IN THE SUPREME COURT OF THE STATE OF NEVADA

DEMARLO ANTWIN BERRY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35201

FILED

APR 06 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Demarlo Antwin Berry's post-conviction petition for a writ of habeas corpus. Berry argues that his petition must be granted because his trial counsel was ineffective in advising him to stipulate to a non-unanimous jury verdict. We conclude that Berry was not rendered ineffective assistance of counsel.

United States Supreme Court jurisprudence regarding unanimity

The United States Supreme Court and virtually every federal circuit court have held that a jury verdict must be unanimous in a federal criminal trial, irrespective of whether the defendant consents to waiver of his right to a unanimous verdict. However, the United States Supreme Court has never held that the right to a unanimous jury verdict in a state criminal trial is guaranteed by the Sixth Amendment, as incorporated to the states by the Fourteenth Amendment.

Traditionally, the United States Supreme Court has assumed that the jury trial established by the federal Constitution embodied the characteristics of a jury trial as it existed at common law.[1] A common law jury trial consisted of a twelve-man jury, the presence of a judge with the power

[1]See Patton v. United States, 281 U.S. 276, 288-90 (1930), overruled on other grounds by Williams v. Florida, 399 U.S. 78, 92-93 (1970).

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and ability to instruct the jury on the law and to advise the jurors upon the facts, and the unanimous verdict.[2] The Patton Court concluded that the right to a jury trial was one that a consenting accused could "forego at his election."[3]

However, in Williams,[4] the Court questioned the basis of Patton and the Court's earlier decisions, declaring that "the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." The Court in Williams concluded that the Sixth Amendment, as applied to the states through the Fourteenth Amendment, was not violated by a state law providing for a six-person rather than a twelve-person jury in non-capital cases.[5] The Williams Court left unanswered the question of whether unanimity "is an indispensable element of the Sixth Amendment jury trial."[6]

In 1972, the United States Supreme Court issued two decisions holding that the Constitution does not require jury verdict unanimity in non-capital state criminal trials. Specifically, the Court considered Sixth Amendment challenges to provisions of the Oregon and Louisiana Constitutions authorizing conviction by a non-unanimous jury. In both cases, the Court upheld the constitutionality of non-unanimity, despite the defendant's refusal to consent, when the state had expressly authorized non-unanimous verdicts.[7]

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[2]Patton, 281 U.S. at 288.

[3]Id. at 298.

[4]399 U.S. at 92-93.

[5]See id. at 103.

[6]Id. at 100 n.46.

[7]See Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

In Apodaca, the Supreme Court upheld an Oregon constitutional provision providing that only ten members of a twelve-person jury need concur in order to render a verdict in non-capital cases.[8]

In Johnson, the Supreme Court upheld a Louisiana constitutional provision authorizing punishment at hard labor upon a vote for conviction by nine of twelve jurors in non-capital criminal cases.[9] Justice Powell joined a plurality of justices in concluding that unanimity is not "in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily

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[8]Article I, Section 11 of the Oregon Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . . .

[9]Article VII, Section 41 of the Louisiana Constitution provides, in pertinent part:

> Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

binding on the States under the Due Process Clause of the Fourteenth Amendment."[10]

State jurisprudence regarding unanimity

Although a defendant may waive a jury trial with the approval of the court and consent of the state,[11] pursuant to NRS 175.481, governing trial procedure in criminal cases, "[t]he verdict shall be unanimous." (Emphasis added.) The relevant statutory authority and corresponding legislative history are both silent as to whether jury unanimity may be discharged.[12] Similarly, there is no constitutional authorization for conviction by a jury of less than twelve or by a less-than-unanimous jury.[13]

Where statutory language is plain and unambiguous, the statutory meaning must be deduced solely from the

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[10]Apodaca and Johnson, 406 U.S. at 373 (joint concurring opinion).

[11]Pursuant to NRS 175.011(1), criminal cases required to be heard by a jury "must be so tried unless the [non-capital] defendant waives a jury trial in writing with the approval of the court and the consent of the state." (Emphasis added.) On the other hand, by way of contrast, "[a] defendant who pleads not guilty to the charge of a capital offense must be tried by jury." (Emphasis added.) Hence, NRS 175.011(1) treats non-capital and capital defendants differently.

[12]See NRS 175.481-.541.

[13]Article 1, Section 3 of the Constitution of the State of Nevada provides:

> The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

(Emphasis added.)

language.[14] "In construing statutes, 'shall' is presumptively mandatory and 'may' is construed as permissive unless legislative intent demands another construction."[15] However, the term "shall" may be construed as merely permissive or directory, unless necessary to effectuate legislative intent.[16] "As against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest."[17]

The Supreme Court of Wyoming addressed the issue of whether a non-capital criminal defendant could waive his right to jury unanimity in Taylor v. State.[18] In question was the interpretation of Wyoming Rule of Criminal Procedure 32(a) which stated, in relevant part, as in the instant case, that the jury verdict "shall be unanimous." (Emphasis added.) The Wyoming Rules of Criminal Procedure similarly made "no provision for accepting a less-than-unanimous verdict and no provision concerning waiver of rights."[19] There, the court concluded that waiver was permissible "consistent with the general rule that all rights and privileges designed for the benefit of the defendant may be waived, so long as there is no violation of public policy and the public's interests are not thereby jeopardized."[20]

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[14]See Cirac v. Lander County, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979).

[15]State of Nevada v. American Bankers Ins., 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990).

[16]See Spaulding & Kimball v. Aetna Chemical Co., 126 A. 588, 589 (Vt. 1924).

[17]Railroad Co. v. Hecht, 95 U.S. 168, 170 (1877).

[18]612 P.2d 851 (Wyo. 1980).

[19]Id. at 854.

[20]Id. at 859.

The Court of Appeals of Maryland also addressed the issue of whether a non-capital criminal defendant could waive his right to jury unanimity in State v. McKay.[21] At issue was the interpretation of Article 21 of the Maryland Declaration of Rights which provides, in relevant part, "that in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty." Also at issue was Maryland Rule of Criminal Procedure 758 which provides that the jury verdict "shall be unanimous."

There, the non-capital defendant was convicted by a 9 to 3 jury vote in the Criminal Court of Baltimore. On appeal, the Court of Special Appeals reversed the decision, announcing that "unanimity [was] an imperative requirement of a legal verdict in a Maryland criminal prosecution before a jury, and not a right of the accused which he may waive."[22] The Court of Appeals, after granting certiorari, declared that although Maryland Rule of Criminal Procedure 758 provides that a jury verdict "shall be unanimous," nevertheless,

> [w]e have never held that the word "shall," which abounds throughout the Maryland Rules of Procedure, imports not simply a mandatory meaning, but one so imperative that there can be no waiver. We recognize, of course, that Rule 544 expressly provides for non-unanimous verdicts in civil cases if the parties so stipulate. But we reject the view that this alone elevates Rule 758 to "imperative requirement" status.[23]

The court ultimately held that "[s]ince a unanimous jury verdict is a fundamental constitutional right guaranteed

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[21]375 A.2d 228 (Md. 1977).

[22]McKay v. State, 362 A.2d 666, 674 (Md. 1976).

[23]375 A.2d at 235.

the defendant in a criminal case, it can be dispensed with only" when waived competently and intelligently.[24]

Contrary to the stance taken by an overwhelming majority of federal jurisdictions, state courts permit the right to a unanimous jury verdict to be waived in non-capital cases. State courts permitting waiver typically examine the circumstances surrounding the defendant's consent to ensure that the record demonstrates that consent was given intelligently, competently, with an accompanying explanation of the concomitant consequences, with the consent of the state counsel, and with the sanction of the court.[25]

Other constitutionally guaranteed rights have been deemed "knowingly and voluntarily" waivable. In pleading guilty, a criminal defendant waives his right to trial by jury, his right to confront witnesses, and his right against compulsory self-incrimination; such a waiver is effective only if made intelligently and voluntarily.[26] A criminal defendant has the constitutional right to waive assistance of counsel, guaranteed by the Sixth Amendment, as long as waiver of

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[24]Id. at 236.

[25]See Glass v. State, 300 S.E.2d 812, 814 (Ga. 1983) (holding that "'before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.'") (quoting Patton v. United States, 281 U.S. 276, 312 (1930))); People v. Miller, 329 N.W.2d 460, 466 (Mich. 1983) (holding that where there "was no explanation to defendant on the record by counsel or the court of the consequences if the jury failed to reach a unanimous verdict after further deliberation, i.e., that a mistrial would be declared, and that defendant would suffer no penalty as a consequence of opting for such declaration," such waiver cannot "be presumed to have been voluntarily and intelligently made"); State v. Rupert, 375 N.E.2d 1250, 1255 (Ohio 1978) (holding that "if a defendant may waive [his right to a jury trial], he may also waive his right to have a unanimous verdict").

[26]See Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).

counsel is "'knowingly and intelligently' made."[27] The right to a speedy trial is not jurisdictional and may be waived by the conduct of the defendant.[28]

In Nevada, at a minimum, an official court record of a plea canvass must consist of ensuring (1) that the defendant knowingly and voluntarily waives certain rights when he pleads guilty; (2) that the plea is not coerced, nor were any promises of leniency given; (3) that the defendant understands the consequences of the plea, particularly the range of punishment; and (4) that the defendant understands the elements of the offense or made factual admissions to committing the offense.[29]

Other similarly situated state courts have interpreted the language "the verdict shall be unanimous" as not importing a mandatory element. Further, this court has recognized several other constitutionally provided for rights as waivable.

United States Court of Appeals jurisprudence

Although the following federal rule and decisions are not binding authority in Nevada State court, we are considering them only for their reasonong on whether unanimity should be waivable.

In 1944, Federal Rule of Criminal Procedure ("FRCRP") 31(a) was adopted. This rule established that "the verdict shall be unanimous." (Emphasis added.) Since then, five United States Courts of Appeal have interpreted FRCRP

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[27]Beals v. State, 106 Nev. 729, 732, 802 P.2d 2, 4 (1990) (quoting Faretta v. California, 422 U.S. 806 (1975)).

[28]See Bates v. State, 84 Nev. 43, 46, 436 P.2d 27, 29 (1968).

[29]Dressler v. State, 107 Nev. 686, 696, 819 P.2d 1288, 1294 (1991).

31(a) as forbidding waiver of jury unanimity, whereas only one circuit court has permitted waiver of the unanimity requirement.

In United States v. Smedes,[30] the Sixth Circuit Court of Appeals reviewed the actions of a trial judge who, at his instigation, asked both sides to either stipulate to an 11 to 1 verdict or have a mistrial declared. Upon agreement by both parties, prior to the return of the verdict, the judge dismissed the holdout juror, thereby reducing the jury from twelve to eleven persons. This was done in an attempt to reach a verdict in accordance with FRCRP 23(b).[31] Although the lone dissenting juror was dismissed prior to the jury return, the appellate court determined that "[s]ince the verdict in [this] case . . . was not unanimous, it cannot stand."[32] The court declared that waiver of a unanimous verdict is prohibited even with the defendant's consent.[33] The court noted that "[a]n early proposal by the Advisory Committee on Criminal Rules to permit, on stipulation of the parties, a verdict by a stated majority, met with much criticism and was

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[30]760 F.2d 109 (6th Cir. 1985).

[31]FRCRP 23(b) reads as follows:

> Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

[32]Smedes, 760 F.2d at 113.

[33]Id.

eliminated from the Rule that became [FRCRP] 31(a)."[34] Thus, the court held that "the right to a unanimous verdict is so important that it is one of the few rights of a criminal defendant that cannot, under any circumstances, be waived."[35]

In United States v. Pachay,[36] in response to an 11 to 1 jury deadlock, the trial judge suggested that the defendant should consider waiving his right to a unanimous verdict. The defendant accepted the non-unanimous verdict of twelve jurors. The appellate court reversed the defendant's subsequent conviction and remanded for a new trial.[37] The Pachay Court held that although "the text [of FRCRP 31(a)] does not explicitly forbid waiver of unanimity," there is "no doubt that Rule 31(a) establishes unanimity as a mandatory requirement in federal criminal trials."[38] In reaching its conclusion, the Court relied upon the advisory committee notes of FRCRP 31(a), as well as the notion that "the general practice of the drafters of the Criminal Rules was to authorize waiver in express terms whenever waiver of a mandatory requirement concerning the jury was to be permitted."[39]

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[34]Id. (citing 3 Charles Alan Wright, Federal Practice and Procedure § 511, at 3-4 (2d ed. 1982).

[35]Smedes, 760 F.2d at 113.

[36]711 F.2d 488 (2d Cir. 1983).

[37]Id. at 488.

[38]Id. at 490.

[39]Id.; see United States v. Ullah, 976 F.2d 509, 513 (9th Cir. 1992) (holding that "[t]he text, history, and purposes of Rule 31(a) clearly demonstrate that a criminal defendant cannot waive the requirement of jury unanimity under any circumstances."); United States v. Morris, 612 F.2d 483, 488-89 (10th Cir. 1979) (noting that the requirement under FRCRP 31(a) that the rule be unanimous cannot be waived); United States v. Scalzitti, 578 F.2d 507, 511-12 (3rd Cir. 1978) (holding that although the defendant initiated the attempted waiver, the "unequivocal command" of FRCRP 31(a) cannot be waived).

Contrary to the holdings from its five sister circuit courts is the singular view of Sanchez v. United States.[40] There, the trial court judge was informed that all twenty-nine defendants, although none knew where the jury stood numerically, were in agreement regarding the waiver of their right to a unanimous verdict.[41] The defendants were individually questioned as to the voluntariness of their waivers and subsequently permitted to waive the right to jury unanimity.[42]

Quoting Patton v. United States,[43] the Sanchez court reasoned that "'[i]f it be assumed that the constitutional provisions for trial by jury should be construed as guaranteeing a right, there is no valid reason why their benefit should not be waivable.'"[44] Importing that line of reasoning, the court in Sanchez concluded that "it would seem that under very limited circumstances, the right to a unanimous verdict is also waivable."[45]

The Sanchez court also concluded that "Rule 31(a) was written to prohibit interference with a defendant's right to a unanimous verdict, but not to prohibit the waiver of the right."[46] Distinguishing itself from the other circuit courts, the Sanchez[47] court declared:

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[40]782 F.2d 928 (11th Cir. 1986).

[41]Id. at 931.

[42]Id.

[43]281 U.S. 276, 281 (1938).

[44]Sanchez, 782 F.2d at 931-32.

[45]Id. at 932.

[46]Id.

[47]Id. (quoting Pachay, 711 F.2d at 494 (Meskill, J., concurring)).

> We do not agree with other circuits that have interpreted that action to mean that waiver is forbidden by the rule. Had that been the intention of the legislature it could certainly have included language to that effect. We would agree with Judge Meskill of the Second Circuit who wrote a specially concurring opinion in the Pachay case and reads Rule 31(a) to merely "restate a defendant's right to a unanimous verdict and protect that right from interference by the trial judge."

The court, further distinguishing this case from the other circuit court cases, claimed "no other court has faced a situation like this one" where "the defendants clearly thought they could gain an advantage by going ahead and accepting what they felt sure would be a guilty verdict."[48]

Ultimately, the court in Sanchez[49] held that "[c]learly there is a constitutional right to a unanimous verdict," but the defendant "should be allowed to waive that right" when the following criteria are met:

> (1) [T]he waiver should be initiated by the defendant, not the judge or prosecutor; (2) the jury must have had a reasonable time to deliberate and should have told the court only that it could not reach a decision, but not how it stood numerically; (3) the judge should carefully explain to the defendant the right to a unanimous verdict and the consequences of a waiver of that right; and (4) the judge should question the defendant directly to determine whether the waiver is being made knowingly and voluntarily.

We take note of the criteria outlined in Sanchez and conclude that there may be circumstances, as in Sanchez, where waiver could benefit a guilty defendant, the party for whom the notion of jury unanimity was designed to protect. Therefore, in accordance with the standards we articulated in Dressler, we conclude that a non-capital criminal defendant

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[48]Sanchez, 782 F.2d at 934.

[49]Id.

may waive his right to a unanimous verdict and accept an 11 to 1 verdict, so long as the waiver was entered knowingly, intelligently and voluntarily.

Ineffective assistance of counsel

An ineffective assistance of counsel claim is sufficient to invalidate a judgment of conviction when a defendant demonstrates that "counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable."[50] A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.[51]

During the evidentiary hearing on Berry's post-conviction petition for writ of habeas corpus, the district court ruled that "the court finds no ineffective assistance of counsel." Referring to Berry's counsel, the district court reasoned:

> [H]is trial strategy is not -- does not meet Strickland to be so ineffective as to show ineffective assistance of counsel. So, I cannot in good conscience say that he was ineffective in making the trial strategy where he was -- made the determination to, in fact, save his client's life because death is different and the court understands that.

We conclude that Berry's counsel did not perform in a manner that "fell below an objective standard of reasonableness." It was not unreasonable for Berry's counsel to advise Berry to waive unanimity in consideration of the State removing a possible death sentence. The agreed-upon

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[50]Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

[51]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

stipulation between Berry and the State transformed this matter from a capital case to a non-capital case when eleven jurors were ready to convict Berry. Although their tactical decision facilitated the rendering of a guilty verdict, we will not criticize counsel for potentially rescuing Berry from an execution.

Having considered Berry's contention and concluded that it lacks merit, we ORDER the district court judgment AFFIRMED.

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Michael L. Douglas, Judge
Attorney General
Clark County District Attorney
Christopher R. Oram
Clark County Clerk