

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BONNER,

Defendant-Appellant.

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UNPUBLISHED

May 17, 2002

No. 230514

Wayne Circuit Court

LC No. 00-004972

Before: Cooper, P.J. and Hood and Kelly, JJ.

KELLY, J (*dissenting*).

I respectfully dissent. It is well settled in Michigan that a criminal defendant may orally waive the constitutional right to be tried by a twelve-member jury. See *People v Miller*, 121 Mich App 691, 702-703; 329 NW2d 460 (1983); *People v Rabin*, 317 Mich 654, 664; 27 NW2d 126 (1947). A valid waiver, however, requires that the individual relinquishing a right conferred by the constitution must do so knowingly and voluntarily.<sup>1</sup> Thus, the question presented for our determination is what constitutes a sufficient “knowing and voluntary” waiver of the right to be tried by a twelve-member jury.

The majority opines, “defendant was not informed by either the trial court or his attorney that a failure to stipulate would result in a mistrial. The [trial court’s] remarks seemed to indicate that defendant’s only choices were either to stipulate to an eleven-member jury, or insist that the twelfth juror forego her plans to attend a family reunion.” I disagree.

A review of the colloquy<sup>2</sup> between the trial court and the juror does not suggest or support that if the trial court compelled the juror to return and deliberate to verdict the juror

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<sup>1</sup> See *People v Saffold*, 465 Mich 268, 273; 631 NW2d 320 (2001) (knowing and voluntary waiver required to relinquish right to a trial by jury entirely); see also *Id.* at 271 (indicating that knowing and voluntary waiver of a jury trial is required before the defendant may enter a guilty plea); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998) (defendant’s confession must be “knowing, voluntary and intelligent” to be admitted at trial.)

<sup>2</sup> The discussion concerning the juror’s conflict among the trial court, the juror and defendant was as follows:

(continued...)

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(...continued)

[Juror]: [I] have some concerns. I'm supposed to be going out of town this morning. My family is waiting for me, because I told them if we didn't finish today that you said Monday. We still planning on going out of town when I left here. Now you tell me I'm coming back tomorrow. My family is going; [w]e paid for our family reunion and everything.

[The Court]: All Right. I guess the only problem with that is I did ask if you wanted to go into the jury room to discuss it, to bring out any of those types of issues, because now we have all the jurors who had left, and it may be difficult, if not impossible, to get a hold of them. You just waited until they all left to say this, and I don't know if we can get a hold of all of them to tell them to come Monday instead of tomorrow.

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[By the Prosecutor]: I would agree to go with eleven.

[By defense counsel]: It would be up to Mr. Bonner as to whether or not he would want to proceed with only eleven jurors. So I ask the court to inquire of him.

[The Court]: All Right. Mr. Bonner, would you want to excuse this juror for cause at this time that she wants to go to a family reunion and has committed to some people, and for that reason does not want to return tomorrow?

The rest of the jurors have all been told to return tomorrow; [h]ave all agreed to return to deliberate on your case. That's what they are intending to do.

So[,] would you want to stipulate to agree to have eleven jurors decide your case rather than the twelve?

[Defendant]: I'm in agreeance [sic]. I'm in agreeance [sic] with that, your Honor, of course.

[By the Prosecutor]: Have you asked him does he realize he doesn't have to do this? This is his choice.

\* \* \*

[Defendant]: Yes, I understand fully.

[The Court]: Do you understand that you have a right to have your case decided by a jury of twelve, and if you do stipulate to have a jury of eleven, you're waiving your right to have a jury of twelve in order to have a jury of eleven, and have these eleven people do that.

(continued...)

would disregard the trial court's order and fail to return. Only if the juror failed to return despite the trial court's directive would the trial court have the option of declaring a mistrial. Thus, the majority's statement that defendant did not have sufficient information to knowingly, voluntarily and intelligently waive his right to a twelve-member jury is not quite accurate. Certainly, absent the defendant's stipulation, the trial court would undoubtedly have ordered the juror to fulfill her civic obligation and return the following day to continue deliberations. A mistrial would have been entertained only *if* the trial court could not adjourn the deliberations to the following Monday; *if* the juror disregarded the trial court's instruction; and *if* the juror actually failed to return. There is nothing contained in the record to suggest that a mistrial was imminent or contemplated. To reach this conclusion, we would have to heap surmise atop of speculation which would result in a decision constructed from nothing more than assumption and supposition; a result that I am unable to sanction on the facts presented in this case.

These circumstances are precisely what distinguishes this case from the court's decision in *Miller, supra*. In *Miller*, the jury deadlocked with eleven jurors voting to convict and one juror voting to acquit. Upon learning that the jury was "hopelessly deadlocked," the trial court gave the defendant two options; either agree to accept the eleven-member majority vote or direct the jury to continue deliberating until they reached a unanimous verdict. Presented with these options, the defendant decided to forego his right to a unanimous verdict and accepted the majority's decision. On appeal, the court held that the defendant's waiver was not voluntarily and intelligently rendered because the trial court failed to advise the defendant that if the jury could not reach a unanimous verdict upon further deliberations, the trial court would have to declare a mistrial. Thus, in *Miller*, the possibility that the jury would not be able to reach a unanimous verdict upon further deliberation was imminently possible especially considering that the jury deliberated and in less than two hours arrived at an impasse.

This is not the situation in the case sub judice. The potential for a mistrial was contingent upon whether the juror actually appeared the following day to continue deliberations. And, with nothing in the record indicating that the juror would not appear as directed, the potential for mistrial was nothing more than mere speculation. I cannot agree that a trial court must advise of every possible or remote contingency to secure a knowing, voluntary and intelligent waiver.

In my opinion, a valid waiver of the right to a trial by a twelve-member jury should parallel that which the law requires for a valid waiver of the right to a trial by jury in favor of a trial before the bench. By foregoing the constitutional right to a trial by the traditional twelve-member jury and electing a trial before the bench, the defendant is merely substituting decision makers. The defendant is electing to have the court as opposed to a jury of his peers render the ultimate verdict. Similarly, the decision to stipulate to an eleven-member jury as opposed to asserting the right to a twelve-member jury is nothing more than a modification in decision makers.

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(...continued)

You don't have to do that in any way; [b]ut if you want to, you may.

[Defendant]: Yes, I'm in agreeance [sic]. I will do that.

[The Court]: All right.

According to MCR 6.402(B), before accepting a waiver of trial by jury:

[T]he court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Consistent with this rule, the trial court asked defendant, in open court, if he understood that he had a right to have a trial by a twelve-member jury and that he did not have to relinquish that right. The trial court explained that it was within defendant's discretion to agree to waive his right to a twelve-member jury, dismiss the twelfth juror and allow the other eleven members of the jury to deliberate to verdict. Defendant responded that he understood "fully" and agreed to have the eleven remaining jurors return to deliberate and dismiss the twelfth for cause. Upon the record before this Court, I would find that defendant knowingly and voluntarily relinquished his constitutional right to a trial by a twelve-member jury and that his waiver was valid and binding. Accordingly, I would uphold defendant's conviction.

/s/ Kirsten Frank Kelly