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Communication between Judge and Jury as Cause for a New Trial

CRIMINAL LAW CASE NOTES AND COMMENTS

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COMMUNICATION BETWEEN JUDGE AND JURY AS CAUSE FOR A NEW TRIAL

Paramount among the procedural safeguards guaranteed the accused in a state criminal trial are the limitations placed upon the conduct of the officers of the court during the trial. All courts agree that certain communications between the judge and jury outside the presence of the defendant call for a new trial. The question, then, becomes whether *all* such communications, or only those which might be prejudicial to the defendant, should be classified as reversible error, as a matter of policy or under the due process clause of the Fourteenth Amendment.

The Illinois Supreme Court recently faced that problem in *People v. Tilley*.[1] Here, the court denied a new trial, holding that the particular communication between the judge and jury outside the presence of the defendant was not prejudicial.[2] Two justices dissented on the ground that as a matter of policy, any communication whatever between the judge and jury, except in open court with the defendant present, should be cause for a new trial.[3]

The theory followed by the majority in the *Tilley* case was first expressed in Illinois in *People v. Brothers*.[4] There, the court denied a motion to set aside the verdict because of a communication between the judge and jury, and set forth the cardinal test in such situations to be whether the communication could possibly influence the jury in a manner prejudicial to the defendant.[5] In situations where the jury is clearly influenced, the courts which

1. 411 Ill. 433, 104 N.E. 2d 449 (1952), *Cert. granted,* 20 U.S.L. WEEK 3338 (June 24, 1952). (The defendant's petition for certiorari assigned error under the due process clause and the Bill of Rights of the United States and Illinois Constitutions.)

2. Tilley was found guilty of manslaughter. The case involved the death of a young woman as a result of an abortion. Defendant did not testify at the trial, but he signed a waiver stating that if it was proved he performed the abortion, then he agreed the operation was not necessary to save the girl's life. After the jury had deliberated through the night, the judge went to the jury room in the company of the bailiff and inquired whether there was any hope of arriving at a verdict. Upon an inquiry by one of the jurors, the judge told the jury to read their instructions and that any additional instructions would have to be given in presence of the attorneys and the defendant. Another juror then referred to the waiver defendant had signed and inquired whether in that statement he admitted committing an abortion. The judge replied, "No. he specifically denies it." A short time later, the jury returned its verdict of guilty.

3. Justices Bristow and Maxwell dissented.

4. 347 Ill. 530, 180 N.E. 442 (1932). Judge in a murder trial inadvertantly submitted an instruction concerning manslaughter. Upon receiving written communications from the jury asking about the instruction, the judge realized his mistake, withdrew the instruction, and returned the other instructions to the jury. Held, motion to set aside the verdict of murder denied.

5. People v. Alcade, 24 Cal.2d 177, 148 P.2d 627 (1944); Collins v. State, 78 Ga. 87 (1886); People v. LaMunion, 64 Fuller (Mich.) 709, 31 N.W. 593 (1887); People v. Pickert, 26 Misc. 112, 56 N.Y. Supp. 1090 (1889); Cartwright v. State, 12 Lea Tenn.) 620 (1883); Denison v. State, 201 Wis. 3, 229 N.W. 83 (1930). See also 39 Am. Jur., Appeal and Error §1050; 23 C.J.S. Criminal Law §1366; Annotations at 22 A.L.R.262 (1923); 34 A.L.R. 104 (1925); 62 A.L.R. 1468 (1929), (At least seventeen states have followed the liberal view).

follow the prejudice test have not been reluctant to grant new trials.[6] But in the majority of situations, the evidence has indicated an absence of influence on the jury or prejudice against the defendant; and the courts have denied motions for new trials on that basis. Thus the courts have refused to grant new trials where the judge asked that he be notified if the jury should agree;[7] where no additional information was given that was not in the original charge;[8] where upon inquiry as to whether the jury could return a decision of life imprisonment "and not eligible for parole," and the judge answered no;[9] where, questioned as to the form of verdict, the judge answered, "guilty or not guilty";[10] where the trial judge, when asked the meaning of a word, told the juror that a reference to the dictionary might throw some light on it;[11] where the jury asked whether a type of verdict was permissible, and the judge replied that he would have to send for the defendant in order to answer;[12] where the jury asked whether they could write a recommendation for clemency and the judge replied that they could.[13]

In conflict with the prejudice rule as set forth in the *Brothers* case, a number of jurisdictions follow a more strict rationale which requires a new trial in the instance of any communication whatever between the judge and jury, except that which takes place in open court with the defendant present.[14] The proponents of this view feel that the question should not be in terms of the substance and effect of each particular communication, but, whether any communication at all is proper. This rationale is followed in a substantial number of states regardless of the innocence of the communication.[15]

Prior to the *Brothers* case, Illinois had consistently followed the strict rule,

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6. *E.g.*, Lewis v. State, 73 Okla. Cr. 172, 119 P.2d 91 (1941). (Judge asked jury its numerical division; appellate court held that burden of proving conduct is not prejudicial is on the state.) Rogers v. State, 118 Tex. Crim. Rep. 123, 38 S.W.2d 784 (1931). (Judge entered jury room and asked how they stood numerically. Foreman replied, "Four to two," whereupon Judge commented that two were "awfully contrary." *Held,* new trial.) The fact that these cases are rare would seem to indicate that either the trial judges are properly exercising their impartial function or that the appellate judges are failing to properly exercise their functions on review.

7. Cartwright v. State, 12 Lea (Tenn.) 620 (1883).

8. People v. LaMunion, 64 Fuller (Mich.) 709, 31 N.W. 593 (1887).

9. People v. Alcade, 24 Cal. 2d 177, 148 Pac. 627 (1944).

10. People v. Moore, 50 Hun. (N.Y.) 356, 3 N.Y. Supp. 159 (1888).

11. Denison v. State, 49 Tex. Crim. Rep. 426, 93 S.W. 731 (1906)

12. Com. v. Myma, 278 Pa. 505, 123 Atl. 286 (1924).

13. State v. McGlade, 165 Kan. 463, 196 P.2d 173 (1948); State v. Evans, 90 Kan. 795, 136 Pac. 270 (1913); State v. Costales, 27 N.M. 121, 19 P.2d 189 (1933).

14. Sargent v. Roberts is the most frequently quoted case propounding this rule; "As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper. . . . And we are all of opinion, . . . that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge unless in open court, and, where practicable, in the presence of the counsel in the cause." 18 Mass. (1 Pick.) 337, 341 (1823).

15. Hinson v. State, 133 Ark. 149, 201 S.W. 811 (1918); O'Connor v. Guthrie & Jordan, 11 Iowa 80 (1860); Hoberg v. State, 3 Minn. 181 (orig. ed. 262) (1859); State v. Duvel, 4 N.J. Misc. 719, 134 Atl. 283 (1926), *aff'd* 103 N.J. Law 715, 137 Atl. 718 (1927); State v. Ashley, 121 S.C. 15, 113 S.E. 305, (1922); State v. Wroth, 15 Wash. 621 47 Pac 106(1896).

There are instances where the innocence of the communication hardly seemed to warrant reversal. Hobery v. Minn., 3 Minn. 181' (orig. ed. 262) (1859) (judge informed jury that if they wanted any information on matters of law, they should come into court and ask for it); State v. Wroth, 15 Wash. 621, 47 Pac. 106 (1896) (upon request of jury, judge went to jury room and stood in the doorway, soon returning to inform counsel that jury requested him to repeat an instruction).

with but one exception.[16] Even assuming that what was said or done by the judge while in the jury room did not influence the jury,[17] the courts would grant a new trial for the simple reason that such an interview did take place.[18] But the court rejected the rule on the ground that it would be "idle" to disturb the verdict where no prejudice could have resulted.[19]

The policy underlying the strict rule is to guarantee the defendant his right to a public trial—the right to be present at every stage of the proceedings.[20] It is argued that private communications, however harmless, may open the door to abuses and destroy the confidence of the accused and of the public in the fairness of the trial.[21] The remarks of the judge may be insignificant, but something about his manner and actions could indicate approval, disappointment or contempt, adversely affecting the defendant's cause.[22] Furthermore, since the defendant is not present when the communication occurs, it may be extremely difficult for him to establish prejudice, particularly because a juror may not impeach his own verdict.[23]

On the other hand, the policy underlying the more liberal rule, requiring a showing of prejudice, is to prevent repetitious litigation after defendant has had a full and complete trial. It is argued that harmless errors and procedural technicalities should not be grounds for new trials. As a practical matter, it is often impossible to prevent a juror from communicating with a trial judge, as when the judge enters the jury room for some purpose other than to communicate with the jury,[25] or when a juror approaches the judge to ask permission to telephone or to report he is ill.[26] Thus, it would seem that no matter which rule is followed, extraneous communications may continue to occur.

The defendant under the liberal rule can satisfy the burden of showing prejudice by reference to the communication itself. Appellate courts have not hesitated to reverse where the communication was capable of a construction prejudicial to his cause. It is admitted that the defendant would have difficulty in proving prejudice that may have been caused by some gesture or voice inflection. However, this type of problem is not likely to

16. Rafferty v. People, 72 Ill. 37 (1874) (The court refused to set aside the verdict, calling the communication a mere "irregularity.")

17. Crabtree v. Hagenbaugh, 23 Ill. 289 (orig. ed. 349) (1860) (This is the landmark case in Illinois.) Although this case involved a civil action, no distinction appears to be made by the courts on this ground. See Shields v. United States, 273 U.S. 583, (1927), and annotation at 84 A.L.R. 220 (1933).

18. *E.g.,* People v. Beck, 305 Ill. 593, 137 N.E. 454 (1922); City of Mound City v. Mason, 262 Ill. 392, 104 N. E. 332 (1914); Chicago & Alton R.R. Co. v. Robbins, 159 Ill. 598; 43 N.E. 332 (1895).

19. People v. Brothers, 347 Ill. 530, 180 N.E. 442 (1932).

20. People v. Beck, 305 Ill. 593, 137 N.E. 454 (1922).

21. Outlaw v. United States, 81 F.2d 805 (5th Cir. 1936).

22. People v. Tilley, 411 Ill. 473, 480, 104 N.E. 2d 449, 502 (1952) (dissenting opinion).

23. 5 WIGMORE, EVIDENCE §2349 (3d ed. 1940).

24. Former testimony of deceased or absent witnesses is generally admitted against the accused so long as the right of cross-examination had been satisfied. 5 WIGMORE, EVIDENCE §1398 (3d ed. 1940). But see Seidensticker, *Illinois Post-Conviction Hearing Act,* 1 DEPAUL L. REV. 243 (1952). (Examples where new trials have been granted under Illinois Post-Conviction Hearings Act, and the state has asked that the matter be stricken because of inability to produce witnesses.)

25. Denison v. State, 49 Tex. Crim. Rep. 426, 93 S.W. 731 (1906) (judge entered jury room to pick up a form).

26. People v. Brothers, 347 Ill. 530, 549, 180 N.E. 442, 449 (1932).

occur frequently.[27] Therefore, it would seem that the liberal rule adequately safeguards defendant's rights, and, at the same time, avoids the problems of repetitious litigation in cases where he has already had a fair trial.

The constitutionality of the liberal rule will be determined by the United States Supreme Court when it hears the *Tilley* case on certiorari.[28] Although the Supreme Court has not been faced with an extraneous communications problem of this nature before,[29] the lower federal courts have met it in several cases and have adopted a rule which differs slightly from both the strict and liberal views expressed above. The federal courts hold that communications between the court and jury constitute error if the defendant was not present when the communication occurred, but if the record shows affirmatively that the defendant was not prejudiced by the communication, then the error does not require reversal.[30] If the record shows the error but does not disclose whether it was or was not prejudicial, it is presumed to have been prejudicial.[31]

This rule seems to have developed "upon general constitutional grounds" and as a variation of the strict rule followed in many states.[32] Even assuming that the federal courts adopted their rule upon constitutional grounds alone, it will not necessarily follow that the states will be denied the choice of adopting a more liberal rule without violating the constitutional guarantees. In the past, the Court has adopted a strict rule for its own procedure but left the states free to adopt less strict measures in analogous situations, *e.g.*, the right to counsel,[33] the admission of evidence illegally seized,[34] and the privilege against self-incrimination.[35]

The Supreme Court must decide in the *Tilley* case whether the liberal rule applied in a state court amounts to a denial of procedural due process under the federal constitution. Although the Court has specifically held that many of the specific safeguards guaranteed a defendant in a criminal trial in the federal courts by the Bill of Rights[36] have not been extended to the state courts by the Fourteenth Amendment nevertheless certain procedures in

27. There are no discovered cases where such a claim has even been asserted. However, it may well be said that the absence of cases may be in part accounted for by the absence of proof.

28. *Cert. granted,* 20 U.S.L. WEEK 3338 (June 24, 1952). (It comes as a surprise that the Supreme Court granted certiorari in view of the long existence of the liberal rule in many states.)

29. The Supreme Court has dealt with the problem in other connections. Shields v. United States, 273 U.S. 583 (1927) (additional written instructions); Brasfield v. United States, 272 U.S. 448 (1926) (Judge asked jury its numerical division); Filippon v. Albion Vein Slate Co., 250 U.S. 76 (1919) (additional written instructions). The judge in these cases did not orally communicate with the jury in private.

30. Ray v. United States, 114 F. 2d 508 (8th Cir. 1940); Outlaw v. United States, 81 F.2d 805 (5th Cir. 1936); Ah Fook Chang v. United States, 91 F.2d 805 (9th Cir. 1935); Little v. United States, 73 F.2d 861 (10th Cir. 1934); Dodge v. United States, 258 Fed. 300 (2d Cir. 1919).

31. Ah Fook Chang v. United States, 91 F.2d 805 (9th Cir. 1935); Little v. United States, 73 F.2d 861 (10th Cir. 1934).

32. The cases speak of defendant's "rights" or "constitutional rights," but are not specific as to the exact constitutional guarantee in question. However, in Fina v. United States, 46 F.2d 643 (10th Cir. 1931) the court held specifically that the communication involved (the court answered a question propounded by the jury in the defendant's absence) violated defendant's right to be present at all stages of the trial and of the right to a fair and impartial trial.

33. Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

34. Wolf v. Colorado, 338 U.S. 25 (1949).

35. Adamson v. California, 332 U.S. 46 (1947).

36. Howard v. Kentucky, 200 U.S. 164 (1906); Betts v. Brady, 316 U.S. 455 (1942).