North Dakota Law Review

Volume 36 | Number 2 Article 9

1960

Jury - Waiver of Right - In Criminal Cases

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Recommended Citation

Warcup, Alan (1960) "Jury - Waiver of Right - In Criminal Cases," *North Dakota Law Review*: Vol. 36 : No. 2 , Article 9.
Available at: https://commons.und.edu/ndlr/vol36/iss2/9

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inhere in the verdict itself.[6] Conversely, affidavits are receivable when they contain matters which do not inhere in the verdict.[7]

In the instant case the affidavit was allowed to come in and as a result a new trial was granted because the statement made by a juror during deliberation was, to use the court's words, " . . . clearly a misstatement of law." This case seems to reject, without mention, an earlier Texas decision wherein the court held that the defendant was not entitled to a new trial even though there was evidence of similar misconduct on the part of the jury.[8] These two cases tend to indicate a Texas withdrawal from rigid adherence to the general rule. As a matter of fact, the court in the instant case ruled that an affidavit was admissible to show a misstatement of law during deliberation. This was directly contrary to the general rule.[9] Admitting an affidavit in such a situation is a clear case of allowing into evidence matters which inhere in the verdict.[10]

North Dakota aligns itself with the majority and will not allow a juror affidavit to impeach a verdict.[11] Provision for the use of such an affidavit is to be found in the Code, but then only where the verdict is determined by chance.[12] The statute is intended for use in civil cases and the North Dakota courts have not yet determined its applicability in criminal cases.[13]

To conclude, it would seem that the decision in the instant case, though out of line with the general rule, insured the defendant a fair and impartial trial. Courts faced with possible application of the exclusion rule in the future would do well to bear this in mind.

DAVID ORSER

JURY — WAIVER OF RIGHT — IN CRIMINAL CASES. — Defendant was convicted of making or causing to be made certain material false statements on behalf of a corporation to the state Commissioner of Securities for registration as a dealer. The district court denied the motion for a new trial and defendant appealed to the Supreme Court of North Dakota. Defendant alleged *inter alia*, that the district court erred in refusing to try the case without a jury when the defendant and the states attorney had waived a jury in open court pursuant to the terms of a statute.[1] The court, one justice dissenting, *held*

7. State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955) "Where (the) jurors' testimony goes. . .merely to the existence of conditions or the occurence of events bearing on the verdict, that basis of policy does not exist, and this whether the condition happens or the event occurs in or outside of the jury room."; Perry v. Bailey, 12 Kan. 539, 545 (1876) Overt acts, that is, things which are open to the knowledge of all the jury, and not simply within the personal conciousness of one, are admissible.

8. Salcido v. State, Tex. Cr. App., 319 S.W.2d 329 (1959).

9. See note 3 *supra*.

10 Ruffalo v. State, 196 Wis. 446, 220 N.W. 190 (1928) (defendants attempted use of juror affidavits to show that he was convicted due to erroneous jury belief that a guilty verdict would result in leniency being shown toward him was excluded); Trimble v. State, 118 Neb. 267, 224 N.W. 274 (1929) (an affidavit stating that jury disregarded instructions and evidence would not be allowed) (dictum).

11. State v. Graber, 77 N.D. 645, 44 N.W.2d 798 (1950); State v. Forrester, 14 N.D. 335, 103 N.W. 625 (1905).

12. N. D. Rev. Code § 28-1902, (2) (1943).

13. State v. Graber, 77 N.D. 665, 44 N.W.2d 798 (1950) (dictum).

1. N.D. Rev. Code §29-1602 (1943) "In any case, whether a midemeanor or felony, a trial jury may be waived by the consent of the defendant and the state's attorney expressed in open court and entered on the minutes of the court. Otherwise, the issues of fact must be tried by the jury."

that it is not error for a trial court to deny a request by the defendant to be tried by the court although both the defendant and the states attorney have waived the trial jury pursuant to the Code provision. *State v. Pandolfo,* 98 N.W.2d 161 (N.D. 1959).

The Supreme Court here is undoubtedly following the majority rule in the construction of the statute involved.[2] There has, however, been much criticism of the statutes and the construction given them. The court in the instant case and in many others cited therein[3] defines waiver as "the voluntary extinguishment or abandonment of a known existing right, advantage, benefit, claim, or privilege which except for such waiver the party would have enjoyed." The court goes on to say that the waiver of a right does not imply the acquisition of a substitute or reciprocal right. This appears to be the point involved in the vigorous criticism by the various authorities on the subject. As stated by the dissenting justice in the instant case: "If it [the legislature] gave to the accused the right to waive a trial by jury, it must have intended, as a corollary, to then provide for trial by the court." If trial by the court does not follow, then what is the purpose of the statute granting the right to waiver? Blackstone[4] refers to trial by jury as "the most transcendent *privilege* which any subject can enjoy," and Justice Story[5] in speaking of a trial by jury said: "when our more immediate ancestors removed to America, they brought this great privilege with them . . . it is now incorporated into all our state constitutions as a fundamental *right* . . . . "

In the light of the foregoing, it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. Thus the constitutional and statutory provisions were meant to confer a *right* upon the accused which he may forego at his election. To deny his power to do so is to convert his privilege into an imperative requirement.

In *State v. Ross,*[6] the court said: "We can see no more reason why a person accused of a crime cannot waive his right to be tried by a jury of twelve and submit his case to a jury of less number, than there is why he cannot waive a jury altogether and plead guilty." In the case of *In re Kortgaard,*[7] the North Dakota Supreme Court held that the defendant in a criminal action may waive his right to the service of counsel, the procurement of witnesses, or a jury trial. The court also stated: "If the constitutional provision, preserving the right of trial by jury, was intended as a part of the frame of government, and not as a guarantee to the accused, the accused could only be sentenced upon the verdict of a jury, and every law authorizing a plea of guilty would be unconstitutional. It is not necessary that the right to a trial by jury be more than a guarantee to the accused, for so long as it is guaranteed it remains inviolate. No power can take it away from him."

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2. People v. Eubanks, 7 Cal. App.2d 588, 46 P.2d 789 (1935); Morrison v. State, 31 Okla. Crim. 11, 236 P.2d 901 (1925).
3. Kessler v. Thompson, 75 N.W.2d 172 (N.D. 1956); Sjoberg v. State Auto Ins. Ass'n., 78 N.D. 179, 48 N.W.2d 452 (1951); Meyer v. National Fire Insurance Company, 67 N.D. 77, 269 N.W. 845 (1936).
4. 3 Sharswood's Blackstone's Commentaries 264 (1897).
5. 2 Story, Constitution § 1779.
6. 47 S.D. 188, 197 N.W. 234 (1924).
7. 66 N.D. 555, 267 N.W. 438 (1936); see also State v. Thompson, 56 N.D. 716, 219 N.W. 218 (1928); State v. Throndson, 49 N.D. 348, 191 N.W. 628 (1922); State v. Layer, 48 N.D. 366, 184 N.W. 666 (1921).

The author of an article in the *Michigan Law Review*,[8] after noting that some jurisdictions require only the consent of the accused, said: "the latter procedure is more in accord with the underlying conception of the waiver plan. If trial by jury, as we have been contending, is a protection for the benefit of the individual, then it is hardly consistent to require also the consent of the court, or the prosecuting attorney, or both, as a condition precedent to a trial without a jury. The act of the legislature is itself consent by the state; and there is a curious contrariety in calling a jury trial a privilege and then making its surrender subject to the control of the court."

ALAN WARCUP.

SALES — CONTRACTS RELATING TO PERSONAL PROPERTY — EQUITABLE SERVITUDES ON CHATTELS. — Plaintiff, in purchasing from carrier a quantity of fruit salad which had been frozen in transit, contracted not to permit the goods to enter retail outlets under the shipper-manufacturer's label. Later, plaintiff, with the assistance of its' employee Ross, sold the goods to Vizcarra with the invoice reciting the restriction. Subsequently, Ross terminated his employment with plaintiff, purchased part of the goods from Vizcarra, sold part of the salad to a retailer, and indicated an intention to dispose of the remainder without regard to the restriction imposed by the plaintiff. Plaintiff's suit for injunctive relief in lower court was granted and the District Court of Appeal in affirming *held*, the contract requirement was not in restraint of trade, and that an equitable servitude on chattels was created thereby which was enforceable against a person who subsequently acquired the chattels with notice of the restriction, notwithstanding lack of privity between such person and the dealer. *Nadell & Co. v. Grasso*, 346 P.2d 505 (Cal. 1959).

The rule is well settled that restrictive agreements relating to real property, classed as equitable servitudes, are enforceable against subsequent purchasers who take with notice of the restriction.[1] In *De Mattos v. Gibson*,[2] broad equitable principles were enunciated which seemed sufficient to allow the desired enforcement to restrictions on chattels. There the court said: "Reason and justice seem to prescribe that . . . where a man . . . acquires property from another, with knowledge of a previous contract . . . the acquirer shall not . . . use and employ the property in a manner not allowable to the giver or seller . . . . " It was thought that these servitudes would receive judicial approval, but in England, such restrictions were held binding on subsequent purchasers with notice only when imposed on patented articles.[3] This view became more entrenched in England with one noteworthy exception decided on equitable servitude principles.[4]

8. Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695, 736 (1927).

1. Tulk v. Moxhay, 2 Phillips 774, 1 H. & Tw. 105, 18 L.J. Ch. 83, 13 L.T. (O.S.) 21, 13 Jur. 89, 41 Eng. Rep. 1143 (1848); 2 Pomeroy, Equity Jurisprudence 5th ed. 1941) 954; McClintock, Equity 213 (1936). See also, Schmidt, *Equitable Servitudes in Colorado*, 33 Dicta 236, 237 (1956).
2. 4 De G. & J. 276, 45 Eng. Rep. 108, 110 (C.A. 1858).
3. Werderman v. Societe' Generale d'Electricite', 19 Ch.Div. 246 (1881); National Phonograph Co. of Australia v. Menck, A.C. 336 (1911).
4. Lord Strathcona Steamship Co. v. Dominion Coal Co., A.C. 108 (1926) (The purchaser with notice was enjoined from using a ship in a manner inconsistent with the charter contract entered into by the original owner and the charter party).