UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 27 | Number 4 Article 8

6-1-1949

Constitutional Law -- Denial of Due Process -- Insufficient Time to Prepare Defense

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six states permit a verdict by five-sixths of the jurors;[47] Nebraska allows a five-sixths verdict after six hours deliberation;[48] Minnesota allows a five-sixths verdict after twelve hours deliberation;[49] Montana and Virginia allow a two-thirds verdict;[50] Iowa permits a valid verdict by a bare majority if the parties stipulate it;[51] Colorado permits the parties to stipulate any majority;[52] and the Texas Constitution would permit a less than unanimous verdict,[53] but by statute[54] the constitutional provision for three-fourths verdicts is limited to situations where one or more jurors is disabled from sitting. The Federal Rules of Civil Procedure[55] provide that the parties may stipulate that a verdict or finding of a stated majority of the jurors would be valid as the verdict or finding of the jury.

It is submitted that the people of North Carolina should give consideration to the question of whether or not the requirement of unanimity is outmoded and should be abolished. If it should be decided to abolish it, attention should be given in the drafting of the necessary constitutional amendment and the ensuing legislation, if any is required, to the advisability of making definite provision therein for the agreement to be required in connection with the separate issues submitted to the jury and for a signing of the verdict.

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Constitutional Law—Denial of Due Process—Insufficient Time to Prepare Defense

A person accused of crime is guaranteed the right to be represented by counsel.[1] This right to representation necessarily includes an oppor-

[47] N. J. CONST. Art. I, §9 (new 1947 constitution permits legislature to provide for five-sixths verdicts); N. M. CONST. Art. II, §12; N. M. STAT. ANN. §§19-101, (48)(b) (1941); N. Y. CONST. Art. I, §2; N. Y. CIV. PRAC. ACT §463-a; S. D. CONST. Art. VI, §6; S. D. CODE §33.1333 (1939) (circuit courts), (justice courts: three-fourths, S. D. CODE §33.1334 (1939)); WASH. CONST. Art. I, §21; WASH. REV. STAT. ANN. §358 (1932); WIS. CONST. Art. I, §5; WIS. STAT. §270.25 (1947).

[48] NEB. CONST. Art. I, §6; NEB. REV. STAT. §25-1125 (1943).

[49] MINN. CONST. Art. I, §4; MINN. STAT. §546.17 (Henderson 1945).

[50] MONT. CONST. Art. III, §23; MONT. REV. CODES ANN. §9358 (1935); VA. CONST. Art. I, §11; VA. CODE ANN. §6012 (1942).

[51] IOWA CONST. Art. I, §9; IOWA RULES CIV. PROC. §203(a) (supersedes IOWA CODE §11483 (1939)).

[52] COLO. CONST. Art. II, §23; COLO. STAT. ANN. rule 48 (1935).

[53] TEX. CONST. Art. V, §13.

[54] TEX. REV. CIV. STAT. ANN. art. 2204 (1941).

[55] FED. R. CIV. P., 48.

[1] U. S. CONST. AMEND. XIV; Williams v. Kaiser, 323 U. S. 485 (1944); Tomkins v. Missouri, 323 U. S. 471 (1944); Avery v. Alabama, 308 U. S. 444 (1939); Powell v. Alabama, 287 U. S. 44 (1932); Kelly v. Oregon, 273 U. S. 589 (1926); Frank v. Mangum; 237 U. S. 309 (1914); Felts v. Murphy, 201 U. S. 123 (1905). N. C. CONST. Art. I, §11 (the original constitution of North Carolina (1776) did

tunity for counsel to have sufficient time in which to prepare a defense.[2] Neither the United States nor the North Carolina Constitution contains any specific time requirements; nor are there any Federal or North Carolina statutes applicable.[3] What factors will the courts consider in determining if the defendant has had sufficient time to prepare?

In North Carolina, a motion for continuance is addressed to the sound discretion of the trial court and its ruling will not be reversed unless there is an abuse of discretion.[4] Nevertheless, the refusal of a motion for continuance is reviewable, the court adopting the view that the lack of sufficient time may be a denial of due process, which should be passed on as a question of law.[5]

Such a question was recently raised in *State v. Gibson*[6] where the defendant was on trial for his life. Counsel for the accused was appointed by the court on the morning of September 13, 1948, and the trial was had at 2:00 P.M. the following afternoon. Counsel for the accused moved for a continuance stating he had not had sufficient time in which to prepare his case and further that he felt the accused should be examined by a competent physician.[7] The motion was overruled and the defendant convicted. On appeal the Supreme Court

not contain the guarantee of counsel. It was provided for later by statute in 1777, N. C. Sess. Laws, c. 115 §85 (1777). This statute is still in force. N. C. GEN. STAT. §15-4 (1943).

[2] Hawk v. Olson, 326 U. S. 271 (1945); White v. Ragen, 324 U. S. 760 (1944); Avery v. Alabama, 308 U. S. 444 (1939); Powell v. Alabama, 287 U. S. 44 (1932); State v. Gibson, 229 N. C. 497, 50 S. E. 2d 520 (1948); State v. Farrell, 223 N. C. 321, 26 S. E. 2d 322 (1943); State v. Whitfield, 206 N. C. 696, 175 S. E. 93 (1934), *cert. denied*, 293 U. S. 556 (1934).

[3] In some jurisdictions the accused is entitled to a specific number of days to prepare for trial. 22 C. J. S., CRIMINAL LAW §478.

[4] State v. Creech, 229 N. C. 662, 51 S. E. 2d 348 (1948); State v. Strickland, 229 N. C. 201, 49 S. E. 2d 469 (1948); State v. Culberson, 228 N. C. 615, 46 S. E. 2d 647 (1948); State v. Rising, 223 N. C. 747, 28 S. E. 2d 221 (1943); State v. Utley, 223 N. C. 39, 25 S. E. 2d 195 (1943); State v. Henderson, 216 N. C. 99, 3 S. E. 2d 357 (1939); State v. Godwin, 216 N. C. 49, 3 S. E. 2d 347 (1939); State v. Whitfield, 206 N. C. 696, 175 S. E. 93 (1934), *cert. denied*, 293 U. S. 556 (1934); State v. Banks, 204 N. C. 233, 167 S. E. 851 (1933); State v. Garner, 203 N. C. 361, 166 S. E. 180 (1932); State v. Lea, 203 N. C. 13, 164 S. E. 737 (1932); State v. Rhodes, 202 N. C. 101, 161 S. E. 722 (1931); State v. Sauls, 190 N. C. 810, 130 S. E. 848 (1925).

[5] State v. Farrell, 223 N. C. 321, 26 S. E. 2d 322 (1943); *accord*, State v. Gibson, 229 N. C. 497, 50 S. E. 2d 520 (1948); State v. Rising, 223 N. C. 747, 28 S. E. 2d 221 (1943); State v. Utley, 223 N. C. 39, 25 S. E. 2d 195 (1943); State v. Jones, 206 N. C. 812, 175 S. E. 188 (1934); State v. Whitfield, 206 N. C. 696, 175 S. E. 93 (1934), *cert. denied*, 293 U. S. 556 (1934); State v. Garner, 203 N. C. 361, 166 S. E. 180 (1932); State v. Ross, 193 N. C. 25, 136 S. E. 193 (1926); State v. Burnett, 184 N. C. 783, 115 S. E. 57 (1922). In State v. Sauls, 190 N. C. 810, 130 S. E. 848 (1925) the court treated this denial as rather an abuse of discretion on the part of the trial court.

[6] 229 N. C. 497, 50 S. E. 2d 520 (1948). Gibson was on trial for rape upon a female child under the age of twelve. He was found guilty and sentenced to die.

[7] Counsel did not support his motion for continuance by affidavits as required by N. C. GEN. STAT. §§1-175, 176 (1943).

affirmed[8] saying, "The record fails to show that the requested continuance would have enabled the prisoner and his counsel to obtain additional evidence or otherwise present a stronger defense."[9] This appears to be in accord with previous North Carolina decisions.[10] However, in *State v. Farrell*,[11] decided in 1943, the court said that the question (on a motion for continuance) was not whether the defendant deserved to suffer for his crime, or the merits of the defense he might be able to produce; but whether the defendant had an opportunity to fairly prepare and present his case. The court did not look for prejudice, but this would appear to be out of line with the general holdings in North Carolina where the defendant must show, not only insufficient time in which to prepare, but further, that he was prejudiced thereby before he can obtain a new trial.

The Supreme Court of Georgia in a recent case[12] sustained a different conclusion saying, "If it should be assumed that the defendant is guilty of murder, without any mitigating facts or circumstances, he is still entitled to have his appointed counsel given an opportunity to

[8] Following the affirmance of the conviction by the Supreme Court, the defendant petitioned the Governor for a commutation. On December 9, 1948, the Governor commuted the sentence to life in prison saying the defendant was mentally incompetent. This commutation was based on two examinations conducted by Dr. Young, Medical Director of the State Mental Institution, who found that the defendant was suffering from sufficient psychiatric disturbances to lessen his responsibilities. It also appeared at this hearing that the defendant had been twice discharged from the army for "primary mental deficiency."

[9] State v. Gibson, 229 N. C. 497, 502, 50 S. E. 2d 520, 524 (1948). The court relied heavily on the recent case of Thompson v. Nierstheimer, 166 F. 2d 87 (C. C. A. 7th 1948). Here there was a petition for a writ of habeas corpus, the defendant having been sentenced to life in prison and having served seventeen years to date, upon the ground that the defendant was denied due process of law in his conviction. He contended there was not sufficient time to prepare for trial. It is interesting to note that he had counsel and had consulted him for at least two days before the trial and that no motion for continuance was made. There appeared to have been an agreement to the effect that if the defendant went ahead with the trial that he would not get the death sentence and at the time the defendant consented and was anxious to get it over. The court on reviewing this stressed that this speedy trial might have been the best defense available to the defendant. It is probable that the court also was influenced by the great delay of the defendant in bringing his writ of habeas corpus.

[10] State v. Creech, 229 N. C. 662, 51 S. E. 2d 348 (1948); State v. Utley, 223 N. C. 39, 25 S. E. 2d 195 (1943); State v. Jones, 206 N. C. 812, 175 S. E. 188 (1934); State v. Whitfield, 206 N. C. 696, 175 S. E. 93 (1934), *cert. denied*, 293 U. S. 556 (1934); State v. Burnett, 184 N. C. 783, 115 S. E. 57 (1922).

[11] 223 N. C. 321, 26 S. E. 2d 322 (1943). The defendant was arrested on March 23, counsel appointed on March 27, arraigned and tried on April 1. Counsel moved for a continuance, this was overruled and the defendant was convicted of rape on his eight-year-old step daughter and sentenced to die by the trial court. On appeal the Supreme Court reversed and granted a new trial saying that it was impossible for counsel to interview witnesses and a psychiatrist and study the law in three and a half days, excluding Sunday.

It should be noted that the court in the Gibson case alluded to the Farrell case only for the inference that a constitutional right may be involved in denying a motion for continuance based on denial of sufficient time to prepare for trial.

[12] Edwards v. State, —— Ga. ——, 50 S. E. 10 (1948).

prepare for trial. . . ."[13] This would appear to be in essence the view taken by the Supreme Court of the United States. In *Powell v. Alabama*[14] this court said (quoting from *Commonwealth v. O'Keefe*),[15] "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts . . . to force a defendant, charged with a serious misdemeanor, to trial within five hours of his arrest, is not due process of law, regardless of the merits of the case."[16] In a more recent decision in 1945, *Hawk v. Olson*,[17] the court said, "Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to speculate on its effect."[18]

The difference in the view of the Supreme Court of the United States in the *Hawk* case and the North Carolina court in the *Gibson* case appears to be this: The United States Supreme Court holds that if the defendant has not had sufficient opportunity to prepare, this is a denial of a fundamental right and a new trial will be granted; the North Carolina Supreme Court holds that if the defendant has not had sufficient opportunity to prepare, this is error, but not reversible error unless the defendant has been prejudiced by this lack of sufficient time, the burden being on him to show this prejudice affirmatively.[19] The North Carolina court states that the defendant has an additional safeguard in the right to make a motion for a new trial at the next term

[13] *Ibid.* at page 13.

[14] 287 U. S. 45, 59 (1932).

[15] 289 Pa. 169, 173, 148 Atl. 73, 74 and 75 (1929).

[16] *Cf.* State v. Sauls, 190 N. C. 810, 130 S. E. 848 (1925) where the defendant was arrested at 9:30 A.M., indicted at 1 P.M., saw counsel at 4:30 P.M., and was tried at 7:30 P.M. the same day. Counsel's motion for a continuance was overruled; the defendant was convicted of incestuous intercourse. The Supreme Court of North Carolina affirmed the conviction saying there was no denial of due process.

[17] 326 U. S. 271, 278 (1945). Writ of habeas corpus. Petitioner alleges he was arraigned and read the information charging him with murder in the first degree, that he pleaded not guilty and orally moved for a continuance to consult counsel and prepare his defense, etc. The court overruled this and the trial was commenced. A Public Defender thereupon came up and conducted the petitioner's defense without ever having consulted with him. The defendant was convicted. The Supreme Court held that on these allegations the petitioner had stated a cause of action, that he was denied due process of law.

[18] In an earlier case decided in 1940, Avery v. Alabama, 308 U. S. 444 (1939), the court held that counsel for the accused had sufficient time to prepare his case (three days). In so holding the court noted that there were few witnesses and the plea of insanity had been withdrawn. The court further said the fact that counsel for the accused had presented nothing to indicate that more could have been accomplished if the continuance had been granted tended to illuminate the conclusion they had reached. This looks in the direction of the North Carolina rule but the court only mentioned this after having reached its conclusion.

[19] Referring to this prejudice the North Carolina Supreme Court said, "The injury must be positive and tangible, and not merely theoretical." State v. Gibson, 229 N. C. 497, 500, 50 S. E. 2d 520, 523 (1948).

of the trial court for newly discovered evidence (obtaining a stay of execution from the governor in the meantime if necessary).[20] But here again the burden would be on the defendant to show that he was prejudiced by not having been able to produce this newly discovered evidence at the original trial.

Therefore, it would seem that, though North Carolina recognizes the existence of this fundamental right which is guaranteed one accused of a crime, the essence of the right is denied him unless he can prove that he will be aided by the exercise thereof. Further it would appear that this requirement placed upon the defendant is opposed to another of our fundamental doctrines, that a person is presumed innocent until proved guilty (the burden being on the state to prove him guilty). Possibly, under the North Carolina rule, a person could be proved guilty because of a denial of adequate time for preparation and being thus convicted, the burden would be shifted to him to introduce evidence which would bear on his innocence at a new trial, *i.e.,* show that the denial of the motion was prejudicial.

The North Carolina rule is plainly an attempt to keep the wheels of justice moving rapidly by avoiding useless new trials where the only end to be accomplished is a delay in the conviction of the accused. The Supreme Court, by taking the burden upon itself, endeavors to separate the wheat from the chaff by deciding each case from its circumstances. Nevertheless, it is doubtful that the Supreme Court of the United States would sustain this North Carolina view as being a sufficient guarantee of this fundamental right to the accused.[21]

A. A. ZOLLICOFFER, JR.

Equity—Easement—Mandatory Injunction to Remove Encroachment

Plaintiff power company acquired an easement over the defendants' land by condemnation proceedings for the construction, inspection and repair of its power lines. The defendants built a brick building across the right-of-way and ten feet below the high-voltage lines. *Held:*— three judges dissenting—the plaintiff was entitled to mandatory injunc-

[20] State v. Gibson, 229 N. C. 497, 50 S. E. 2d 520 (1948); State v. Dunheen, 224 N. C. 738, 32 S. E. 2d 322 (1944); State v. Edwards, 205 N. C. 661, 172 S. E. 399 (1933); State v. Casey, 201 N. C. 620, 161 S. E. 81 (1931).

[21] Certiorari was denied by the United State Supreme Court in State v. Whitfield, 206 N. C. 696, 175 S. E. 93 (1934), *cert. denied,* 293 U. S. 556 (1934). There the defendant was indicted and convicted of rape. Counsel had two days in which to prepare, his motion for a continuance having been overruled. The facts were simple and there were only two witnesses, the defendant and the prosecutrix. Thus the case was reduced to a question of veracity between the two and there was no plea of insanity.