



Ohio Prosecuting Attorneys Association

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No Right to Jury Nullification

A jury has the largely unchecked ability to acquit the defendant despite evidence showing that the defendant is guilty beyond a reasonable doubt. It is unchecked because there is no means to undo the acquittal; inquiries into jury deliberations are generally forbidden, and double jeopardy would bar a retrial. But this “power of juries to ‘nullify’ * * * is just that – a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent.” *United States v. Thomas* (C.A. 2, 1997), 116 F.3d 606, 615. “[C]ourts have consistently recognized that jurors have no *right* to nullify.” *Id.* “A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.” *Strickland v. Washington* (1984), 466 U.S. 668, 695. See, also, *United States v. Powell* (1984), 469 U.S. 57, 63; *Dunn v. United States* (1932), 284 U.S. 390, 393.

A defendant has no entitlement to a jury instruction on the “power” of jury nullification, nor is the defense allowed to argue “nullification.”

While a jury does have the power to bring a verdict “in the teeth of both law and facts,” *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920), its duty is to apply the law as interpreted and instructed by the court. *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969) * * *. The courts that have considered the question have almost uniformly held that a criminal defendant is not entitled to a jury instruction which points up the existence of that practical power. [citations omitted]

In arguing the law to the jury, counsel is confined to principles that will later be incorporated and charged to the jury. *United States v. Sawyer*, 443 F.2d 712, 714 & n. 11 (D.C.Cir. 1971). * * * While we recognize that a jury may render a verdict at odds with the evidence or the law, neither the court nor counsel should encourage jurors to violate their oath. We therefore join with those courts which hold that defense counsel may not argue jury nullification during closing argument. See *e.g.*, *United States v. Dougherty*, 473 F.2d at 1130-37; *United States v. Moylan*, 417 F.2d at 1005-09.

United States v. Trujillo (C.A. 11, 1983), 714 F.2d 102, 105-106 (footnote omitted).

In Ohio, “a trial court is not required to inform the jury about jury nullification.” *State v. Jackson* (2001), 10th Dist. No. 00AP-183.

In a criminal case, the court must recognize the statutory law of the state and may not permit the jury to determine whether it chooses to follow the law. Submission of some questions of law to the jury was permitted years ago; however, this form of nullification of the law by the jury has not existed in this state for over a century. *Sparf v. United States*, 156 U.S. 51 (1894). The jury must always be instructed on the law and required to respect it. The jury is not a political or legislative institution.

State v. Floyd (1981), 2nd Dist. No. 81 CA 18.

[T]his theory of jury nullification * * * is a theory that, under the rule of general verdicts, a jury has the power to acquit even though such acquittal is contrary to law and contrary to evidence. We recognize that this possibility exists without any determination for the reason that a general verdict of the jury in a criminal case may not be subsequently searched. However, we find no authority for the proposition that a trial judge must instruct a jury as to this power.

State v. Mark (1988), 7th Dist. No. 87-J-19. See, also, *Johnstown v. Hembree* (1990), 5th Dist. No. CA-3538 (jury must accept the law as given by the court); *State v. Gribble* (1987), 5th Dist. No. 87AP020016 (“specific instruction on jury nullification is not necessary.”).

Waiver of Jury Trial in Open Court

In *State v. Burnside*, 2nd Dist. No. 23504, 2010-Ohio-1235, the trial judge held an in-chambers conference before trial to discuss the defendant’s jury-trial waiver. The defendant, his counsel, and the prosecutor were present, as was the court reporter. The judge thoroughly discussed the defendant’s right to a jury trial, and the defendant said on the record that he wished to waive jury. A written waiver was signed and filed, and when proceedings began in the courtroom, the judge announced that the defendant had waived jury. Both sides indicated they were ready. The resulting trial ended with a guilty verdict on felonious assault, for which the defendant received community control.

R.C. 2945.06 requires a written waiver of the right to jury trial, and it further provides that “[s]uch waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel.” The defendant on appeal complained that the jury waiver had not been made “in open court.”

Relying on *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, and other authorities, the 2nd District sustained the assignment of error, concluding that the in-chambers conference was not “in open court.” The “open court” requirement requires proceedings in the courtroom itself, not back in chambers. It would not have taken much

to comply with the requirement, as a mere acknowledgement of the waiver by the defendant in the courtroom would have sufficed. But the trial judge did not obtain such an acknowledgement:

The court never asked Burnside, in the courtroom, whether he still wished to waive a jury trial, and Burnside made no affirmative statement that he wished to proceed without a jury. In the absence of a record, in the courtroom, between Burnside and the court during which Burnside acknowledged or reaffirmed his waiver of his right to a jury trial, Burnside's purported waiver of his right to a jury trial did not comport with the "open court" requirement of R.C. 2945.05.

The 2nd District seemed to sympathize with the prosecutor's argument that this was an absurd result, but the court believed the result was required by the statute and case law:

{¶ 73} The right to a jury trial in a felony criminal case is a fundamental right. We are mindful that a defendant could "sandbag" the court, but the legislature has concluded, and the Ohio Supreme Court has agreed, that a jury waiver (or at least its acknowledgment) must be in open court. In this particular case, we have no doubt that Burnside waived a jury and agreed to be tried by the court, but the "in open court" rule is prophylactic and designed to protect all defendants, not just this one. Considering that the written waiver need not be signed in open court and the trial court need not engage in an extensive discussion with a defendant, it is not difficult for a trial court to comply with the "open court" requirement.

Baker Issue Not Retroactive

In *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, the Court discussed the requirements of Crim.R. 32(C), and concluded that, to constitute a "judgment," the judgment must reference the manner of conviction, i.e., whether by plea or trial.

In *State v. Loyer*, 5th Dist. No. 2009-CA-00312, 2010-Ohio-1181, the defendant was convicted of aggravated murder in 2002. In 2003, the 5th District affirmed the conviction.

In 2008, the defendant filed a motion to vacate his sentence because the court had not mentioned court costs. The trial court denied the motion, and the 5th District affirmed.

In 2009, the defendant filed a motion to vacate his sentence based on Crim.R. 32(C) and *Baker*. The trial court denied the motion. The 5th District affirmed, concluding that *Baker* was not retroactive to the defendant's 2002 conviction:

{¶ 7} We find the Rule set forth in *Baker*, supra, does not apply here. *Baker* does not apply retroactively to a case in which the direct appeal became final prior to the date *Baker* was decided. A new interpretation of a rule or statute by the Ohio Supreme Court is generally applied to cases that are pending at that time,

but is not applied to cases that have already completed the direct appeal process. *State v. Evans* (1972), 32 Ohio St. 2d 185, 291 N.E. 2d 466; *State v. Lynn* (1966), 5 Ohio St. 2d 106, 214 N.E. 2d 226. We affirmed this conviction and sentence in 2003, and again reviewed and affirmed the sentence in 2008.

One Gun, Two Disabilities, Two WUD Convictions

In *State v. Thomas*, 1st Dist. No. C-090060, 2010-Ohio-894, the defendant possessed one weapon but had two prior convictions disabling him from possessing the weapon, i.e., a conviction for an offense of violence, see R.C. 2923.13(A)(2), and a conviction for drug abuse, see R.C. 2923.13(A)(3). The 1st District refused to merge the two weapon-under-disability counts, citing its prior decision in *State v. Render*, 1st Dist. No. C-060382, 2007-Ohio-1606.

Render was based on the premise that a single act can constitute more than one violation based on different subsections of the same statute. A key issue is whether *Render* has been overtaken by the “same societal interest” approach of *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569.

Victim’s Mother Allowed to Speak at Sentencing

In *State v. Battigaglia*, 6th Dist. No. OT-09-009, 2010-Ohio-802, the defendant entered an *Alford* plea to attempted abduction, a fourth-degree felony. At sentencing, the court allowed the victim and her mother to speak, and the court also heard from the defendant and his counsel. The court imposed a 17-month sentence.

The defendant complained on appeal that the trial court had erred in allowing victim’s mother to speak. In rejecting the assignment of error, the appellate court is initially helpful, but then the court’s analysis veers off course.

{¶ 25} In his third assignment of error, appellant contends the trial court erred by permitting the victim’s mother to speak regarding sentence at the sentencing hearing. Appellant’s argument is unfounded. The Ohio statute governing sentencing hearings provides that “the offender, the prosecuting attorney, the victim or the victim’s representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case.” R.C. 2929.19(A)(1). The court therefore has discretion “to hear statements from *anyone* with information relevant to the imposition of a sentence in the case.” *State v. Hough*, 11th Dist. No. 2001-T-0009, 2002-Ohio-2942.

{¶ 26} This court has held, furthermore, that a trial court may consider relevant statements regarding the impact of the offense on a victim, the victim’s family and friends so long as those persons addressing the court do not express an opinion as to the sentence that should be imposed. *State v. Houston*, 6th Dist. No. E-03-059, 2004-Ohio-6462, ¶ 11. The trial court is presumed to have considered

only relevant, material and competent evidence in determining the sentence unless it affirmatively appears to the contrary. *Houston* at ¶ 11; see, also, *Hough* (holding that “it is presumed that a judge will consider only proper evidence when arriving at its judgment, unless it affirmatively appears to the contrary, and the admission of these comments is not reversible error without an indication that the judge was influenced or relied on the information when making his sentencing decision.”)

{¶ 27} At the sentencing hearing, the victim’s mother recommended appellant receive the maximum sentence allowed by law. A review of the record, however, shows no indication that, prior to sentencing, the trial court gave any consideration to the statement of the victim’s mother. Notably, appellant did not receive the maximum sentence requested by the victim’s mother. The trial court therefore did not commit reversible error by allowing the victim’s mother to speak at the sentencing hearing. We therefore find appellant’s third assignment of error without merit.

While the foregoing passage rightly recognizes the broad statutory authority of the sentencing court to hear from anyone who gives information relevant to sentencing, it introduces a “no opinion as to sentence” caveat that finds no basis in the statutory language.

The concern about considering a third party’s sentencing opinion traces back to capital-sentencing law, which prohibits the prosecution from admitting evidence in the penalty phase of the victim’s opinion that death should be imposed. In the non-capital context, however, the court is largely unlimited as to what information it may receive. As a result, the court can properly hear and consider the opinion of the victim’s mother as to what sentence is justified, just as much as it can hear and consider the opinion of the defendant’s mother on that issue.

Identification not included in Corpus Delicti

In *State v. Ridsen*, 2nd Dist. No. 22930, 2010-Ohio-991, the defendant complained that his confession had been admitted in violation of the corpus delicti rule, which requires that “some evidence” of the corpus delicti be introduced before a defendant’s confession is admitted. The 2nd District summarized the doctrine, as follows:

{¶ 143} Corpus delicti has two elements, “1) the act, and 2) the criminal agency of the act.” *State v. Van Hook* (1988), 39 Ohio St.3d 256, 261; *State v. Maranda* (1916), 94 Ohio St. 364. Corpus delicti must be established by evidence outside of a defendant’s out-of-court confession before the confession can be admitted. *Id.* “The quantum or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a prima facie case.” *State v. Maranda* (1916), 94 Ohio St. 364. Corpus delicti, however, only requires “some evidence outside of the confession that tends to prove some material element of the crime charged.” *Id.*

The burden to provide some evidence of the corpus delicti is minimal. *State v. Edwards* (1976), 49 Ohio St.2d 31, 36, death penalty vacated (1978), 438 U.S. 911.

Insofar as tampering with evidence was concerned, the defendant Riden argued that the corpus delicti had not been proven because the evidence had not shown that he was the perpetrator. The 2nd District rejected that argument:

Riden's argument * * * represents a misapplication of the doctrine of corpus delicti. The doctrine does not require that the State produce evidence that a particular defendant committed a crime prior to the admission of a defendant's confession to actually committing said crime. Rather, the doctrine of corpus delicti only requires that the State produce "some evidence outside of the confession that tends to prove some material element of the crime charged."

In other words, the corpus delicti doctrine only requires some minimal evidence that *someone* committed the crime, not that this particular defendant did so. The defendant's confession can be the sole evidence identifying him as the offender.

Restitution vs. Community-Control Condition

In *State v. Schul*, 12th Dist. No. CA2009-08-215, 2010-Ohio-1285, the defendant pleaded guilty to two felony counts of criminal nonsupport. The court imposed as restitution the entire amount of his child-support arrearage, rather than limiting the amount of restitution to the two years covered by each count. The 12th District agreed that the order was invalid as an order of restitution, as restitution is limited to the amount of economic loss attributable to the offense for which the offender is being sentenced.

The court emphasized, however, that the amount could have been upheld if it had been ordered as a condition of the defendant's community-control sanction. "[W]here a trial court orders restitution as part of the sentence in a criminal nonsupport case, the amount of restitution is limited to the support arrearage that accrued during the time frame encompassed by the specific charge or charges for which the defendant is convicted. In the alternative, if the defendant is sentenced to a term of community control, the trial court may, as a condition of community control, order the defendant to pay the entire outstanding child support arrearage." *Schul*, at ¶ 12, quoting *State v. McCants*, 12th Dist. No. CA2009-08-214, 2010-Ohio-854, ¶ 13. See, also, *State v. Stewart*, 10th Dist. No. 04AP-761, 2005-Ohio-987.