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CRIMINAL LAW CASE NOTES AND COMMENTS

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JURY NOTE-TAKING IN CRIMINAL TRIALS

Donald S. Buzard

The question of the propriety of allowing jurors to take notes during the course of a criminal trial[1] was recently considered by the United States Court of Appeals, Second Circuit, in *United States v. Chiarella.*[2] Four defendants had been convicted of counterfeiting, and alleged as a ground of appeal that the trial judge had refused to let the jurors take notes of evidence during the trial. The court recognized the argument against allowing such note-taking on the grounds the notes take on undue importance while the jury deliberates, but stated that the supposed dangers appeared far-fetched, if not imaginary. But in any event, the question has never been must the judge *permit* the practice, but must he *forbid* it. "Moreover, it is at most a matter of discretion."[3] The convictions were affirmed.

Two views have been advanced by the courts with regard to jury note-taking, in the absence of statutory provision.[4] The first is that the practice is improper, and to allow it is reversible error. The second is that of the principal case, that the matter is discretionary with the trial court. There is a relative scarcity of case law on the subject, there being only some fifteen reported decisions.

Cheek v. State[5] is the leading authority for the view that note-taking constitutes grounds for reversal. In that case two jurors, over the objection of the defendant and contrary to the prohibitions of the court, made notes of the evidence. The decision of the trial court was reversed on another ground, but the court said this misconduct of itself would have entitled the defendant to a new trial. The primary objections to the practice were thought to be that the process of writing necessarily diverted the attention of the juror from other evidence; and that during the deliberations, the jury would be apt to rely strongly on the notes, which might be imperfect, whereas properly the jury should rely on what is registered on their memories. In another case in which the practice was declared improper, the reasons given were that conflicts of memory between jurors would be settled by the notes, which might be inaccurate, meager, careless, loosely deficient, partial, and altogether incomplete; and there is increased opportunity for a corrupt juror to influence the

1. The same problem exists of course in civil trials, but the scope of this discussion is limited to criminal trials.
2. 184 F.2d 903 (2d Cir. 1950).
3. *Id.* at 907.
4. A third view, that a juror can take notes as a matter of right, is suggested by the language in Thomas v. State, 90 Ga. 437, 16 S.E. 94 (1892): "There is no law to prohibit a juror from taking notes of any of the evidence." A later case from the same jurisdiction (Vaughn v. State, 17 Ga. App. 268, 86 S.E. 461 (1915)) seems to adopt the discretionary view.
5. 35 Ind. 492 (1871).

other jurors.[6] Later cases seem to make an effort to avoid granting a new trial on this ground alone. Thus, where the defendant failed to object to note-taking during the trial, it was presumed that he had consented thereto.[7] In another instance, where a juror ceased taking notes when the judge informed him it was improper, on appeal it was said that the defendant suffered no injury thereby.[8] Other holdings seem to require that the defendant affirmatively show that neither he nor his attorney knew that notes were being taken, else the lack of objection during trial be deemed a waiver.[9]

The dangers of allowing note-taking, in addition to those previously mentioned, include the possibility that a juror, usually inexperienced, may erroneously evaluate the testimony, and during deliberations, his memory would be bolstered by such evaluation. Also, a juror may start a trial by making many notes, but the novelty will wear off and as the job becomes tedious, he will stop. The party presenting evidence at that point will be placed at a disadvantage, for in reviewing the notes the juror will be refreshed only as to part of the testimony. Another danger is that the jurors will take notes of statements of counsel, which might tend to be colored, and in deliberations will confuse this with testimony. It is true that judge and counsel often make notes, but the judge, who has studied the pleadings and knows the issues, will note only the important evidence.

The view that note-taking should be permitted is also based upon a number of important factors. One such consideration recognizes that a person's memory is faulty, particularly over a long period of time, and to allow notes to be made as a memory-refresher will better enable a jury to reach a proper result. An experienced note-taker may influence the jury, but there is less danger in a persuasive juror unduly influencing other jurors who have notes before them than those with no notes at all. The purpose of the notes is not to replace the memory but to aid it. In lengthy trials, such as prosecutions under the Anti-Trust Acts, stock frauds, tax and bank cases—trials that may extend six months or longer—there may be many party defendants and witnesses, and it is impossible for a juror to remember accurately the testimony of each. Allowing the juror to make notes will to some extent alleviate the guessing that must occur in deliberations of all but the shortest trials.

In the absence of statutory provision, the majority view is that allowing or forbidding the practice is a matter of discretion with the trial court.[10] The court, obviously, should not allow the practice if it will prejudice the defendant. This discretion presumably would be exercised to permit the taking of notes in lengthy trials, trials involving many defendants, or many

6. United States v. Davis, 103 F. 457 (C.C.W.D.Tenn. 1900), *aff'd* 107 F. 753 (6th Cir. 1901). After a strong statement against the practice, the court hedges, and says that perhaps it is a matter within the discretion of the court.

7. Cluck v. State, 40 Ind. 263 (1872).

8. Batterson v. State, 63 Ind. 531 (1878); *cf.* State v. Joseph, 45 La. Ann. 903, 12 So. 934 (1893), where the evidence showed the juror took the notes to the jury room but destroyed them; State v. Keehn, 85 Kans. 765, 11 P. 851 (1911), where no inference of prejudice was drawn from the jury using an inaccurate copy of an incorrect map prepared of the locale, since the jury knew of the inaccuracies and took the map only for what it was worth.

9. Long v. State, 95 Ind. 481 (1884); State v. Robinson, 117 Mo. 649, 23 S.W. 1066 (1893). It may be noted here that in jurisdictions where the State can appeal from criminal cases, the same right to show prejudice might be available. Such does not appear in any case, however.

10. United States v. Chiarella, *supra;* Miller v. Commonwealth, 175 Ky. 241, 194 S.W. 320 (1917); Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127 (1905). A common law origin of the rule cannot be perceived from the cases.

witnesses,[11] with complicated issues, and to forbid the practice in shorter, more simple trials where the dangers might possibly outweigh the necessity and value to be derived from note-taking. The court is said to balance the interests between dangers and necessity. But the dangers increase as the necessity increases. In a short trial, the memory needs no aid, but notes taken could not harm since they are more likely to be accurate and less likely to supplant the memory. In lengthy trials, however, where the memory may fade, the notes are important. There is greater danger in their being inaccurate, because of the volume of notes taken, or incompleteness; and as the memory fails, the notes become the memory itself. If the purpose of allowing the practice is to better enable the jury to reach a proper result, it would appear this purpose is served in all trials, and that there is no benefit in leaving the matter discretionary with the court.[12]

Ten states provide by statute that among the articles jurors may take with them into the jury room for deliberation are "notes of testimony taken by themselves or any of them but none taken by any other person.[13] In none of these states is there a case applying the statute, as an authorization for the jury, as a matter of right, to take notes if they desire. However, in none of these states are there cases forbidding the practice, or leaving it to the judge as a discretionary matter.[14] The clear language of the statute indicates that its purpose is to give the jurors the right to make notes.

Conclusion

The value to be derived from allowing jurors to take notes outweighs the dangers from the practice. Jurors should be encouraged by the court to

11. "In State v. Avery (R.I. 1833), a 'trial of unprecedented length, commencing May 16th and continuing to June 2d, and in which upwards of 150 witnesses were examined, such permission was applied for, but refused.'" BURRILL, CIRCUMSTANTIAL EVIDENCE 108 n.(a) (1859). Permission should have been granted in this trial.

In United States v. Carlisi, 32 F. Supp. 479, 483 (E.D.N.Y. 1940), where the defendant's objection to infrequent note-making was overruled for the reason there were twenty-nine individual defendants, many witnesses testifying, and much detailed testimony involving the names of many persons, dates, and occurrences, the court said: "There is no legal reason why notes should not be made by jurors. Judges and lawyers make notes, why not jurors? Certainly the making of notes would better aid their memories and thus enable them to more intelligently consider the evidence. While it did not happen in this case I see no objection to all jurors, if they desire, making notes which could be used by them to refresh their recollections, when we realize that the purpose of a law suit is to do justice rather than make it a game of chance. The Courts should make progress with the times."

12. A desire on the part of the bar to change the state of the law is evidenced by the recommendation of the Indiana State Bar Association that jurors be permitted to take notes (32 J. Am. Jud. Soc. 57, 1948). In the Alabama Juror's Handbook is the statement that a juror may take notes of testimony if he desires, provided in doing so he is careful to give attention to all the testimony, and to observe the conduct and demeanor of witnesses while testifying on the stand. The point is not mentioned in "A Handbook for Petit Jurors Serving in the United States District Courts" (1943), published by authorization of the Judicial Conference of the United States.

13. CAL. PEN. CODE Sec. 1137 (1935); IDA. CODE c.19, Sec. 2203 (1947); IA. CODE Sec. 784.1 (1949); MINN. STAT. Sec. 631.10 (1949); MONT. REV. CODE c.94, Sec. 7303 (1947); NEV. COMP. LAWS Sec. 11004 (1929); N.D. REV. CODE c.29 Sec. 2204 (1943); UTAH CODE tit. 105 Sec. 33-2 (1943); N.Y. CRIM. CODE AND PENAL LAW (Clevinger-Gilbert) Sec. 426 (1950). Similar provisions in Arizona (ARIZ. REV. CODE Sec. 5077 (1928) and Oregon (ORE. CODE Sec. 2-312 (1930)) statutes were deleted in 1939 revisions. Such a provision is adopted by the RESTATEMENT, CRIMINAL PROCEDURE Sec. 330 (1931).

14. Letters from members of the bar in several of these states indicate that as a general practice, jurors do take notes of the testimony, although the statute is not employed as authority.