

FAILURE TO ADMINISTER OATH BEFORE VOIR DIRE NOT REVERSIBLE ERROR

State v. Glaros

170 Ohio St. 471, 166 N.E.2d 379 (1960)

Defendant was convicted in the Common Pleas Court of Mahoning County, Ohio, of aiding and abetting an embezzlement.¹ On the third day of the trial, the court revealed that it had failed to put the prospective jurors under oath or affirmation before examination on voir dire. Ohio Rev. Code section 2945.27 as amended, effective September 9, 1957, requires the trial judge to administer the oath or affirmation before the jurors' examination.² Defendant's counsel stated that he could not and would not attempt to waive the *mandatory* requirement of the law. The court, nevertheless, permitted the trial to continue to verdict and judgment. On appeal the court of appeals reversed, stating in part:

Through inadvertence the prospective jurors were not sworn as required by Ohio Rev. Code Sec. 2945.27 and therefore the defendant was not placed on trial before a legally constituted jury . . . A legal duty has been created by the General Assembly, that the judge shall examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors. This duty was not carried through. . . .³

The Ohio Supreme Court, in a four to three decision, reversed the court of appeals, holding that where it did not appear that the defendant had been prejudiced, failure of the trial court to give the oath or affirmation as indicated by the statute was not reversible error,⁴ and also that such failure would not entitle the defendant to a new trial if defendant and his counsel failed to call the error to the attention of the court;⁵ in other words, the defendant had waived his right to a new trial.

As in most jurisdictions,⁶ Ohio has decided by statute⁷ that reviewing

¹ Ohio Rev. Code § 2907.34 (1953) "Embezzlement or Fraudulent Conversion." Ohio Rev. Code § 1.17 (1953) "Aiders and Abettors."

² Ohio Rev. Code § 2945.27 (1957) "The judge of the trial court shall examine the prospective jurors *under oath or upon affirmation* as to their qualifications to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel." The italicized portion was added by an amendment in 1957.

³ *State v. Glaros*, Appearance Docket No. 9, Seventh Circuit Court of Appeals, Mahoning County, June 10, 1959.

⁴ *State v. Glaros*, 170 Ohio St. 471, 166 N.E.2d 379 (1960).

⁵ *Ibid.*

⁶ 3 Am. Jur. "Appeal and Error," § 1006 (1936).

⁷ Ohio Rev. Code § 2945.83 (1953) "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of: (A) An inaccuracy or imperfection in the indictment, information, or warrant, . . . (B) A variance between the allegations and the proof thereof unless . . . (C) The admission or rejection of any evidence . . . unless . . . (D) A misdirection of the jury unless . . . (E)

courts shall not reverse judgments of lower courts in criminal cases for errors or defects which do not affirmatively appear to affect the substantial rights of the accused. An error or defect which affects the substantial rights of the accused is one from which he sustains injury.⁸ It is an error which prejudices the cause of the accused, while a technical error is one not affecting the substance of the issues or the substantial rights of a party.⁹ This statute is mandatory upon the courts¹⁰ and in order to reverse a judgment of conviction it must *affirmatively* appear that the accused was *prejudiced* thereby or was *prevented from having a fair trial*. It has even been held that prejudicial error will not be cause for reversal unless the error is called to the attention of the court at the time of its commission.¹¹ The modern trend is away from technicalities toward substance. It was formerly the view of the courts that any technical error was grounds for reversal because it *might* have prejudiced the accused.¹² The modern view is that it should be shown that it *probably did* prejudice him, before a reversal will be justified.¹³ There was no showing whatsoever in *State v. Glaros* that Glaros had been prejudiced or was prevented from having a fair trial, and neither statute nor precedent warrants a reversal on the basis of the alleged error.

Both the dissent in the Supreme Court and the entire court of appeals stress that the failure of the trial court to administer the oath or affirmation to the prospective jurors caused the trial to be a nullity.¹⁴ They emphasize that the legislature, in amending Ohio Rev. Code section 2945.27, clearly intended that no jury could be legally impaneled without examination on voir dire under oath or upon affirmation. This view cannot be sustained either by what little legislative history is available¹⁵ or by past judicial interpretation.¹⁶ The majority opinion does not so much as discuss this line of argument, possibly indicating a lack of belief in its probative force.

Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

⁸ *People v. Perlman*, 128 Misc. 68, 217 N.Y. Supp. 662, (Sup. Ct. 1926).

⁹ *Hintz v. Wagner*, 25 N.D. 110, 140 N.W. 729 (1913).

¹⁰ *State v. Moon*, 124 Ohio St. 465, 179 N.E. 350 (1931); *Makley v. State*, 49 Ohio App. 359, 197 N.E. 339 (1934).

¹¹ *State v. Kollar*, 93 Ohio St. 89, 112 N.E. 196 (1915).

¹² *Young v. State*, 6 Ohio 435 (1835).

¹³ *State v. Daniels*, 169 Ohio St. 87 n.3, 157 N.E.2d 736 n.3 (1959); *State v. Schultz*, 96 Ohio St. 114, 117 N.E. 229 (1917); *State v. Jenkins*, 76 Ohio App. 277, 64 N.E. 2d 86 (1944).

¹⁴ *State v. Glaros*, *supra* note 4, at 480, 166 N.E.2d at 386; *State v. Glaros*, *supra* note 3.

¹⁵ The title to the 1957 amendment reads as follows: "An act to amend sections 2313.42, 2790.14 and 2945.27 of the Revised Code, to *authorize* the examination of prospective jurors under oath or affirmation." (Emphasis added.) The meaning of the word "authorize" in this type of statute is equivocal; courts across the country are divided as to whether it is mandatory or directory. See 4 Words and Phrases 844 (1940).

¹⁶ Before the 1957 amendment, which inserted the oath or affirmation requirement, the Ohio courts of appeals had construed the statute to be directory only. In *State v.*

The court of appeals and the dissent in the Supreme Court claim that waiver by the accused was not possible because one cannot "breathe life into a proceeding which has never legally commenced."¹⁷ This view also cannot be sustained by precedent. The mandatory nature of a statute requiring procedural steps to be taken does not make a trial without these steps a nullity. It has been consistently held that failure to comply with the mandatory requirements of trial procedure will not be cause for reversal unless there is an affirmative showing of prejudice to the accused.¹⁸ No such affirmative showing appeared here.

It is also claimed by the dissent that an accused person cannot possibly waive a mandatory requirement of law. But it has been held in analogous situations that the right to jury trial itself,¹⁹ to a speedy trial,²⁰ to poll the jury,²¹ to the appointment of counsel,²² to arraignment²³ (all of these being fundamental substantive rights—mandatory requirements of law) may be waived. There appears to be no reason for saying that failure to administer the oath to prospective jurors before voir dire examination is any more sacred or fundamental to the administration of justice than any of the foregoing rights.

It has become apparent that the practice of reversing perfectly valid judgments because of inconsequential errors not affecting the justice of the case is becoming infrequent.²⁴ The practice of preserving errors by maintaining silence, thus preventing the trial court from correcting them, in order to take advantage of a favorable verdict or to reverse an unfavorable one, is to be discouraged.²⁵ To avoid the possible effects of an error in a trial when it occurs by giving the court every opportunity to correct it at once is well recognized as an obligation of counsel.²⁶

In overruling the court of appeals, the Supreme Court has reiterated

Berkman, 79 Ohio App. 432, 74 N.E.2d 411 (1944) the Court of Appeals for Lucas County held that it was not prejudicial error for the court to fail to examine prospective jurors. In *State v. Mays*, 74 Ohio L. Abs. 43, 139 N.E.2d 639 (Ct. App. 1956) (appeal dismissed for want of a debatable question, 165 Ohio St. 456, 135 N.E.2d 760 (1956)), the Court of Appeals for Montgomery County held that "Examination of jurors by the court is a matter of discretion and in the absence of a request failure to do so does not constitute error prejudicial to the accused."

¹⁷ *State v. Glaros*, *supra* note 4, at 482, 166 N.E.2d at 386-87.

¹⁸ *State v. Moon*, *supra* note 10; *Warner v. State*, 104 Ohio St. 38, 135 N.E. 249 (1922); *Nigro v. State*, 23 Ohio L. Rep. 334 at 340 (Ct. App. 1922) (case on error dismissed, 106 Ohio St. 659, 140 N.E. 942 (1922)).

¹⁹ *State v. Frohner*, 150 Ohio St. 53, 80 N.E.2d 868 (1948).

²⁰ Annot., 129 A.L.R. 574 (1940).

²¹ 15 Ohio Jur. 2d Criminal Law" § 127 (1955).

²² *In re Burson*, 152 Ohio St. 375, 89 N.E.2d 651 (1949).

²³ *Wescoat v. State*, 47 Ohio App. 266, 191 N.E. 816 (1934).

²⁴ See: Cal. Pen. Code § 1258; Ind. Ann. Stat. § 9-2320 (1956); Mich. Stat. Ann. § 28.1096 (1954); N.Y. Code Crim. Proc. § 542; Tenn. Code Ann. §§ 27-117 (1955); W. Va. Code § 5752 (1955).

²⁵ *Patterson v. State*, 96 Ohio St. 90, 104, 117 N.E. 169, 173 (1917).

²⁶ *Glenn v. Nat'l Supply Co.*, 101 Ohio App. 6, 129 N.E.2d 189 (1954).

and clarified its position concerning preservation of non-prejudicial error. Failure to object to such error at the proper time is an effective waiver. Failure to administer the oath or affirmation before voir dire examination will not constitute reversible error unless objected to at the time of the omission. An error of omission on the part of the court must affirmatively be shown to have prejudiced the defendant or prevented him from having a fair trial before it will be grounds for reversal.