

**ORAL ARGUMENT - 10/10/95**  
**95-0385**  
**PHARO V. CHAMBERS COUNTY, TEXAS**

CLARKSON            This is an important case. Interestingly enough it's not a subject that comes up that much. There aren't that many appellate decisions dealing with jury misconduct and party misconduct as we have here. We come before this court this morning because we are claiming that this case has significant public policy reasons that need to be discussed. And also because what occurred in the TC violates some strong stare decisis rules. I think that this is a good time to argue this case because we've all just finished listening to the O.J. Simpson case. We are all aware of the discussions going on on TV and in the print media about the integrity of the jury system and the court system. We see that there is a division between the black community and the white community on certain things, certain aspects of the case. And this brings us to the important public policy questions in this case. For instance: To use racial epithets in the court has always been held to be ipso facto wrong and something that's incurable. In this case involving the simple things like giving aspirin or giving a coke or giving a ride in a vehicle has required reversal of all these cases.

PHILLIPS:            Some, although by no means all of your cases do date from an era before the harmless error rule was firmly entrenched in our jurisprudence though.

CLARKSON            Yes. And that's interesting. There are a lot of cases and a lot of them as the court suggests are early cases. The McCaslin court, I think it was Justice Norvell who said that with the passage of this rule, that the courts would still look to prior cases stare decisis in ruling on these questions. And I think one of the important reasons is perhaps even in the rule itself where it says that the jurors (Rule 327) may not testify about what influenced them or not. Although they can testify about outside events that occurred. So I think it's a good rule and maintains its viability that there are certain kinds of action that the court simply hold by long, long tradition, going back certainly before even Blackstone and carried over to this country, that certain kinds of activities raise an appearance of impropriety of such a nature that a new trial is required. And the courts in Texas, in federal courts, hold that you cannot look behind these kinds of activities, that it is human nature that the jurors will say, or the parties, or witness will say: "Oh, well this didn't bother me. They did say this or they did do that. But we weren't affected by it."

OWEN:                Should the same rule apply across-the-board? Let's say that this same case had come up and it involved the Dallas ISD. And a gentleman had been a teacher in the Dallas ISD. Should we apply the same scrutiny, or the same test that you say we should apply in this case to that kind of situation?

CLARKSON            What did the teacher do?

OWEN:                Under the same facts: Had lunch with; had dinner with.

CLARKSON            Well, yes, I think if the school district was a defendant in the case, and the teacher took out a juror to have lunch, or dinner. In this case there appears to have been a romantic relationship. So there was a lot of meals. And also they went across the street to the Sheriff's department, had coffee during the trial. I think so. And I think what this court is is the guardian of the appearance of propriety, the guardian of the integrity of the court.

HECHT:                So it wouldn't make any difference how remote the employee was if he was say in this case a janitor, the same result?

CLARKSON Yes. And I think the job your honor is the court's job. As Justice O'Connor says in her dissent. The rule says: The court, the TC shall instruct the jury on this matter, and explain to them exactly what is involved.

HECHT: Why does it make any difference that they actually went to dinner if they were romantically involved? Wouldn't that be a problem in and of itself?

CLARKSON Well I think it might heighten the need for scrutiny. Because this man is working as again as Justice O'Connor says in her dissent this is a small county with a small sheriff's dept.

HECHT: So if they've been dating steadily for a long period of time, but the juror didn't go out with the fellow for a few days or hours during the trial of the case, that wouldn't be a problem?

CLARKSON Well of course what the court is making I suppose a technical point it wouldn't be a problem. Because they have suspended an activity for a few days or two are probably going to change their heart or their tendencies. I think that the lady in question, Ms. Pylant would certainly be concerned about whether or not her boyfriend, or would-be husband is going to lose his job. But I think these kind of cases ought to be looked at in a unique way. And that is that historically, and I invite the court to look at the Crawford opinion by US SC, historically the courts have taken great care to protect the jury system. And I think what we are talking about here not about situation ethics, or practicalities, that sort of thing. I think the court has set out historically certain rules that are to be honored and to be enforced regardless of the fact that one might say or people in the streets might say: "Oh, well you know that wasn't really a problem. My experience is that that really wouldn't have changed anything."

The court says as it says in Crawford, that the courts cannot look behind these kind of situations. You know we are all born humans. We are taught that we all were born with original sin. We all have the tendency toward venality. We all have the tendency to justify ourselves when called on the carpet. We all have the tendency to say: Oh well it wouldn't influence me. And the court said: Unless you can show absolute corruption there is no way to really get behind to see if this in fact did affect the outcome of the jury. And of course this is the outcome of the case, and this is a 10-2 verdict.

OWEN: Would you agree that if you had a juror that you could strike for cause, but that you didn't ask the questions on voir dire that would bring this out, you can waive that objection to the juror? Would you agree with me that you can waive a right to strike a juror for cause by not asking the proper questions on voir dire for example?

CLARKSON Yes. I think it is. I think in this situation that you couldn't because the judge's instructions to the jury were clear. The CA in its opinion did not rule that there was any kind of a waiver. They discussed the instructions to the judge, or the evidence and so forth. They simply held that this deputy sheriff was too remote as an employee from the facts of the case.

OWEN: On voir dire the juror volunteered that she knew the sheriff and other members of the sheriff dept; is that correct?

CLARKSON Yes.

OWEN: And there were no follow-up questions to explore the extent of that relationship or how she knew them; is that correct?

CLARKSON Yes, that's right. But again if you will look at this county. I don't know where you grew up, but in Beaumont most people say they know the sheriff. Certainly in Chambers County most

people will say they knew the sheriff. To exclude from the jury those who knew the sheriff might empty the courthouse.

OWEN: Because she knew she volunteered that she knew others in the sheriff's dept., not just the sheriff.

CLARKSON And she identified another sheriff's deputy. There was no statement about the fact that she was dating a deputy sheriff or anything like that.

HECHT: If they had been married should they just have to live apart for the time that she is on the jury?

CLARKSON Well as a practical matter your honor I don't think she should serve on the jury.

HECHT: But no one asked her, and she got on the jury, and the TC instructs them to have nothing to do with the party in this case. Your view is that she couldn't go home.

CLARKSON My view and the view of the CA and of Justice O'Connor was that the jury was instructed on this. In fact the witness herself said when they received that instruction she knew that she wasn't supposed to talk to the sheriff. She knew she wasn't supposed to talk to the people that were sheriff's employees who were involved in this fatal occurrence. She knew that she wasn't supposed to talk to anyone who was an employee of the sheriff's department at the time of these events.

HECHT: So I guess your answer is if they had been married she just couldn't go home?

CLARKSON Well if she got on the jury, and the parties knew about this relationship, I suppose there could be a waiver of it. But if she got on the jury under the court's instruction she should avoid contact with her husband in talking about the case and so forth.

PHILLIPS: But how are we going to know if they talk about the case? She said they didn't. And you say that's irrelevant here. But if they were married it wouldn't be irrelevant. We would look at their testimony.

CLARKSON But the cases set out in the briefs your honor show a long line of cases that hold, and McCaslin says that, that it's not important...

PHILLIPS: Just so we are fully open can we talk for a minute about the bailiff's remark.

CLARKSON Yes. Before I do that your honor I do want to say that the Texas decisions hold that an employee should not be on the jury. It doesn't say an employee who was involved, or employee that works on the same floor of somebody involved, or anything like that. It's across-the-board prohibition.

BAKER: But this deputy sheriff was not on the jury. Isn't that a distinguishing fact?

CLARKSON Well it's distinguished in this way: If you can't be on the jury, then you certainly cannot be dating jurors and going out and having meals and inviting the jurors over for coffee, and so forth.

BAKER: That leads me to my next question. Are you arguing that McCaslin dictates in the case of jury misconduct a no harm analysis, but reversible error period?

CLARKSON The courts say that there is a presumption of harm.

BAKER: Do you construe that to mean it's without a harm analysis and that's all the further you can go, or is it a rebuttable presumption?

CLARKSON No. I don't think it's rebuttable in these lines of cases.

BAKER: You do not think it's rebuttable?

CLARKSON That's right.

BAKER: Well what about Strange v. Treasure City, this court's 1980 decision?

CLARKSON What was the activity in Strange that was the subject...

BAKER: No, I am asking you about the standard of review, not the activity.

CLARKSON I think that the dissent of Justice O'Connor in all the cases...

BAKER: No, you haven't answered my question yet.

CLARKSON I am not able to make a distinction if that's what you are asking. And that's not because there isn't one. I have just not read that case. So please don't take my remark as...

BAKER: The respondent relied on it.

CLARKSON I consider the principle case that the respondent relied upon your honor as the Hunnicut v. Clark case, which if you will notice in there the distinction is that nothing happened along the lines that we are talking about here which is food, drink, meals, rides in automobiles, coffee at the sheriff's dept., and so forth.

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RESPONDENT

BAKER: May it please the court. I found no case in which a juror's relationship to the employee of a multi-employee defendant is disqualification for the juror as a matter of law. Nor have I found a statute that holds that. Given that fact, the standard of review in this case should be one for a typical misconduct case. And that would mean that the trial judge's findings with regard to misconduct should be binding on this court. And of course we know that Judge Wellborn determined that there was no misconduct.

HECHT: Should the standard of review be abuse of discretion?

BAKER: Yes your honor. And in our brief we cited I think a good case that discusses the standard of review is the Soliz v. Saenz case, which is out of the Corpus Christi court. In fact juror Pylant did not commit misconduct. She answered every question that was asked of her on voir dire honestly. When she was asked about who she knew in the sheriff's dept she stated she knew them, and how she knew them. She was not asked about this particular sheriff's deputy; and therefore had no reason to tell anyone about her relationship with this particular deputy.

In the hearing on the motion for new trial there was no evidence that her contacts with deputy sheriff Collier led to any discussion of the case, or that there was any sort of influence brought to bear during the jury deliberations such as an outside influence. And there is just no evidence to suggest

that this relationship resulted in misconduct.

HECHT: Do you concede that if the sheriff had bought her coffee that might be a different case?

BAKER: That might be a different case.

HECHT: County commissioner?

BAKER: That might be a different case.

CORNYN: Why would it be a different case if she testified that didn't have any influence on my verdict?

BAKER: Because the sheriff was directly involved in this case.

CORNYN: The county was involved in the case.

BAKER: The county was involved in the case, and of course hypothetically...

CORNYN: Her boyfriend was an employee of the county.

BAKER: He was a deputy sheriff. He worked under the sheriff. But he was not involved in the case. He was not employed by the sheriff's department at the time this incident occurred. Was not involved in any investigation.

CORNYN: My question was Judge Hecht asked you if somebody had bought her coffee, and is that because we presume harm from that contact with the juror?

BAKER: If it is an employee. In my view if you have a multi-employee defendant such as a sheriff's department, or a corporation, if one of the persons involved in the incident that is the subject matter of the case, or is present at the trial buys coffee or has some improper contact with a juror, that to me would be misconduct.

CORNYN: Is that because we presume harm? If the juror testifies and all the testimony is that didn't have any influence on my decision in this case, how do we get past the harmful error analysis?

BAKER: I don't think you can presume harm, because I have seen cases in which a corporate representative had a conversation with a juror during a trial that was ruled to be a harmless contact.

CORNYN: But we are asking about buying coffee for the juror which is held to necessitate a new trial. And my question is how do you reconcile that with a harmful error analysis? And it sounds like what I am speculating is that we presume harm in some circumstances. Now are you saying this employee is too remote from the party?

BAKER: Yes.

CORNYN: But you agree under some circumstances we do presume harm?

BAKER: In some of the older case that has been the law, and I haven't seen that those cases

have been overruled. The McCaslin case is an example.

GONZALEZ: What about the bailiff's comments?

BAKER: Your honor the bailiff's comments were off the cuff. They were not directed to any particular issue in this case. I think it was before voir dire had started he said one of his high school friends who happened to be on the panel asked him about the jury cards. And his comment was: Well if you want to talk about spending money on jury cards you're going to talk about raising taxes. And some other people on the panel overheard that. Everybody laughed.

HECHT: What is a jury card?

BAKER: I don't know if they were talking about the cards that go on the lapels, or if they were talking about some other card.

GONZALEZ: Wasn't there a clear implication of liability if they found liability as to the county that taxes would have to be raised?

BAKER: No, he never said that. I don't think you can read that into the comments that he made. He was talking specifically within the context of these jury cards. And I think to say that you can read into that that he is saying that if you find against the county you are going to have to raise taxes is taking this beyond the stretch of any analysis.

OWEN: What about his comment to the Houston Lawyer to that effect?

BAKER: That took place in the judge's chambers. I don't see how that's relevant to anybody. She solicited his view of what the case was about and what he thought was going to happen. And I don't see how that can bear on what the jury did or didn't do. I mean that was in the judge's chamber away from the jury. I mean I've certainly be in many situations where bailiffs have said much worse than that about my case or my opponent's cases. But as long as it is not communicated to the jury I don't think there is a problem.

CORNYN: May I take you back to the distinction that I think you were making about the remoteness of the connection of the party's employee. And I think you told Justice Hecht that if it was the county commissioner or the sheriff himself it might have been different. But because this was a deputy sheriff then it was too remote from the party. What sort of principle can we apply to this remoteness argument? What I am wondering is do we have to take all these on a case-by-case basis, or if the sheriff or the county commissioner is enough to necessitate a reversal but a deputy sheriff is not, what's the defining principle?

BAKER: Well I think the principle is that which is embodied in Rule 327, which is to leave it with the TC's discretion unless you have a situation in which one of the parties or in one of these situations where you've got a corporation or a police department or Dallas ISD, unless you've got the witness or the corporate representative who does some sort of special favor for a juror.

CORNYN: So any kind of juror contact would not be reversible unless it was giving them a ride, or buying them a cup of coffee?

BAKER: I am not saying any...if it is one of the individuals involved in the case for the company or the sheriff's department and there is some contact, that it has to be evaluated whether it's an off-the-cuff comment verses some special favor there might be a distinction between the two.

CORNYN: Of course we can't know and I guess the trial judge couldn't know what exactly transpired between the deputy sheriff and the juror other than what they saw fit to reveal.

BAKER: At the hearing on the motion for new trial they did testify and they said they went to lunch and dinner a couple of times, and didn't talk about the case. Sure you can assume that they weren't truthful, or that there was more discussed than was.

CORNYN: What I am struggling with is how we reconcile the presumption of harm where they buy a cup of coffee. But we have a different rule with regard to harm analysis when it's juror contact that doesn't involve buying somebody a cup of coffee where they are the only two people who were present and it's not possible other than through their mouths to find out what they say happened, how much of that we can tolerate without creating an appearance that somebody got to the jury and that resulted in a verdict that would have been different if they hadn't gotten in touch with them?

BAKER: To me the first question you have to ask yourself is whether this particular deputy sheriff had anything to do with the case. If they weren't involved in the case, then I can't think of anything that would be harmful in terms of conduct other than if they tried to bribe the juror. In the area where I try lawsuits it is common to have the spouses of employees of corporations on juries and not be stricken for cause unless they are stockholders in the company.

SPECTOR: You keep saying the remoteness of the deputy sheriff in this case. But we are not talking about deputy sheriff misconduct. We are talking about juror misconduct. And it's your position that there was no juror misconduct here?

BAKER: That's right. There was no juror misconduct.

SPECTOR: Going into the sheriff's office and having coffee in the sheriff's office when this case involved...the party was the county but it was there because of the conduct of the sheriff's deputies isn't that correct?

BAKER: Yes, your honor.

SPECTOR: And you see no misconduct whether it's harmless or harmful of a juror going into the sheriff's office at a break in the trial?

BAKER: No, your honor.

CORNYN: Does the record show who bought her coffee in the sheriff's office?

BAKER: In the motion for new trial the coffee was not provided by the county, it was apparently one of the other deputies who is identified. It was their coffee pot, their coffee.

CORNYN: It was a coffee pot in the sheriff's office that somebody poured her a cup of coffee out of?

BAKER: Right.

CORNYN: The record doesn't show who it is that paid for that?

BAKER: I think that one of the deputy sheriffs that she was talking to. Also not involved in this case. There is a coffee pot in the jury room that the county provides. No, I don't see that as misconduct. The county is paying the jurors to come there everyday.

CORNYN: So what if they had had buffet lunch for jurors in the sheriff's office, would you see a problem with that while the sheriff was a defendant in the case, and the county was on trial?

BAKER: That gives me some discomfort. If the sheriff's department invites the jury over for a buffet lunch it causes me concern.

GONZALEZ: Why should it if there is no presumed harm?

BAKER: Well all I am saying is that it is something that I would look askance at. I am not sure that I would necessarily conclude that it was harmful.

ENOCH: Mr. Baker would that be more in line with misconduct of the parties rather than misconduct of the jury?

BAKER: Yes, your honor it would be. That would have been something solicited by a party for the jury.

To kind of conclude here I think that Judge Wellborn's analysis of this was correct. I think the CA's analysis of this was correct. I don't want to retry this case. But I must say that if I understand what the petitioner is asking for here, it would mean that in cases in counties where you have one or two large employers, the spouses of employees, remote employees, are automatically disqualified. Because here we have a farther relationship or a more distant relationship than the husband and wife relationship.

CORNYN: If this juror had been married to an employee of the county would that have appeared on the juror information card?

BAKER: Yes.

CORNYN: So even if counsel hadn't asked the question it would have been apparent.

BAKER: It would have been on the jury question. But the second situation is let's say in voir dire I stand up and say okay I represent Chevron Corp., and these are the witnesses that are going to testify for Chevron and were involved in this case: John Doe; Jim Smith; Bob White, and no one on the jury knows these individuals. But at some point later during the trial or after the trial I find out that a juror is rooming with an employee of Chevron, that has not been the law in this state, that that person is automatically disqualified. Or that that results in jury misconduct. And I think the logical extension of what petitioners are asking for leads to that, and I think it is going to make it awfully hard to seat juries in counties where there are 1-2 employers, or where you have defendants that have a big presence.

As I say even in Chambers county where you have a small sheriff's department, Sheriff Morris was a lame duck at the time this case was tried. I couldn't find out how the jurors voted. I couldn't ask the panel members did you vote for him or against him? There are things that are just inherent in this type of case involving a county that are going to be there. And with one or two more questions on voir dire I think to Ms. Pylant about did you know anybody else in the sheriff's department this would have been resolved. And even if the questions had been asked I don't think the judge would necessarily disqualify her for knowing a deputy sheriff who was not involved in the case.

CORNYN: Well even if they had asked the question: Do you know anybody else in the sheriff's department? And she had said: Yes, I date one of the sheriff's deputies. Would that have cured or given the subsequent conduct if in fact the subsequent conduct is a problem? I mean assume the argument is that



just because you know this sheriff's deputy that doesn't disqualify your dating them. But we say that certain contacts with an employee of a party is a problem. Just the fact she knew him or was dating him would not disqualify her. Is anybody arguing that?

BAKER: No.

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REBUTTAL

LARKSON I think the law is clear in Texas that the test is: Did certain events occur or not occur? And perhaps judge this is the distinction you were referring to in the Strange case is whether or not the event occurred or not. That's a fact question.

Now the witnesses at the motion for new trial hearing admitted that the events occurred. Now the next question is: Is harm presumed or is there a further inquiry as to whether or not there was any harm? Now the cases in Texas and the federal cases which are in the brief say: As a matter of public policy the courts do not ask whether or not harm occurred, that if that were the case it would be impossible for instance as the Clote case says: To show a harmful result with certainty is practically impossible short of proof of actual corruption or the most gross impropriety. Again the Matthews case cites all the long precedent and says: "That the parties were permitted to excuse improper conduct of this character, this was buying food and cigars for a juror, on the grounds that no wrong was intended and probably no injury was done it would be impossible to draw the line anywhere short of absolute corruption. We are unwilling to lend encouragement to practices which have tolerated would undermine the purity and efficiency of our jury system." And they go on to state other sentiments along those lines.

Now it seems to me what we are doing here is backing away in arguments from an absolute prohibition to one where we are going to have a sort of gradualism. If the child moves away from the home is it alright for him to be on a jury if his parents are a plaintiff. If the employee is working for a different department is it alright? If the subsidiaries being sued is it alright for the parent company to have a hospitality room for the jurors? Is it alright for this? Is it alright for that? So that it is going to be eaten away and the premise behind the whole argument which is human nature is corruptible, human nature is venal, we can't get behind all this to protect the integrity of the system. We are going to have a cross-the-board prohibition. Then you say we are going to get rid of all that. And we are now going to start to second guess. We are going to look to see this obscure idea of remoteness. And then you know really to me is there really any proof that it affected them.

GONZALEZ: How would you answer Mr. Baker's argument that in a small county that everybody knows everybody and are usually related. You couple that with did the standard of review is abuse of discretion. The standard of review for us is abuse of discretion.

CLARKSON: I think the standard must be the presumption of harm. Otherwise you begin to second guess. Just like the racial epitaph argument.

GONZALEZ: How would you write an opinion? If it was up to you what would the opinion say to give guidance and would be binding on all 254 counties?

CLARKSON: I would say that the court finds that these events occurred because the witnesses have acknowledged that they did.

GONZALEZ: When you are talking about these events what specifically are you referring to?

CLARKSON: Having lunches and dinners, spending times on weekends together, going over to the sheriff's department and having coffee, having this kind of intimate relationship.

GONZALEZ: What would you say about the bailiff? The argument is that that statement has been taken out of context that what the bailiff was in reference to was some sort of a jury card, and that's what he was talking about.

CLARKSON: Well I don't think it was taken out of context. And if you take the remark literally he is telling this jury that these little jury cards which tell them their duties and so forth, and evidently have been used in a number of cases and were getting worn, he is saying literally if you take that literally, that if you want us to get you new jury cards we are going to have to raise taxes. Now one could second guess and say: Oh you know he's just joking. But there is subtle messages there just like in a racial epitaph could be a subtle message. And the point is if you take that literally is he telling the jury in effect that if you award damages for these plaintiffs against the county we are going to have to do the same thing.

GONZALEZ: I take it your answer just to wrap this up you disagree with the standard of review for is that abuse of discretion when you say these types of events occur as a matter of law there is jury misconduct, end of story?

CLARKSON: Yes. The cases say that the courts will not go behind to determine motivation, or effect of the remarks on the jurors or the parties that are involved.