

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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**On Writ of Certiorari to the Court of Appeals
Appeal from Greenwood County
Court of General Sessions
Hon. Donald Hocker, Circuit Court Judge**

S.C. SUPREME COURT

Appellate Case No. 2022-000571

The State Respondent,

vs.

Adam Rowell Petitioner.

REPLY BRIEF OF PETITIONER

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Argument

Did the court of appeals err in holding the trial judge did not need to conduct an evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the solicitor for the 8th judicial circuit when such a question was asked during jury voir dire?

The State in its brief incorrectly states that Adam Rowell had the “opportunity to present evidence to support his claim at this hearing and failed to do so.” Br. of Resp. at 5. This conclusion is not supported by the record. At the time of the hearing, the juror was being represented by the public defender for the eighth judicial circuit. This juror, therefore, could not be interviewed by the attorney for Mr. Rowell without contacting his lawyer. The attorney for Mr. Rowell did in fact contact the public defender. App. at 1406 1 12. Both the state and the attorneys for Mr. Rowell had anticipated the juror providing testimony. The record shows that the parties anticipated a later full hearing at which time the juror would testify.

The hearing, in which only argument from the lawyers was presented, the trial judge learned nothing about why the juror did not truthfully answer the question. After the hearing, Judge Hocker expressed some concern about the responses by Juror 164. App. at 1430, 1436. The trial judge asked for informal briefs on the juror issue from both sides. In the response of Mr. Rowell, a specific request for a hearing was made. App. at 1433, In its response, the State also asked for a hearing as to Juror 164. App. at 1438. No hearing was held.

The State cites several cases in support of its position that the trial judge acted properly in finding the concealment was not intentional. In the vast majority of these cases, a hearing was held in which the juror testified. *Porter v. White*, 23 F.4th 322 (4th Cir. 2022); *State v. Sparkman*,

358 S.C. 491, 596 S.E.2d 375 (2004); *State v. Woods*, S.C. 583, 550 S.E.2d 282 (2001); *United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001); *Long v. Norris & Assoc. Ltd*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998); *United States v. Langford*, 990 F.2d 65 (2d Cir. 1993). If anything is to be gleaned from the cases cited by the State, a hearing with the juror is the preferred method of resolving the issue involving juror misconduct on their voir dire. As stated by the South Carolina Court of Appeals, “It is the duty of every potential juror to make true and full disclosures during voir dire because counsel is entitled to rely on the answers in determining whether to exercise a peremptory strike.”

Long v. Norris & Assocs., Ltd, at 573, 538 S.E.2d at 11.

The State has argued that there is no evidence that defense counsel would have used a peremptory strike on Juror 164. At the November hearing, defense counsel was very clear they would not have wanted a juror with pending charges with the solicitor’s office on their jury. App. at 1407, 118. The record in this case establishes defense counsel would have used a peremptory strike. This court is required, therefore, to look beyond the actual bias of the juror.

The State argues that defense counsel should have brought the juror to the November hearing and have them testify. This was not practicable for several reasons. First, defense counsel did not have a written copy of the actual voir dire questions. If the juror were to testify that the question was not asked, there would be no means to impeach him. To argue, as the State does, that, “This assertion is meritless.” (Br. of Resp. at 15) ignores the reality of what is needed to impeach a witness if the witness is not truthful. Had defense counsel taken the course suggested by the State, and proceeded without the transcript, they would have argued defense counsel should have waited until they had the transcript, if the witness had denied the question

was asked. Second, once the defense establishes the juror did not properly respond to the question, then the defendant has made a prima facie case and a hearing needed to be held. The trial court accepted the representation by defense counsel that they had contacted the court reported and discussed the questions asked. Neither the state nor the court disputed the representation by defense counsel. Lastly, like a lot of post trial motion hearings, defense counsel at that point was not sure how the trial judge wished to proceed on the Juror 164 issue. The state, at the hearing below, certainly did not raise the issue of defense counsel failing to subpoena Juror 164. As noted previously, they also expressed a desire to have the juror testify.

What the State fails to fully appreciate, the trial judge made several factual findings as to the juror's state of mind with no testimony from the juror. When this occurs, an abuse of discretion occurs because there is not factual basis for the trial judge to determine what the juror knew or thought when the juror did not testify. As noted in the opening brief, "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Without testimony from the juror, the trial judge has made two factual findings. First the trial judge found that the failure to disclose was unintentional. Second, that the question was ambiguous to the juror. App. at 1425-1426. As noted in the opening brief, the other jurors did not find the question ambiguous. In an attempt to justify the ruling by the trial judge, the State has elected to go beyond the record and argue that as the juror was an habitual user of marijuana, his ability to remember questions is diminished. Br. of Resp. at 18. Had a hearing been conducted, this line of questioning could have been explored. The State has further argued, "In

its order denying Rowell's motion, the court found the 'manner in which the question was asked and the amount of time between when the question was posed and when it was meant to be answered could be confusing to the average juror.'" Br. of Resp. at 18. This finding by the trial judge is without evidentiary support. As noted in the opening brief, many jurors had no problem responding to the question.

The State further argues that Mr. Rowell cannot raise the issue of an ambiguous question as a basis for reversing his conviction. The problem with the State's argument is that Mr. Rowell's defense team had no basis for believing the question was ambiguous until the trial judge issued its order denying the motion was a new trial. The State certainly never made the argument at the November hearing. The defense team never believed the question to be ambiguous when it was originally asked. And apparently the trial judge did not either at that time.

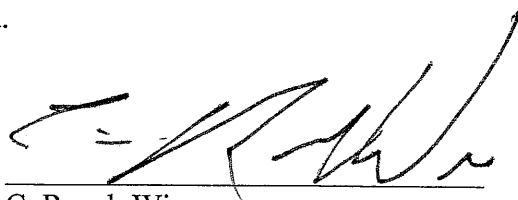
The State further makes an issue of the fact that the juror did not know the office of the solicitor would be prosecuting his case. This is simply not relevant. The importance of the question is defense counsel needed to know if a witness had pending criminal charges being prosecuted by the solicitor's office for the eighth judicial circuit. Based upon a truthful answer, defense counsel would have assumed the juror knew who was prosecuting the case and would have used a peremptory strike. In addition, this argument by the State is assuming a fact not in evidence because the juror did not testify. The record does not establish that the juror did not know who was prosecuting the case. The standard bond form, of which this court can take judicial notice, states that the case is being prosecuted in the court of general sessions for Greenwood County. A much more reasonable assumption is the juror did know.

A remand for a hearing is virtually useless. This trial occurred more than six years ago. one should expect a juror who has not had the occasion to discuss this case for over six years to be able to remember what he knew on February 13, 2017. Counsel for Mr. Rowell certainly recognizes the time spent trying this case. The issues was very much contested. While a finality of a judgement is a valid concern, the right of a defendant to have honest answers from jurors is also a valid concern. If this court were to adopt a rule that when a juror gives false answers during their voir dire, a hearing must be conducted, the need for finality and the need for honest answers to voir dire and both be met in a manner that addresses the concerns of both.

CONCLUSION

For the foregoing reasons and for the reason set forth in the opening brief, the conviction of Adam Rowell should be reversed and a new trial ordered.

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