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Constitutional Law—Failure to Poll Jury Held Not to be Denial of Due Process

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effectiveness of the jury system as a legal institution. A necessary assumption in our judicial system is that juries are capable of intelligently weighing the evidence in a long and complicated trial.

Another consideration is that if a limitation on the length of a jury trial were to be established, a denial of due process might occur. Both parties should have the opportunity to fully present their case and a time limitation might lead to unfairness and thus to a denial of due process.

FAILURE TO POLL JURY HELD NOT TO BE DENIAL OF DUE PROCESS

In an Appellate Division case, *People v. Light*,³⁴ prosecuted under an indictment, it was held that the failure of the trial court, after the foreman had announced the purported verdict of the jury, to poll individual members of the jury regarding their confirmation of such verdict and to make inquiry of all the jurors as to whether or not the verdict as recorded, was their verdict, resulted in an incomplete verdict requiring a new trial. That court based its verdict on the interpretation of Section 433 of the Code of Criminal Procedure.³⁵ The Court of Appeals, in several previous cases,³⁶ held that unless the defendant called the trial court's attention to the failure of that court to comply with Section 433 he waived his opportunity and could not take advantage of it on appeal.

The instant case, *People v. Marilla*,³⁷ arose under the prosecution for operating a motor vehicle while in an intoxicated condition.³⁸ The City Court of Buffalo entered a judgment of conviction which was affirmed by the Supreme Court of Erie County. The defendant appealed on the basis that, upon the jury's return after reaching their verdict, it was possible that one of the jurors might have been missing or in the alternative, that the verdict as announced was not that of all the jurors. The defendant did not raise this objection in the trial court. On appeal the defendant contends that the failure to poll the jury was, in effect a denial of a constitutional right. The failure resulting in an incomplete verdict thereby depriving defendant of his effective right to due process of law.

The Court of Appeals, in a per curiam decision,³⁹ held that the failure of the defendant to raise this objection at the trial court level precluded him

34. 285 App. Div. 496, 138 N.Y.S.2d 262 (4th Dep't 1955).

35. Code of Criminal Procedure § 433:

When the jury have agreed upon their verdict, they must be conducted into the court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict.

In that event, the cause must be tried again, at the same or another term.

36. *People v. Baumgart*, 5 N.Y.2d 874, 182 N.Y.S.2d 24 (1959); *People ex rel. Meers*, 4 N.Y.2d 898, 174 N.Y.S.2d 649 (1958); *People v. Manfredi*, 1 N.Y.2d 743, 152 N.Y.S.2d 290 (1956).

37. 7 N.Y.2d 319, 197 N.Y.S.2d 154 (1960).

38. N.Y. Vehicle and Traffic Law § 70(5). Note: under the Vehicle and Traffic law effective October 1, 1960 this provision is now found in § 1192.

39. *Supra* note 37.

from raising it on appeal. Had the defendant so alerted the trial court, the trial judge, under Section 450 of the Code of Criminal Procedure,⁴⁰ could have removed any doubt by polling the jury. The Court expressed some doubt whether Section 433 even applied to Courts of Special Sessions—but assuming that it did, the defendant was not allowed to raise the objection for the first time on appeal. There is long standing support that a poll of the jury is not a matter of absolute right.⁴¹ The right to poll the jury may be waived either expressly, or by acts or failure to act. Section 450 of the Code of Criminal Procedure provides that, upon the rendition of the verdict, the jury may be polled at the instance of either party, but the application of the statute has come to require that, in order for there to be a valid poll the request must be timely or the defendant will be assumed to have waived the right.⁴² Reliance by the defendant on the Fifth and Fourteenth Amendments to The United States Constitution would not change the result because the Fifth Amendment operates exclusively on federal courts and any right to poll a jury is not an element of due process which could be said to be guaranteed by the Fourteenth Amendment. The failure of a trial court to poll the jury is not a denial of any fundamental, constitutional right owed to a defendant; and the right to poll may be waived by a failure to request it before the recording of the verdict.⁴³

Proceedings in Courts of General Sessions outside the metropolitan area of New York City are governed by Part 5 of the Code of Criminal Procedure, Sections 699-740C inclusive and Section 714 which states in substance that when a jury have reached a verdict, they must deliver it publicly to the court which must enter it in its minutes. These sections make no provision requiring that the names of jurors be called.⁴⁴ The decisions of the Court of Appeals point out the necessity of the defendant to make his objection in the lower court upon the jury's return or else he will preclude himself from raising this issue upon appeal.

COMPULSION TO TESTIFY AFTER IMMUNITY HAS BEEN GRANTED

The New York Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."⁴⁵ Because of this constitutional privilege, a prospective defendant, or one who was a potential target of an investigation, could not be constitutionally subpoenaed and sworn before a grand jury, and if he was subpoenaed he could not be held in contempt

40. Code of Crim. Proc. § 450:

When a verdict is rendered and before it is recorded the jury may be polled, on the requirement of either party; in which case they must be severally asked whether it is their verdict. . . .

41. *Reed v. Cook*, — Misc. —, 103 N.Y.S.2d 539 (Sup. Ct. 1951).

42. *People v. Schneider*, 154 App. Div. 203, 139 N.Y. Supp. 104 (2nd Dep't 1912).

43. *Warner v. New York Central Railroad*, 52 N.Y. 437, 11 Am. R. 724 (1873).

44. *People v. Albro*, 8 Misc. 2d 670, 172 N.Y.S.2d 175 (County Ct. 1957).

45. N.Y. Const. Art. 1, § 6.