).

[18] Corbin v. Cleveland, 144 Ohio St. 32, 56 N.E.2d 214 (1943). See also Annot., 154 A.L.R. 878 (1945).

[19] It had previously been held in Ohio that it was not improper for jurors to

it was their duty to take notes, regardless of their ability or disposition to do so. Also, the attorneys had not opportunity to inquire as to the jurors' note taking abilities on voir dire examination. The court pointed out that normal people are endowed by nature with the ability to listen and remember, but that writing is an acquired ability and note taking is a further refinement of the ability to write. If the procedure adopted by the trial court were allowed, education or the ability to take notes would be a prerequisite to selection as a juror.

This latter decision does not seem to be based on sound reasoning. If the court may, in its discretion, allow jurors to take notes on their own volition, what objection can validly be made to the court's stating on its own motion that it will allow the jurors to take notes? Why should the court not suggest that the jury take notes where it appears that such a practice will better facilitate the ends of justice? Of course the court should properly instruct the jury as to the proper use of the notes and should make it clear that the taking of notes is optional and not mandatory. It seems highly doubtful that such a practice would lead to a prerequisite of note taking ability in order to be selected as a juror anymore than the practice of allowing jurors to take notes on their own volition or upon motion of counsel has led to such a requirement.

In the principal case, the South Carolina court expressly limited its discussion to the practice of note taking by jurors on their own volition.[20] The court did not discuss note taking at the request of counsel or the trial judge.

Where the jury is observed taking notes it is universally held that, even if it is objectionable, it may be waived by failure to make a timely objection.[21] This seems proper since counsel should not be allowed to sit idly by while the jury takes notes and then raise the objection after the jury has rendered a verdict against him. There is a duty upon counsel to use due diligence to ascertain that the jurors are taking notes, and the objection is deemed waived where the action of the jury is obvious.[22] In other words, if the attorney should have seen the jury taking notes, it is no excuse that he denies having seen their conduct, and the objection is deemed waived unless he can show that by the use of due

take notes on their own volition. Davis Die Co. v. Beltzhoover Elec. Co., 40 Ohio App. 308, 178 N.E. 418 (1931).

[20] State v. Trent, 106 S.E.2d 527, 531 (S.C. 1959).

[21] Conger v. White, 69 Cal. App. 2d 28, 158 P.2d 415 (Dist. Ct. App. 1945); Gipson v. Commonwealth, 133 Ky. 398, 118 S.W. 344 (1909); Martin v. Atherton, 151 Me. 108, 116 A.2d 629 (1955); Randolph v. O'Riordon, 155 Mass. 331, 29 N.E. 583 (1892); State v. Robinson, 117 Mo. 649, 23 S.W. 1066 (1893); Swift & Co. v. Bleise, 63 Neb. 739, 89 N.W. 310 (1902); Corbin v. Cleveland, 40 Ohio App. 308, 178 N.E. 418 (1943).

[22] Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127 (1905); Swift & Co. v. Bleise, *supra* note 21; State v. Trent, 106 S.E.2d 527 (S.C. 1959).

diligence he could not have ascertained that notes were being taken. There seems to be no exception to this rule, even in a capital case where the defendant is on trial for his life, as the application of the rule in the principal case illustrates.

No case was found in which it was held that there is an absolute right to have the jury take notes, absent a statute to that effect. It is at most a matter in the sound discretion of the trial court and it is not error to prohibit note taking.[23] "It has never been suggested that the judge must permit the practice; the question has always been whether he must forbid it."[24] At least nine states have enacted statutes which expressly authorize the jury to take notes in criminal trials.[25]

While permitting the jury to take notes may not be entirely advantageous, the argument is well in favor of allowing the practice within the sound discretion of the trial court. It should not be permitted to delay or unduly prolong the trial, nor should it be allowed where it might in some way be prejudicial, but otherwise it would seem to be a useful and favorable practice.

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Trust Investments—Prudent Man Rule

The recent Virginia case of *Goodridge v. National Bank of Commerce*[1] raised the issue of whether or not a prudent man investment statute,[2] enacted in 1956, was applicable to trusts created prior to the enactment of the statute. The trusts in question gave authority to the trustees to make such investments as were authorized "under the statute laws of the State of Virginia."[3] The trustees contended that they were bound to invest according to the "legal lists" statutes that were in existence when the trusts were created, because to apply the new prudent man statute to previously created trusts would be an unconstitutional impairment of the contract obligation owed the settler by the trustees, and would interfere with the vested rights of the beneficiaries without due process of law. The Virginia court rejected the above contentions, holding that the settlor is presumed to have contemplated that the legislature might change the type of investments allowed fiduci-

[23] United States v. Campbell, 138 F. Supp. 344 (N.D. Iowa 1956).
[24] United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950).
[25] CAL. PEN. CODE § 1137; IDAHO CODE ANN. § 19-2203 (1947); IOWA CODE § 784.1 (1954); MINN. STAT. ANN. § 631.10 (1947); MONT. REV. CODES ANN. § 94.7303 (1947); NEV. REV. STAT. § 175.390 (1957); N.Y. CODE CRIM. PROC. § 426; N.D. REV. CODE § 29-2204 (1943); UTAH CODE ANN. § 77-32-2 (1953). While these statutes apparently apply only to criminal cases, it is certainly arguable that they are declarative of the state's policy and apply by analogy to civil cases.

[1] 106 S.E.2d 598 (Va. 1959).
[2] VA. CODE ANN. § 26—45.1 (Supp. 1958).
[3] One of the trust indentures omitted the word "statute" and authorized the trustees to invest according to "the laws of the State of Virginia."