Denver Law Review

Volume 16 | Issue 10 Article 3

July 2021

# Misconduct of Jury - Ground for New Trial

William E. Doyle

# MISCONDUCT OF JURY—GROUND FOR NEW TRIAL

*By* WILLIAM E. DOYLE, *of the Denver Bar*

VERY recently our Supreme Court announced a most interesting and instructive decision. The case was that of Wharton v. People, 90 Pac. (2d) 615, 103 Colo. ____ (May 8, 1939).

Wharton was convicted of murder in the first degree in the District Court of El Paso county. He was sentenced to death. Following the verdict a motion for a new trial was filed. Contained therein was the affidavit of a juror who had served on the trial of the case. This affidavit set forth that the juror had concurred in the verdict only by reason of threats and coercion at the hands of the other jurors. The district attorney objected to the reception and consideration of this affidavit, and the court sustained the objection. On appeal the Supreme Court held that prejudicial error was committed by the trial court in its refusal to receive and consider the evidence.

The substance of the affidavit above mentioned is as follows: That the verdict was not that of the juror; that he had been coerced into signing the death penalty verdict by abusive language, threats, scoffing and slurring remarks and argumentative pressure until "after hours of the above repeated and continuous violent, abusive and profane language and conduct on the part of the said other eleven jurors to affiant, affiant became so weak and exhausted as to be unable to speak or argue without breaking down physically and crying, and affiant was made to continuously withstand the repeated assaults, pressure and conduct of the other jurors in the jury room, and the threats to physical combat made by the other eleven purported jurors, and affiant because of his weakened physical condition and the long repeated pressure of . . . abusive epithets and conduct . . . told said other eleven purported jurors that affiant would let the penalty be entered on the verdict that the other eleven purported jurors wished."

It is noteworthy that the language contained in the affidavit is very strong. It charges that the verdict was not unanimous, but rather that it was rendered by only eleven of the twelve jurors. It should be noted also that the case is criminal and involves the death penalty.

Our Supreme Court, per Mr. Justice Bock, held that the circumstances of the case were such as to "warrant a departure from the general rule." Language used is as follows (p. 618 of 90 Pac. 2nd):

"In the instant case the trial court's action in denying a hearing on the question raised by the Anderson affidavit was arbitrary, and its failure to hear and determine the matter, in view of the allegations hereinabove quoted from said affidavit, was prejudicial error."

The rule which prohibits a juror's impeachment of his own verdict is very old. Prior to 1785 a juror's testimony in such cases was sometimes received. But in that year Lord Mansfield, in Vaise v. DeLaval, 1 T. R. 11, refused to receive the affidavits of jurors to prove that their verdict had been made by lot. That ruling came to be universally recognized in both England and the United States.[1] Also, it has been broadened to include all affidavits of jurors. In many states the rule has been codified into statutes.[2] The rule is based upon reasons of policy. As was said by the United States Supreme Court in McDonald v. Pless, considering the question, "For while it may often exclude the only possible evidence of misconduct, a change in the rule would open the door to the most pernicious arts and tampering with jurors. 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse,' and 'no verdict would be safe.' Cluggage v. Swan, 4 Binn. 155, 5 Am. Dec. 400; Straker v. Graham, 4 Mees & W. 721, 7 Dowe P. E. 223, 1 Horn & H. 449, 8 L. J. Ech. N. S. 86."

It would seem that on grounds of policy the soundness of the rule is beyond question; however, from the standpoint of legal soundness it has often been sharply criticized. (See Wigmore, Secs. 2348-2354.)

If we concede that criminal cases involving the death penalty are distinctive with regard to this question, and if we are cognizant also that the reasons for the rule are reasons of policy, then we will conclude that the Wharton case is not a

[1]There are now only six states in the United States that do not adhere to it. See Wigmore, Sec. 2354.

[2]The Colorado statute modified the common law rule as follows (Sec. 237, Ch. 17, Code of Civil Procedure, Part 2): "Second—Misconduct of the jury, and when any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of one or more of the jurors."

wide departure from established practice. Moreover, it is to be remembered that exceptions to the rule are not impossible when the reasons of policy suggest exceptions rather than no exceptions. (See Boyles v. People, 90 Colo. 32, 6 Pac. (2d) 7.)[3]

The situation which occurred in the Wharton case will probably never arise again. If a juror's affidavit is filed under identical circumstances the trial court will most likely receive it, hear evidence on the other side of the question, and make a finding, which finding will probably not be disturbed on appeal. Had the trial court in the Wharton case afforded a hearing and exercised discretion, the case would not have been sent back.

Finally, it is submitted that rules should not be blindly worshipped. An exception should be made without equivocation where, as in the Wharton case, plain principles of reason and justice dictate such an action. I believe that the decision is sound.

Since the above was prepared a new trial has been granted. A hearing was had in accordance with the ruling laid down by the Supreme Court. At this hearing it appeared for the first time that there were irregularities other than the alleged coercion, which consisted of the failure on the part of the bailiff to properly confine and watch the jury. The defendant then filed a supplemental motion for a new trial, setting forth in substance that the bailiff had left the jury unattended during the night of September 30, 1938; that they had access to the whole third floor of the county courthouse; that a telephone was available to the jury.

The court found that there had not been coercion of juror Anderson "and no improper conduct upon the part of any member of the jury." The irregularities being the fault of officers of the court, the court felt that a very liberal view should be taken in the matter of granting the defendant a new trial.

---

[3]In the Boyles case the Court, per Mr. Justice Butler, said: "It states the rule too broadly to say that such affidavits are never admissible to impeach a verdict in a criminal case. In the Wray case, supra, we stated that it is the general rule. It would not be safe to lay down any inflexible rule, for, as was said by Mr. Justice Taney in United States v. Reid, 53 U. S. (12 How.) 361, 366, 13 L. Ed. 1023, 'Cases might arise in which it would be impossible to refuse them (such affidavits) without violating the plainest principles of justice.' "