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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Post Conviction Relief

Edward W. Miller, Presiding Judge

Appellate Case No.: 2012-213036

David Andres Ortiz Molina #315546 .....Appellant,

vs.

State of South Carolina .....Respondent.

PETITION FOR WRIT OF CERTIORARI

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June 27, 2013

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QUESTIONS PRESENTED

1. Did the Post-Conviction Relief Judge err in not allowing the testimony of one of the original Jurors in the case that she was pressured by the other jurors to vote guilty?

2. Did the Post-Conviction Relief Judge err in not granting the Appellant relief on the basis that Trial Counsel was ineffective for not presenting evidence that it would not have been possible for the Appellant to have been at the location of the crime during the time in question?

STATEMENT OF CASE

The Appellant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Appellant was indicted by the Greenville County Grand Jury for Assault and Battery With Intent to Kill (2005-GS-23-6796). He was represented by Jeffery Falkner Wilkes, Esq.

After the State called the case to trial, the Appellant was found guilty. On May 18, 2006, the Honorable D. Garrison Hill sentenced the Appellant to twenty (20) years imprisonment.

A Notice of Appeal was filed at the South Carolina Court of Appeals. Eleanor Duffy Cleary, Esquire of the South Carolina Office of Appellate Defense perfected the Appeal. The court of Appeals affirmed the Appellant's conviction and sentence. State v. Molina, Op. No. 2009-UP-073 (S.C. Ct. App. filed February 10, 2009).

This matter came before the Court by way of an Application for Post-Conviction Relief (PCR) filed December 15, 2009. The Respondent made its return on April 21, 2010. An evidentiary hearing into the matter was convened on April 3, 2012 at the Greenville County Courthouse. The Appellant was present at the hearing and represented by Tommy A. Thomas, Esq. Karen C. Ratigan, Esq. of the South Carolina Office of the Attorney General represented the Respondent.

The Appellant testified on his own behalf at the PCR hearing. Also testifying were Lee Connelly and the Appellant's trial counsel, Jeffrey Falkner Wilkes, Esq. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Appellant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the Respondent's Return, the Appellate records and the Appellant's Exhibits.

The PCR Court issued its original Order of Dismissal denying the Application for Post Conviction Relief on June 6, 2012. A timely Motion to Alter or Amend was filed June 15, 2012. A final Order of Dismissal was filed September 11, 2012.

STATEMENT OF FACTS

The Appellant was indicted and found guilty by trial by Jury of the Offense of Assault and Battery with Intent to Kill. He was sentenced to twenty (20) years. The victim upon arriving at her home was assaulted on the front door step of her home. She received numerous cuts and injuries. She required immediate medical attention. A very short time after the incident, the Appellant arrived at the scene. The Appellant was a former boyfriend and friend of the victim. The State alleged that the Appellate was the assailant in this matter.

The victim saw someone running towards her as she looked for the keys to her home (App. p. 109, lines 10-16). The victim described the assailant as tall, wearing a big black jacket with lots of pockets (App. p. 110, lines 7-13). The assailant was wearing a mask. Upon entering the home, she realized that she had been cut and was bleeding (App. p. 113, lines 1-9). While the victim was talking to 911, she received a call from the Appellant (App. p. 117, lines 13-22). She told the Appellant that she had been attacked and he said he was coming over to her home (App. p. 117, lines 11-16). The victim testified that she called 911 at 12:12 a.m. (App. p. 121, lines 1-10) and that she received a call from the Appellant at 12:17 a.m. The victim stated that she had expected the Appellant to be at work, which is twenty minutes away (App. p. 122, line 11-16). The Appellant arrived at the scene shortly after the victim called 911. The victim did not suspect the Appellant as the assailant initially but after the Appellant made reference to the ski mask as being Hunter Green in color (App. p. 131, lines 5-18) she became suspicious that he

might be the assailant. (App. p. 133, lines 12-20). The Appellant was later charged with Assault and Battery with Intent to Kill.

There was no DNA evidence presented at trial. However, two blood samples taken indicated that the blood was a mixture of two females (App. p. 527-528, lines 1-25). The K-9 tracking evidence indicated a single route out for the perpetrator (App. p. 313, lines 10-25) and despite testimony of remembering the scent and/or reacquiring the scent (App. p. 315, lines 5-14, p. 316, line 10-17) the dog failed to hit on the Appellant's scent left when he arrived on the scene.

ARGUMENT #1

The Post-Conviction Judge erred in not allowing the testimony of one of the original Jurors in the case that she was pressured by the other jurors to vote guilty.

Motion was made before the Court to present the testimony of Ms. Denna Reid who was a member of the Jury on the Appellant's case. Ms. Reid was present in the Court Room.

The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the Defendant as a consequence. *State v. Smith*, 338 S.C. 66, 525 S.E.2d 263 (Ct.App. 1999). In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. *State v. Kelly*, 331 S.C. at 141, 502 S.E.2d 99 (1998).

As a general rule, juror testimony is inadmissible to impeach a jury verdict. *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995). Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict. Traditionally, a juror's

testimony was not admissible to prove either his own misconduct or the misconduct of the other jurors. *State v. Galbreath*, 359 S.C.398, 597 S.E.2d 845 (Ct.App. 2004). However, Rule 606 (b), SCRE, altered this common law rule, and now, juror testimony regarding external prejudicial information or improper outside influence is allowed. Rule 606 (b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Thus, juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence. *State v. Franklin,* 341 S.C. 555, 534 S.E.2d 716 (Ct. App. 2000).

Until 1995, the prohibition against juror testimony regarding allegations of internal jury misconduct remained intact. In *State v. Hunter,* our Supreme Court set out an exception to this rule, holding that juror testimony is competent in cases involving internal misconduct where necessary to ensure due process and fundamental fairness.

Argument was made in the present case that the Juror did not believe that the Appellant was guilty and was coerced into finding him guilty. The PCR Court was provided a copy of the case of *State v. Zeigler*, 364 S.C. 94, 610 S.E.2d 850 (2005), which set out the exceptions to Juror testimony as discussed above.

In addition, the problem with this Juror may have become evident to counsel at the trial. Counsel brings to the court's attention that a juror for a period of time has held her head in her hands. (App. p. 655, lines 18-24) That she left the courtroom crying (App. p. 655, line 21-23). She states on the record that "I don't want to put somebody in my hands." (App. p. 657, lines 7-8) The court does not excuse her from the jury but allows the Jury to take a lunch break. (App. p. 659, lines 2-4). A Motion for mistrial was made and denied (App. p. 660, lines 1-25). Defense counsel then requests that she remain with the Jury (App. p. 661, lines 8-16). The Court finds that she is able to perform her duties and leaves her on the Jury (App. p. 663, lines 19-24).

The Appellant would contend that the Court erred in not hearing or allowing the Juror to testify. That her testimony was clearly an indication of internal misconduct and her testimony was necessary to ensure due process and fundamental fairness.

ARGUMENT #2

The Post-Conviction Relief Judge erred in not granting the Appellant relief on the basis that Trial Counsel was ineffective for not presenting evidence that it would not have been possible for the Appellant to have been at the location of the crime during the time in question.

The victim testified that she first called 911 at 12:12 a.m. as soon as she got inside the house (App. p. 121, lines 1-15). This would place the occurrence of the crime shortly before the 12:12 a.m. phone call. She received a phone call from the Appellant while she was speaking to the 911 operator. She told the operator she had an important call and attempted to place the 911 operator on hold (App. p. 117, lines 18-22). She told the Appellant that she had been attacked and he said "okay, I am coming over" (App. p.117, line 22). She then called the 911 operator a second time.

The time line is extremely important in this case. The Appellant would contend that the time line would show that he could not have committed the crime.

The incident happened at approximately 12:07 a.m. and the Appellant called the victim at 12:17 a.m. He arrived 3 to 4 minutes later at approximately 12:21 a.m. It would have been impossible for him to have changed his clothes to remove evidence of blood and arrive at the scene at 12:21 a.m.

In addition, the Defendant's drive time was at least 20 minutes, with good traffic conditions (App. p. 122, lines 11-16). It is also necessary to take into consideration that the clock at the Appellant's work was 7 minutes slow (App. p. 821, lines 1-6).

According to the testimony presented by Ms. Lee Connelly, who investigated the time sequence, the Appellant clocked out at 11:40 p.m. the night in question. He was working at Industrial Recovery and Recycling in Greer, SC. The clock was seven minute slow, so it was actually 11:47 p.m. (App. p. 854, lines 1-23)

She testified that she drove the route from the Appellant's work to the scene of the crime at 12 Contera Circle. It took approximately 20 minutes and was about 13.3 miles. She traveled on I-85 South (App. p. 854, lines 19-25, p. 855, lines 1-12). She drove this route several different times leaving his place of employment at 11:41 p.m. It consistently took approximately 20 to 21 minutes.

She further testified that on the night in question, there was ongoing construction on I-85. That highway Department records indicate that an inspector arrived on the scene at I-85 at 11:30 p.m. February 8th, 1:00 a.m. February 9th and 3:15, 5:30 a.m. the morning of the 9th. (App. p. 855, lines 12-25, p. 856, lines 1-6) The Appellant testified that he had been stuck in traffic the night of the incident.

The Appellant contends that it would have been impossible for the Appellant to have initiated the attack, changed his clothes and arrived at the scene shortly after the 12:17 a.m. call.

This problem with the time line is compounded by the error the Assistant Solicitor made in closing argument. He states:

> "David checked out of his business at 11:40 or 11:33 you take away the seven minutes. Not adding on seven minutes. Whether it be 11:33, 11:40 or 11:47, David Molina checked back in to his business and then leaves. Bothe employers, Mrs. Mathis and Mr. Mazych, that's improper, that's not right. That's a big glaring error, big glaring error." (App. p. 676, line 23-25, p. 677, lines 1-3)

Defense counsel was therefore ineffective for not properly presenting this crucial evidence to the Jury and also allowing this mistake to be compounded by statements of the Assistant Solicitor in closing argument.

For an Appellant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, the Appellant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052).

The Appellate would contend that he has met this criteria.

CONCLUSION

The Appellate would assert that he meets the criteria for granting of Post Conviction Relief and that the Court erred in not granting relief. In addition, the Court erred in not allowing the testimony of the Juror, Ms. Denna Reid. For the reasons stated above, the Petitioner respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tommy A. Thomas, Attorney for Appellant in the above referenced case, hereby certify that I hand delivered a copy of a Petition for Writ of Certiorari, an Appendix to Karen Ratigan, Esq. at:

Karen Ratigan, Esq.
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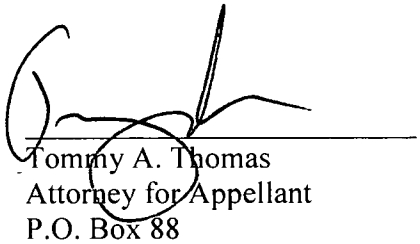

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