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Misconduct of Jurors--Impeachment of Verdict--New Trial [*People v. DeLucia*, 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967)]

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MISCONDUCT OF JURORS — IMPEACHMENT OF VERDICT — NEW TRIAL

People v. DeLucia, 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967).

In *People v. DeLucia*,[1] the New York Court of Appeals was presented with the question of just how much the United States Supreme Court ruling in *Parker v. Gladden*[2] had affected the long-standing rule that jurors would not be permitted to impeach their own verdict. In *Parker*, the Court ruled that when a baliff, who was assigned to shepherd a sequestered jury, made unauthorized statements to some of the jurors, there was created an "outside influence" upon the jury.[3] The Court stated that this outside influence could have affected the jury's verdict and, in fact, might have become a witness against the defendant, all in contravention of the defendant's rights under the sixth amendment to the Constitution.[4]

In *DeLucia*, two defendants were convicted of attempted burglary in the third degree and of possession of burglar tools. Shortly after the verdict had been rendered, some of the jurors admitted to defendants' counsel that several jurors had made an unauthorized visit to the scene of the crime, had reinacted the crime, and had thereafter related their experience to the remainder of the jury.[5]

Based on the above facts, the initial question focused on by the *DeLucia* court was whether there could be any exception to the traditional rule that jurors would not be permitted to impeach their own verdicts. The court determined that its decision depended on whether the protection of an individual's constitutional rights outweighed the policy reasons for the strict rule against jurors' self-impeachment.[6] The court decided, solely on the basis of the *Parker*

[1] 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967). This case came up for reargument following the Supreme Court's decision in Parker v. Gladden, 385 U.S. 363 (1966). Initially, the New York Court of Appeals had affirmed the conviction of the defendants involved in this case. People v. DeLucia, 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377, *cert. denied*, 382 U.S. 821 (1965).

[2] 385 U.S. 363 (1966).

[3] The bailiff in *Parker* on one occasion stated to an alternate juror and was overheard by another juror: "Oh, that wicked fellow, he is guilty." *Id.* On another occasion he said to another juror: "If there is anything wrong the Supreme Court will correct it." *Id.* at 364. Little did he realize the accuracy of his prophecy.

[4] *Id.* at 364. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . by an impartial jury . . . and . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

[5] 20 N.Y.2d at 275, 229 N.E.2d at 211, 282 N.Y.S.2d at 526.

[6] *Id.* at 278, 229 N.E.2d at 213, 282 N.Y.S.2d at 528.

decision, that a defendant's right to a trial by a fair and impartial jury was of greater importance,[7] reasoning that although the rule against jurors' impeachment of their verdicts is essential to the smooth conduct of jury trials, the exception drawn in *DeLucia* would in no way infringe upon the merits or the workability of the general rule. The case was remanded to the trial court for a hearing to test the truth of the appellants' allegations. Upon proof of the allegations, an order for a new trial would follow.[8]

As a result of *DeLucia*, New York's rule against a juror's impeachment of his verdict applies only when the investigation into jury misconduct is concerned with what happened in the jury room and does not apply when the investigation concerns a fact in the form of an "outside influence" which would violate rights granted under the sixth amendment.[9] Because such outside influences occur infrequently and are susceptible to adequate proof, the rule that a juror will not be allowed to impeach his verdict remains essentially intact.[10]

The question, however, remains as to the future scope and definition of "outside influence." In *DeLucia*, the visit to the scene of the crime by the jurors amounted to evidence against the defendants which was presented out of the confines of the court — that is, extraneous to the established guilt-determining procedure. The defendants lacked all the fundamental avenues of defending themselves from the ill-gained evidence. Thus the effect of such prejudicial evidence entering the sanctity of the court was clear in *De-*

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[7] *Id.* at 278, 229 N.E.2d at 213, 282 N.Y.S.2d at 529.

[8] In a letter from appellants' counsel, this writer learned that the testimony of the jurors at the hearing established the allegations of the unauthorized view with the result that a new trial has since been ordered. Letter from William Sonenshine to William J. Davis, Nov. 8, 1967.

[9] The court did not discuss the question of State action in extending the protection of the sixth amendment to the appellants. The reader, however, should be aware of the problem of State action which potentially lingers in every appeal concerning the denial of individual rights granted under the U.S. Constitution. In *Parker*, the bailiff was unquestionably an officer of the State, and the State action requirement was obviously fulfilled. In *DeLucia*, it seems fairly certain that the jurors would fulfill the requirement in that they were acting as agents, of a sort, for the State, as an integral part of the State judicial system. *See* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

[10] *See* State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955), in which the court similarly took exception to the rule. The court said:

> Where, however, jurors' testimony goes, not to the motives or methods or processes by which they reached the verdict, but merely to the existence of conditions or the occurrence of events bearing on the verdict, that basis of policy does not exist, and this whether the condition happens or the event occurs in or outside of the jury room. *Id.* at 100, 118 A.2d at 816.

Lucia — the purity of the courtroom, in which the supposed goal is the honest determination of guilt or innocense via the thrust and parry by counsel on both sides with evidence presented in a formal manner, was not afforded the defendants.

The difficulty with "outside influence" arises when the inequity is not so clear cut. In *Sheppard* v. *Maxwell*,[11] the question of jurors' verdict impeachment was not at issue, but the atmosphere created at the Sheppard murder trial by the Cleveland news media could very well have been labeled an "outside influence" and conformed to the definition of outside influence as enunciated in *Parker* and interpreted in *DeLucia*. This leads to the question whether a juror who ignores court admonishments and reads a newspaper article to the defendant's prejudice should be allowed to impeach his previously rendered verdict. The only clue to future interpretation of the rule is the majority's statement that the rule should not apply where there is "a patent injustice to a defendant."[12]

The decision marks a significant departure from the rule established at common law, a rule which took a strong hold in virtually every American jurisdiction and with minor exceptions has remained intact.[13] As the dissent vigorously points out, the overwhelming majority of jurisdictions adhere to a strict interpretation of the rule against the self-impeached verdict.[14] Calling on antiquity and tradition under the guise of stare decisis, the dissent fired salvos of precedent in an effort to save the time-honored rule from what the dissent felt was wanton destruction. The rule was first clearly defined by Lord Mansfield in *Vaise* v. *Delavel*.[15] The justification afterwards offered by courts which followed the rule was that if jurors' affidavits alleging their own misconduct were admitted, the doors to post-verdict jury-tampering would be constantly opened.[16] This argument is weakened, however, by other factors

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[11] 384 U.S. 333 (1966).

[12] 20 N.Y.2d at 279, 229 N.E.2d at 214, 282 N.Y.S.2d at 529.

[13] *See* 15 BUFFALO L. REV. 217 (1966); 25 U. CHI. L. REV. 360 (1958).

[14] 20 N.Y.2d at 283, 229 N.E.2d at 216, 282 N.Y.S.2d at 533. For an exhaustive survey of State cases, see 8 J. WIGMORE, EVIDENCE § 2354 (McNaughton rev. ed. 1961).

[15] 99 Eng. Rep. 944 (K.B. 1785). The entire text of the opinion was:

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means. *Id.*

[16] *See, e.g.*, McDonald v. Pless, 238 U.S. 264 (1915); Payne v. Burke, 236 App. Div. 527, 260 N.Y.S. 259 (1932). For a general policy discussion, see 8 J. WIGMORE, *supra* note 14, § 2353.

that guard against jury-tampering. Ethical standards might prohibit post-verdict tampering of the sort feared by the courts when they invoke the rule.[17] Undoubtedly, the caution embodied in the rule is wise if reasonably restrained.

The rule itself has not been negated by this case. Its application, however, has been restricted and a significant avenue heretofore blocked has now been opened. There is now additional cause for inquiry into a jury's activities during the trial itself, albeit the additional area of inquiry is small. Where before almost no jury conduct was assailable after the verdict had been rendered, counsel suspicious of a jury's folly or naiveté can now seek out misconduct at least as to outside activities not connected with deliberation.[18]

While this decision does not destroy the rule against jurors' impeachment, the question arises as to whether it opens any road for further erosion. Perhaps the most formidable obstacle which impedes progress in trimming the harshness from unrestricted application of the rule is the American reverence for the jury system itself. Trial by jury is asserted to be the law's bond with democracy,[19] the safeguard of the equities,[20] and the most meaningful heritage from our English forefathers.[21] Correspondingly, the dissenting judge in *DeLucia* called upon the democratic appeal of the jury system when he argued: "One of the advantages asserted in favor of jury trials is that jurors bring to bear upon the point at issue their varied individual experiences of life."[22] While such arguments may be flattering to the man in the street, they do little to console the defendant whose conviction erroneously stands because of the misapplication of the rule. The late Jerome Frank forthrightly thrust the jury system into realistic focus by pointing out that although judges and lawyers publicly acclaim trial by jury as an integral and desireable part of the American way of life, they privately wince at the thought of the jury as they view its function in the legal process.[23] Most judges, Judge Frank asserted, regard jury deliberation

[17] A federal judge issued an injunction to restrain counsel from post-trial interrogation of jurors and rebuked the Ethics Committee of the Bar Association of New York City for condoning such practices. United States v. Driscoll, 36 U.S.L.W. 2276 (S.D.N.Y. Nov. 1, 1967), *noted in* N.Y. Times, Nov. 2, 1967, § M, at 43, col. 7.

[18] *But see* note 17 *supra.*

[19] J. FRANK, COURTS ON TRIAL 135 (1949).

[20] *Id.* at 136.

[21] *Id.* at 110.

[22] 20 N.Y.2d at 287, 229 N.E.2d at 219, 282 N.Y.S.2d at 537.

[23] J. FRANK, *supra* note 19, at 108-10.

as a cauldron of dubious ingredients which, if slightly investigated, would boil over, exposing all the inherent injustices and pulling down in its course the comfortable veil of democratic involvement which has taken so long to grow.[24] Thus exclusionary rules, such as the rule against a juror's impeaching his verdict, serve a double function: they permit the court to keep a tight lid on the cauldron of unmentionables on the one hand, and they preserve the standard notions of fair play and democratic justice on the other. *DeLucia*, in its exception to the rule, may be a recognition of the underlying "illegitimacy" of the jury function; and while the decision may serve to undermine faith in the jury system, such dogmatic faith was ill founded in the first place.[25]

The sentimental argument that the jury system is an essential part of our heritage from England is refuted by the present lack of civil jury trials in England and the abolishment of the unanimity requirement for jury verdicts in criminal cases.[26] An American observer of the British trial courts was forced to take a second look at the present American jury system.[27] A comparison of the two methods led to the suggestion of a program of permanent jurors, composed of longtime residents of mature years with records of honesty and integrity in the community.[28] Permanent jurors would become versed in the rules of factfinding and resilient to the antics of dramatic trial lawyers, thus eliminating many of the causes of criticism. While such a scheme, if workable, is not within the foreseeable future, the probing of the rule against verdict impeachment is at least a recognition of the problem and a step in the right direction. In light of the facts of *DeLucia*, which are narrow and which obviously affected the defendants adversely, the possibility of any im-

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[24] *Id.* at 115-16. Judge Frank sought to allow the true workings of the jury to be aired in public in order that they could be analysed and profited from. Having recognized the "unmentionable" side of justice, we could then set about to shape the law of trial procedure to utilize the layman-juror sense of justice instead of pretending that it was not there. Constructively, Judge Frank advocated: 1) the abandonment of jury trials except for the most grave criminal cases, 2) selection of jurors for their special knowledge, 3) special verdicts only, 4) compulsory instruction of jurors in the do's and don't's of factfinding, 5) the recording of jury room deliberations, and 6) the revision of exclusionary rules such as the one presently under discussion. *Id.* at 141-45.

[25] *See* Galston, *Civil Jury Trials and Tribulations*, 29 A.B.A.J. 195 (1943) (suggesting the recording of jury deliberations).

[26] *See* 15 DEPAUL L. REV. 416, 438 (1966). *But see* Kalven and Zeisel, *The American Jury — Notes for an English Controversy*, 48 CHI. B. RECORD 195 (1967) (suggesting that the abolishment of the unanimity requirement will not substantially change the frequency of hung juries).

[27] Richards, *A New Look At Our Jury System*, 41 FLA. B.J. 93 (1967).

[28] *Id.* at 99.

mediate significant collapse of the rule seems remote. The majority opinion effectively performed minor surgery in an effort to rid the rule of some of its senility, but just as effectively closed the wound to insure a proper healing.

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