Nebraska Law Review

Volume 34 | Issue 4 Article 18

1955

Criminal Law—Trial—Instructions from the Court Concerning Possible Pardon or Parole of the Accused

Robert E. Roeder
University of Nebraska College of Law

CRIMINAL LAW—TRIAL—INSTRUCTIONS FROM THE COURT CONCERNING POSSIBLE PARDON OR PAROLE OF THE ACCUSED

During the deliberation of a jury in a murder prosecution, the jury foreman requested information concerning the granting of paroles and pardons. The court responded by reading and discussing the pardon and parole board's published rules and regulations concerning the granting of paroles and pardons. The jury thereafter returned a verdict of guilty without a sentence recommendation. *Held*: It was erroneous for the trial court to read and discuss, at the request of the jury, the published rules and regulations concerning the granting of paroles and pardons; but such error was waived when the accused failed to raise an objection.[1]

This decision is of interest for it presents questions which have long plagued the American judiciary. Should a jury, faced with the task of determining a defendant's guilt and of imposing or recommending his punishment, be entitled to instructions as to the possibility of executive interference with the sentence by way of pardon, parole, or time off for good behavior? And if so, should it be allowed to take this information into consideration in its deliberation on the verdict or sentence recommendation?

The decisions concerning these questions are in disagreement, and two distinct and conflicting rules seem to have been developed. The first rule is that the court should refuse to answer a question from the jury concerning the possibility of executive reduction of the sentence, and should clearly inform the jury that the matter is not a proper element to be considered in its deliberations.[2] This rule was followed in the present case. The second rule is that it is proper for the trial court to instruct the

[1] Bland v. State, 84 S.E.2d 369 (Ga. 1954). But see Balkcom v. State, 86 Ga. App. 513, 71 S.E.2d 554 (1952) and Weeks v. State, 63 Ga. App. 773, 11 S.E.2d 670 (1940), both holding that it was not error to give, apparently without any query from the jury, an instruction as to the possibility of time off for good behavior, the court saying that such an instruction should always be given in order to inform the jury of the effect of its sentence.

[2] Lovely v. United States 169 F.2d 386 (4th Cir. 1948); Ryan v. United States, 99 F.2d 864 (8th Cir. 1938); McCray v. State, 74 So.2d 491 (Ala. 1954); Bell v. State, 265 S.W.2d 709 (Ark. 1954); People v. Letourneau, 34 Cal.2d 478, 211 P.2d 865 (1949); People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944); People v. Hoyt, 20 Cal.2d 306, 125 P.2d 29 (1942); Sukle v. People, 107 Colo. 269, 111 P.2d 233 (1941); Strickland v. State 209 Ga. 65, 70 S.E.2d 710 (1952); Thompson v.

jury upon request about the possibility of future executive intervention with the sentence to be rendered, and that such information is a proper matter for the consideration of the jury.[3] Nebraska follows this rule by holding that it is within the discretion of the trial court to answer such questions of a jury.[4]

In the present case, the holding that the error of reading and discussing the rules of the parole and pardon board was waived when the defendant failed to make timely objection follows the general weight of authority in those jurisdictions which hold it is error for the trial judge to answer questions concerning the future possibilities of parole or pardon during the sentence imposed.[5] However, other courts have held that such failure to

State, 203 Ga. 416, 47 S.E.2d 54 (1948); Brannon v. State, 118 Ga. 15, 2 S.E.2d 654 (1939); Houston v. Commonwealth, 270 Ky. 272, 192 S.W.2d 45 (1937); Gains v. Commonwealth, 242 Ky. 237, 46 S.W.2d 75 (1932); State v. Quilling, 363 Mo. 1016, 256 S.W.2d 751 (1953); Liska v. State, 115 Ohio St. 283. 152 N.E. 667 (1926); Bean v. State, 58 Okla. Crim. 432, 54 P.2d 675 (1936); Commonwealth v. Johnson, 368 Pa. 139, 81 A.2d 569 (1951); Commonwealth v. Carey, 368 Pa. 157, 82 A.2d 240 (1951); Commonwealth v. Mills, 350 Pa. 428, 39 A.2d 572 (1944); Williams v. State, 191 Tenn. 456, 234 S.W.2d 993 (1950); Porter v. State, 177 Tenn. 515, 151 S.W.2d 171 (1941); Gibson v. State. 153 Tex. Crim. 582, 223 S.W.2d 625 (1949); Moore v. State, 152 Tex. Crim. 312, 213 S.W.2d 844 (1948); Prater v. State, 131 Tex. Crim. 35, 95 S.W.2d 971 (1936); Jones v. Commonwealth, 194 Va. 273, 72 S.E.2d 693 (1952); McCann v. Commonwealth, 174 Va. 429, 45 S.E.2d 768 (1939); Coward v. Commonwealth. 164 Va. 639, 178 S.E. 797 (1935).

[3] Glover v. State, 211 Ark. 1002, 204 S.W.2d 373 (1947); Jones v. State, 88 Ga. App. 330, 76 S.E.2d 810 (1953); State v. Lammers, 171 Kan. 668, 237 P.2d 410 (1951); State v. Satcher, 124 La. 1015, 50 So. 835 (1909); State v. Dworecki, 124 N.J.L. 219, 10 A.2d 287 (Ct. Err. & App. 1940); State v. Barth, 114 N.J.L. 112, 176 Atl. 183 (Ct. Err. & App. 1935); State v. Rombolo, 89 N.J.L. 565, 99 Atl. 434 (Ct. Err. & App. 1916); State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 385 (1950); Licavoli v. State, 20 Ohio Ops. 562, 34 N.E.2d 450 (1935); Commonwealth v. Wooding, 355 Pa. 555, 50 A.2d 323 (1947); State v. Buttry, 199 Wash. 228, 90 P.2d 1026 (1929); State v. Carroll, 52 Wyo. 29, 69 P.2d 542 (1937).

[4] Neb. Rev. Stat. § 25-1116 (Reissue 1952); Griffith v. State, 157 Neb. 448, 59 N.W.2d 701 (1953); Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951); Dinsmore v. State, 61 Neb. 418, 85 N.W. 445 (1901).

[5] People v. Barclay, 40 Cal.2d 146, 252 P.2d 321 (1953); People v. Ramos, 3 Cal.2d 269, 44 P.2d 301 (1935); Postell v. Commonwealth. 174 Ky. 272, 192 S.W. 39 (1917), overruled on other grounds; Powell v. Commonwealth, 276 Ky. 234, 123 S.W.2d 279 (1938); State v. Quilling, 363 Mo. 1016, 256 S.W.2d 751 (1953); State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (1950); Hudman v. State, 89 Okla. Crim. 160, 205 P.2d 1175 (1949); Prater v. State, 131 Tex. Crim. 35, 95 S.W.2d 971 (1936); McCann v. Commonwealth, 174 Va. 429, 4 S.E.2d 768 (1939).

object will not preclude review of the error on appeal.[6] One jurisdiction has taken the view that the appellate court should reverse on its own motion, even though the defendant's counsel had concurred in the giving of the instruction, because such consent by defendant's counsel to the court's action under the circumstances "would have been fraught with grave peril to his client."[7]

It is also generally held that the jury must arrive at its verdict from evidence regularly produced in the course of the trial proceedings, and not from their own personal knowledge.[8] It cannot be questioned that executive interference with sentences commonly occurs and that this is common knowledge to jurors, although they usually are not cognizant of the specific rules and regulations on the subject. Since jurors have no right to undertake an independent investigation of the law in the jury room,[9] and since there is every likelihood that whatever knowledge the individual jurors may possess on the subject of punishment will be used by the jury in its deliberation, the court should make sure that the jury is properly informed regarding the law pertaining to the possibilities of a parole or pardon of the accused in the particular case.

To hold otherwise leaves the jury in a state of confusion. Not specifically knowing the law of puishment, they may reach a final decision based upon misconceptions as to what the law upon the subject actually is.

It is submitted that it is proper to instruct the jury upon their request as to the possibility of future executive intervention in the sentence which will result from their decision or recommendation, and that such information is proper for the jury to take into consideration in its deliberation.

Robert E. Roeder, '56

[6] In Bell v. State, 265 S.W.2d 709 (Ark. 1954) the court held error was committed by the trial judge in stating to the jury during deliberation, in response to inquiry, that life termers usually were released on parole after serving 7 to 10 years imprisonment. The court said this was so highly prejudical that objection thereto upon learning of such statement could not have erased the damage done and failure of defendant to object or move for mistrial did not constitute a "waiver of such error." In Jones v. Commonwealth, 194 Va. 273, 72 S.E.2d 693 (1952), the court held there was no waiver of error when counsel for defendant was taken by surprise at the occurrence of the erroneous instruction.

[7] Sukle v. People, 107 Colo. 269, 111 P.2d 233 (1941).

[8] Brown v. Piper, 91 U.S. 37, (1861); Chicago B. & Q. R.R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N.W. 880 (1902).

[9] State v. McCail, 63 S.D. 649, 263 N.W. 157 (1935).