
Defendant's Right to Poll the Jury in Criminal Cases

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vails in this state, which is in accord with the majority view; that it is not only sound, but that if such comment were to be permitted, it would, in effect, amount to an infringement of the constitutional right of the accused to abstain from taking the witness stand or to give testimony in the trial of his own cause. . . .

We are fortified in this view by the fact that in those states where comment obtains, experience has shown the defendant is, in fact, pressed to testify. . . .

Allowing comment would indeed make the constitutional privilege against self-incrimination an idle gesture, for everyone accused of crime would be faced with the dilemma of being forced to either take the stand in his own defense or have an inference of guilt attach merely because he does not do so.³⁵

CONCLUSION

It would appear that all the arguments favoring the right of comment may be distilled into one major proposition, viz., a greater amount of truth will be obtained in criminal proceedings. This will occur because the possible effect of comment will cause more defendants to testify, and therefore direct evidence will be obtained for the court.

While it is true that the obtaining of direct evidence would aid in producing a just result, the fact remains that such a desirable end tends to reduce the effectiveness of the constitutional privilege against self-incrimination since the accused will usually testify out of fear of the prosecution's right to comment on his failure to testify.

Therefore, although the choice is technically a voluntary one on behalf of the accused, in a real sense he is being forced to testify, which is the exact right which the self-incrimination amendments are designed to protect. The all-important question, then, is whether the increased obtainment of direct evidence is a great enough benefit to pay for the cost of reducing a constitutional right.

³⁵ State v. Bentley, 219 La. 893, 54 So. 2d 137, 141, 142 (1951).

DEFENDANT'S RIGHT TO POLL THE JURY IN CRIMINAL CASES

Polling the jury—the practice whereby the jurors are asked individually the findings they have reached, thus creating individual responsibility and eliminating any uncertainty as to the verdict announced by the foreman¹—is designed to afford the members of the jury an opportunity for free expression before the court, unhampered by the fears or the errors which may have attended their private deliberations.² A survey of the extent to which this right exists, if at all, comprises the subject matter of this comment.

Little did Sir Matthew Hale realize, in writing his *History of the Pleas of the Crown*, the extent of the divergence subsequent judicial interpreta-

¹ State v. Cleveland, 6 N.J. 316, 78 A. 2d 560 (1951).

² 8 Wigmore on Evidence § 2355 (1940).

tion was to accord his choice of but one word. In writing, "now touching the giving up of their verdict, if the jury say they are agreed, the court *may* examine them by poll, and if in truth they are not agreed, they are finable,"³ he provided the foundation for three separate and distinct theories with regard to polling the jury upon the defendant's request, namely, (1) no such right exists; (2) whether or not a poll will be granted is solely within the discretion of the court; and (3) the defendant has an absolute legal right to do so.

THEORIES

The rule adopted in three New England states declares that the defendant has no right to poll the jury.⁴ In *Commonwealth v Costley*⁵ the court said: "In Massachusetts, it has never been the right of a party, in any case, civil or criminal, to have the jury polled." In *State v Hoyt*,⁶ in affirming a refusal to grant the defendant's request for a poll of the jury, the Connecticut court declared: "Such a right, under the law and practice of this state, has never been recognized, and there are no considerations of justice, expediency, or security to the prisoner, that require its adoption instead of our present practice." Justification for this position is found in the practice prevalent in these jurisdictions whereby the entire panel is asked whether or not they assent to the verdict, which purportedly is substantially equivalent to a poll of the jury.⁷

Other jurisdictions, adopting a more literal interpretation of Hale's choice of words, permit the trial court, in the exercise of its sound discretion, to grant the defendant's request for a poll of the jury.⁸ Typically, this result is reached without the aid of any statute, as illustrated by *Ryan v. People*, wherein the court remarked:

We have no statute on this subject. The right, if any, which exists respecting the poll of the jury is from the common law. That the right is absolute may be well doubted. What little authority we have upon the subject rather points to the fact that at common law the matter was in the discretion of the court and for it to exercise if, for any reason, upon return of a verdict there appeared a doubt as to its entire unanimity.⁹

³ 2 Hale, *History of the Pleas of the Crown* (1st Am. ed., Stokes and Ingersall, 1847) at 299 (italics added).

⁴ *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89 (1880); *Commonwealth v. Costley*, 118 Mass. 1 (1875); *Fellow's Case*, 5 Me. 333 (1828).

⁵ 118 Mass. 1 (1875).

⁶ 47 Conn. 518, 36 Am. Rep. 89 (1880).

⁷ Authorities cited note 4 *supra*.

⁸ *State v. Grierson*, 96 N.H. 36, 69 A. 2d 851 (1949); *State v. Simon*, 126 S.C. 437, 120 S.E. 230 (1923); *State v. Sousa*, 43 R.I. 176, 110 Atl. 603 (1920); *Ryan v. People*, 50 Colo. 99, 114 Pac. 306 (1911).

⁹ 50 Colo. 99, 114 Pac. 306 (1911).

Circumstances properly motivating the court to exercise its discretion so as to grant the defendant's request for a poll of the jury have included those where there exists some doubt as to the unanimity of the agreement upon the verdict¹⁰ or upon a showing of some other reason or justification for the polling.¹¹

The third view—which represents the great weight of authority among the courts that have litigated the question—permits the defendant, irrespective of an statute, to demand as a matter of legal right a poll of the jury after a guilty verdict.¹² This right is considered absolute in felony cases,¹³ and has frequently been applied, and expressly declared applicable, in misdemeanor cases as well;¹⁴ moreover, the defendant has this right whether it be an oral or a sealed verdict.¹⁵ It should be noted, in addition, that in those jurisdictions according the defendant an absolute right to poll the jury, there is authority for granting a similar right to the prosecution.¹⁶

¹⁰ Ryan v. People, 50 Colo. 99, 114 Pac. 306 (1911).

¹¹ State v. Wise, 41 S.C.L. 412 (7 Rich, 1854).

¹² State v. Schmelz, 17 N.J. 227, 11 A. 2d 50 (1955); State v. Brooks, 59 N.M. 130, 279 P. 2d 1048 (1955); State v. Cephus, 241 N.C. 562, 86 S.E. 2d 70 (1955); Allen v. State, 260 Ala. 324, 70 So. 2d 644 (1954); Carver v. Commonwealth, 256 S.W. 2d 375 (Ky., 1953); England v. State, 196 Tenn. 186, 264 S.W. 2d 815 (1953); State v. Thursby, 245 S.W. 2d 859 (Mo., 1952); Gilmore v. State, 229 Ind. 359, 98 N.E. 2d 677 (1951); State v. Ritchie, 172 La. 942, 136 So. 11 (1931); Webb v. State, 166 Ga. 218, 142 S.E. 898 (1928); Commonwealth v. Scovern, 292 Pa. 26, 140 Atl. 611 (1927); Watts v. Commonwealth, 129 Va. 781, 106 S.E. 339 (1921); Clemens v. State, 176 Wis. 289, 185 N.W. 209 (1921); Roney v. United States, 43 App. D.C. 533 (1915); State v. Gorman, 113 Minn. 401, 129 N.W. 589 (1911); Wingfield v. State, 95 Ark. 71, 128 S.W. 562 (1910); Cable v. State, 38 So. 98 (Miss., 1905); Hommer v. State, 85 Md. 562, 37 Atl. 26 (1897); Summeralls v. State, 37 Fla. 162, 20 So. 242 (1896); Stewart v. People, 23 Mich. 63, 9 Am. Rep. 78 (1871); Rose v. State, 20 Ohio 31 (1851); Harriman v. State, 2 Greene 270 (Ia., 1849); People v. Perkins, 1 Wend. 91 (N.Y., 1928); Nomaque v. People, 1 Ill. 145 (1825), rev'd on other grounds in People ex rel. Merrill v. Hazard, 361 Ill. 60, 196 N.E. 827 (1935).

¹³ Commonwealth v. Davis, 17 Pa. D. and C. 488 (1931).

¹⁴ Stewart v. State, 147 Ala. 137, 41 So. 631 (1906).

¹⁵ State v. Young, 77 N.C. 498 (1877), where the court said: "We think a defendant on trial in a criminal case, . . . has the right to have the jury polled, whether it be oral or a sealed verdict. He has no right to say in what manner it shall be done, nor to propound any question, but simply to know that the verdict given by the foreman is the verdict of each juror, and we think it is error in the court to deny it when demanded." Many jurisdictions, however, permit sealed verdicts in misdemeanor cases only; see, e.g., Ill. Rev. Stat. (1929) c. 38, sec. 745, which declares: ". . . [P]rovided, in cases of misdemeanor only, if the prosecutor for the people and the person on trial, by himself or counsel, shall agree, which agreement shall be entered upon the minutes of the court, to dispense with attendance of an officer upon the jury, or that the jury when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement and receive any such verdict so delivered to the clerk, as the lawful verdict of such jury."

¹⁶ Feddern v. State, 79 Neb. 641, 113 N.W. 127 (1907); Cowart v. State, 147 Ala. 137, 41 So. 631 (1906).

Illinois, assuming continued adherence to a remarkably uncontroversial 1825 decision in *Nomaque v. People*,¹⁷ must be included among those jurisdictions that regard the defendant's right to poll the jury an inviolate one. In holding that a prisoner has the right to have the jury present in court when they deliver their verdict in order that they may be polled, the court relied on prior civil cases, justifying its holding on the theory that it certainly was of no less importance to grant a similar right to a defendant in a criminal case. This theoretical justification is difficult to undermine; in addition, this position presents no cumbersome procedural problems regarding a poll of the jury so as to require revision—consequently, an abrupt change in attitude seems highly unlikely.

To dispel any confusion which may exist in their courts, and to promulgate an affirmative policy, many jurisdictions have enacted legislation regarding the defendant's right to poll the jury;¹⁸ typically, they permit the jury to be polled at the instance of either party,¹⁹ which right is regarded as a substantial one and an integral part of trial by jury.²⁰

RESTRICTIONS

Even in the jurisdictions regarding a poll of the jury a matter of right—whether by interpretation of the common law or by statute—and clearly in the jurisdictions regarding such a right as merely discretionary, the court is not bound to poll the jury unless the defendant requests, at the proper time, that it do so.²¹ Requests which have been held timely include those made (1) after the verdict is announced and prior to its filing;²²

¹⁷ 1 Ill. 145 (1825), rev'd on other grounds in *People ex rel. Merrill v. Hazard*, 361 Ill. 60, 196 N.E. 827 (1935).

¹⁸ Ark. Stat. Ann. (1947) § 43-2160; Ariz. Code Ann. (1939) § 44-1912; Cal. Penal Code (Deering, 1941) § 1163; Fla. Stat. Ann. (1941) 919.10; Ida. Code Ann. (1946) § 19-2316; Ind. Stat. Ann. (Burns, 1933) § 9-1811; Ia. Code Ann. (1946) § 785.15; Ky. Crim. Code of Prac. (Carroll, 1948) § 267; La. Rev. Stat. (1950) § 15.416; Minn. Stat. Ann. (1943) § 631.16; Mont. Rev. Code (1947) § 94.7416; Neb. Rev. Stat. (1943) § 29-2, 24; Nev. Comp. Laws (1929) § 11021; N.Y. Penal Code (McKinney) § 450; N.D. Rev. Code (1943) § 29-2213; Ohio Gen. Code (Page, 1948) § 13448.5; Okla. Stat. Ann. (1936) 22.921; Ore. Stat. (1941) c. 22, § 921; Tex. Code Crim. Proc. (1925) Art. 691; Utah Code Ann. (1953) §§ 77, 33-10; Wyo. Comp. Stat. (1945) § 10-1401. See also Fed. Rules Crim. Proc. 31(d).

¹⁹ Contra: Ind. Stat. Ann. (Burns, 1933) § 9-1811, which apparently limits the right to poll to the defendant only.

²⁰ *Mackett v. United States*, 90 F. 2d 462 (1937); *Johnson v. Commonwealth*, 308 Ky. 709, 215 S.W. 2d 838 (1948); *State v. Callahan*, 55 Ia. 364, 7 N.W. 603 (1880).

²¹ *State v. Vaszorich*, 13 N.J. 99, 98 A. 2d 299 (1953), cert. denied 346 U.S. 900 (1953); *State v. Boger*, 202 N.C. 702, 162 S.E. 877 (1932); *State v. Simon*, 123 S.C. 437, 120 S.E. 230 (1923).

²² *State v. Cleveland*, 6 N.J. 316, 78 A. 2d 560 (1951); *State v. Lewis*, 59 Nev. 262, 91 P. 2d 820 (1939).

(2) prior to the separation or discharge of the jury;²³ and (3) prior to the pronouncement of sentence.²⁴ A request that the jury be polled when they first report that they cannot agree on a verdict has been held to be premature.²⁵

Failure to make a timely request for a poll of the jury, where a reasonable opportunity to do so has been afforded the defendant, is generally held to constitute a waiver of the right.²⁶ The defendant's consent to the separation of the jury prior to the rendition of the verdict,²⁷ and the voluntary absence of the defendant or his counsel from the courtroom at the time the verdict is delivered,²⁸ similarly may give rise to a waiver under some circumstances. This is true in spite of statements to the effect that a waiver of the right to poll should never be implied.²⁹

CONCLUSION

In conclusion, having observed the three different interpretations accorded Hale's statement regarding the defendant's right to poll the jury, it seems inescapable that the position adopted by the vast majority of American courts—that the defendant's right to poll the jury, if properly made, is absolute—is in greater harmony with our traditional notions of fair play and substantial justice; much more so, in any event, than the rules considering this right as merely discretionary or denying it entirely. It is submitted for the reader's consideration, however, that perhaps our traditional notions, as propounded by judges and legislators, are steeped in precedent rather than reason so as to afford the criminally accused an unwarranted and unreasonable measure of protection; for in application, a poll of the jury is requested by the defendant only as a final effort, as a last resort in the hope of a mistrial resulting from a possible defection among the jury because of the public declaration required.

²³ *Budges v. State*, 154 Miss. 489, 122 So. 533 (1929); *Hammond v. State*, 166 Ga. 213, 142 S.E. 895 (1928); *Joy v. State*, 14 Ind. 139 (1860).

²⁴ *Webb v. State*, 166 Ga. 218, 142 S.E. 898 (1928).

²⁵ *Cable v. State*, 38 So. 98 (Miss., 1905).

²⁶ *State v. Vaszorich*, 13 N.J. 99, 98 A. 2d 299 (1953); *England v. State*, 196 Tenn. 186, 264 S.W. 2d 815 (1953); *United States v. Dye*, 61 Fed. Supp. 457 (D.C. Ky., 1945).

²⁷ *Vaughan v. State*, 9 Ga. App. 613, 71 S.E. 945 (1911).

²⁸ *Clemens v. State*, 176 Wis. 289, 185 N.W. 209 (1922); *State v. Waymire*, 52 Ore. 281, 97 Pac. 46 (1908); *Hommer v. State*, 85 Md. 562, 37 Atl. 26 (1897).

²⁹ *Carver v. Commonwealth*, 256 S.W. 2d 375 (Ky., 1953); *Wooten v. State*, 19 Ga. App. 739, 92 S.E. 233 (1917), where the court said: "The right to poll the jury should never be denied where the right is exercised in time. This right is always exercised in time when demanded after the verdict is published and before the jury is dispersed and before sentence. A waiver of the right should never be implied."