

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

BREON J. MAYERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000634

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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Trial counsel erred in failing to move for a mistrial upon discovering internal juror misconduct after it was revealed at trial that a juror intentionally concealed information during the jury voir dire by not disclosing her connection to a detective, who investigated petitioner’s case and testified at trial regarding his findings, even though said juror was removed, because the resulting prejudice remained and violated petitioner’s right to a trial by an impartial jury.4

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ISSUE PRESENTED

Trial counsel erred in failing to move for a mistrial upon discovering internal juror misconduct after it was revealed at trial that a juror intentionally concealed information during the jury voir dire by not disclosing her connection to a detective, who investigated petitioner's case and testified at trial regarding his findings, even though said juror was removed, because the resulting prejudice remained and violated petitioner's right to a trial by an impartial jury.

STATEMENT OF THE CASE

Petitioner Breon Jacoby Mayers was convicted of murder, first degree burglary, armed robbery, and possession of a weapon during the commission of a violent crime during the August 2012 term of the Lexington County General Sessions Court before Judge Roger M. Young, Senior. Petitioner was sentenced to life without parole on the murder conviction, life without parole on the burglary conviction, thirty years on the armed robbery conviction, thirty years on the armed robbery conviction, and five years on the weapon conviction. App. 1-1058. Assistant Solicitors Shawn Graham and Christopher Dale Scott appeared on behalf of the state at trial and Robert T. Williams, Sr., represented petitioner at trial. Petitioner's convictions and sentences were affirmed on appeal. State v. Mayers, Op. No. 2014-UP-344 (S.C. Ct. App. Filed September 24, 2014).

On April 28, 2015, petitioner filed a PCR application with the Lexington County Office of the Clerk of Court. App. 1060-1066. An Amended PCR application was filed on July 23, 2015. App. 1067-1114. The respondent filed a return dated March 15, 2016, in response to petitioner's PCR action. App. 1115-1120.

A PCR hearing was held on January 30, 2017, at the Lexington County Courthouse before Judge Eugene C. Griffith, Junior. Petitioner was present at the hearing and represented by Mindy W. Zimmerman, Esquire, and Assistant Attorney General Johanna Valenzuela appeared on behalf of the state at the hearing. App. 1122-1190. An Order of Dismissal was filed on May 2, 2017, by Judge Griffith. App. 1206-1225.

On May 17, 2017, a Rule 59(e), SCRPC, motion was filed on petitioner's behalf. App. 1228-1230. The respondent filed a response dated March 9, 2020. App. 1231-1237. A memorandum in support of the motion was filed by petitioner on July 20, 2020. App. 1238-1243.

A virtual PCR hearing was held on July 21, 2020, in Lexington County in response to the Rule 59(e), SCRPC, motion filed in the case. Attorney Cole Lawrimore appeared on behalf of petitioner, and Assistant Attorney General Lilly Meadows appeared on behalf of the state. Judge Griffith presided over the virtual PCR hearing. App. 1192-1204.

On April 28, 2022, Judge Griffith signed an Order on the Rule 59(e), SCPCR, motion therein finding that there was no ineffective assistance of counsel in reference to the amended indictment issue subsequently explored and incorporated within the prior PCR Order of Dismissal issued in the case. App. 1244-1254.

Petitioner appealed. This petition follows.

ARGUMENT

Trial counsel erred in failing to move for a mistrial upon discovering internal juror misconduct after it was revealed at trial that a juror intentionally concealed information during the jury voir dire by not disclosing her connection to a detective, who investigated petitioner's case and testified at trial regarding his findings, even though said juror was removed, because the resulting prejudice remained and violated petitioner's right to a trial by an impartial jury.

Petitioner, Jermaine Caughman, Tyrone Brennan, and Jasmine Janelle Barnes were charged with the murder and robbery of David Cannon.¹

Jasmine Janelle Barnes testified that she was present in the company of petitioner, Jermaine Caughman, and Tyrone Brennan on October 11, 2011, as they walked down a dirt road in Chapin, South Carolina, to David Cannon's house after a decision was made to confiscate David Cannon's marijuana and his money.² Barnes stated that petitioner, who was in possession of a gun at that time, declared that he (petitioner) planned to shoot David Cannon. When they arrived at their destination, Barnes stated that she told them that David Cannon was outside of the house, and that she ran away thereafter. Barnes stated that as she ran away, she heard gunshots fired. Barnes explained that she went back to Cannon's house later and saw him lying on the floor dead. Barnes admitted that they fled after they confiscated drugs and money (\$1,000.00) inside Cannon's house. App. 377, l. 2 – p. 401, l. 21.

Jermaine Caughman testified that he and Tyrone Brennan were riding in a car petitioner drove on the day in question, and that they stopped by Jackie Barnes' house to talk to her. Caughman stated that petitioner had a gun and that Tyrone Brennan had his (Caughman's) gun. Caughman explained that their plan was to rob Cannon, but that after they arrived at Cannon's

¹ All four were charged also with possession of a weapon during the commission of a violent crime.

² David Cannon's wife stated that her husband sold marijuana locally. App. 104

house, he heard two gunshots fired. Caughman stated that petitioner shot Cannon, and that they departed after gathering up the drugs and money. App. 274, L.1 – p. 304, l. 12.

Tyrone Brennan testified that he, petitioner, and Caughman met up with Barnes on the date in question in order to carry out the plan to rob Cannon. Brennan stated that petitioner announced that he (petitioner) was going to have to shoot Cannon. Brennan stated that he and petitioner were armed with guns as they all approached Cannon's residence, and that it was petitioner who shot Cannon. Brennan stated that they all fled after the collected the drugs and money. Tr. 434, l. 6 – p. 490, l. 20.

Midway through the trial, it was discovered that juror Farmer (#61) knew Detective Novack, who conducted investigations in this case and testified at trial about the case. Apparently, juror Farmer called Detective Novack's wife at some point during the trial (after a third party commented on the connection) about Detective Novack's involvement in petitioner's case, and about the fact that she was sitting on the jury in the same case. Farmer responded to the trial judge's inquiry into the matter by admitting that she called Detective Novack's wife and relayed to her in effect that she was a juror in a case in which her husband (Detective Novack) was involved. Farmer stated that she did not discuss the case with the detective's wife and explained that her connection to Detective Novack would not "sway" her decisions, i.e. verdict(s), in the case. App. 426, l. 21-p. 428, l.1.

Note that previously during the juror voir dire, indeed, Farmer did not disclose the fact that she knew Detective Novack. App. 24, l.7-11; App. 26, l.10-p. 27, l.11. Nonetheless, regarding the discovery of juror Farmer's deception, the trial judge commented as follows:

Trial Judge: If anything, you should [have] disclose[d] it to the court that you knew him because we questioned about that.

Juror Farmer: Whenever I heard the name I recognized the name, but I didn't think [Detective] Novack, would know who I was...and again it's not going to sway my decision. App. 428, lines 12-18.

After the inquiry, defense counsel and the solicitor agreed to remove juror Farmer from the petit jury. The trial judge agreed, and an alternate juror was then seated in Farmer's place on the jury. App. 430, 1.22-p. 433, 1.13. The trial judge stated that when he "asked the question during voir dire whether or not she (Farmer) had any knowledge of any of the witnesses, she should have disclosed that so that the defense could have had the opportunity to strike if they had so desired." App. 430, 1.2-7; App. 432, 1.4-15.

During the PCR hearing, petitioner stated that when Farmer was removed from the jury, it was defense counsel's duty to have moved for a mistrial. Clearly, the failure to do so was ineffective assistance of trial counsel. App. 1127, 1.15-p.1130, 1.13. Note that juror Farmer went back into the jury room after she was questioned about Detective Novack. Note further that Farmer not only failed to disclose the association in question, but reasoned also that there was no reason to disclose the association per her rationale that Detective Novack probably would not have recognized her as his wife's friend. App. 1130, 1.9-13. App. 428, lines 15-20; App. 429, 1.10-16.

Defense counsel testified during the PCR hearing. Counsel's explanation was that since Farmer claimed that she had not discussed the case with anyone, then there was no reason to move for a mistrial as "she only knew that the wife had a police officer who was her husband." App. 1160, 1.14-p. 1162, 1.14. The fact that the defense ended the jury selection with one strike left was important because Farmer could have been struck from the case. App. 1167, 1.21-23.

PCR counsel's argument regarding the matter of juror Farmer follows:

First, I want to point out and we have cited in here the sections of the transcript that apply particularly to our juror issues and the first one that we have raised my client has already mentioned about this question about juror Farmer. There were three different very specific issues with the juror but I think juror Farmer is the most concerning because that was not revealed from the juror. As pointed out, it was revealed by the detective and when the juror was brought out, her excuse for not revealing it was not that she didn't know the detective but she didn't think the detective would recognize her. In addition, she was questioned about whether she talked to the parties outside of the trial but she was never questioned about whether she had talked to anybody in the jury room about her knowledge of this detective and of his wife.

So we have no idea what she told the jurors before it was discovered and in addition the fact that she was sent back into the jury room after this problem was discovered we don't know what happened in there but it seems that this relationship and the fact that she's close enough to the lead detective's wife to pick up the phone and call her and tell her I'm on your husband's jury is certainly concerning and the fact that a mistrial was never raised over that issue is alarming to us. App. 1154, l.20-p.1155, l.3.

The general test for evaluating juror misconduct is whether there was misconduct in fact and if so, whether any harm resulted to the defendant as a consequence. State v. Smith, 338 SC 66, 525 S.E.2d 263 (S.C. Ct. App. 1999). A defendant must demonstrate prejudice from the jury misconduct in order to be entitled to a new trial. State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999). A new trial is required when a juror intentionally conceals information during voir dire. See reversal in State v. Woods, 338 S.C. 561, 527 S.E.2d 128 (S.C. Ct. App. 2000); affirmed in State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001). In Woods, the Court reversed where there was an intentional failure by a juror to disclose a relationship that gave rise to bias, i.e., where the juror failed to disclose the fact that she worked as a volunteer victims' advocate (3 years) in the solicitor's office which prosecuted Wood's case despite the fact that the question on voir dire included whether the venirepersons had associations with the attorneys at trial, or whether they were involved in the protection of victims' rights. The Court in Woods defined intentional

concealment as what occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable; and where the information concealed would have supported a peremptory challenge or a challenge for cause. In Woods, the Court held that the concealment deprived Woods of information material to the intelligent use of his peremptory challenges.

All defendants have the right to a trial by an impartial jury under the Sixth and Fourteenth Amendments. Compare also State v. Gulledege, 277 S.C. 368, 287 S.E.2d 488 (1982), where the Court held that the trial judge abused his discretion in denying the defendant's motion for a mistrial when the relationship between a juror who had not responded affirmatively on voir dire to the question of whether any jurors were related by blood or marriage to present or former police or law enforcement officers, and the deputy sheriff, who viewed both crime scene and had custody of the defendant in the courtroom during the trial, was discovered.

In the case at bar, we have juror Farmer's intentional concealment of her association with a detective who investigated the case without justification. The bias was evident on two levels. First, juror Farmer intentionally concealed her connection to Detective Novack during the jury voir dire. Second, juror Farmer justified her failure to disclose her intentional concealment per the rationale that she did not think the detective would recognize her, although she recognized him. In the end, it was only after her connection to the detective was revealed by an outside party ("I called [Detective Novack's wife]" because a friend of mine said that she ran into her [wife] and that she [wife] knew that I was [on the jury in the case]"), that juror Farmer herself admitted to the connection to the detective in the case. Also, but for being exposed, it appears via inference based on Farmer's initial failure to disclose this during the jury voir dire, that she

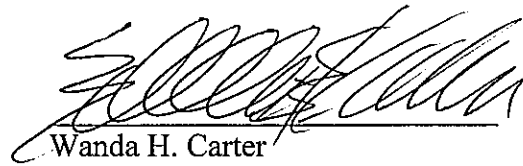
would not have disclosed the information at all during the trial, and that she would presumably have continued to sit on the petit jury panel in petitioner's case until the case ended. Therefore, Farmer's failure to disclose her connection to Detective Novack constituted an intentional concealment, and petitioner was prejudiced by the same at trial because he was unable to make an informed decision regarding the use of a preemptory challenges to exclude Farmer from the petit jury or have her excused for cause prior to his trial. As a result, trial counsel's performance at trial was ineffective in this regard because he failed to move for a mistrial upon discovering juror Farmer's misconduct.

The decision to grant or deny a mistrial is within the sound discretion of the circuit court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 514, S.E.2d 584 (1999), The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham 334 S.C. 302, 513, S.E.2d 606 (1999). A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris 340 S.C. 59, 530 S.E.2d 626 (2000). In the case at bar, the mishandling of the juror misconduct issue by trial counsel by failing to move for a mistrial was ineffective assistance of counsel. Trial counsel erred in failing to move for a mistrial after learning of juror Farmer's intentional concealment of a known association with a detective who investigated petitioner's case and testified at petitioner's trial as this precluded the opportunity to use a preemptory challenge to strike Farmer or request that she be excused for cause from the venire panel, all of which denied petitioner of his Sixth Amendment right to a trial by an impartial jury. Counsel's error violated petitioner's Sixth

Amendment right to competent counsel at his criminal trial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), and his Sixth Amendment right to an impartial jury at trial.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised issue.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of October, 2022.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

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V.

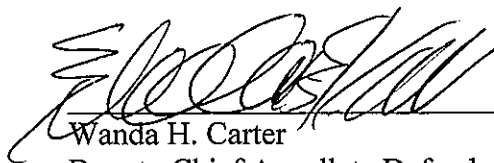
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000634

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Lilly Meadows, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Breon J. Mayers, #351910, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 12th day of October, 2022.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER