

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JAN 27 2014

Appeal from Charleston County

S.C. Supreme Court

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

APPELLANT,

V.

WILLIAM COAXUM,

RESPONDENT.

APPELLATE CASE NO. 2012-206607

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether a prejudice or harmless error analysis applies to the undisputedly erroneous removal of an impartial juror after she innocently disclosed a remote connection to the defendant's family discovered only after the trial began?

STATEMENT OF THE CASE

William Coaxum Sr. (“Coaxum”) was indicted by the Charleston County grand jury for armed robbery and possession of a firearm during the commission of a violent crime. He was also indicted for another armed robbery that the State withdrew prior to the case’s submission to the jury. He was tried before the Honorable R. Markley Dennis, Jr. on January 12-13, 2009. Coaxum was represented by Beattie Butler. App. 4, ll. 17 – 20. Greg Voight and Rutledge Durant of the Ninth Circuit Solicitor’s Office represented the State. App. 5, ll. 21 – 25. He was convicted and received a life sentence pursuant to section 17-25-45 of the South Carolina Code. App. 175, ll. 12 – 20.

Coaxum appealed his conviction and sentence. On November 7, 2011, the South Carolina Court of Appeals reversed his conviction, holding that the trial court abused its discretion in removing a juror during the trial. State v. Coaxum, No. 2011-UP-496 (Ct. App. Nov. 7, 2011). The State’s Petition for Rehearing was denied. App. 233. On July 25, 2013, this Court granted the State’s petition for certiorari.

ARGUMENT

No prejudice or harmless error analysis applies to the undisputedly erroneous removal of an impartial juror after she innocently disclosed a remote connection to the defendant's family discovered only after the trial began.

Introduction

After the trial began, a juror recognized a member of the defendant's family sitting in the gallery. She immediately brought this to the trial court's attention. She did not know the defendant. Her connection to the family member was remote. She affirmed she could be fair and impartial. The trial court removed her from the jury over the defendant's objection. Following this Court's instructions in its jurisprudence on the removal of jurors to the letter, the court of appeals held that the juror's removal was error.

The State does not dispute this holding by the court of appeals. Instead, the State contends the defendant must show prejudice and that a harmless error analysis applies. The State's argument is not supported by this Court's decisions. Furthermore, adoption of such a rule would be unwise because it would leave defendants without a remedy for a legal error, would undermine the integrity of our state's jury selection procedure, and violate the statutory and constitutional rights of citizens serving on juries.

Relevant Facts

After the swearing of the jury, opening statements, and the testimony of witnesses, juror Pearl Alston ("Juror Alston") recognized members of Coaxum's family sitting in the audience. Juror Alston promptly informed the Court, through a note sent by the foreperson, that she knew "the family of the Defendant but not the Defendant himself." App. 110, ll. 17 - 21. None of Coaxum's family members were called to testify. Upon questioning by the

judge, it became clear that Juror Alston worked with one of Coaxum's family members. App. 112, ll. 8 – 12. According to this family member, they are distant cousins. App. 112, ll. 13 – 17. Juror Alston did not necessarily agree with this claim. App. 112, ll. 13 - 17. She disclosed this information because she wanted the information known and not something that someone would find out later. App. 112, ll. 18 - 22.

The judge asked if the parties had any additional questions. The State asked Juror Alston:

MR. VOIGHT:-- [A]re you able when you're considering the evidence from the witness stand and the other evidence that you're presented, are you able to put out of your mind those relationships, whether they be working relationships, family relationships, and consider just the evidence that comes from the witness stand?

JUROR NUMBER 7: Yes, sir.

MR. VOIGHT: Do you believe that your knowing anybody from the Defendant's family would have, in any way, any influence your decision? (sic) Make you deliberate longer? Make your view of the evidence in any different light than you would have had you not been—not at all?

JUROR NUMBER 7: No, it wouldn't.

App. 113, ll. 6 - 21. The judge remarked that the only other person who knew of the relationship was the foreperson, but the State did not believe it "necessary" to speak to her as well. App. 114, ll. 1 - 7.

The State then asked that Juror Alston be excused "out of an abundance of caution." App. 114, ll. 18 – 19. The assistant solicitor thought that "ultimately she may not be able to put it out of her mind . . ." App. 114, l. 18 - 115, l. 2. Defense counsel objected to the juror's removal. App. 113, ll. 3 - 4. Only upon prompting by the trial judge, the assistant solicitor said that he would have exercised a peremptory challenge to remove Juror Alston had he been aware of the information. App. 115, ll. 5 - 8. The judge noted that the State had

peremptory challenges available and could have used one to remove her. App. 117, ll. 17 - 20.

No one ever accused Juror Alston of intentionally concealing the information that she disclosed. The trial judge discussed the applicable law, including the controlling cases of State v. Woods¹ and State v. Stone.² Reviewing Stone, the trial judge understood, “that a new trial is required only when the court finds a juror intentionally concealed information and that the information concealed would have supported a challenge for cause and would have been a material factor for use in the party’s peremptory challenge.” App. 116, ll. 4 – 9. Without making any finding that Juror Alston intentionally concealed information, the trial judge stated that he would grant the State’s motion “notwithstanding Stone.” App. 123, ll. 7 - 8.

¹ 345 S.C. 583, 550 S.E.2d 282 (2001).

² 350 S.C. 442, 567 S.E.2d 244 (2002).

The Court of Appeals' Decision

After oral argument, but in an unpublished *per curiam* decision, the South Carolina Court of Appeals reversed Coaxum's conviction. App. 213-15. The court quoted this Court's test from Woods that "a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." App. 214. The court cited this Court's opinion in Stone for the proposition that the inquiry ends when the failure to disclose was unintentional. App. 215. Once the court held that Juror Alston's nondisclosure was unintentional, it found that Woods "and its progeny" required reversal. The court conducted no prejudice or harmless error inquiry.

Discussion

The State asks this Court to graft either a prejudice or harmless error analysis inquiry onto the Woods test. Despite multiple applications of Woods in appellate decisions, the Court has never imposed a prejudice or harmless error requirement. The Court most recently dealt with the Woods test in McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013). McCoy was a PCR case. The petitioner alleged in a successive PCR application that he had newly discovered evidence that a juror intentionally concealed that she was related to the solicitor. Id. at 366, 737 S.E.2d at 625. The PCR court summarily dismissed the application, holding that he failed to satisfy the test for newly discovered evidence. Id. at 367-68, 737 S.E.2d at 625-26. The PCR court held that the petitioner could not show how the information about the juror "would have affected his trial." Id. at 368, 737 S.E.2d 626.

This Court reversed and discussed whether to apply the newly discovered evidence standard or the Woods standard. Id. at 370-72, 737 S.E.2d at 627-28. The newly discovered evidence standard contains a prejudice inquiry, specifically whether the evidence “would probably change the result if a new trial is had.” Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993). The McCoy Court rejected use of the Clark test for juror nondisclosure cases. McCoy at 371-72, 737 S.E.2d at 627-28. McCoy held that because juror misconduct “is a separate basis for a new trial, it is governed by a separate standard.” Id. The Court held that the Woods test applied. Id. Even in a collateral attack, at no point in McCoy did this Court add a prejudice inquiry to the Woods test. In fact, the rejection of the Clark test in favor of the Woods test should be interpreted as a rejection of a prejudice or harmless error inquiry when dealing with juror misconduct cases.

Since this Court announced its rule regarding the removal of jurors in Woods, multiple cases have applied the Woods analysis. However, only in Stone has a South Carolina appellate court analyzed the dismissal of a juror where the State sought the juror’s removal. The facts in Stone are very similar to the case at bar. In Stone, the State called the defendant’s aunt as a witness. Stone, at 448, 567 S.E.2d at 247. A juror indicated that she knew the defendant’s aunt, although did not know her name. Id. The aunt was listed during *voir dire* as a witness. Id. The State asked for dismissal of the juror and the trial court complied over the defendant’s objection. Applying the Woods test, this Court determined that the juror’s failure to disclose the acquaintance was innocent and the trial judge abused his discretion in dismissing the juror. Id. at 448-49, 567 S.E.2d at 247-48. The Stone Court conducted no prejudice analysis. Id.

The State argues that the Stone decision cannot be read as requiring reversal because the Court found two other errors also requiring reversal. This argument has no merit. Had the issue of the juror's dismissal been nondispositive in Stone, this Court need not have considered it. Our appellate courts decline to address nondispositive assignments of error when other dispositive issues require reversal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

The Stone Court ultimately addressed five issues on appeal. The first issue addressed was a directed verdict issue, which could not be avoided under the Futch rule. Stone at 445-46, 567 S.E.2d at 246. The juror issue was the second issue addressed. Id. at 448, 567 S.E.2d at 247. The Court then addressed three other issues: (1) the failure to charge statutory mitigators, (2) a parole ineligibility charge, and (3) the admission of expert testimony. Of these issues, the juror issue is the only issue that would not be likely to arise at a new trial. Since a new trial would have a new jury, its recurrence was highly improbable. Under the State's argument, if a prejudice analysis was required, there was no reason for the Stone Court to have addressed the juror issue pursuant to Futch. The fact that Stone did address the juror issue (and did not conduct a prejudice inquiry) and addressed it as the first issue in which it found error means that it was dispositive. This Court should disregard the State's attempt to distinguish Stone.

Every other decision since Woods dealt with the trial court's refusal to dismiss a juror over a defendant's objection. In all of these cases, the appellate court upheld the trial judge's refusal to dismiss the juror on the sole ground that the juror's concealment was

unintentional.³ See Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007); State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 378 (2004); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010) (cert. denied); State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007) (cert. denied); State v. Guillebeaux, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004) (cert. denied); State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004). In State v. Miller, the court of appeals remanded the case to the trial court for a factual determination whether the juror's concealment was unintentional. No. 4977, 2012 WL 1861978 (Ct. App. May 23, 2012). As happened in all of these cases, the inquiry at trial should have ended upon the conclusion that Juror Alston's nondisclosure was innocent.

A trial judge was reversed on the sole ground of a juror's improper removal in Greer v. Norvill, 21 S.C.L. (3 Hill) 262 (1837). In Greer, an attorney objected to a sworn juror based on speculation of some bias against counsel and the trial judge dismissed the juror. Id. at *1. The Court reversed, stating that "Vague and capricious objections should not receive the countenance of the court." Id. at *3. "After a trial has commenced, and the jury is charged with the case, no juror can withdraw except from necessity, the consent of the parties, or the permission of the law" Id. at *2. The Greer Court held that prejudice was not a concern, stating, "It is probable that a new trial will result in the same verdict. But the motion for a new trial must be granted." Id. at *3.

³ The volume of cases unequivocally stating that an unintentional concealment ends the inquiry magnifies the trial judge's error in this case.

The State's claim that no case has been reversed solely on this ground is also misleading. In each of the cases following Woods, all but Stone dealt with jurors who remained on juries after innocently failing to disclose information. Stone and this case deal with the removal of an innocent juror at the State's insistence. Coaxum respectfully urges that a more accurate statement would be that the only convictions obtained since Woods where a juror was improperly removed during trial were reversed.

Sound policy lies behind the Court's refusal to conduct a prejudice or harmless error analysis in cases like Greer, Stone, and the one at bar. If such an analysis were conducted, judges' abuses of discretion disfavoring defendants would have no remedy. Upon removal of a juror at the State's behest, the juror will be replaced with an alternate. As petitioner correctly states, in South Carolina, a defendant has no right to any particular jury, only to a fair and impartial one. See Palacio v. State, 333 S.C. 506, 511 S.E.2d 62, 68 (1999). Therefore, even when a judge ignores the clear and manifest law as stated by this Court and removes a juror over a defendant's objection, the defendant can have no remedy because the rule in Palacio will uphold the alternate's place on the jury.

This creates an unfair set of incentives. Trial judges can remove jurors perceived by the State as favorable to the defendant at no risk of reversal; however, State-friendly jurors will remain on juries over defendants' objections based on Woods and the many affirmances based on its holding. Such a situation is manifestly unfair to defendants and diminishes their constitutional right to a jury trial. By affirming, the Court will remain true to its analysis in Stone and leave defendants with a remedy for clear abuses of discretion.

Other states have recognized this problem and either refuse to require a showing of prejudice or recognize that removal of a juror selected with the defendant's approval inherently prejudices the defendant. Like South Carolina, Georgia authorizes its trial judges to use their discretion when replacing jurors. See Dunn v. State, 706 S.E.2d 596, 598 (Ga. Ct. App. 2011). In Dunn, the trial judge dismissed a juror because he was allegedly sleeping and other jurors objected to his body odor. See id. The Georgia Court of Appeals reversed, finding that the trial judge's exercise of his discretion "must be an informed exercise" and that "[d]ismissal of a juror without any factual support or for a legally irrelevant reason is prejudicial [to the defendant]." See id. at 598-99 (internal quotations omitted).

The New York Court of Appeals wholly rejects a prejudice or harmless error analysis regarding the removal of jurors. See People v. Anderson, 70 N.Y.2d 729, 730 (N.Y. 1987). The Anderson court stated, "We decline the People's invitation to apply a harmless error analysis based on the proof of defendant's guilt, or based on the fact that defendant participated in selecting the alternate who replaced the discharged juror." Id. Unlike South Carolina, New York recognizes the right of a defendant to the particular jury chosen, but the policy reasons behind New York's decisions are the same as those recognized in Stone. The Court should reject the State's attempt to graft a prejudice and harmless error analysis onto Woods and Stone and recognize that the outcome urged by the State would result in a right without a remedy for aggrieved defendants.

It is undisputed that the trial judge erred in removing Juror Alston. As the court of appeals correctly held, the test for whether a juror should be removed for nondisclosure of information is: (1) whether the concealment was intentional, and (2) whether the information would have been a material factor in the use of a peremptory challenge or

would have supported a challenge for cause. See Woods, at 587-88, 550 S.E.2d at 284. Once a court determines that a juror's concealment was unintentional, the "inquiry is over." State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 378 (2004).

As the court of appeals correctly found, the inquiry in this case should have ended at the determination that Juror Alston did not intentionally conceal information. In fact, Juror Alston concealed no information during *voir dire*. She did not know Coaxum. She did not realize she knew any member of Coaxum's family until she recognized them sitting in the audience. These members of the family were not presented as witnesses during *voir dire* nor called during the case.

At trial, the solicitor did not argue that Juror Alston intentionally concealed any information. The trial judge did not find any intentional concealment. On appeal, the State does not argue that Juror Alston concealed information. Therefore, as conceded by the State, Juror Alston's "concealment" was unintentional, and the court of appeals correctly concluded that, under Woods, the trial judge abused his discretion.

Should the Court decide to inquire into prejudice, the court of appeals' decision should still be affirmed. While Coaxum concededly cannot demonstrate a specific prejudice flowing proximately from Juror Alston's dismissal, Coaxum can demonstrate prejudice in two ways. First, the removal of the juror improperly allowed the State a post-selection peremptory strike. Had the State used a peremptory strike during selection to exclude Juror Alston, it would have undoubtedly affected the remainder of the selection process and how Coaxum used his strikes. Juror Alston was the second juror seated. App. 36, ll. 5 – 16. Coaxum had used only one peremptory strike at the time Juror Alston was seated. Juror Alston's later removal upset the selection strategy used by Coaxum and deprived him of his

constitutional rights. Also, the dismissal of jurors such as happened in this case disrupts the integrity of the selection process and potentially invites gamesmanship during trial based on observations of juror behavior. See Greer, at *2 (“I presume the change [in jurors] made no material difference in this case; nor do I believe any undue advantage was sought. It is sufficient to say, however, that such might be the case, if the practice were to receive the sanction of the court.”).

Second, Juror Alston had a statutory and constitutional right to serve on this jury and her dismissal on an improper ground violates that right. See S.C. Code Ann. § 14-7-360; Batson v. Kentucky, 476 U.S. 79 (1986). Section 14-7-360 states in mandatory language that “When the name of a person is drawn from the jury box for jury service by the commissioners the person shall serve as a juror unless disqualified or excused by the court as may be provided by law.” S.C. Code Ann. § 14-7-360 (emphasis added). This Court has also recognized a juror’s constitutional right not to be removed from a jury for an improper reason. See Greer, *supra*; State v. Floyd, 353 S.C. 55, 577 S.E.2d 215 (2003). The Greer Court eloquently expressed the right and privilege of a citizen to serve on a jury, stating, “This privilege is of little value ordinarily, but there may be occasions and junctures in the republic, when a citizen would sooner perish than yield his privilege.” Greer, at *1. “[H]e can at no time be arbitrarily discharged against his consent.” Id.

In Floyd, the trial judge excluded a juror because the juror refused to swear a religious oath. Id. at 57-58, 577 S.E.2d at 216. This Court reversed, holding, “The dismissal of Juror 126 constituted a violation of the juror’s constitutional rights.” Id. at 58, 577 S.E.2d at 216. The Floyd Court noted that when a constitutional right is

involved, the “line of cases which hold a defendant is entitled to a fair and impartial jury but has no right to trial by a particular jury, do not apply.” Id. at 59, n.5, 577 S.E.2d at 216, n.5. Floyd disproves the State’s argument that a defendant cannot assert a juror’s right to serve on a jury as an error requiring reversal. Therefore, the removal of Juror Alston for an undisputedly erroneous reason violated her statutory and constitutional right to serve on this jury and, as such, demonstrates the prejudice required for reversal.

Alternatively, should the Court decide that Woods must be modified and the systemic prejudice discussed above does not pass muster, it should not impose a specific prejudice hurdle that, practically, could never be surmounted. A better way to modify Woods would be to discard the existing framework of whether a juror’s “concealment” was intentional or unintentional and simply invite the parties to challenge the participation of the juror for cause. Adopting this rule would abolish the somewhat arbitrary distinction between intentional and unintentional concealment. The federal courts make no such distinction. Jones v. Cooper, 311 F.3d 306, 310 (4th Cir. 2002) (stating “the test applies equally to deliberate concealment and to innocent non-disclosure”). The law on challenges for cause is well-developed and would provide adequate guidance to our trial judges. It would also serve the binary goals of protecting both parties’ right to an impartial jury and a juror’s right to serve.

Under this framework, the State could not have challenged Juror Alston for cause. State v. Wells, 249 S.C. 149, 153 S.E.2d 904 (1967). Juror Alston’s connection to the defendant was, at best, remote. App. 112, ll. 3 – 17. She affirmed that any possible connection would not influence her decision and that she could be fair and impartial. App. 112, l. 18 – 113, l. 22. The solicitor did not even attempt to argue that grounds existed that

would justify excluding Juror Alston for cause. She was arbitrarily removed by the trial judge on the whim of the solicitor. The Court should not allow a juror to be so frivolously dismissed.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed and this Court should grant Respondent a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 27th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
R. Markley Dennis, Jr., Judge

THE STATE,

APPELLANT,

V.

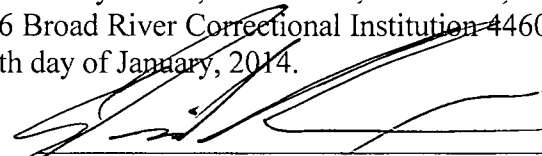
WILLIAM COAXUM,

RESPONDENT

APPELLATE CASE NO. 2012-206607

CERTIFICATE OF SERVICE

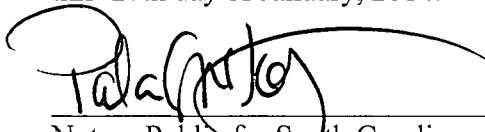
The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and upon William Coaxum, Sr. #327616 Broad River Correctional Institution 4460 Broad River Road Columbia, SC 29210, this 27th day of January, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 27th day of January, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.