University of Richmond Law Review

Volume 6 | Issue 2 Article 16

1972

Criminal Procedure- Virginia's Limited Use of A Two-Trial System

Criminal Procedure—Virginia's Limited Use of a Two-Trial System—*Snider v. Cox*

It has long been the general assumption in criminal cases in the United States that the fair trial provided for by the Federal Constitution[1] contemplates a unitary one wherein all of the issues are deliberated within a single proceeding, with verdict, and punishment if any, in the form of a single pronouncement.[2] A recent Virginia case, however, has held that the issues of guilt and punishment are severable and may be tried separately where particular circumstances exist.

In *Snider v. Cox*,[3] the Virginia Supreme Court focused its attention on the often-debated problems regarding the continued utilization of the unitary trial concept, and held that there was no injustice in retrying a defendant on the issue of punishment alone where that was the only issue unfairly deliberated at the first trial.[4] In *Snider* the defendant had been found guilty of statutory rape and sentenced to death. In the course of the trial prospective jurors had been excluded on the grounds of having conscientious scruples against capital puinshment. Subsequent to Snider's conviction the United States Supreme Court in *Witherspoon v. Illinois*[5] declared this practice to be unconstitutional.[6] On Snider's writ of habeas corpus the trial

---

1 U.S. Const. amend VI.

2 The constitutionality of the unitary trial in capital cases has been challenged. *See* Maxwell v. Bishop, 398 U.S. 262 (1970). The issue remains undecided, however, because the court studiously avoided any conclusion on the constitutionality of the unitary process and decided the case on entirely different grounds.

3 212 Va. 13, 181 S.E.2d 617 (1971).

4 *Cf.* Brady v. Maryland, 373 U.S. 83 (1963). The petitioner contended he was denied a federal right when the Maryland Court of Appeals restricted his retrial to the question of punishment, but the majority of the Supreme Court found there had been no violation of the fourteenth amendment in such practice.

5 391 U.S. 510 (1968).

6 The Court carefully limited its decision:

> The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the state's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it. *Id.* at 513-14.

In light of such language, the dissent of Justice Black to the effect that the majority opinion is based upon a "semantic illusion" which will not significantly change the make-up of juries, but will cost the states much time and money, seems justified. *Id.* at 539.

court held that although the sentence was clearly invalid, there was no reason to question the validity of the verdict,[7] and therefore the defendant should be retried on the issue of punishment alone.[8] Snider thereupon appealed, contending that his new trial should embrace all of the issues, including the question of his guilt.[9] The Virginia Supreme Court affirmed the lower court's decision and denied Snider a trial de novo.

In contrast to its frequent employment in civil suits,[10] the two-stage trial in criminal procedure is a comparative rarity.[11] However, the split-trial con-

---

[7] *See generally*, Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 PA. B.A.Q. 252 (1958); Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEXAS L. REV. 545 (1961).

[8] *See* Witherspoon v. Illinois, 391 U.S. 510 (1968) where the Court stated:

> [T]he jury was entrusted with two distinct responsibilities: first, to determine whether the petitioner was innocent or guilty; and second, if guilty, to determine whether his sentence should be imprisonment or death. It has not been shown that this jury was biased with respect to the petitioner's guilt. But it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments. *Id.* at 518.

[9] *Cf.* Witherspoon v. Illinois, 391 U.S. 510 (1968) in which Justice Douglas in a spirited dissent stated:

> Although the Court reverses as to penalty, it declines to reverse the verdict of guilt rendered by the same jury. It does so on the ground that petitioner has not demonstrated on this record that the jury which convicted him was "less than neutral with respect to *guilt*," . . . because of the exclusion of all those opposed in some degree to capital punishment. . . . But we do not require a showing of specific prejudice when a defendant has been deprived of his right to a jury representing a cross section of the community. . . . I would not require a specific showing of a likelihood of prejudice, for I feel that we must proceed on the assumption that in many, if not most, cases of class exclusion on the basis of beliefs or attitudes some prejudice does result and many times will not be subject to precise measurement. *Id.* at 531.

[10] In such cases the first trial determines liability, the second damages. *See* Annot., 85 A.L.R.2d 9 (1962); Annot., 34 A.L.R.2d 988 (1954); Annot., 29 A.L.R.2d 1199 (1953). It has been stated as a majority rule in civil suits that the new trial can be limited to particular severable questions. 58 Am. Jur. 2d *New Trial* § 24 (1971). Virginia has remanded civil cases for trial before a different jury on issues of damages alone or other specific issues. For a discussion of considerations, see Rawle v. McIlhenny, 163 Va. 735, 177 S.E. 214 (1934). *See also* Certified TV & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959); Isenhour v. McGranighan, 178 Va. 365, 17 S.E.2d 383 (1941); Walker v. Crosen, 168 Va. 410, 191 S.E. 753 (1937); Johnson v. Kellam, 162 Va. 757, 175 S.E. 634 (1934); Baker v. Carrington, 138 Va. 22, 120 S.E. 856 (1924).

[11] Some jurisdictions do, however, allow bifurcated trial procedure in criminal cases where insanity is a defense. Under such statutes, the first trial is on guilt or innocence, the second on the insanity issue. *See* ARIZ. REV. STAT. § 13-1621.01 (1968); CAL. PEN. CODE § 1026 (West 1970); COLO. CRIM. PROC. CODE § 39-8-3 (1963); TEX. CODE CRIM. PROC. art. 46.02 (1965). Arizona has recently held its statute violative

cept has been advocated in some jurisdictions having "habitual criminal" statutes,[12] and five states[13] have gone so far as to institute by statute a system of separate trials, one to decide guilt or innocence, a second to fix punishment. It has been urged in other jurisdictions that the two-trial procedure is more equitable both to the defendant and the state,[14] but the majority view in regard to this aspect of criminal procedure still subscribes to the unitary trial concept.[15] Consequently most states hold that if a new trial is granted in a criminal case it must be de novo. Some justify this conclusion by state statute;[16] some refer to precedent;[17] some merely state their conclusion without attempting to justify it.[18]

---

of due process and unconstitutional. State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970); 22 SYRACUSE L. REV. 823 (1971). In *Shaw* the court found that the statute was unconstitutional since all inquiry relevant to the mental state of the defendant was excluded from the first trial and the requisite criminal intent necessary for proof of guilt had to be presumed. California has avoided this pitfall by case law which provides that evidence relevant to criminal intent is admissible at the first trial, so long as it does not touch the question of legal insanity. People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949). *See generally* Annot., 67 A.L.R. 1447 (1930).

[12] In such cases there would be one trial to decide the issue of guilt or innocence, another to decide the status of the defendant as a "habitual criminal" or not. *See generally*, 39 Am. Jur. 2d *Habitual Criminals and Subsequent Offenders* § 2 (1968); Annot., 79 A.L.R.2d 826 (1961).

[13] *See* CAL. PEN. CODE § 190.1 (Supp. 1967); CONN. GEN. STAT. ANN. § 53-10 (Supp. 1965); N.Y. PEN. LAW §§ 125.30, 125.35 (1967); PA. STAT. ANN. tit. 18 § 4701 (1963); TEX. CODE CRIM. PROC. art. 37.07 (1966). The Model Penal Code also contains a split trial provision. MODEL PENAL CODE § 210.6 (Proposed Official Draft, May 4, 1962). *See also* S.D. CODE § 13.2012 (Supp. 1960) (trial court may ask jury to retire to deliberate on penalty after verdict of guilt is determined).

[14] Proponents claim the split-trial concept is more fair to the defendant because evidence of an aggravating and prejudicial nature need not be introduced in the course of the trial of guilt or innocence, and more fair to the state since it allows evidence of this nature to be made known to the jury when they are deliberating on punishment thereby allowing the best-informed decision. *See* United States v. Curry, 358 F.2d 904 (2d Cir. 1966); Frady v. United States, 348 F.2d 84, 91 (D.C. Cir. 1965) (McGowan, J.).

[15] "An order granting a new trial, particularly where so prescribed by statute, results in a rehearing of the case before a new jury with the parties in the same position as though the case had been never before heard." 24 C.J.S. *Criminal Law* § 1426 (1961).

[16] *See* Jones v. People, 155 Colo. 148, 151, 393 P.2d 366, 369 (1964) (interprets state statute to provide for unitary trial and further notes presence of two-trial statutes (note 13 *supra*) as indicative that the general rule must be changed by statute); State ex rel. Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931); State v. Young, 200 Kan. 20, 434 P.2d 820 (1967); State v. Burke, 28 Wis. 2d 170, 172, 136 N.W.2d 297, 300 (1965) (interpreting "new trial" in state statute "as encompassing redetermination of guilt irrespective of whether the original or subsequent determination was made on plea of guilty").

[17] *See* Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964); Stough v. State, 75 Okla. Crim. 62, 128 P.2d 1028 (1942); Clapp. v. State, 74 Okla. Crim. 144, 124 P.2d 267 (1942); State v. Percy, 81 S.D. 519, 137 N.W.2d 888 (1965).

The *Snider* case is but one of several cases requiring reappraisal in the aftermath of the *Witherspoon* decision.[19] Several of these cases have been squarely on point with *Snider*,[20] and likewise have been remanded merely for renewed deliberation of the punishment issue. However, it would be presumptuous to interpret these cases as an unqualified endorsement of the dual trial system on the part of the several states involved. The Virginia court carefully limited its holding by referring to *Johnson v. Commonwealth*,[21] in which it had earlier concluded that if the split-trial system was to be adopted in Virginia the legislature, not the courts, should institute such procedural reform. The court found that the *Johnson* holding did not conflict with *Snider* because no procedural reform was being implemented in the *Snider* case, but rather only a sanction for a trial on the issue of punishment alone where the original sentence had been declared unconstitutional. The court found nothing prohibiting the practice of retrial on the sole issue of punishment,[22] and therefore concluded that it must be permissible.

The *Snider* case, although expressly limiting the use of the split trial to particular circumstances, nonetheless provides the foundation upon which continuing and expanding exceptions to the general rule of unitary trial in criminal cases may be built. Before considering further exceptions, however, the Virginia court should look carefully at those jurisdictions which have implemented the two-trial system in capital cases. In the states of New York, California and Pennsylvania the system has created myriad problems, most of which have been in the area of admissibility of evidence,[23] the very

---

18 *See, e.g.*, State v. Parker, 77 Ohio App. 473, 68 N.E.2d 223 (1945).

19 *See* Massey v. Smith, 224 Ga. 721, 164 S.E.2d 786 (1968); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); Rouse v. State, 222 So. 2d 145 (Miss. 1969); State v. Spence, 274 N.C. 536, 164 S.E.2d 593 (1968).

20 Massey v. Smith, 224 Ga. 721, 164 S.E.2d 786 (1968) and Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968) were both rape convictions, and both were sent back merely for redetermination of punishment; Rouse v. State, 222 So. 2d 145 (Miss. 1969), a murder case, likewise was remanded solely for new deliberation on sentencing.

21 208 Va. 481, 158 S.E.2d 725 (1968).

22 The court referred to VA. CODE ANN. §§ 19.1-192, 19.1-291; 19.1-292 (Cum. Supp. 1971) in its review of relevant statutory law.

23 The question that has become the perpetual stumbling block is what evidence is admissible at the penalty trial. New York's statute provides "any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence." N.Y. PEN. LAW § 125.35 (McKinney 1967). This opens a veritable Pandora's box of hearsay, questionable allegations and even unconstitutionally obtained evidence. "Presumably, the legislators believed that the rules which are designed to assure fair trial are irrelevant in the determination of life or death." Redlich, *Edmond Cahn: A Philosopher for Democratic Man*, 40 N.Y.U. L. REV. 259, 270 (1965). California's statute provides no limit on the admissibility of evidence during the penalty trial, but the California Supreme Court

area in which the system's advocates claim it to be most remedial.[24] The system in fact seems to create more new problems than it alleviates old ones.[25] Virginia would be ill-advised to adopt it.[26]

R. C. K.

has refused to go as far as New York and allows at the second trial only evidence it deems competent and relevant to the particular inquiry. *See, e.g.*, People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); People v. Hamilton, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963); People v. Love, 53 Cal. 2d 843, 350 P.2d 705, 3 Cal. Rptr. 665 (1960); People v. Purvis, 52 Cal. 2d 871, 346 P.2d 22 (1959). Pennsylvania's statute requires testimony at the second trial be "relevant and admissible upon the question of penalty to be imposed upon the defendant." PA. STAT. ANN. tit. 18 § 4701 (1963). The question of relevance is singularly difficult in a capital case, since it depends upon a coherent and intelligible theory of the social interests deemed to be protected by the death penalty sanction, a problem in reference to which much has been written and little proved.

[24] *See* note 14 *supra*.

[25] In addition to the evidentiary problem (see note 23 *supra*) further difficulties are rampant in New York and California. For a general discussion of the problems of two-trial procedure, see Comment, *The California Penalty Trial*, 52 CAL. L. REV. 386 (1964); Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. REV. 50 (1964).

[26] For a good general discussion of the problems the system would create in Virginia, see Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 997-1000 (1967).