IN THE COURT OF APPEALS OF MARYLAND

No. 368

September Term, 1964

LIDGE SCHOWGUROW

v.

STATE OF MARYLAND

Prescott, C.J.
Hammond
Horney
Marbury
Oppenheimer
Foster, Dulany
(specially assigned),
Jones, Shirley B.
(specially assigned),
JJ.

Dissenting Opinion
by
HORNEY, J.

Filed: October 11,1965

Horney, J., dissenting:

It may be likely that in a proper case Torcaso v. Watkins, 367 U.S. 488 (1961), might require a holding that Article 36 of the Maryland Declaration of Rights, making belief in the existence of God one of the tests of competency to serve as a juror, is unconstitutional, but, in my opinion, that question is not before us in this case.

While the appellant, a follower of the Dalai Lama and an adherent of the Buddhist faith which does not teach belief in the existence of God or a Supreme Being, moved to dismiss the indictment because the grand jury was not legally constituted, and likewise challenged the petit jury as a whole on the theory that it (like the grand jury) had been selected in accordance with the requirement of Article 36, supra, the record fails to show a violation of his constitutional rights.

It is true, as the record discloses, that the lower court presumed, for the purpose of ruling on both motions, that all members of the jury panel (both grand and petit) had been selected in accordance with the constitutional requirement, i.e., that the jurors believe in God, but that did not relieve the appellant, who claimed he had thereby been injuriously affected, from showing how, as to him or any other nonbeliever, the attacked declaration of right was unconstitutional. Not only is the record devoid of proof that residents of Cecil County, who were voters and taxpayers and otherWise qualified, had been systematically excluded as jurors because they were nonbelievers,

but which is more significant, there was no proof that a juror had been excluded as a nonbeliever at the term of court in which the appellant was indicted and tried. Nor was it shown that a prospective juror had ever been queried as to whether he or she believed in God or that those who were drawn as grand jurors and those who were selected as petit jurors were ever required to declare their belief in God before they were sworn as such jurors. Furthermore, because he deemed it unnecessary and useless to do so, the appellant did not inquire of any petit juror on voir dire whether he or she was a believer or nonbeliever.

To supply these deficiencies in the record, the majority took "judicial notice of the fact that it is and for many years has been a widespread practice in this State, not only for grand and petit jurors to be questioned as to their belief in God as a part of their oath, but also for prospective jurors to be so questioned, orally or in written interrogations, before their names are placed on the jury lists, and that any person who does not state his belief in God is excluded." Aside from the circumstance that it is questionable whether an appellate court can take judicial notice of facts as to which there was no proof whatever, and regardless of what the practice is elsewhere, it has not been, nor is it now, the common practice in the Second Judicial Circuit, composed of Cecil and the other four

counties that are cis-Choptankia,[1] either to inquire whether prospective jurors believe in God before their names (represented by numbered marbles)[2] are put in the jury ballot box or to thereafter require a juror to declare his or her belief in the existence of God as a part of the oath they take as grand or petit jurors.[3] Rather, it is the practice, as the lower court clearly indicated, to assume that a juror is a believer in the absence of information to the contrary.

To reiterate, other than the presumption that the grand and petit jurors had been selected in accordance with law, there is not an iota of proof that the constitutional rights of the appellant were in fact violated. It is therefore inconceivable to me how or why a constitutional question can be decided in vacuo when the rule is that an ordinary question of law cannot be reviewed in the absence of facts to support the

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1. This (or the north side) of the Choptank River. No inquiry was made as to what the practice is in the four southern counties that are trans-Choptankia.

2. The jury as a whole is drawn from lists of taxpayers and registered voters by the judge with the aid of the clerk in the presence of the sheriff and the lawyers who are usually also present when the jury is drawn.

3. While a judge, in charging the grand jury, may on occasion call their attention to the constitutional requirement and its effect, and both the grand and petit jurors always take the oath "in the presence of Almighty God," the oath they take does not require a declaration of belief in the existence of God as is the case with respect to the oath of office.

decision. See Newark Trust Co. v. Trimble, 215 Md. 502, 138 A.2d 919 (1958).

In my opinion the decision of an important constitutional question such as this ought not to be based on a presumed factual situation of which there was no proof.

I would affirm on this point.

In any event the decision of the majority should not apply retrospectively. And I agree that the voluntariness of the appellant's statement to the police was properly submitted to the jury.