DePaul Law Review

Volume 9
Issue 2 *Spring-Summer 1960*

Article 19

Criminal Procedure - State Allowed Peremptory Challenge of Previously Accepted Juror after Defense Exhausted Peremptory Challenges - Nail v. State, 328 S.W.2d 836 (Ark., 1959)

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that the death of the child was caused by the accidental burning in which the father had no part; and that the absence of medical attention did not cause "the killing" of the child even if the failure or refusal of the father to provide medical attention was "culpable negligence." And again in the *Beck* case, while the court affirmed the conviction of a misdemeanor, it held the punishment excessive and modified it by taking off the jail sentence and leaving a $50 fine. It appears that the child died of lockjaw.

In the *Craig* case, the court followed the majority view in denying religion as a defense, but held that the evidence was not sufficient to establish the element of causation. The evidence presented, which gave the appellate court its problem was the testimony of medical witnesses called to give expert opinions. The principal question put to them was whether or not appropriate treatment would have resulted in recovery. The response to this was that if appropriate treatment had been given soon enough and if the patient responded, an excellent chance of recovery would have been had. The court's answer was that since parents have a reasonable discretion in when to call in medical aid, and that since nothing in the testimony would sustain a finding that the parents were negligent during the early period of the disease, causation had not been proven. The court further considered that the doctors stated that, at the last stages of the illness, a cure would have probably been ineffectual. Yet, the record discloses that the child had extensive pneumonia of both lungs in an advanced state, with a complication of acute suppurative arthritis in the elbow joint and some hemorrhage in the adrenals. It was further shown that the child was ill for eighteen days before its death.

It would appear, from what has been said, that though religion is held not to be a defense, that it is nevertheless the *best* defense. If this is not so, then why is it that the courts expect such exactness of medical science in a case involving religious overtones and not in one of pure negligence.

CRIMINAL PROCEDURE–STATE ALLOWED PEREMPTORY CHALLENGE OF PREVIOUSLY ACCEPTED JUROR AFTER DEFENSE EXHAUSTED PEREMPTORY CHALLENGES

The defendant was indicted for murder. During the examination on voir dire, after the defendant had exhausted his peremptory challenges, the prosecution asked the court to excuse a juror that had already been accepted by both sides. The court excused this juror over the defendant's objection. After being convicted of murder in the first degree, the defendant appealed, contending that the trial court committed error in allowing the state to excuse a juror already accepted after defendant's peremptory challenges were exhausted. The Supreme Court of Arkansas affirmed the judgment holding that there is no valid reason to refuse the

request of the state to excuse this juror unless it first be shown that the defendant will be prejudiced in his right to a fair and impartial jury by the service of the venireman accepted in lieu of the excused juror. *Nail v. State*, 328 S.W. 2d 836 (Ark., 1959).

The prosecution gave no cause or reason for its challenge, so it is peremptory in effect. A peremptory challenge is an objection to a juror based upon the whim or fancy of the challenger, as compared to a challenge for cause where the juror is disqualified as a matter of law.

At common law, a juror could be peremptorily challenged at any time prior to being sworn.[1] Today the accused has no constitutional right to a peremptory challenge, but it is expressly conferred by statute in most jurisdictions.[2] If the subject is not controlled by statute, the order in which peremptory challenges may be exercised is in the discretion of the court.[3]

The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused; it is a right "material to [the] defense."[4] The *Nail* decision, concerning this right, brings out a novel question—what are the rights of the defendant in selecting a jury after he has exhausted his challenges and the prosecution seeks to peremptorily challenge an accepted juror?

As a pure matter of right to the defendant, and apart from any special circumstances, there may be said to be two divergent rules existing among the American jurisdictions: (1) That a juror cannot be challenged peremptorily by the prosecution after he has been accepted by both sides;[5] and (2) that a juror, although accepted, may be challenged peremptorily until he or the jury is sworn to try the case.[6]

The majority in the *Nail* case specifically overruled the landmark case

[1] Lindsley v. People, 6 Park. Cr. (N.Y.) 233 (1867). It is to be noted that at common law a juror was called individually and accepted and sworn in before the next juror was called.

[2] State v. Durham, 177 Ore. 574, 164 P.2d 448 (1945); Foreman v. State, 203 Ind. 324, 180 N.E. 291 (1932); People v. Reese, 258 N.Y. 89, 179 N.E. 305 (1932).

[3] Pointer v. United States, 151 U.S. 396 (1894). Accord: Turpin v. State, 55 Md. 462 (1880); Commonwealth v. Piper, 120 Mass. 185 (1876).

[4] Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 293 (1891).

[5] Dixon v. State, 164 Miss. 540, 143 So. 855 (1932); State v. Martin, 32 N.M. 48, 250 Pac. 842 (1926); People v. McQuade, 110 N.Y. 284, 18 N.E. 156 (1888); Munday v. Commonwealth, 81 Ky. 233 (1883); McMillan v. State, 7 Tex. App. 142 (1879); Sparks v. State, 59 Ala. 82 (1877); State v. Potter, 18 Conn. 166 (1846).

[6] Thompson v. State, 199 Ind. 697, 160 N.E. 293 (1928); Whittemore v. State, 151 Md. 309, 134 Atl. 322 (1926); State v. Peel, 23 Mont. 358, 59 Pac. 169 (1899); Mann v. State, 23 Fla. 610, 3 So. 207 (1888); State v. Spaulding, 60 Vt. 228, 14 Atl. 769 (1887); People v. Carrier, 46 Mich. 442, 9 N.W. 487 (1881); State v. Pritchard, 15 Nev. 74 (1880); People v. Kohle, 4 Cal. 199 (1854).

of *Williams v. State,*[7] in which the defendant was also on trial for first degree murder. After ten jurymen were accepted by both sides, and the defendant had exhausted his twenty challenges, the prosecution was allowed to peremptorily challenge the eighth juror in the box. The supreme court held that the allowance of this challenge was reversible error.

In the latter decision, the court, in noting that the defendant had not shown that he was prejudiced by the prosecution's action in challenging a juror already accepted and substituting another, analyzed the situation in an outstanding opinion. Since it was the basis for many subsequent decisions, it is important to look at the language of the court:

> In the case at bar the basic fact of the defendant's contention is that the state asked to be allowed to make the challenge without assigning any reason or cause whatever for the change in the composition of the jury selected that far. As has been said, the courts in this state are accorded the largest discretion in such matters; but whenever it becomes necessary to exercise discretion, ought it not, in cases like this, to be exercised upon cause shown, rather than arbitrarily? We would not assume to control the discretion of the trial court in determining a matter of this kind, presented to it upon a showing that the due administration of the law demanded that the juror be discharged, provided the charge was made on conditions that would prevent detriment to the defendant. It is true that we cannot certainly say just how the discharge of these jurymen was prejudicial to the defendant. Indeed, we may not be able to say positively that it was prejudicial to him at all; but at the same time we cannot say that it was not detrimental to him, and in fact we are rather inclined to think it was. *But this uncertainty is, of itself, a strong argument against the propriety of such a procedure;* and, in view of the fact that the defendant is condemned to suffer capital punishment, we are unwilling to sanction such a doubtful method of selecting the jury that has convicted him.[8]

In accord is *State v. Durr,*[9] in which the court held that the right of a peremptory challenge enables the prisoner to say who shall not try him, and even though the prosecution has the legal right to peremptorily challenge the juror, it must be done before the accused has accepted him.

There is ample authority to the effect that even if, as a matter of right, a juror cannot be challenged peremptorily after he has been accepted, it is still within the discretionary power of the trial court to allow a party to exercise a peremptory challenge against such a juror.[10] This is, of course, where there is no statute regulating the procedure of peremptory challenges. And it is generally held, both under the common law and

[7] 63 Ark. 527, 39 S.W. 709 (1897).

[8] Ibid., at 530, 711 (emphasis supplied).

[9] 39 La. Ann. 751, 2 So. 546 (1887). Cf. State v. Haines, 36 S.C. 504, 15 S.E. 555 (1892).

[10] Vallejo & N.R.Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238 (1915); People v. Joyce, 154 Ill. App. 13, 92 N.E. 607 (1910); Swanson v. Mendenhall, 80 Minn. 56, 82 N.W. 1093 (1900); Curnow v. Phoenix Insurance Co., 46 S.C. 79, 24 S.E. 74 (1896); Hubotter v. State, 32 Tex. 479 (1870).

under statutes, that where it is within the power or discretion of the trial court to allow the peremptory challenge of an accepted juror, there should be good cause or some special reason shown why the challenge should be allowed at that time.[11] Good cause for allowing a peremptory challenge at such time should pertain to something which has arisen subsequently to the acceptance of the juror or which would not ordinarily be discovered on the examination allowed on voir dire.[12]

A fairly recent case, *DeCarlo v. Frame*,[13] supported the rule that when examination is on voir dire, a party has no *right* to peremptorily challenge after he has accepted a juror, but the court, where the ends of justice so require, may in exercise of its discretion permit such a challenge to be made at any time before the jury is sworn. The trial court there did not permit the challenge in exercise of its discretion, but, in effect, ruled that it could be made as a matter of right without any cause being shown. The Supreme Court of Connecticut held that this was error.

This opinion was expressed in an earlier case[14] involving a New Jersey statute which allowed challenges to a juror to be made at any time before he is actually sworn. The court there held that the statute was not applicable to peremptory challenges without any cause being assigned.[15]

Illinois law on this subject is regulated by statute.[16] This statutory provision was in effect in 1887 when the Illinois Supreme Court, in *Mayers v. Smith*,[17] held that whatever the rule had been at common law as to the exercise of the right of peremptory challenges at any time before the jury is sworn, under the Illinois statute such right is cut off with respect to any one of a panel of four jurors which has been passed on and accepted by both sides.

Whether or not a party has either the right to, or may at the court's discretion, challenge a juror peremptorily after the juror has been ac-

[11] Nicholson v. People, 31 Colo. 53, 71 Pac. 377 (1903); Colvin v. Commonwealth, 22 Ky. L. R. 1407, 60 S.W. 701 (1901) (applying statute).

[12] Baker v. State, 3 Tex. App. 525 (1878). Cf. Stanley v. Commonwealth, 296 Ky. 548, 178 S.W.2d 12 (1944); Commonwealth v. Hettig, 46 Pa. Super. 395 (1911); Commonwealth v. Marion, 232 Pa. 413, 81 Atl. 423 (1911).

[13] 134 Conn. 530, 58 A.2d 846 (1948).

[14] State v. Lyons, 70 N.J.L. 635, 58 Atl. 398 (1904).

[15] Cf. Andrews v. State, 152 Ala. 16, 44 So. 696 (1907); Peoria, D. & E. Ry. Co. v. Puckett, 52 Ill. App. 222 (1893).

[16] Ill. Rev. Stat. (1959) c.78, § 21 provides: "[T]he jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff." Ill. Rev. Stat. (1959) c.78, § 23 provides: "The provisions of this act shall apply to proceedings in both civil and criminal cases."

[17] 121 Ill. 442, 13 N.E. 216 (1887). Cf. People v. Gray, 251 Ill. 431, 96 N.E. 268 (1911). Consult 47 Ill. Bar J. 150 (Oct., 1958) in which Mayers v. Smith is discussed.

cepted, it appears that the allowance of the challenge would be erroneous if the other party has exhausted his peremptory challenges. Most of the cases on this point seem to be limited to situations where the defendant had not exhausted his peremptory challenges. But in these opinions, the court always says that it would be error to allow such a challenge by the prosecution if the defendant had exhausted his peremptory challenges.[18]

The majority in the *Nail* case failed to mention *Temple v. State*[19] in which the court said:

> It was held in some of these cases that the court, in its discretion, might permit the state to use a peremptory challenge on a juror who had been accepted by both sides, where the defendant had not exhausted all of his peremptory challenges; *but in all the cases in which it was held not to have been error to permit this action the defendant had not exhausted his peremptory challenges.* The test seems to be whether the defendant has remaining as many challenges as the state is permitted to exercise, and upon the authority of these cases, the judgment of the court must be reversed.[20]

Where the prosecution was allowed to peremptorily challenge a juror after all twelve veniremen had been accepted by both sides, the court, in *Estep v. State*,[21] was influenced by the fact that at this time the defendant had not exhausted his peremptory challenges. And in *State v. Thornhill*,[22] where by statute the court has discretion to allow a peremptory challenge up to the time the jury is impaneled, the court said that the allowance to the state of a peremptory challenge at such time would be error where the defendant had exhausted his peremptory challenges.[23] Justice Land said by way of dictum:

> If it should appear in any case that, at the time the state peremptorily challenged a juror, the panel was complete, and the defendant had exhausted his peremptory challenges and was compelled, because of the state's challenge, to accept an obnoxious juror, we would not hesitate to set aside the conviction and sentence in such a case, as both prejudice and injury to the defendant would be clearly shown.[24]

[18] Johnson v. People, 110 Colo. 283, 133 P.2d 789 (1943); State v. Braden, 56 Ohio App. 19, 9 N.E.2d 999 (1936).

[19] 126 Ark. 290, 189 S.W. 855 (1916).

[20] Ibid., at 293, 857 (emphasis).

[21] 193 Tenn. 222, 245 S.W.2d 623 (1951).

[22] 188 La. 762, 178 So. 343 (1937).

[23] See United States v. Davis, 103 F. 457 (W.D. Tenn., 1900), aff'd 107 F. 753 (C.C.A. 6th, 1901). Here the court said that allowing the prosecution to challenge peremptorily a juror who has been accepted by both sides is not error where the defendant had not exhausted his peremptory challenges.

[24] 188 La. 762, 770, 178 So. 343, 348 (1937). Here the defendant's peremptory challenges were not exhausted, so such a ruling was not necessary.

Thus the courts appear to be in accord that if the defendant has exhausted his peremptory challenges, it would be error to allow the prosecution to exercise a peremptory challenge on an accepted juror.

The *Nail* case has specifically overruled a long line of Arkansas decisions which have held it was error to allow the prosecution to peremptorily challenge a juror who was already accepted after the defendant's challenges were exhausted.[25] The majority opinion relied strongly on *Green v. State*,[26] in which a juror, previously accepted by each side, was excused by the court through fear that ineligibility might be assigned as error. In the *Green* case, the court cited no authority, basing its decision on the fact that the appellant failed to show that he was prejudiced in any way by the ruling and that he would be injured by the new juror the prosecution accepted.

The court also relied on *People v. Rich*[27] in which the Michigan Supreme Court expressly said that there was no error in allowing the prosecution to peremptorily challenge an accepted juror after the defendant had exhausted his peremptory challenges.

The logic behind the majority's decision follows the thinking in *People v. Mullane:*[28] Since the juror could be dismissed by a challenge for cause after he was accepted and after the defendant had exhausted his peremptory challenges, how was the defendant prejudiced or deprived of further peremptory challenges when a peremptory challenge was allowed to the state?

Justice Robinson, in the *Nail* dissenting opinion, strongly attacks the majority's decision on two grounds. First, he points out the weakness of the only two cases they relied on. In the *Green* case, the juror was excused by the court on its own motion for cause, and in the *Rich* case, where the court was divided, the majority there relied on three cases which were not decided on the same set of facts as exist here in the *Nail* case.[29] Second, the majority completely overlooked an Arkansas statute

[25] Ruloff v. State, 142 Ark. 477, 219 S.W. 781 (1920); Dewein v. State, 114 Ark. 472, 170 S.W. 582 (1914); McGough v. State, 113 Ark. 301, 167 S.W. 857 (1914); Bevis v. State, 90 Ark. 586, 119 S.W. 1131 (1909); Williams v. State, 63 Ark. 527, 39 S.W. 709 (1897).

[26] 223 Ark. 761, 270 S.W.2d 895 (1954).

[27] 237 Mich. 481, 212 N.W. 105 (1927).

[28] 256 Mich. 54, 239 N.W. 282 (1931).

[29] Hamper's Appeal, 51 Mich. 71, 16 N.W. 236 (1883). The court here said that the order of challenges is discretionary with the trial court rather than controlled by statute. Scripps v. Reilly, 38 Mich. 10 (1878). The challenge was one for cause. Jhons v. People, 25 Mich. 499 (1872). The prosecution was allowed to peremptorily challenge an accepted juror only after the defendant was allowed to make a peremptory challenge.

regulating the order of challenges to a juror.[30] Where such a statute is in effect, it is mandatory; the court exercises its discretion only in the absence of statutory regulation.[31]

The *Nail* case has expressly reversed a long line of Arkansas decisions regarding the right to peremptorily challenge an accepted juror, and appears to be in definite conflict with the view in most states that it is error to allow such a challenge when the defendant has exhausted his peremptory challenges.

The order in which peremptory challenges are exercised is more important than it seems. Assume a particular juror is so offensive that both sides would not hesitate to peremptorily challenge him. If the state must challenge first, the defendant has saved himself a challenge. Repeat this for a number of jurors, and we see that the order in which the challenges must be exercised has its advantages and disadvantages. Further, where the peremptory challenges are exhausted on one side, to allow such a challenge by the opposite side after he has accepted the juror could conceivably work a hardship, if not injustice, on that party.

It will be interesting to note if the *Nail* majority opinion will have any effect on the discretionary powers of the trial courts in states where the order of challenges is not mandatory by statute. The possible effect will be even more important in cases where the defendant *has exhausted* his peremptory challenges and the court will be faced with precisely the same problem.

[30] Ark. Stat. (1947) c.19, § 43-1914 provides: "When challenges taken.—It must be taken before he is sworn in chief, but the court, for a good cause, may permit it to be made at any time *before the jury is completed.*" (emphasis supplied). Ark. Stat. (1947) c.19, § 43-1924 provides: "Order of challenges.—The challenge to the juror shall first be made by the State and then by the defendant, and the State must exhaust her challenges to each particular juror before such juror is passed to the defendant for challenge or acceptance."

[31] State v. Ferguson, 187 La. 869, 175 So. 603 (1937); People v. Grieco, 266 N.Y. 48, 193 N.E. 634 (1934) cites similar statute in N.Y. Code, Crim. Proc. § 385 which provides: "Challenges to an individual juror must be taken first by the people, then by the defendant." Accord: People v. Hamlin, 192 N.Y.S.2d 870 (1959).

DOMESTIC RELATIONS—MASSACHUSETTS JOINS STATES HOLDING BLOOD GROUPING TESTS CONCLUSIVE IN PATERNITY SUITS

In a criminal proceeding on complaint charging the defendant with begetting complainant with child, evidence was introduced showing that the defendant had intercourse with complainant during the probable period of conception and that the defendant had suggested a name for the child. A blood grouping test was made. The test excluded the de-