Tulsa Law Review

Volume 7 | Number 1

1971

Trials: Juror's Notes Approved in Oklahoma

Tommy L. Holland

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Prior to *State ex rel. Department of Highways v. Lehman,*[1] the Supreme Court of Oklahoma had not considered whether jurors should be permitted to take notes. In *Lehman,* the supreme court ruled that jurors may take notes during the course of the trial. With the *Lehman* decision, Oklahoma joins the majority of the jurisdictions which have considered the question.[2]

The question of the propriety of note taking by jurors was presented to the court through an action in eminent domain. Plaintiff, Department of Highways, sought to condemn property of the defendants, Ralph J. Lehman, Nina C. Lehman and Elta M. Allen. At the beginning of the trial, a juror requested permission to take notes; and the request was granted by the trial court without objection from counsel for either party. After the trial, the trial court sustained defendants' motion for a new trial on the ground that the juror could have resented an objection by defendants' counsel; and thus, according to the trial judge, defendants' objection might have resulted in adverse consideration of their position by the juror.[3]

On appeal, the supreme court held that trial courts may permit jurors to take notes in a proper case.[4] Noting that such practice may not be desirable in all cases, the court decided the trial judge should have discretion to determine when note taking would be proper.[5] And the court found no abuse of discretion by the trial judge, particularly since defendants

[1] 462 P.2d 649 (Okla. 1969).
[2] *See* Annot., 14 A.L.R.3d 831 (1967).
[3] 462 P.2d at 650.
[4] *Id.* at 651.
[5] *Id.*

failed to object to the ruling.[6] Accordingly, the supreme court reversed the trial court's order sustaining the motion for a new trial.

On what grounds did the supreme court rely for its conclusion? First, the court reasoned that jurors should not be subject to treatment different from judges and attorneys who take notes during the trial.[7] However, judges and attorneys are not equal with respect to note taking because judges and attorneys have knowledge of the issues in the case and of the law applicable to the case at the beginning of the trial, whereas jurors do not possess such knowledge until instructions are given by the court after presentation of all the evidence. Thus, jurors are not in a position to select the most pertinent evidence as are judges and attorneys.[8] So, the mere fact that judges and attorneys take notes during the trial is not sufficient to justify note taking by jurors.

Next, the court considered notes by jurors to be merely memory refreshers; and therefore, jurors who believe that

[6] *Id.* For decisions approving discretion of the trial judge absent a showing of prejudice, *see, e.g.,* State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968), *cert. denied,* 394 U.S. 908 (1969); Carson v. Squirrel Inn Corp., 298 F. Supp. 1040, 1045 (D.S.C. 1969); Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141, 148-49 (1965); Toles v. United States, 308 F.2d 590, 594 (9th Cir. 1962), *cert. denied,* 375 U.S. 836 (1963); Harris v. United States, 261 F.2d 792, 796 (9th Cir. 1958), *cert. denied,* 360 U.S. 933 (1959). For opinions holding that failure to object to note taking constitutes a waiver of any possible prejudice, *see, e.g.,* State v. Shedd, 274 N.C. 95, 161 S.E.2d 477, 484-85 (1968); State v. Trent, 234 S.C. 26, 106 S.E.2d 527, 529 (1959); Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127, 142 (1905); Cluck v. State, 40 Ind. 263, 272 (1872).

[7] 462 P.2d at 651; *accord,* Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141, 146 (1965); United States v. Carlisi, 32 F. Supp. 479, 483 (E.D.N.Y. 1940).

[8] *See* Corbin v. City of Cleveland, 144 Ohio St. 32, 56 N.E.2d 214, 215 (1944).

notes would improve their ability to arrive at a conclusion on the issues should be allowed to take notes.[9] Although notes would undoubtedly serve to refresh a juror's memory, the juror's attention may be focused on his note taking activities at the very time an important aspect of the case is being presented.[10] But this problem could be alleviated to some extent under appropriate instructions from the trial court.[11] For instance, jurors could be instructed not to attempt to transcribe all the evidence,[12] or instructions could limit notes to damage amounts.[13] Another suggestion, which might be utilized to reduce instances of distraction from other evidence while taking notes, would be to allow jurors, on request, to delay the presentation of evidence while engaged in note taking activities. However, delay requests from twelve jurors likely would be numerous, resulting in even longer trials.[14] Considering the over-burdened court dockets of today, this suggestion is probably unrealistic. Perhaps even more important than the previous reasons why jurors should not take notes as memory refreshers is the fact that statutory law provides a method for jurors, on request, to have testimony

[9] 462 P.2d at 651; *accord,* Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141, 147-48 (1965); United States v. Carlisi, 32 F. Supp. 479, 483 (E.D.N.Y. 1940) (dictum); *cf.* United States v. Campbell, 138 F. Supp. 344, 353 (N.D. Iowa 1956) (If jurors request permission to take notes, it should be denied only in exceptional circumstances.).

[10] *See, e.g.,* United States v. Standard Oil Co., 316 F.2d 884, 897 (7th Cir. 1963); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344, 347-48 (1955); Cheek v. State, 35 Ind. 492 (1871).

[11] *See* Scherlis, *Note Taking by Jurors,* 37 TEMP. L.Q. 332, 335-38 (1964).

[12] Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141, 147 (1965).

[13] *In re* Appropriation of Easements, 87 Ohio L. Abs. 295, 16 Ohio Op. 2d 465, 176 N.E.2d 881, 888 (C.P. 1961).

[14] Corbin v. City of Cleveland, 144 Ohio St. 32, 56 N.E.2d 214, 215 (1944).

read from the transcript.[15] Thus, it is not essential that jurors be allowed to take notes for the purpose of refreshing memory. And, if notes are permitted for this purpose, it would seem desirable to circumscribe the scope of the note taking so that jurors would not attempt to record all the evidence.

Though the reasons advanced by the supreme court as the basis for permitting jurors' notes do not seem to support the propriety of such activity without some qualifications, there are other factors to be considered before arriving at a final conclusion. In order to adequately evaluate the desirability of permitting jurors to take notes, an analysis of the more important propositions of both the proponents and opponents is essential.[16]

The argument of the opponents most frequently mentioned is the doctrine that undue influence may be exerted by the jurors who take notes, especially if some jurors do not take notes.[17] Similarly, it is believed that jurors skilled in

[15] OKLA. STAT. tit. 12, § 582 (1961) provides in part:
> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, . . . they may request the officer to conduct them to the court, where . . . the court may give its recollections as to the testimony on the point in dispute, or cause the same to be read by the stenographer in the presence of, or after notice to, the parties or their counsel.

[16] For other discussions of these points, *see* Petroff, *The Practice of Jury Note Taking—Miscounduct, Right or Privilege?*, 18 OKLA. L. REV. 125, 130-31 (1965); Scherlis, *supra* note 11; The Jury System in Federal Courts: Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 409, 458-59 (1960).

[17] Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141, 147 (1965); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344, 347-48 (1955); United States v. Campbell, 138 F. Supp. 344, 353 (N.D. Iowa 1956); United States v. Davis, 103 F. 457 (C.C.W.D. Tenn. 1900), *aff'd on other grounds*, 107 F. 753 (6th Cir. 1901).

shorthand will be able to assert even more influence.[18] However, these theories seem to have been given an inordinate amount of weight. As suggested by one court, a juror possessing greater intelligence or one with a better memory is as likely to be in a position to assert a predominant influence as is the note taking juror.[19] Moreover, it has been noted that the present level of education of jurors tends to reduce the influence of any one juror.[20] Accordingly, the validity of this argument is highly questionable.

Also, the opponents contend that jurors will place too much emphasis on the evidence noted, possibly to the exclusion of other equally, if not more important aspects of the case.[21] One writer has suggested that this point is mere speculation;[22] but reason seems to support the contention. On the other hand, it is quite possible that certain portions of the evidence also will impress jurors relying on memory only. Hence, this contention is not a sufficient basis for refusing to allow jurors to take notes.

Finally, notes may be inaccurate and unreliable according to the opponents.[23] However, it should be obvious that any inaccuracy or unreliability in notes would be magnified when jurors are required to rely on memory only.[24]

[18] Fischer v. Fischer, 31 Wis. 2d 293, 142 N.W.2d 857, 863 (1966); United States v. Standard Oil Co., 316 F.2d 884, 897 (7th Cir. 1963).
[19] Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141, 147 (1965).
[20] The Jury System in the Federal Courts, *supra* note 16.
[21] Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344, 347-48 (1955); Cheek v. State, 35 Ind. 492 (1871).
[22] Scherlis, *supra* note 11.
[23] United States v. Davis, 103 F. 457 (C.C.W.D. Tenn. 1900), *aff'd on other grounds,* 107 F. 753 (6th Cir. 1901); *cf. In re* Appropriation of Easements, 87 Ohio L. Abs. 295, 16 Ohio Op. 2d 465, 176 N.E.2d 881, 886 (C.P. 1961) (Evidence could be presented and then stricken but remain in jurors' notes.).
[24] Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141, 146-47 (1965).

Turning to the position of the proponents, their strongest argument is that notes are more reliable than memory.[25] Undoubtedly, the actual notes would be more accurate than memory for that particular item of evidence. However, most jurors are not specially qualified as stenographers.[26] Jurors not so qualified would be prone to miss some of the evidence while noting other evidence.[27] When this distraction factor is considered, the risk caused by unrestricted note taking exceeds the advantages. Particularly, is this true where jurors have access to the transcribed testimony as a means of refreshing recollection.[28]

After analyzing the principal contentions of the proponents and the opposition, it is the opinion of this writer that the scope of jury note taking should be quite limited. This opinion results primarily from the conclusion that substantial portions of material evidence will be missed while jurors un-

[25] United States v. Carlisi, 32 F. Supp. 479, 483 (E.D.N.Y. 1940); Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141, 146-47 (1965); B. H. Palmer & Son v. Cowie, 27 Ohio C.C.R. 617, 7 Ohio C.C.R. (n.s.) 46 (1905); Petroff, *supra* note 16, at 127; Woodcock, *Note Taking by Jurors,* 55 DICK. L. REV. 335, 337 (1951); Lecture by Honorable Grover M. Moscowitz, United States District Judge for the Eastern District of New York, before Section on Federal Practice of the Association of the Bar of the City of New York, Mar. 14, 1944, *Some Aspects of the Trial of a Criminal Case in the Federal Court,* 3 F.R.D. 380, 383; The Jury System in the Federal Courts, *supra* note 16; *see* State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, *cert. denied,* 377 U.S. 978 (1964) (Before instructing the jury, the trial judge gave the jurors paper for an outline of indictments and counts because the conspiracy involved 8 indictments and 18 counts.).

[26] The Jury System in the Federal Courts, *supra* note 16.

[27] Fischer v. Fischer, 31 Wis. 2d 293, 142 N.W.2d 857, 863 (1966); United States v. Standard Oil Co., 316 F.2d 884, 896 (7th Cir. 1963); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344, 347-48 (1955).

[28] *See* OKLA. STAT. tit. 12, § 582 (1961); Scherlis, *supra* note 11.

familar with the law and the issues are noting evidence of lesser import. However, it is believed that jurors' notes can be used to great advantage in cases involving numerous and conflicting damage amounts or estimates, a large number of parties or any other complex litigation. But, in such cases, the trial court's instructions should strictly limit notes to damage amounts or identification of parties. And, even in long and complex litigation, stipulated exhibits, where feasible, should be used to reduce the length of jurors' notes.[29] Accordingly, this writer believes the trial courts of Oklahoma, in the exercise of their discretion, should adopt the dictum in *Lehman*[30] and limit the scope of note taking by jurors.

Tommy L. Holland

[29] Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344, 347-48 (1955); Fischer v. Fischer, 31 Wis. 2d 293, 142 N.W.2d 857, 863 (1966).

[30] 462 P.2d at 651 ("While in many instances note taking by a juror may not be a commendable practice, there are occasions where it is proper. This would be especially true in a long extended trial or a trial involving complex intricacies of details and figures.").