705 LAW NOTE: JURY NULLIFICATION

This law note discusses "jury nullification," a term generally understood as referring to a jury's returning of a not guilty verdict even though the evidence is sufficient to establish all the elements of a crime beyond a reasonable doubt. State v. Bjerkaas, 163 Wis.2d 549, 472 N.W.2d 615 (Ct. App. 1991), is the first published appellate decision in Wisconsin to consider directly several issues relating to the jury nullification issue. Bjerkaas and related cases are discussed below.

I. The Jury Has the Power But Not the Right to "Nullify"

A. The Power to Nullify

A jury has the power to nullify, that is, to return a not guilty verdict even though the evidence is sufficient to prove all elements beyond a reasonable doubt. This power flows from the interaction of practical concerns and legal rules:

1) the jury cannot be compelled to act in a particular way or reach a particular result;

2) once the jury retires, no one knows what goes on;

3) only general verdicts are used in criminal cases; and

4) there can be no appeal from a not guilty verdict.

Thus, when a jury returns a general, not guilty, verdict, no one can tell what the basis for that verdict was. The verdict may reflect legitimate disagreement about whether the elements of the crime were established; it may reflect honest doubt about whether the burden of proof was met; it may reflect a mistake about the facts; or it may reflect a conclusion reached in defiance of the proof. But unless individual jurors make posttrial statements to explain their verdict, the basis for the verdict will remain unknown.

Even if it becomes known that a jury engaged in nullification, no remedial action can be taken.[1] It is a fundamental principle of double jeopardy that the state cannot appeal from a not guilty verdict.[2] The principal applies regardless of the reason why the jury reached the not guilty conclusion.

Wisconsin courts have recognized the jury's power of nullification.[3] But they have distinguished between the "power to nullify the objectively correct application of the law and the right to do so." State v. Bjerkaas, 163 Wis.2d 949, 960, emphasis in original.

© 1991, Regents, Univ. of Wis.

B. The Jury Does Not Have the Right to Nullify

One argument in favor of an expansive view of jury nullification is that the jury has a historical role as a check on prosecutors, judges, and legislatures.[4] Some go so far as to argue that for conduct to be criminal, it must be "blameworthy" in addition to meeting the statutory requirements, and that the "blameworthiness" is only for the jury to assess.[5] In support, proponents refer to situations where courageous juries have refused to convict "technically" guilty protesters like William Penn and John Peter Zenger.[6] The claim is that the nullification power is of the essence of the right to jury trial and may not be limited in any way without violating that constitutional right.

In 1895, the United States Supreme Court rejected the federal constitutional right argument. Sparf v. United States, 156 U.S. 51 (1895). More recently, the court has stated that "a defendant has no entitlement to the luck of a lawless decisionmaker, even if the decision cannot be reviewed." Strickland v. Washington, 446 U.S. 668, 695 (1984) (in holding that a harmless error analysis may be applied to claims of ineffective assistance of counsel). Federal and state courts have been uniform in rejecting the constitutional right argument. An exception exists in three states C Georgia, Indiana, and Maryland C where the state constitution expressly provides that the jurors are the judges of the law and the facts.[7] (Note that Article I, Section 3, of the Wisconsin Constitution provides that in criminal prosecutions for libel "the jury shall have the right to determine the law and the fact.")

The Bjerkaas court followed this trend: . . . that "juries have the power to do what they want . . . does not translate to have a jury decide a case contrary to law or fact. . . ." 163 Wis.2d 949, 960.

II. Defense Argument Relating to Jury Nullification is Properly Limited

The defendant in Bjerkaas argued that it was error for the trial court to refuse defense counsel permission to argue nullification by urging the jury to acquit regardless of the law. The court of appeals held that the trial court did not abuse its discretion in refusing to allow this line of argument. That "juries have the power to do what they want . . . does not translate to a right to have a jury decide a case contrary to law or fact, much less a right . . . to an argument urging them to nullify applicable laws." 163 Wis.2d 949, 960. The defense counsel in Bjerkaas was allowed to "talk in terms of fairness in general terms" but not to go further and argue that the jury "should discard the instructions and the law and find her not guilty because it seems fair." Ibid.

© 1991, Regents, Univ. of Wis.

III. Jury Instructions For or Against Jury Nullification

A. A Jury Instruction on Jury Nullification May Properly be Refused

The argument in favor of a jury instruction on jury nullification is based in part on the rationale that since the jury has the practical power to engage in nullification, the jury ought to be told of that power. The court in Bjerkaas also rejected this assertion: that "juries have the power to do what they want . . . does not translate to a right to have a jury decide a case contrary to law or fact, much less a right . . . to an instruction telling jurors they may do so." 163 Wis.2d 949, 960. In accord is State v. Olexa, which held that an instruction telling jurors they "could ignore [a] statute if they felt it was unfair" could properly be denied. 136 Wis.2d 475, 485, 402 N.W.2d 733 (Ct. App. 1987).[8]

An instruction on jury nullification would contradict other general instructions jurors receive which tell them that they are to reach a verdict based only on applying the law given in the instructions to the facts properly proved by the evidence. (Wis JI-Criminal 100.) Jurors are told not to be swayed by sympathy, prejudice, or passion. (Wis JI-Criminal 460.) Standard questions asked of jurors during voir dire typically require a commitment that the juror can reach a verdict fairly and impartially, based on the law given in the instructions and the evidence presented. See, for example, SM-20, Suggested Jury Voir Dire, and Wisconsin Judicial Benchbook, CR-17 (1987).

B. Instructing that Nullification is Not Proper

Antijury nullification instructions have been approved. It has been held to be proper to admonish jurors that they are not at liberty to disregard the law no matter what their individual views as to its wisdom. Williams v. State, 192 Wis. 347, 352, 212 N.W.2d 631 (1927). In Schmidt v. State, 159 Wis. 15, 149 N.W. 388 (1914), the following instruction was approved:

> The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case.

Despite these two cases, the Committee recommends that no instruction, pro or con, be given relating to jury nullification. The instructions for substantive criminal offenses do, in a sense, acknowledge the power of jury nullification. The concluding paragraphs always state that if the jury is satisfied that the facts necessary to constitute the crime are proved, they should find the defendant guilty but that if they are not so satisfied, they must find the defendant not guilty.[9] The Committee believes this accurately reflects the law on jury

© 1991, Regents, Univ. of Wis.

nullification as discussed in Bjerkaas: it acknowledges that the power exists but declines to offer specific advice on its exercise.

COMMENT

This law note was approved by the Committee in August 1991.

1. The general rule is that impeachment of a verdict by receiving evidence relating to the jury's deliberations is not permitted. See § 906.06(2); after Hour Welding v. Lanceil Management Co., 108 Wis.2d 734, 324 N.W.2d 868 (1982); and State v. Poh, 116 Wis.2d 510, 343 N.W.2d 108 (1984).

2. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . could not be reviewed . . . without putting [a defendant] twice in jeopardy. . . ." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), cited in State v. Turley, 128 Wis.2d 39, 48, 381 N.W.2d 309 (1986).

"To permit an appeal from the acquittal itself would violate the fundamental principles upon which the constitutional prohibition of double jeopardy is grounded. . . ." State v. Evjue, 254 Wis. 581, 591 37 N.W.2d 50 (1949). [The Evjue case held that the same rule applies when the acquittal is by the trial court in a nonjury case. It, in effect, recognized a power of nullification in a trial judge acting as the finder of fact.]

3. State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987); Evjue v. State, note 2 supra.

4. The historical background is discussed in Scheflin and Van Dyke, "Jury Nullification: The Contours of a Controversy," 43 Law and Contemporary Problems 51 (Autumn 1980). Also see Scheflin, "Jury Nullification: The Right To Say No," 45 So. Cal. L. Rev. 168 (1972).

5. This view sees jury nullification as a technique for counteracting the trend toward legislature's adopting over-inclusive criminal legislation: "American criminal procedure responds to this legislative defect by giving both the prosecutor and the jury the power to decriminalize a particular defendant's conduct that is not sufficiently 'blameworthy' or 'dangerous'. . . ." Arenella, "Rethinking The Functions of Criminal Procedure," 72 Georgetown Law Journal 185, 216 (1983).

6. See note 4, supra.

7. For example, article 1, § 19, of the Indiana Constitution says that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts." Cited in Scheflin and Van Dyke, note 4, supra, at 79.

8. For federal cases holding that a specific nullification instruction should not be given, see, for example, United States v. Berrigan, 417 F.2d 1002 (4th Cir. 1969); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972), and United States v. Anderson, 716 F.2d 446, 449 (7th Cir. 1983).

9. "This distinction between 'must' and 'should' in the criminal law is long-standing in American jurisprudence, as it is in Wisconsin. Indeed, there is authority that this distinction is implicit in the Constitution's Sixth Amendment right to a trial by jury." State v. Thomas, 161 Wis.2d 616, 631, 468 N.W.2d 729 (Ct. App. 1991).

© 1991, Regents, Univ. of Wis.