No. 28404 -- State of West Virginia v. Michael E. Brown

Starcher, J., dissenting:

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OF WEST VIRGINIA

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OF WEST VIRGINIA

I dissent because this defendant's conviction was obtained under circumstances that amounted to a less-than-fair trial. Specifically, there was an illegal "guest" in the jury room -- an alternate juror, who had absolutely no right to be there.

The majority makes the argument that this illegal person in the jury room "did not participate" in the jury's deliberations. But surely we can not be so naive as to believe that the legitimate jurors never interacted in any way with the illegal person in the jury room, that the illegal person never "raised an eyebrow" or "made a frown" during the deliberations. Nor am I inclined to rely on juror affidavits as to what happened in the jury room, to excuse clearly illegal conduct in connection with a criminal conviction.

The majority's argument could logically extend to having several alternate jurors in the jury room. And if "non-participation" in the jury's deliberations is the test, why not invite the bailiff to sit in, too -- as long as he or she promises to keep quiet?

As Chief Justice McGraw stated in his dissent in *State v. Lightner*, 205 W.Va. 657, 664, 520 S.E.2d 654, 661 (1999) (a dissent in which I joined):

> In clear contrast to the view of the majority of this Court, I view a defendant's right to a jury of twelve as a fundamental constitutional privilege. Indeed, the express directive contained in Article III, § 14 of the *West Virginia Constitution*, which commands that all criminal trials "shall be by a jury of twelve," leaves room for no other conclusion.

> Thus, any deviation from this constitutional requirement must be accomplished through a knowing and intelligent waiver.

In addition to improperly excusing the aforesaid clear violation of the *West Virginia Constitution* that underlies the appellant's criminal conviction, the majority opinion responds to each of the appellant's other assignments of error -- including the denial of a continuance, the denial of a jury specialist, and the denial of a jury view -- with a rote repetition of the doctrines of judicial discretion and harmless error. Unlike the majority, in this close case where only the testimony of a self-serving criminal implicated the defendant, I would hold that the multiple adverse rulings of the trial judge toward the appellant constituted cumulative error that also requires reversal of the appellant's conviction.

I would reverse and remand for a new trial, and I think this Court is now ready to revisit *Lightner*.