SUMMARY
November 4, 2021

2021COA133

No. 18CA1410, *People v. Taylor* — Criminal Law — Rights of Defendant — Right to Jury Trial

A division of the court of appeals considers whether a district court conducting a felony trial may, under section 18-1-406(7), C.R.S. 2021, and over a defendant's objection, remove a juror for "just cause" and accept a verdict from the remaining eleven jurors. The division concludes that under the supreme court's interpretation of our state constitution a court may not do so. Consequently, the division reverses and remands for a new trial.

COLORADO COURT OF APPEALS **2021COA133**

Court of Appeals No. 18CA1410
City and County of Denver District Court No. 16CR7255
Honorable Bruce A. Jones, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Bobby L. Taylor,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE DAILEY
Dunn and Kuhn, JJ., concur

Announced November 4, 2021

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Megan A. Ring, Colorado State Public Defender, Casey Mark Klekas, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Bobby L. Taylor, appeals the judgment of conviction entered on a jury verdict finding him guilty of possession of a controlled substance (cocaine). At issue is whether during jury deliberations on a felony charge a district court may, under section 18-1-406(7), C.R.S. 2021, and over a defendant's objection, remove a juror for "just cause" and accept a verdict from the remaining eleven jurors. Because we conclude that, under the supreme court's interpretation of our state constitution, a court may not do so, we reverse and remand for a new trial.

I. Background

¶ 2 A police officer was riding along Colfax Avenue on his bicycle as Taylor and a companion approached from the other direction on the sidewalk. The officer saw Taylor show his companion something in his hand, which he concealed when the officer came closer. When the officer asked Taylor what was in his hand, Taylor said, "I don't have anything" and then dropped two small white rocks — later confirmed to be cocaine — onto the ground.

¶ 3 Taylor was arrested and charged with possession of a controlled substance. At trial, Taylor did not testify or present any witnesses. His theory of defense, however, was that the only

evidence against him was the officer's testimony, there was no corroborating evidence, and the officer was not a credible witness.

¶ 4 During deliberations, the jury sent the court a note inquiring what it needed to do "[i]f there is some number of jurors who will not vote guilty because of their disagreement with the drug law(s)."

¶ 5 The court responded:

> Each juror is reminded of the oath given by the court, at the beginning of trial, "that you will well and truly try the matter before the court, and render a true verdict, according to the evidence and the laws as I instruct you." Each juror should further refer to the third paragraph of Instruction No. 1.

¶ 6 The third paragraph of Instruction No. 1 stated, in pertinent part,

> It is my job to decide what rules of law apply to the case. . . . [Y]ou must follow the instructions I give you. Even if you disagree with or do not understand the reasons for some of the rules of law, you must follow them.

¶ 7 The jury continued deliberations until it was released for the evening. After resuming deliberations the next day, however, the jury sent the court a second note:

> We have an 11-1 guilty vote, and the "1" juror also believes the defendant is guilty but will not vote that way due to his/her disagreement

> [with] the drug laws of the state of CO. Under no circumstances will he/she change his/her vote, thereby knowingly breaking his/her oath. There will never be a unanimous decision. This particular juror is willing to meet with the Judge [and] discuss. Will you meet with him/her? If so, when? If not, how do we proceed?

¶ 8 Defense counsel moved for a mistrial, arguing, "[W]e're at the point where this is a hung jury." The court refused to grant a mistrial, however. Instead, it brought the jury into the courtroom and asked whether all of the jurors were aware of the contents of the second note. After all jurors nodded affirmatively, the court asked that the "one juror . . . identified in the note . . . raise their hand." Juror H did so.

¶ 9 In the presence of the entire jury, the court read the second note aloud and then asked Juror H whether the note was accurate, and Juror H responded, "I believe so."

¶ 10 The court then sent the other eleven jurors back into the jury room and re-read to Juror H part of the second note, ending with the sentence, "Under no circumstance will [the juror] change his . . . vote, thereby knowingly breaking his . . . oath." When the court asked if "that [was] an accurate statement," Juror H responded, "I

believe its sufficiently accurate. I mean, I can't foresee any circumstances in which I will change my mind."

¶ 11 Over defense counsel's objection, the trial court applied section 18-1-406(7) to (1) excuse Juror H for "just cause"; and (2) return the remaining eleven jurors "to the jury room to continue . . . deliberations, and to notify [the bailiff] if and when [they had] reached a verdict."[1]

¶ 12 The court found "just cause" to excuse Juror H for two reasons: (1) Juror H "had a pre-existing belief . . . with respect to his disagreement with the drug laws of the State of Colorado" and "despite having ample opportunity during jury selection to express that disagreement, which many other prospective jurors did, [Juror H] for whatever reason chose not to do so"; and (2) after taking "the oath, indicating that he would follow the law," Juror H chose not to do so.

¶ 13 Shortly after resuming deliberations, the remaining eleven jurors returned a verdict finding Taylor guilty of possession of a

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[1] The record reflects that by this time the court had already dismissed the single alternate juror.

controlled substance (cocaine), and the trial court later sentenced him to a term of two years' probation.

¶ 14 On appeal, Taylor contends that the trial court erred by not granting a mistrial because (1) section 18-1-406(7) is unconstitutional because it is inconsistent with article II, section 23 of the Colorado Constitution, which guarantees a person accused of a felony the right to be tried by a jury of twelve; (2) section 18-1-406(7) is invalid because it conflicts with Crim. P. 23(a)(7), which requires a defendant's consent to deliberations by an eleven-person jury; (3) in addressing the issue, the court impermissibly intruded into the deliberative process of the jury; and (4) Juror H's conscientious conviction that he could not find Taylor guilty was not, in any event, "just cause" for excusing him and allowing eleven jurors to return a verdict in this case. Because we agree with, and find dispositive, Taylor's first contention, we reverse without discussing his other contentions.

II. Section 18-1-406(7) is Unconstitutional

A. Standard of Review

¶ 15 We review a trial court's conclusions of law about the constitutionality of a statute de novo. *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 30.

> Statutes are entitled to a presumption of constitutionality, rooted in the doctrine of separation of powers, through which "the judiciary respects the roles of the legislature and the executive in the enactment of laws." Because "declaring a statute unconstitutional is one of the gravest duties impressed upon the courts," this presumption of constitutionality can be overcome only if it is shown that the enactment is unconstitutional beyond a reasonable doubt.

Id. (citations omitted).

B. Analysis

¶ 16 Section 18-1-406(1) provides that "[e]xcept as otherwise provided in subsection (7) of this section, every person accused of a felony has the right to be tried by a jury of twelve whose verdict shall be unanimous."

¶ 17 Section 18-1-406(7), in turn, provides that "[e]xcept as to class 1 felonies, with respect to a twelve-person jury, if the court excuses a juror for just cause after the jury has retired to consider its

verdict, the court in its discretion may allow the remaining eleven jurors to return the jury's verdict."

¶ 18 Section 18-1-406(7) was enacted in 1994.[2] *See* Ch. 287, sec. 5, § 18-1-406, 1994 Colo. Sess. Laws 1716. It was modeled on Fed. R. Crim. P. 23(b) (1994), which, at the time, provided, in pertinent part, "if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." *See United States v. Davis*, 15 F.3d 1393, 1403 n.1 (7th Cir. 1994).[3]

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[2] The legislative history of section 18-1-406(7), C.R.S. 2021, reflects that the provision's genesis can be traced, in part at least, to a memorandum written by the author judge while he was a member of the Attorney General's Office. *See* Hearings on H.B. 1126 before the H. Judiciary Comm., 59th Gen. Assemb., 2d Reg. Sess. (Jan. 27, 1994) (statement of Ray Slaughter, Executive Director, Colorado District Attorneys' Council). This circumstance does not, however, require the author judge to recuse himself from deciding this case. *See People v. Owens*, 219 P.3d 379, 385-90 (Colo. App. 2009) (background of Colorado Court of Appeals judge as a prosecutor who tried death penalty cases, and his involvement in the drafting and passage of the unitary review statute (URS) governing death penalty appeals, did not require his recusal from a case interpreting the URS).

[3] Fed. R. Crim. P. 23(b) has since been revised and renumbered. *See* Fed. R. Crim. P. 23(b)(3) ("*Court Order for a Jury of 11.* After the

¶ 19 The purpose of this rule is "to save the parties and the judicial system the time and expense of a retrial." *See* 25 James Wm. Moore et al., *Moore's Federal Practice* § 623.03[4], at 623-10 (3d ed. 2015).[4] "Because it permits a jury of fewer than 12 to return a verdict without defendant's consent, it has been subjected to constitutional challenge." *Id.* But because a defendant is not entitled as a matter of federal constitutional law to a twelve-person

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jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror."). "No change in substance [was] intended" in the alteration in verbiage — from "just" to "good" cause. 25 James Wm. Moore et al., *Moore's Federal Practice* § 623App.05, at 623App.-5 to -6 (3d ed. 2015); Fed. R. Crim. P. 23 advisory committee's note to 2002 amendment.

A "deliberating juror's intent to nullify" — that is, the "purposeful disregard of the law as set forth in the court's instruction" — constitutes a "just" or "good" cause for removing a juror. *See United States v. Thomas*, 116 F.3d 606, 612, 625 (2d Cir. 1997); *see also United States v. Wilkerson*, 966 F.3d 828, 835 (D.C. Cir. 2020) (same); *cf. People v. Scott*, 2021 COA 71, ¶ 18 ("[A] trial court must grant a challenge for cause if a prospective juror is unable or unwilling to follow the court's instructions on the law.").

[4] The trial court described section 18-1-406(7) as a "logical remedy — a tool for trial courts in narrow circumstances to ensure fairness, unanimity, and also avoid the wastefulness of a mistrial based on the unwillingness of a single juror to follow the law and abide by his oath."

jury, *see Williams v. Florida*, 399 U.S. 78, 86 (1970), state provisions allowing for fewer than twelve jurors in a criminal trial have withstood federal constitutional challenges, *see, e.g.*, *United States v. Stratton*, 779 F.2d 820, 830-33 (2d Cir. 1985).

¶ 20 When section 18-1-406(7) was enacted in 1994, it was thought that Colorado's constitution also did not require twelve-person juries in felony cases. *See People v. Burnette*, 775 P.2d 583, 589 n.6 (Colo. 1989) ("In Colorado, the right to a jury of twelve and twelve only in non-capital felony cases is based upon a statutory provision and not constitutional necessity." (first citing *People ex rel. Hunter v. Dist. Ct.*, 634 P.2d 44, 46 (Colo. 1981); then citing § 18-1-406(1), C.R.S. 1986; and then citing Crim. P. 23(a)(1))).

¶ 21 In 2005, however, the supreme court concluded otherwise. Noting that "the framers of the Colorado Constitution adopted [article II,] section 23, which goes beyond the protections" of the Federal Constitution and "has no comparable federal counterpart,"[5]

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[5] Article II, section 23 of the Colorado Constitution provides, in pertinent part, as follows: "The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law."

the supreme court interpreted section 23 as guaranteeing a "right to a jury of twelve in felony cases." *People v. Rodriguez*, 112 P.3d 693, 698, 703 (Colo. 2005); *see also id.* at 709 ("[T]he [state constitutional] right to a jury of twelve only extends to felony offenses . . . .").

¶ 22 Further, the supreme court broadly said, "section 23 establishes a right to a jury of twelve . . . that may not be encroached upon by legislation or procedural rule." *Id.* at 709. "[S]ection 23 prohibits the General Assembly from providing fewer than twelve jurors in felony cases." *Id.*

¶ 23 As the trial court and the People point out, the *Rodriguez* court never commented on section 18-1-406(7). In an opinion concurring in the judgment only,[6] however, then Justice (later Chief Justice) Coats presciently recognized the import of the *Rodriguez* court's broad pronouncements on section 18-1-406(7). *See Rodriguez*, 112

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[6] The "judgment" in which Justice Coats joined addressed whether, by statute or rule, fewer than twelve jurors could suffice to constitute a jury in misdemeanor cases. The court — and Justice Coats too — concluded that such would be constitutionally permissible. *People v. Rodriguez*, 112 P.3d 693, 709 (Colo. 2005); *id.* at 711 (Coats, J., concurring in the judgment only).

P.3d at 709-12 (Coats, J., concurring in the judgment only). By proclaiming a state constitutional right to a jury of twelve in felony cases, Justice Coats said, "the majority all but strikes down the general assembly's attempt to avoid mistrials upon the dismissal of a juror for cause during deliberations, *see* § 18-1-406(7), C.R.S. (2004)." *Id.* at 712.

¶ 24 Given the expansive and unqualified language in *Rodriguez*, we agree with Justice Coats's observation. Section 18-1-406(7) provides for a situation allowing fewer than twelve jurors to render a verdict in felony cases. Because the statute conflicts with the state constitutional right to twelve jurors recognized in *Rodriguez*, the statute is invalid. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); *Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) ("[W]here a statute and the constitution are in conflict the constitution is paramount law.").

¶ 25 In so concluding, we reject the trial court's reason for upholding section 18-1-406(7)'s constitutionality — that is, that the constitutional right to have twelve jurors "at the start" of a trial does not encompass a right to have twelve jurors "at the end."

¶ 26 According to the trial court, it could

> only find [section 18-1-406(7)] unconstitutional by resort to a rote recitation — twelve means twelve, beginning, middle[,] and end. The unique set of facts in this case — namely, Juror H misleading the Court and counsel during juror selection, the notes from the jury that Juror H believed [Taylor] to be guilty and Juror H's assent thereto, and a resulting mistrial — demonstrate that [Taylor] was not deprived of his right to a jury trial.

¶ 27 There is, though, a difference between a "right to a jury trial," *see* Colo. Const. art. II, § 16, and the "right to be tried by a twelve-person jury," *see* Colo. Const. art. II, § 23. *See People v. Forgette*, 2021 COA 21, ¶¶ 18-19 (distinguishing between the two rights).

¶ 28 The right with which we are concerned is the right to be tried by a twelve-person jury. Such right is not vindicated simply because twelve jurors are selected to serve; such right is effectuated only when twelve jurors complete the trial and deliberate to a conclusion in the case. *See Taylor v. State*, 612 P.2d 851, 853 (Wyo. 1980) (interpreting a constitutional provision identical to section 23, and holding that "[i]t is beyond dispute that the Wyoming Constitution guarantees a criminal defendant in a court of record the right to a unanimous verdict by twelve impartial jurors");

see also, e.g., *People v. Sanborn*, 35 Cal. Rptr. 3d 592, 595 (Ct. App. 2005) (stating that, in California, defendants accused of felonies are constitutionally guaranteed "the right to the unanimous verdict of [twelve] jurors"); *People v. Matthews*, 710 N.E.2d 524, 526 (Ill. App. Ct. 1999) (The drafters of a state constitutional provision "did not intend to empower the legislature to deny a defendant in a criminal case the right to have a jury of [twelve] persons to decide his case . . . ."); *Pierce v. State*, 248 P.2d 633, 637-38 (Okla. Crim. App. 1952) (The constitutional provision in question "specifically extends the right to those charged with a felony to the unanimous verdict of a jury composed of twelve persons. This is a valuable right. No exception is made prescribing a less number for a felony charge . . . .") (footnote omitted); *State v. Bindyke*, 220 S.E.2d 521, 531 (N.C. 1975) ("[T]here can be no doubt that the jury contemplated by our Constitution is a body of twelve persons who reach their decision in the privacy and confidentiality of the jury room."); *Fritz v. Wright*, 907 A.2d 1083, 1094 (Pa. 2006) ("The right to have a jury of twelve decide one's case means that the jurors who have been empanelled are required to consider and decide each of the issues submitted to them by the court. The absence of any one voice from

that process or the relegation of that voice to the margins by diminishing its influence invalidates the sanctity" of the twelve-person jury trial.); *State v. Lehman*, 321 N.W.2d 212, 225 (Wis. 1982) (noting "the defendant's right to have a trial by a jury of twelve persons who deliberated together to reach a unanimous verdict").

¶ 29 That does not mean that fewer than twelve persons can never render a valid verdict. The right to a twelve-person jury is a constitutional right; but, constitutional rights may be waived. *Forgette*, ¶ 16. Significantly, though,

> [t]here is a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve. A defendant's waiver of a jury trial is "the defendant's alone and may be made contrary to counsel's advice." Crim. P. 23(a)(5)(II). But the waiver of the right to a jury of twelve may be made by defendant or defense counsel. *See People v. Chavez*, 791 P.2d 1210, 1211 (Colo. App. 1990) (counsel's verbal request for a six-person jury, on the record, was sufficient to waive the statutory right to a twelve-person jury); *cf.* Crim. P. 23(a)(7) (providing that if a juror becomes unavailable during trial and there is no alternate "the defendant and the prosecution . . . may stipulate in writing or on the record in open court, with approval of the court, that the jury shall consist of less than twelve but no

> fewer than six in felony cases"); *People v. Baird*, 66 P.3d 183, 189-90 (Colo. App. 2002).

Id. at ¶ 19.

¶ 30 Thus, the right to a jury of twelve persons can be waived. But neither Taylor nor his counsel waived the right. Indeed, counsel objected to continuing deliberations with only eleven jurors. Because neither Taylor nor his counsel waived his state constitutional right to a jury of twelve, and there was no alternate juror available to substitute for Juror H, the "verdict" was returned by only eleven jurors. Because this violated Taylor's state constitutional right to have his case decided by a jury of twelve, the "verdict" was a nullity, and the court should have declared a mistrial, as Taylor requested.

III. Disposition

¶ 31 The judgment of conviction is reversed, and the case is remanded for a new trial.

JUDGE DUNN and JUDGE KUHN concur.