Washington and Lee Law Review

Volume 20 | Issue 1 Article 20

Spring 3-1-1963

Prosecutor's Reference to Parole in Argument to Jury

jail simply because he had the misfortune of witnessing a crime.[30] The situation does not become more fair, but perhaps more justified, upon an examination of the rights involved. While an individual has a right to freedom from imprisonment, the people of a state, through the prosecution, have a right to enforce their laws and punish violators thereof. This end could easily be frustrated if the courts were powerless to compel the attendance of a material witness at the trial. Further, it must be considered that there are several safeguards provided for such a witness. He has the benefit of a judicial hearing to determine his status as a material witness. If he is of good character, probably all that will be required of him is his personal recognizance without surety. If, however, surety is required of him, it must not be excessive. Therefore, it is only in extreme circumstances that the witness will actually be committed to jail, which confinement may last only a reasonable time.

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PROSECUTOR'S REFERENCE TO PAROLE IN ARGUMENT TO JURY

Where the purpose or effect of a prosecuting attorney's reference to parole or pardon is to convey the impression to the jury that the consequences of its verdict are of little importance since its errors will be corrected on appeal to some other body, the verdict may well be reversed.

The consequence of such remarks made by the prosecuting attorney was considered as one of first impression by the Court of Appeals of Maryland in *Shoemaker v. State*,[1] involving a conviction of rape. During his argument to the jury, the state's attorney stated that rape is punishable by death,[2] but that the state was not asking for this penalty, the practical effect of which was to take away from the

[30]The Uniform Act to Secure The Attendance of Witnesses From Without A State in Criminal Proceedings, 9 U.L.A. 86, presents some clarification to the situation, but still offers no remedy other than imprisonment to compel a recalcitrant witness's attendance.

[1]228 Md. 462, 180 A.2d 682 (1962).

[2]Upon a verdict of "guilty" in a Maryland trial for rape, the court may sentence the prisoner to death or life imprisonment in the penitentiary, or to confinement in the penitentiary for a term of not less than eighteen months nor more than twenty-one years. Md. Ann. Code art. 27 § 461 (1957).

jury any function in fixing the penalty.[3] Continuing, he told the jury that on a verdict of guilty without capital punishment, the court would be required to sentence the defendant to the penitentiary for eighteen months to twenty years and it would become the obligation of the Parole Board to consider the defendant's eligibility for parole after he had served one third of his sentence,[4] or that the Governor could pardon him or commute his sentence even before he had served one third of his sentence.[5]

After the jury returned a verdict of guilty without capital punishment, the trial court sentenced the defendant to a term of twenty years in the penitentiary.

The court granted the prisoner a delayed appeal under the Post Conviction Procedure Act,[6] finding that he was not at fault in failing to file a direct appeal.[7]

The Court of Appeals held that the state attorney's remarks regarding parole constituted reversible error, since:

> "[T]he natural tendency and effect of the statements about parole was to suggest to the members of the jury that they might resolve any question about the defendant's guilt beyond a reasonable doubt with the thought that, even if they made a mistake, no great harm would be done since he might soon be paroled."[8]

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[3]The jury may add the words "without capital punishment" to a verdict of guilty. If the jury renders such a verdict, the court must sentence the prisoner to confinement in the penitentiary for a term of not less than eighteen months nor more than twenty years. Md. Ann. Code art. 27 § 463 (1957).

[4]Md. Ann. Code art. 41 § 124 (1957). This section was amended in 1961 so that it is now the obligation of the Parole Board to consider the prisoner's eligibility for parole after he has served one-fourth of his sentence. Md. Ann. Code art. 41 § 124 (Supp. 1962).

[5]Md. Ann. Code art. 41 § 120 (1957). "The Governor... may commute or change the sentence of any person from imprisonment in the Maryland Penitentiary to imprisonment for a like or less period in the Maryland House of Correction. And... he may pardon any person, convicted of crime, on such condition as he may prescribe, or he may... remit any part of the time for which any person may be sentenced to imprisonment on such like conditions without such remission operating as a full pardon to any such person."

[6]Md. Ann. Code art. 27 §§ 645A-645J (Supp. 1962). This art is commented on in 19 Md. L. Rev. 233 (1959). For a discussion of post conviction remedies in the different states see Note, 61 Colum. L. Rev. 681 (1961).

[7]State v. Shoemaker, 225 Md. 639, 171 A.2d 468 (1961). After sentencing, the defendant asked his attorney to file an appeal, but the attorney withdrew at the request of the defendant's wife before doing so. The defendant's wife engaged another attorney who initiated an appeal, but, not having received his agreed fee, failed to follow it through. During this entire time, a period of three years, the defendant was unaware that he was no longer represented by his original attorney and that no appeal had been taken.

[8]180 A.2d at 685.

At the outset, a distinction should be drawn between remarks made by the court in response to a jury inquiry and remarks made by the prosecuting attorney in his argument to the jury.

While some courts apply the same rules of error to references made by the trial judge and the prosecuting attorney,[9] most courts draw a distinction between the two. The majority of American courts hold that an explanation by the trial judge of the effect of sentence and the executive discretion thereon is a permissible response to inquiries from the jury,[10] but most courts hold it to be reversible error for the prosecuting attorney to refer to the possibility of parole or pardon.[11] The primary distinction lies in the fact that when the jury inquires into the possibility of an early release of the defendant, the subject is obviously at the fore of their deliberations and whether or not their questions are answered, the subject will still persist in their minds. Quite a different situation exists when it is the prosecuting attorney who introduces the subject, especially since the jury may then feel that the possibility of parole or pardon is a proper consideration in reaching a verdict.

In considering whether or not statements regarding possible parole or pardon constitute a ground for reversal it is important to bear in mind the "harmless error" rule, for even if the court thinks that the prosecuting attorney's statements were improper, still, most courts will not grant a reversal unless it is found that the remarks were so prejudicial to the defendant that they adversely affected the verdict.[12] In the *Shoemaker* case, the majority of the court held that the state at-

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[9]See Annot., 132 A.L.R. 679 (1941); Annot., 35 A.L.R.2d 769 (1954).

[10]Mallory v. United States, 236 F.2d 701 (D.C. Cir. 1956), rev'd on other grounds, 354 U.S.449 (1957); Glover v. State, 211 Ark. 1002, 204 S.W.2d 373 (1947); Griffith v. State, 157 Neb. 448, 59 N.W.2d 701 (1953); State v. White, 27 N.J. 158, 142 A.2d 65 (1958) (court set out model statement to be given jury); Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960) (habeas corpus proceeding); Liska v. State, 115 Ohio St. 283, 152 N.E. 667 (1926); State v. Carroll, 52 Wyo. 29, 69 P.2d 542 (1937). Contra, McCray v. State, 261 Ala. 275, 74 So. 2d 491 (1954); Jones v. Commonwealth, 194 Va. 273, 72 S.E.2d 693 (1952).

[11]Blackwell v. State, 76 Fla. 124, 79 So. 731 (1918); People v. Klapperich, 370 Ill. 588, 19 N.E.2d 579 (1939); State v. Clark, 196 Iowa 1134, 196 N.W. 82 (1923); Powell v. Commonwealth, 276 Ky. 234, 123 S.W.2d 279 (1938); State v. Johnson, 151 La. 625, 92 So. 139 (1922); State v. Dockrey, 238 N.C. 222, 77 S.E.2d 664 (1953); Gray v. State, 191 Tenn. 526, 235 S.W.2d 20 (1950). Contra, State v. Jordan, 80 Ariz. 193, 294 P.2d 677 (1956); Gransinger v. State, 161 Neb. 419, 73 N.W.2d 632 (1955).

[12]See Note, 39 Va. L. Rev. 85 (1953). Tennessee incorporates the rule by statute. Tenn. Code Ann. § 27-117 (1955). "No verdict...shall be set aside or new trial granted . . . for error . . . unless . . . after an examination of the entire record . . . it shall affirmatively appear that the error complained of has affected the results of the trial."

torney's remarks were improper and that their likely effect on the jury's verdict was prejudicial to the defendant. However, one judge dissented[13] stating that he would affirm the judgment and sentence because he felt that the probable prejudice to the defendant would be negligible.

Among the states which allow the jury a function in fixing the penalty by returning a verdict with or without a recommendation,[14] Georgia and California have dealt with the question by legislative enactment coupled with judicial decision.

In Georgia, prior to 1955, the courts held that references by the prosecuting attorney to parole or pardon were not grounds for reversal.[15] The Supreme Court of Georgia in *Strickland v. State*[16] affirmed a conviction of murder, holding such remarks to be proper in view of the jury's discretion in recommending or failing to recommend mercy. The court went on to say that: "This question is so well settled by the decisions of this court that it should no longer be open to doubt."[17] Two years after the 1953 decision in the *Strickland* case, the state legislature upset the settled judicial doctrine and enacted a statute prohibiting any attorney from making any reference to parole, pardon or executive clemency in argument to the jury.[18] The statute has been held to have established the policy of law that the question of parole or pardon is not to be considered by the jury in their determination of guilt and punishment.[19]

The usual character of criminal procedure developed in California has made it possible to deal with the problem somewhat differently. Prior to 1957, in cases in which the statutory penalty was death

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[13]Judge Hammond dissented. Judges Prescott, Horney and Sybert joined Chief Judge Brune in the majority opinion.

[14]For a comprehensive list of states which have statutes providing for jury recommendations see Annot., 17 A.L.R. 1117 (1922); Annot. 87 A.L.R. 1362 (1933); Annot., 138 A.L.R. 1230 (1942).

[15]McLendon v. State, 205 Ga. 55, 52 S.E.2d 294 (1949).

[16]209 Ga. 675, 75 S.E.2d 6 (1953).

[17]75 S.E.2d at 8.

[18]Ga. Code Ann. § 27-2206 (Supp. 1961).

[19]McGruder v. State, 213 Ga. 259, 98 S.E.2d 564 (1957). Referring to the statute cited in note 18 supra, the court said: "This act . . . establishes the policy of the law that the jury should not be influenced . . . in the rendition of their verdict by a consideration of the fact that the penalty imposed by them might be commuted by the State Board of Pardons and Paroles." 98 S.E.2d at 569.

It is worth noting what the court said about the legislature upsetting the judicial doctrine. In McKuhen v. State, 216 Ga. 172, 115 S.E.2d 330 (1960), Chief Justice Duckworth said: "And while the writer has repeatedly indicated his belief that the jury should know the full meaning of the sentence, the legislature has fixed it otherwise and we must conform thereto." 115 S.E.2d at 331.

or life imprisonment in the alternative, the jury determined the penalty in addition to the defendant's guilt, the references to parole or pardon were held to be permissible as relating to the penalty, but not in regard to the determination of guilt.[20] In 1957, the California legislature enacted a statute requiring the jury to make a separate determination of the defendant's guilt prior to any consideration of punishment.[21] The statute further provides that if the jury returns a verdict of guilty, a further proceeding is initiated whereby the jury determines the punishment. Since the enactment of this statute, the court has held that it is permissible for the prosecuting attorney to refer to the possibility of parole or pardon after a verdict of guilty has been rendered, while the jury is considering the punishment.[22]

Most states, however, have relied solely upon judicial decision in regard to the propriety or impropriety of such references made by the prosecuting attorney.[23]

States in which the jury has no function in determining the punishment have almost universally considered such statements improper and grounds for reversal.[24] The problem is more complex in states where the jury has a function in fixing the penalty, for it can be argued that while the subjects of parole, pardon or executive clemency have no bearing on a determination of guilt, they do relate to punishment in the sense that the jury should be allowed to consider the effect of the punishment they are to impose.[25]

While the weight of authority favors the "harmless error" rule,[26] some jurisdictions hold that while such remarks are improper, they do not constitute grounds for reversal if the trial court has admonished the jury to disregard them,[27] or if the court finds that the evidence clearly supports the verdict and it appears that the jury in all probability would have rendered a verdict of guilty even in the absence of the prosecuting attorney's improper remarks.[28]

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[20]People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956); People v. Barclay, 40 Col. 2d 146, 252 P.2d 321 (1953).

[21]Cal. Pen. Code § 190.1.

[22]People v. Robillard, 55 Cal. 2d 620, 335 P.2d 678 (1959).

[23]See generally, 23A C.J.S. Criminal Law § 1107 (1961).

[24]People v. Klapperich, 370 Ill. 588, 19 N.E.2d 579 (1939); People v. Sherwood, 271 N.Y. 427, 3 N.E.2d 581 (1936).

[25]State v. Rombolo, 89 N.J.L. 565, 99 Atl. 434 (Ct. Err. & App. 1916); see note 22 supra.

[26]See note 12 supra.

[27]Thackston v. State, 205 Ark. 493, 169 S.W.2d 130 (1943); Jones v. State, 220 Ind. 384, 43 N.E.2d 1017 (1942).

[28]State v. Kingsley, 137 Ore. 305, 2 P.2d 3 (1931); State v. Buttry, 199 Wash. 228, 90 P.2d 1026 (1939).