Evidence--Weight of Evidence and Credibility of Witnesses--Juror's Common Knowledge and Experience

J. D. McD.
West Virginia University College of Law

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tations are made to the defendant by responsible officers of the state that a reward in the form of immunity or a lesser punishment than might be expected will be given in return for a plea of guilty and the defendant, in good faith, relies on these promises, and pleads guilty. The effect has been to preclude the exercise of free will and judgment by the defendant and his plea is not voluntary. People v. Gilbert, 25 Cal. 2d 422, 145 P.2d 657 (1944).

Because constitutional rights are involved here it is necessary that the defendant's plea be made voluntarily and with full knowledge and understanding on his part and that the rules for accepting such a plea be strictly adhered to by the courts. Even though the principal case may be distinguished from the majority of cases on this point, because the coercion was done in open court by a trial judge, its ruling inevitably follows these well established criminal law principles ordained to protect the constitutional rights of defendants.

G. D. G.

Evidence—Weight of Evidence and Credibility of Witnesses—Juror's Common Knowledge and Experience.—P's decedent was fatally injured when an automobile driven by D at an excessive speed left the road and went into a creek. D testified that at the time of the accident he felt the effects of beer which he had consumed during the course of the evening and that he had driven at excessive speed earlier on the evening of the accident. Judgment for P. Held, reversing lower court, that P's decedent was guilty of contributory negligence as a matter of law when he knew or should have known of the great danger incident to the journey and, though having reasonable opportunity to leave the automobile, voluntarily continued therein as a passenger. Hutchinson v. Mitchell, 101 S.E.2d 73 (W. Va. 1957).

The subject of this comment is a question raised in the dissenting opinion of Browning, J., in the principal case, of the propriety of a juror's use of his common general knowledge and experience in determining the weight and credibility to be given to the evidence presented before him.

In general a juror may act only upon evidence that is properly presented before him during the course of the trial; but this does not preclude him from acting upon and taking notice of facts that
are of such notoriety as to be matters of common knowledge and experience. 9 Wigmore, Evidence § 2570 (3d ed. 1940); 1 Jones, Evidence § 134 (4th ed. 1938). It is this common knowledge and experience which enables a juror to make a just and intelligent decision and in light of which he selects and weights those facts which are to be considered by him in arriving at a decision. See Rostad v. Portland Ry. Light & Power Co., 101 Ore. 569, 201 Pac. 184 (1921); Jenney Elec. Co. v. Branham, 145 Ind. 314, 41 N.E. 448 (1895). The normal inference or presumption which one may draw from a set of facts is but a manifestation of the jurors' consideration of these facts in relation to the "ordinary course of events" or in relation to the "ordinary experiences of mankind." See Gunn v. Ohio River R.R., 36 W. Va. 165, 14 S.E. 465 (1892); cf. Helm v. Manufacturers Light & Heat Co., 86 W. Va. 628, 104 S.E. 59 (1920). Experience is a desirable, if not necessary, characteristic of a juror. Jenney Elec. Co. v. Branham, supra.

While a juror may consider facts which are matters of common knowledge in judging the weight and credibility to be given to the evidence, he may not consider facts which are only within his personal knowledge. Levine's Loan Office, Inc. v. Starke, 140 Va. 712, 125 S.E. 683 (1924); cf. Thorn v. Addison Bros. & Smith, Inc., 119 W. Va. 479, 194 S.E. 771 (1937); Chesapeake & O. Ry. v. Allen, 113 W. Va. 691, 169 S.E. 610 (1933). A juror who has knowledge of any relative fact in issue may not disclose this fact to the jury alone, but must make such disclosure in open court. W. Va. Code c. 56, art. 6, § 18 (Michie 1955). A decision rendered solely upon a juror's personal knowledge would be unintelligible in light of the record evidence and would (stating but one result) unjustly deprive the unsuccessful party of his rights to challenge the credibility of such "outside" evidence. Washburn v. Milwaukee & L.W.R.R., 59 Wis. 364, 18 N.W. 328 (1884).

Since a juror may consider matters of common knowledge and experience in reaching a verdict upon the law and evidence of the case, it is proper for the court to give an instruction informing the jurors of this fact. Head v. Hargrave, 105 U.S. 45 (1881); Rostad v. Portland Ry. Light & Power Co., supra; Cincinnati, H. & I.R.R. v. Gregor, 150 Ind. 625, 50 N.E. 760 (1898); Jenney Elec. Co. v. Branham, supra. Contra, Washburn v. Milwaukee & L.W.R.R., supra. Refusal to give such an instruction, in the proper case, may lead the jurors to believe that they must accept the truth of testimony which, as men of ordinary experience, they know to be false, or the finality
of conclusions reached by witnesses which, as men of general knowledge, they know to be unreasonable. See *Head v. Hargrave*, supra; *Jenney Elec. Co. v. Branham*, supra. By the same token, it would be improper for the court to give an instruction which may lead the jurors to believe that they can use their personal knowledge in arriving at a verdict; or to give an instruction which states that a matter is of common knowledge when, in fact, it is not. *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 64 N.W. 501 (1895); *Waite v. Teeters*, 36 Kan. 604, 14 Pac. 146 (1887).

While it appears that our court has not been called upon to decide the propriety of such an instruction, it has, on at least two occasions, recognized that the general knowledge and experience of a juror may be used by him in weighing and determining the credibility of evidence. *Helm v. Manufacturers Light & Heat Co.*, supra; *Gunn v. Ohio River R.R.*, supra. It appears that our court, to be consistent, would not deny the request for an instruction which informs a juror that he may use this common knowledge and experience which our court has recognized as being properly within a juror's consideration. But while consistency may demand an instruction which in its effect so informs the jurors, it is felt that the court would not be inconsistent in denying an instruction in these exact terms.

There is an ever present danger that a juror, by misunderstanding this instruction or by judging a matter to be of common knowledge, when in fact it is not, would erroneously make use of personal knowledge in arriving at his decision. *Washburn v. Milwaukee & L.W.R.R.*, supra. The court, by informing the jurors of the exact matter which they may consider as being of common knowledge, may itself make the error in judgment. See, e.g., *Waite v. Teeters*, supra. Even though it is more likely that the court will not err in this respect, the statement of this matter may tend to influence the jurors upon the factual issue involved. Cf. *Stenger v. Hope Natural Gas Co.*, 90 S.E.2d 261 (W. Va. 1955). If the matter is of common knowledge it need not be stated; if not of common knowledge it should not be stated. *Gulf, M. & N.R.R. v. Weldy*, 193 Miss. 59, 8 So. 2d 249 (1942).

It is felt that an instruction which tells the jurors that they may use their common knowledge and general experience in arriving at a verdict would only tend to confuse the jurors and would be redundant in light of the usual instructions given to the jury on
the weight and credibility which they may attach to the evidence before them. It is submitted that an instruction which informs a juror that he is to use his “common sense” in weighing and judging the evidence before him is less confusing and imports substantially the same meaning as an instruction on the juror’s use of his common knowledge and general experience.

J. D. McD.

Evidence—Wire Tapping—Admissibility of Matter Illegally Obtained.—At D’s trial for an alcohol tax violation, testimony was admitted concerning existence of a wire tap which had been operated by state officers in accordance with state law. As a result of the tap, D was picked up by the state officers on a suspected narcotics violation. His cargo was then found to be untaxed alcohol, instead of narcotics, so he was turned over to the federal authorities, who had no knowledge of the wire tap. Trial resulted in a conviction, affirmed on appeal. Held, on certiorari, that evidence obtained by means forbidden by federal statute, whether obtained by state or federal officers, is inadmissible in federal courts. Benanti v. United States, 78 Sup. Ct. 155 (1957).

At common law, evidence was generally admissible on a trial even though obtained illegally. See 8 Wigmore, Evidence § 2183 (3d ed. 1940). In federal courts, however, evidence procured by federal agents in violation of the Constitution is inadmissible. Weeks v. United States, 232 U.S. 388 (1914). This exception to the common law rule has been broadened to include evidence obtained in violation of federal law. E.g., Shinyu Noro v. United States, 148 F.2d 696 (5th Cir. 1945).

Wire tapping is not unconstitutional. Olmstead v. United States, 277 U.S. 438 (1928). A federal statute, however, now provides, in part, that no person not authorized by the sender shall intercept any message and divulge its existence or contents to any person. Communications Act, 1934, 48 Stat. 1103, 47 U.S.C. § 605 (1952). Severe penalties are provided for violation. 48 Stat. 1100, 47 U.S.C. § 501 (1952). Prior to passage of this act, wire tap evidence was admissible in federal courts. Foley v. United States, 64 F.2d 1 (5th Cir. 1933); Kerns v. United States, 50 F.2d 602 (6th