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Constitutional Law: The Primary Importance of an Impartial Jury Trial

William Knight Zewadski

creates a second set of legal relationships without discharging the obligations of a former husband.

The court could have elected to adopt the above rationale. Instead, by reviving the doctrine that a bigamous marriage is absolutely void, the court casts doubt on the rationale of its earlier decisions. The better solution would appear to be that suggested above. The result would remain the same, but the court would have avoided doctrinal inconsistency in the area.

RICHARD L. FLETCHER, JR.

CONSTITUTIONAL LAW: THE PRIMARY IMPORTANCE OF AN IMPARTIAL JURY TRIAL

Parker v. Gladden, 87 Sup. Ct. 468 (1966)

Appellant, whose conviction for second-degree murder was affirmed by the Supreme Court of Oregon,[1] sought post-conviction relief on the ground that the bailiff's misconduct prejudiced the jury. The appellant's petition for a new trial was granted by the trial court and appeal was taken by the state. The Oregon Supreme Court reversed the order for a new trial,[2] holding that the error at trial, even though "reversible, prejudicial or materially affecting the rights of the party,"[3] was not a sufficient basis upon which to grant post-conviction relief and that post-conviction relief was not intended to be a delayed appeal. On certiorari the United States Supreme Court, in a per curiam opinion, reversed and HELD that bailiff's statements to certain jurors that defendant was a "wicked fellow," that he was guilty, and that if the defendant were erroneously found guilty the United States Supreme Court would correct it, violated constitutional guarantees of trial by impartial jury and confrontation by accusing witnesses. Judgment reversed, Justice Harlan dissenting.

In the instant case, the Supreme Court placed paramount importance on the right of the accused in state courts to a fair trial with a totally impartial jury under the dictates of the sixth amendment. In so holding the Court deemphasized the need for finality in verdicts

1. State v. Parker, 235 Ore. 366, 384 P.2d 986 (1963).
2. Parker v. Gladden, 407 P.2d 246 (Ore. 1965).
3. *Id.* at 247.

and protection of the jury from post-conviction harassment. These considerations formed the basis of the Oregon Supreme Court decision[4] and Mr. Justice Harlan's dissent.[5] The ramifications implicit in this holding require a fresh look at the approach taken by Florida courts in similar cases and perhaps a reconsideration of the newly-promulgated Canon 23 of the Florida Code of Ethics Governing Attorneys.[6]

The instant decision follows a long line of cases which have stressed that in state criminal trials, as well as in federal, those "provision[s] of the Bill of Rights which [are] 'fundamental and essential to a fair trial' [are] made obligatory upon the States by the Fourteenth Amendment."[7] Specifically, the Supreme Court has held these "fundamental requirements of a constitutionally fair trial"[8] to include a trial in all criminal cases[9] in a courtroom presided over by a judge[10] with the accused having a right to be physically present during prosecution for a felony (except in viewing the scene of the alleged offense),[11] to be represented by counsel,[12] to confront and cross-examine witnesses brought against him,[13] and to have all evidence developed in open court from the witness stand[14] and presented according to rules consistent with the due process clause of the fourteenth amendment[15] before an unbiased jury free of outside influences.[16]

In the principal case the Court required a trial court to grant a new trial to avert the *possibility* of prejudice resulting from remarks to the jury. In this holding the Court relied on *Turner v. Louisiana*,[17] a case in which two deputy sheriffs who were key witnesses for the prosecution were in "continuous and intimate association" with the jury during the three-day trial. Although no direct prejudice was shown and the deputies testified that there had been no conversation

4. *Id.* at 249.
5. 87 Sup. Ct. 468, 471 (1966).
6. The canon, as amended in June of 1966, concerns attorney-jury relations. *In re* Canons of Ethics Governing Attorneys, 186 So. 2d 509 (Fla. 1966).
7. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).
8. 87 Sup. Ct. 468, 470 (1966).
9. *In re* Oliver, 333 U.S. 257, 278 (1948).
10. See Rideau v. Louisiana, 373 U.S. 723 (1963).
11. See Snyder v. Massachusetts, 291 U.S. 97, *affirming* Commonwealth v. Snyder, 283 Mass. 401, 185 N.E. 376 (1933).
12. Gideon v. Wainwright, 372 U.S. 335 (1963).
13. Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).
14. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).
15. Rogers v. Richmond, 365 U.S. 534 (1961).
16. Remmer v. United States, 350 U.S. 377 (1956).
17. 379 U.S. 466 (1965).

about the case itself, the Court held that in view of the close association "it would be blinking [at] reality not to recognize the extreme prejudice inherent in this [situation]."[18] In the instant case not only was there mere association with an officer of the court who was prejudiced, but also there was testimony that the bailiff had made statements to certain jurors that were prejudicial, according to the trial court, and which " 'materially affected the rights of the defendant.' "[19] In both cases the decision rested on the rights to an impartial jury, confrontation, and counsel. *Turner* was based on the due process standard of fundamental fairness, while the present case utilized the sixth amendment guarantees of confrontation and impartial jury as applied to the states.[20]

In reaching the decision in the instant case, however, the Supreme Court ignored the objections raised by the Oregon Supreme Court and part of those asserted by Mr. Justice Harlan's dissent. In so doing the Court emphasized the importance, perhaps even the "preferred position," that the guarantee of an impartial jury trial has attained under the Constitution as presently interpreted by a majority of the Court.[21] As Mr. Justice Harlan pointed out in his dissent, Parker and his wife, without any reason to suspect the existence of irregularity, wrote and interviewed jurors in an attempt to establish grounds for a new trial during both the time that his first trial was on appeal and after his conviction had been affirmed.[22] Further, the testimony was not that actual prejudice resulted from the bailiff's comments to some jurors,[23] but only that his remarks *might* have been prejudicial.

The Oregon Supreme Court had distinguished *Turner* by saying

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18. *Id.* at 473.

19. 87 Sup. Ct. 468, 471 (1966).

20. Pointer v. Texas, 380 U.S. 400 (1965) had previously applied the confrontation clause of the sixth amendment to the states.

21. For its decision, the Oregon Supreme Court relied in part on the Oregon post-conviction statutes. ORE. REV. STAT. §§138.550, .530 (1965). Mr. Justice Harlan based his dissent in part on his refusal to apply the sixth amendment to the states. Parker v. Gladden, 87 Sup. Ct. 468, 472 (1966). Neither basis need be considered here, since the statutory requirement for a new trial only for deprivation of constitutional rights was met by the majority Supreme Court decision, and Mr. Justice Harlan is presently alone in his contention that the sixth amendment does not apply to state action.

22. 87 Sup. Ct. 468, 471 (1966).

23. One juror testified: "[A]ll in all it [the bailiff's comments] must have influenced me. I didn't realize it at the time." 87 Sup. Ct. 468, 470 n.3 (1966) (dissenting opinion). Mr. Justice Harlan noted she [the juror] denied any influence whatsoever when first examined and later admitted she "would do anything short of committing perjury to overturn it [the decision]." Parker v. Gladden, *supra* at 473 n.3 (dissenting opinion).

that "the difference in degree of the out-of-courtroom influence is so great"[24] as to make *Turner* inapplicable. Mr. Justice Harlan extended this argument by adding that the Court has never insisted on jurors being "absolutely insulated from all expressions of opinion on the merits of the case or the judicial process,"[25] that the evidence of prejudice was "extremely trivial," and that the Court should require "a substantial showing of prejudice . . . before a due process violation can be found."[26] Mr. Justice Harlan revealed implications of the majority's holding by observing: "[T]he Court's opinion leaves open the possibility of automatically requiring a mistrial on constitutional grounds whenever any juror is exposed to any potentially prejudicial expression of opinion."[27]

Both Mr. Justice Harlan and the Oregon Supreme Court attacked the petition for new trial on the ground that it would permit and encourage after-trial harassment of jurors by the convicted defendant or his attorney. The Oregon Supreme Court suggested that the need for finality in verdicts and for protection of jurors from harassment should be assessed with the guarantee of a fair trial to determine if a new trial should be granted.[28] Mr. Justice Harlan cited the established policy of the Court "to protect the sanctity of the jury process,"[29] and keep jurors from intimidation and harassment. He warned that others will be encouraged to follow Parker's example in pursuing the jury.

In the present case then, the majority of the Court is looking only to the circumstances of the trial itself, and in order to secure an absolutely impartial jury trial under the sixth and fourteenth amendments, would grant a new trial where *any possibly* prejudicial remarks have been overheard by *some* of the jury. On the other hand, the Oregon Supreme Court and Mr. Justice Harlan look to the degree of *actual* prejudice that has been shown, thereby establishing a rebuttable presumption of integrity as to the jury's deliberations. This presumption is needed, in their view, to assure finality in decisions[30] and to protect jurors from possible post-conviction harassment.[31] They

24. Parker v. Gladden, 407 P.2d 246, 249 (Ore. 1965).
25. 87 Sup. Ct. 468, 472 (1966) (dissenting opinion).
26. *Ibid.*
27. *Ibid.*
28. Parker v. Gladden, 407 P.2d 246, 249 (Ore. 1965).
29. 87 Sup. Ct. 468, 473 (1966) (dissenting opinion).
30. See Stein v. New York, 346 U.S. 156, 178 (1953); McDonald v. Pless, 238 U.S. 264, 267-68 (1915).
31. See, *e.g.*, Bryson v. United States, 238 F.2d 657, 665 (C.A. Cal. 1956), *cert. denied*, 355 U.S. 817 (1957); Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir. 1948), *cert. denied*, 335 U.S. 826 (1948); United States v. Provenzano, 240 F. Supp. 393, 412-13 (D.N.J. 1965); United States v. Holmes, 183 F. Supp. 361, 363

require that actual prejudice, determinative in the final conviction, be shown before a new trial is granted.

Thus, the majority holding, so interpreted, has two significant implications for state criminal proceedings in Florida. First, as to the probability of prejudice necessary for a new trial, the present case, taken with *Turner,* requires that the harmless error rule in Florida[32] be strictly limited to cases where, in the trial judge's discretion, *no* prejudice was *possible;* not because of statutory provisions,[33] nor because of precedent,[34] nor because of a vague requirement for "fairness" in court procedure,[35] but because of the overriding demands of the sixth and fourteenth amendments to the Constitution. Since the standard of granting a new trial where there is possible prejudice resulting from remarks tending to be prejudicial will be applied in the sound discretion of the trial judge,[36] the outcome will not be affected in a case, for example, where no new trial was granted because no actual prejudice or prejudicial remarks were shown, and defendant waived his objection to the bailiff's being a prosecution witness.[37] Also, no new trial would be required where the prejudicial remarks did not reach the jury.[38] Furthermore, the outcome will remain the same where a new trial is necessitated by a showing of actual prejudice.[39] In cases where prejudice is possible or in doubt, however, there is now a firm constitutional basis for granting a new trial.

Second, regarding appellant's post-conviction interviews, the Supreme Court's refusal, in the face of the specific objections of the

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(E.D.S.C. 1960), *rev'd on other grounds,* 284 F.2d 716 (4th Cir. 1960).

32. North v. State, 65 So. 2d 77 (Fla. 1952), *aff'd,* 346 U.S. 932 (1954).

33. A new trial was ordered in Holzapfel v. State, 120 So. 2d 195 (Fla. 1960), based on FLA. CONST. Decl. of Rights §11 (fair and impartial trial guaranteed) and FLA. STAT. §§918.07 (bailiff shall prevent communication with jury), 919.05 (jury may return to courtroom for instructions), 920.05 (1) (a) (grounds for new trial if criminal defendant is not present when required) (1965). See also FLA. STAT. §§920.04 (grounds for new trial if substantial rights are prejudiced), 920.05 (1) (b) (grounds for new trial if jury receives evidence out of court) (1965).

34. Pait v. State, 112 So. 2d 380, 385-86, 388-89 (Fla. 1959) distinguished North v. State, 65 So. 2d 77 (Fla. 1952) and held that in a capital case if the trial record does not show the *absence* of prejudice resulting from improper remarks of the prosecuting attorney, a new trial must be granted.

35. See State *ex rel.* Larkins v. Lewis, 54 So. 2d 199, 201 (Fla. 1951). However, both State *ex rel.* Larkins v. Lewis, *supra,* and Pait v. State, 112 So. 2d 380 (Fla. 1959) granted new trials when a doubt existed as to possible prejudice, even though they were not decided on the constitutional grounds used in the present case.

36. North v. State, 65 So. 2d 77 (Fla. 1952), *aff'd,* 346 U.S. 932 (1954).

37. Moseley v. State, 60 So. 2d 167 (Fla. 1952).

38. McVeigh v. State, 73 So. 2d 694 (Fla. 1954), *appeal dismissed,* 348 U.S. 886 (1954).

39. Owens v. State, 68 Fla. 154, 67 So. 39, 40 (1914).

Oregon Supreme Court and the dissent of Mr. Justice Harlan, to condemn or even to discuss the possibly undesirable effects of post-conviction probing of the jury when there is no reason to suspect any irregularity in the proceedings, seems to imply that the right to question jurors after trial is absolute. If this interpretation is correct, the newly-promulgated Canon 23 of the Florida Code of Ethics Governing Attorneys—"Relations with Jury" is unconstitutional insofar as it requires "reason to believe that ground for such challenge may exist"[40] and establishes restrictions on the scope of the interview.

It is, however, unlikely that the Supreme Court intended to permit unrestrained harassment or intimidation of jurors after trial by any convicted defendant, since even *possibly* prejudicial remarks are seldom made to the jury, and the danger of harassment of the jurors and jury tampering would be ever present. On the other hand, the present case does indicate that the showing of probable cause is too restrictive as a prerequisite for after-trial interviews with the jury. When possibly prejudicial remarks reach the jury after deliberations have begun, there is no way (other than post-conviction interview) for the accused to discover the possibility of prejudice before or after verdict unless there is a voluntary admission by a juror or the one who made the statements. Clearly, when such remarks have been made, the right to interview jurors after trial is crucial to insure the impartiality of the proceedings, and Canon 23 should not shield the possible prejudice from exposure by counsel for the accused.[41] In the light of the present decision, therefore, Canon 23 should perhaps be modified to establish only procedural limitations (such as notice to opposing counsel and the court, and restrictions as to the time and

40. FLORIDA CODE OF ETHICS GOVERNING ATTORNEYS, Canon 23, as amended June 15, 1966, provides in part as follows: "Subject to any limitations imposed by law it is a lawyer's right, after the jury has been discharged, to interview the jurors solely to determine whether their verdict is subject to any legal challenge *provided he has reason to believe that ground for such challenge may exist*, and further provided that prior to any such interview made by him or under his direction, he shall file in the cause, and deliver a copy to the trial judge and opposing counsel, a notice of intention to interview such juror or jurors setting forth in such notice the name of each such juror. *The scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror* and to avoid influencing his action in any subsequent jury service." Emphasis added.)

41. It is unlikely that the rationale of the present decision will be held inapplicable to Canon 23 of the Florida Code of Ethics Governing Attorneys solely because the defendant Parker, who made the interviews, was not an attorney, since it would be more desirable whenever possible to have any post-conviction inquiries made by counsel, responsible to the court and the bar, rather than by the defendant, who may conduct his questioning with less restraint or consideration for the jurymen.