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WAIVER OF TRIAL JURY IN FELONY CASES IN KENTUCKY

THE PROBLEM

The federal constitution and all the state constitutions have provisions that guarantee an accused the right to a jury trial in a felony case.[1] Thus, there is adequate assurance that he will not be forced to have his fate decided *without* a jury. Should the accused likewise have assurance that he will not be forced to have his fate decided *by* a jury? In short, if an accused after consulting with his attorney, feels that he cannot possibly get a jury that will give him a *fair* trial, should he nevertheless be forced to have his case placed in their hands?

WAIVER IN GENERAL

Some jurisdictions have legislation which permits an accused to waive trial by jury in felony cases after pleading "not guilty."[2] The jurisdictions having no express written provision concerning waiver are divided as to whether waiver will be permitted.[3] Historically, in the absence of express statutory authority an accused in such cases could not waive a jury trial.[4] Some of the courts based their holding on the notion that the state has an interest in preserving the lives and liberties of its citizens.[5] Other courts held that a judge sitting alone was without jurisdiction to hear a felony case.[6]

Both propositions have been repudiated, however. Other jurisdictions having neither constitutional nor statutory sanctions have rejected both arguments and have permitted an accused to waive the jury in felony cases.[7]

[1] 14 Am. Jur. *Criminal Law* § 128 (1938).

[2] State v. Rankin, 102 Conn. 46, 127 AH. 916 (1925); People v. Henderson, 246 Mich. 481, 224 N.W. 628 (1929).

[3] For cases permitting waiver, see Patton v. United States, 281 U.S. 276 (1930); People v. Scudieri, 363 Ill. 84, 1 N.E.2d 225 (1936); People v. Fisher, 340 Ill. 250, 172 N.E. 722 (1930); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947); Rose v. State, 177 Md. 577, 10 A.2d 617 (1940); State v. Hernandez, 46 N.M. 134, 123 P.2d 387 (1942); State v. Haas, 69 S.D. 204, 8 N.W.2d 569 (1943). For cases refusing waiver, see State v. Porter, 176 La. 673, 146 So. 465 (1933); Commonwealth v. Rowe, 257 Mass. 172, 153 N.E. 537 (1926); State v. Bresse, 326 Mo. 885, 33 S.W.2d 919 (1930); Cancemi v. People, 18 N.Y. 128 (1858); State v. Ellis, 210 N.C. 170, 185 S.E. 662 (1936); State v. Karunsky, 197 Wash. 87, 84 P.2d 390 (1938); State v. Smith, 184 Wis. 664, 200 N.W. 638 (1924).

[4] 31 Am. Jur. *Jury* § 50 (1958).

[5] State v. Porter, 176 La. 673, 146 So. 465 (1933); Cancemi v. People, 18 N.Y. 128 (1858); State v. Lockwood, 43 Wis. 403 (1877).

[6] Commonwealth v. Rowe 257 Mass. 172, 153 N.E. 537 (1926); State v. Karunsky, 197 Wash. 87, 84 P.2d 390 (1938).

[7] Patton v. United States, 281 U.S. 276 (1930); People v. Fisher, 340 Ill. 250, 172 N.E. 722 (1930).

Where the Plea is "Not Guilty"

The Constitution of Kentucky merely provides that the accused has a right to a jury trial. The provision has not been interpreted as being mandatory. The Kentucky Constitution, section 7 provides, "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution." There are no pertinent modifications. Kentucky Revised Statutes section 29.015, formerly Kentucky Statutes section 2252, provides, "A petit jury in the circuit court shall consist of twelve persons . . . but the parties to any action or prosecution, except for a felony, may agree to a trial by a lesser number of persons." Thus, Kentucky has a constitution which guarantees the right to a trial by jury, has no constitutional provisions either permitting or prohibiting waiver, and has a statute which provides that an accused shall not be tried by a lesser number of persons than twelve in a felony case. Reading the statute literally it seems definitely to prohibit waiver of the jury.[8] It says that an accused shall not be tried by less than twelve in a felony case, and certainly where the accused waives the jury, the judge sitting alone is "less than twelve." But, looking at the statute from a different perspective it would appear to provide only that an accused must have twelve jurors *if he elects to have a jury.*[9] The statute should not be read to prohibit the accused from waiving the entire panel. To group the judge and jury together in reaching a conclusion that the judge sitting alone is "less than twelve" is like adding apples and oranges; they are simply different entities.

But, that seems to be exactly what the Kentucky court has done. The first case which brought up the question of waiver in Kentucky involved a jury composed of less than twelve. Both the Commonwealth and the defendant in *Branham v. Commonwealth*[10] agreed to a jury of seven. The defendant was convicted. On appeal the conviction was set aside and the cause remanded for a new trial, the court holding that Kentucky Statutes section 2252, quoted *supra,* was mandatory and therefore an accused could not agree to a jury of less than twelve. This ruling was subsequently affirmed in *Jackson v. Commonwealth*[11] where the panel consisted of eleven jurors. The only difference in the two cases was that Jackson did not object to

[8] See Moreland, "Waiver of Jury Trial in Criminal Cases in Kentucky," 21 Ky. L. J. 1, 26 (1932).
[9] Cf. Munsell v. People, 222 P.2d 615 (Colo. 1950).
[10] 209 Ky. 734, 273 S.W. 489 (1925).
[11] 221 Ky. 823, 299 S.W. 983 (1927).

the panel after a juror had been excused due to illness. That is, the jury of eleven in *Jackson* was due to inadvertence, whereas the jury in *Branham* was composed of seven by agreement.

McPerkin v. Commonwealth[12] was the first case in Kentucky to involve a genuine attempt at waiver. The defendant was a Negro accused of raping a white woman. Through counsel he asked that the jury be waived. The trial court denied his request and the accused was convicted by a jury. The Court of Appeals affirmed the conviction, holding that it was not error for the trial court to deny the request for waiver and cited the *Branham* and *Jackson* opinions as authority for the proposition that "the right to trial by jury is a constitutional right that cannot be waived." In other words, it is a constitutional right that cannot be waived because the statute says it cannot be waived.[13]

The final word from the Kentucky court on waiver in cases where the accused pleads "not guilty" came in *Tackett v. Commonwealth.*[14] The defendant was found guilty and sentenced to two years in the penitentiary. On appeal the record did not show that the verdict was found by a jury. The Court of Appeals took judicial notice of the omission and remanded the case for a new trial, citing *Branham, Jackson* and *McPerkin* as its authority. Thus, a jury cannot be waived in a felony case where the plea is "not guilty" even though both the prosecution and the judge agree with the accused and his counsel that the judge should decide both the facts and the law.

While Kentucky was generally considered a jurisdiction which would not permit waiver before the *Tackett* case,[15] it should be noted that the Kentucky court *could* have permitted waiver in that case by applying accepted legal principles. It could have 1) interpreted section 21.015 as meaning that an accused must have a jury of twelve only if he elects to be tried by a jury, as noted *supra,* 2) distinguished the *McPerkin* case on the ground that the Commonwealth did not agree to the waiver[16] and 3) decided that the right to jury trial as guaranteed by the constitution is not a part of the framework of government but a personal right that may be waived.[17]

[12] 236 Ky. 528, 33 S.W.2d 622 (1930).
[13] Moreland, *supra* note 8, at 26.
[14] 320 S.W.2d 299 (Ky. 1959).
[15] Roberson, New Kentucky Criminal Law and Procedure § 106 (2d ed. 1927).
[16] Some jurisdictions which permit waiver require that the prosecution agree to the waiver. See Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Patton v. United States, 281 U.S. 276 (1930).
[17] The Kentucky court has not been faced with a decision on this point since it has relied on Ky. Rev. Stat. § 29.015. For opinions holding that the right is personal see Patton v. United States, 281 U.S. 276 (1930); People v. Fisher, 340 Ill. 250, 172 N.E. 722 (1930).

Where the Plea is "Guilty"

The constitutional guarantee of trial by jury applies only to the issue of guilt or innocence since the ancient mode of trial by jury did not include having the jury set the sentence.[18] Thus, it is strictly statutory as to whether the accused may be sentenced by the judge where he pleads "guilty." In Kentucky, prior to 1952 the controlling statute[19] was interpreted to permit a judge to fix the degree of punishment only: 1) where the jury found the defendant guilty as pleaded and the punishment was fixed definitely by law, leaving no discretion on the part of the judge[20] or 2) where there was a maximum and minimum penalty provided for the offense and the judge imposed the minimum.[21] In the latter situation the accused could not be heard to say that he was prejudiced since the punishment was the minimum that the jury could have given.[22]

In 1952 the statute was amended,[23] and it has since been interpreted to permit the judge to fix the degree of punishment without the intervention of a jury when the following conditions precedent are met: 1) the accused pleads "guilty,"[24] 2) the crime is a non-capital offense,[25] 3) the accused is represented by counsel,[26] and 4) both the prosecutor and defense counsel consent.[27]

EVALUATION

From the Standpoint of the Accused

The Kentucky statute which permits an accused to plead guilty and have the court set his sentence is sound law. There is no sense

[18] Ward v. Hurst, 300 Ky. 464, 189 S.W.2d 594 (1945).

[19] Prior to 1952 Ky. Crim. Code § 258 provided:

> [I]n "verdicts of guilty" or "for the Commonwealth," the jury shall fix the degree of punishment to be inflicted unless the same be fixed by law.

[20] Bates v. Commonwealth, 190 Ky. 338, 227 S.W. 472 (1921).

[21] *Ibid.*

[22] *Ibid.*

[23] Ky. Rev. Stat. § 431.130 (1959) now provides:

> [U]pon a verdict of "guilty" or a plea of guilty or "for the Commonwealth," by agreement of the Commonwealth's attorney and the defendant, with advice of an attorney, the court may, within its discretion, and without the intervention of a jury, fix the degree of punishment within the periods or amounts prescribed by law, except in cases involving an offense punishable by death. . . .

[24] Holt v. Commonwealth, 310 S.W.2d 40 (Ky. 1957).

[25] See Thomas v. Maggard, 313 S.W.2d 271 (Ky. 1958), holding that a sentence set by a judge without a jury in a capital punishment case is erroneous but not void and thus the accused is not entitled to release through habeas corpus proceedings.

[26] King v. Commonwealth, 283 S.W.2d 707 (Ky. 1955).

[27] Holt v. Commonwealth, *supra* note 24.

in impanelling a jury to do a useless act. There is no issue of fact to decide where the accused pleads "guilty." Further, there is nothing to be gained in having the jury set a sentence that both the accused and prosecution have agreed on. The accused has adequate assurance that his rights will be protected, since he must be represented by an attorney.[28]

Similarly, the decision as to whether the accused may waive the jury in cases where he pleads "not guilty" should be left to the accused and his counsel. Since the right to trial by jury is generally recognized as having been instituted as a protection to the accused[29] he should be permitted to choose the manner of trial which will be to his greatest advantage. Then, if the accused is satisfied that he will be better protected without a jury, waiver should be permitted.

This might occur in the following situations:

1. *Complex Cases.* Cases involving income tax evasion and stock market transactions sometime are very complicated on their facts. In such a situation the accused may feel that a judge is more capable of understanding the case and consequently will have a better basis for reaching a decision. In one federal case,[30] the accused felt that his case was too complicated for both the jury and counsel, so he waived both. The Court permitted it, saying:

> The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may be competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer.[31]

2. *Faster Disposition.* No time would be spent in selecting a jury. To an innocent accused who cannot post bail this is very important, for it means that he will spend a minimum of time behind bars.

3. *Fuller Presentation of the Case under Relaxed Rules of Procedure.* Since there is no jury, the court will not be as strict in admitting or excluding evidence. The accused will have an opportunity to have his case presented to the fullest extent without any "show." Further, the judge would not have to be in a hurry to return the verdicts, as might a jury, who in certain instances might be anxious "to get home to supper." The judge could hold the case under advisement for several days, meanwhile hearing other cases. Judge

[28] Gholson v. Commonwealth, 308 Ky. 82, 212 S.W.2d 537 (1948).
[29] See People v. Fisher, 340 Ill. 250, 257, 172 N.E. 722, 725 (1930).
[30] Adams v. United States *ex rel* McCann, 317 U.S. 269 (1942).
[31] *Id.* at 275.

Bond of the Supreme Bench of Baltimore city had this to say about a criminal trial without a jury:

> The trials are usually less formal than trials before juries, and, of course, quicker. There is no delay in selection of the tribunal, often opening statements are omitted as unnecessary, the evidence is more direct and concise, and there are fewer objections or other interruptions. The judges as they go along ask questions to clear up matters for themselves. They may, without inconvenience, interrupt a trial and hold it for days until other witnesses they might like to hear are hunted up. They may hold it under advisement for days, after all the evidence is in, to reflect upon it. Sometimes the examination of witnesses suggests the existence of additional evidence which may go right to the point of final difficulty in the judge's mind, and where the evidence may be on the side of the accused the judge is especially careful to bring it into the case. I have seen great benefit come to the accused from a long suspension to get such additional evidence.[32]

4. *The Possibility of Prejudiced Jurors.* While the law does not, and should not, guarantee an accused a sympathetic jury, it should at the same time, ensure that he does not have his case tried before a jury that is prejudiced against him. There are certain circumstances that may arise which will tend to cause any jury to be prejudiced against the accused:

A. The newspaper, radio and television coverage may have been extensive. In such a situation the accused must accept the fact that most, if not all, of the jurors have learned of the case and have probably formed an opinion as to his guilt or innocence. There is also the factor to be considered that it is difficult for a prospective juror to admit publicly, on *voir dire,* that he has been influenced to the point of prejudice by the news media.

B. The crime may have been one of a revolting nature such as rape or a sex act against a child. There is little doubt that the accused would be unable to get a sympathetic jury. It is most probable that he would get a jury that was prejudiced against him. The situation is magnified when the accused is a Negro and the victim a white person. The Negro, in such a situation, rarely feels that he has a chance of getting a fair jury trial. Consequently, it is this type of case that brings most of the requests for waiver.

C. The victim may have been a prominent member of the community, in which case public opinion is apt to run high. One or two of the jurors who held the person in high esteem might be able to sway the undecided jurors. Thus, there is the strong possibility that the accused will be convicted on the basis of the victim's social status.

[32] Bond, "The Maryland Practice of Allowing Defendants in Criminal Cases to Choose a Trial Before a Judge or a Jury Trial," 6 Mass. L. Q. 89, 95 (1921).

D. The accused may have something in his past life, his reputation or appearance likely to arouse prejudice against him in the minds of the jurors. Perhaps a previous criminal conviction has made him well known in the community. Perhaps he merely has a "shifty" look or certain physical characteristics that would cause the jury to believe anything bad said against him. Such a situation calls to mind the jury which supposedly found an accused innocent of the specific crime charged but sentenced him to prison anyhow, because "he would have committed the crime had he been present and afforded the opportunity."

From the Standpoint of the State

The primary interest of the state is to administer justice in the most efficient manner. If the accused feels that his interests are better protected without a jury, certainly it would be in the interest of justice to permit him to forego the jury. Further, for reasons stated *supra* there are situations in which justice demands that there be no jury. Also, cases tried without a jury can be decided faster and with less cost. Time ordinarily spent in impanelling a jury can be utilized in hearing the case. Consequently, more cases can be handled in the same length of time. While the cost factor is important, it should be noted that great consideration should be given to the judge in waiver cases. His time spent in the courtroom would be reduced, but other aspects of his workload may be increased. For example it would be his sole responsibility to judge the credibility of witnesses. In certain cases this added responsibility may be more than some judges would want to accept.[33] But, the judge should not be permitted to prevent waiver. If trial by jury is to be a privilege that the accused may waive, it is inconsistent to require the judge to consent before the right of waiver can be exercised.

[33] In a memorandum opinion to a personal injury case in California, the judge had this to say about hearing the case without a jury:

> The plaintiff has been grievously injured, possibly maimed for life and the court was certainly disposed to grant him relief if it could be fairly done within the law and the facts that had been presented. What really happened on that unfortunate night is largely vested in smoke and I cannot honestly say who, if anyone, was at fault. . . .
>
> There is another comment which I desire to make about this case. While my conscience has compelled me to find for the defendants, I think that a case such as this should never be tried by one man. It is peculiarly the sort of case that calls for the focus of a dozen laymen's point of view. Judge Curtis Bok, I think, summed the matter up very well when he said, "I am inclined to think that the use of a jury, which is a community in microcosm, is more consistent with our way of life than the use of a single man when it comes to the decision of cases that affect the deep concern of litigants." Quoted in 1 Belli, Modern Trials 777 (1954).

CONCLUSION

A state, by forcing an accused to have his case tried by a jury, does not ensure that he will be tried fairly. The jury may be susceptible to many prejudices, some of which are perceptible by the accused or his counsel. Therefore, an accused, properly represented by counsel, should be permitted in *all* criminal prosecutions to be heard and sentenced by a judge without a jury if he so elects.

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