

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Colleton County
Honorable Perry M. Buckner, III, Circuit Court Judge
Appellate Case No. 2013-002571

THE STATE,

Respondent,

vs.

DAVID JAKES,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

I.

The Court of Appeals properly affirmed Petitioner's sentences and convictions because the trial judge did not err in refusing to remove the juror, who voluntarily admitted that her husband was a reserve deputy even though she was never asked of the information during voir dire. Regardless, even if the trial judge erred, Petitioner suffered no prejudice.

STATEMENT OF THE CASE

Procedural History

On October 28, 2010, a Colleton County Grand Jury indicted Petitioner on three counts of attempted armed robbery and one count of possession of a weapon during the commission of a violent crime. On August 25, 2011, a Colleton County Grand Jury indicted Petitioner on three counts of attempted murder.

On August 29, 2011, Petitioner proceeded to trial. Attorney Harris S. Beech represented Petitioner, and Attorney David S. Matthews represented Petitioner's co-defendant, Antwan McMillan. Assistant Solicitors Amanda Haselden and Ben Shelton represented the State.

On September 1, 2011, the jury found Petitioner not guilty of the three counts of attempted murder, guilty of three counts of first-degree assault and battery, guilty of the three counts of attempted armed robbery, and guilty of possession of a weapon during the commission of a violent crime. The Honorable Perry M. Buckner, III sentenced Petitioner to an aggregate term of 35 years.

On September 6, 2011, Petitioner served a timely notice of appeal. On April 3, 2013, the Court of Appeals heard arguments on this matter. On June 10, 2013, the Court of Appeals issued a published opinion affirming Petitioner's convictions and sentences. State v. Jakes, Op. No. 5158 (Ct. App. filed July 10, 2013). Petitioner filed a petition for rehearing, which the Court of Appeals granted. On September 25, 2013, the Court of Appeals withdrew its previous opinion and substituted and refiled a new opinion, which once again affirmed Petitioner's convictions and sentences. State v. Jakes, Op. No. 5158 (Ct. App. filed September 25, 2013). On October 2, 2013, the Court issued a third opinion, which once again affirmed Petitioner's convictions and sentences. State v. Jakes,

2013-UP-360 (Ct. App. filed October 2, 2013). On October 25, 2013, Petitioner filed a second petition for rehearing. On November 12, 2013, the Court of Appeals issued an order denying Petitioner's petition for rehearing.

Factual History

After the fourth witness testified for the State, the trial judge received a note from the foreman of the jury regarding Juror #102. (R. p. 197.) Juror #102 asked the court if she was a "suitable juror" due to the fact her husband was a reserve deputy with the Colleton County Sheriff's Department. (R. p. 198.) The trial judge asked Juror #102 the following question: "The fact that your husband previously, more than two and a half years ago, was a full time deputy, and been a reserve deputy for the past two and a half years, would that in any way affect your ability to give the State of South Carolina or the defendant McMillan or the defendant Jakes, in this case, a fair and impartial trial?" (R. p. 202.) The juror responded, "No, it wouldn't." (R. p. 202.)

During voir dire, the trial judge never asked the potential jurors if their spouses had ever been a member of law enforcement. (R. p. 203.) Moreover, Petitioner never requested the trial judge to ask that question during voir dire. (R. p. 204.)¹ When the juror disclosed the information after the trial began, Petitioner objected to the juror sitting and stated that he might have used his strikes differently if he had the information during jury selection. (R. p. 204.)

Ultimately, the trial judge found that the juror was fair and impartial and refused to excuse the juror. (R. p. 207.)

¹ Apparently, the Clerk's Office did not transmit everything that the juror filled out on the Clerk's sheet onto the sheet the lawyers used for voir dire. (R. p. 206.)

ARGUMENT

I.

The Court of Appeals properly affirmed Petitioner's sentences and convictions because the trial judge did not err in refusing to remove the juror, who voluntarily admitted that her husband was a reserve deputy even though she was never asked of the information during voir dire. Regardless, even if the trial judge erred, Petitioner suffered no prejudice.

Petitioner contends the trial judge erred when he refused to excuse a juror when, after jury selection, the juror voluntarily revealed the fact that her husband was a reserve deputy for the Colleton County Sheriff's Department. Petitioner argues that the information the juror revealed would have been a material factor in Petitioner's preemptory strikes; therefore, the trial judge erred. However, Petitioner's argument on appeal fails for four reasons: First, the trial judge properly found that the juror could be fair and impartial because the juror did not conceal any information and stated she could be fair and impartial. Second, the test Petitioner advocates on appeal has never been approved by this Court. Third, the Clerk's omission of the information on the jury summary sheet was irrelevant. Finally, even if the trial judge erred, Petitioner failed to show any prejudice.

Standard of Review

"A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial court, and such decision will not be reversed on appeal absent an abuse of discretion." State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (2007). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

A. The trial judge properly found that the juror could be fair and impartial.

First, the ultimate test in cases such as this is whether the juror can be fair and impartial. See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”); S.C. Const. art. I, § 14 (“The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury”).²

One of the ways our courts determine if a juror can be fair and impartial is by applying the State v. Woods³ test. In Woods, this Court held: “When a juror conceals information inquired into during *voir dire*, 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.” Woods, 345 S.C. at 587, 550 S.E.2d at 284 (emphasis added).

Petitioner conceded in his brief and during oral argument that the juror did not intentionally conceal any information. Without such concealment, there was no basis to suggest that the juror was partial or biased against Petitioner. Therefore, no further inquiry into the matter is needed. See State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004) (“[A] determination that a juror did not intentionally conceal the information **ends** the court’s inquiry.”) (emphasis added); Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) (“Where a juror, without justification, fails to disclose a

² Notably, the fact the juror’s husband was a reserved deputy did not automatically disqualify that juror from serving on the jury. See State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2011) (“[T]he fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror.”); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910) (“There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness . . .”). Further, Petitioner admitted the fact that the juror was married to a reserve deputy sheriff did not disqualify her from serving as a juror. (App. Br. p. 11.)

³ State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001).

relationship, it may be inferred . . . that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn.” (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284); see also Woods, 345 S.C. at 589, 550 S.E.2d 285 (“Where the juror's failure to disclose information is “without justification,” i.e., intentional, the juror's bias will be inferred. Conversely, where the failure to disclose is innocent, no inference of bias can be drawn.”).

Further, the trial judge acted within his discretion in finding that the juror could be fair and impartial. See State v. Mercer, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009) (describing the trial judge’s broad discretion to determine whether a juror is qualified). The juror in this case voluntarily gave the information regarding the status of her husband’s employment even though she was never asked for the information during voir dire. Moreover, the juror told the trial judge that she could be fair and impartial despite the fact that her husband was a reserve deputy and former active deputy.

Moreover, the fact that there were three alternate jurors available does not mean that the trial judge had to replace the juror with one of the alternates. In fact, in State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002), the trial judge decided to replace the juror with an alternate even though the juror said she could be fair and impartial. In Stone, this Court held the trial court abused its discretion in removing the juror because the juror’s failure to disclose her acquaintance with one of the witnesses was innocent. Id. at 448, 567 S.E.2d at 247-48. Just like the juror in Stone, the juror in this case did not intentionally conceal any information. Thus, it would have been error for the trial judge in this case to replace the juror with one of the three alternates.

In summary, the only test this Court needs to apply is the Woods test, which is essentially a test to determine whether or not a juror can be fair and impartial. Because

the juror did not intentionally conceal the information, the trial judge properly refused to remove the juror.

B. The test Petitioner advocates on appeal has never been approved by this Court.

Second, the test Petitioner advocates on appeal is not a test our appellate courts recognize. Rather, Petitioner is picking the favorable part of the Woods test and ignoring the unfavorable part. Although this Court provided our trial courts with the two part test mentioned above, Petitioner wants this Court to only apply the second part of the two part test, which deals with whether or not the information concealed would have been a material factor in the use of the party's peremptory challenges. Petitioner blatantly ignores the first part of the Woods test, which deals with whether or not the juror intentionally concealed the information. As a matter of policy, a juror who does not conceal any information whatsoever should not be subject to stricter rules than a juror who intentionally conceals information. Accordingly, Petitioner's argument on appeal is without merit.

C. The Clerk's omission of the information was irrelevant.

Third, the Clerk's omission of the juror information was irrelevant because Petitioner was not entitled to the juror information in the first place. See State v. Childs, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989) (holding that there is no right to discovery in criminal cases absent a statute or court rule and there is no statute or court rule requiring the state to provide defense counsel with prospective juror information). The Clerk of Court's office provided the jury summary sheet out of convenience to the parties, and the fact the Clerk provided the information out of convenience does not give the parties the right to rely solely on the jury summary sheet. Moreover, the reason

Petitioner did not know the information regarding the juror beforehand was because he never asked for a voir dire question regarding whether or not any member of the jury had a spouse that was in law enforcement. See State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct induced.”).

D. Petitioner received a fair trial by twelve impartial jurors; therefore, Petitioner suffered no prejudice.

Finally, even if this Court finds that the trial court erred in refusing to excuse the juror, any error was harmless because Petitioner failed to show any prejudice. See State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996) (noting error without prejudice does not warrant reversal).

In the case at hand, the juror stated that she could be fair and impartial even though her husband was a reserve deputy and former active deputy. (R. p. 202.) The judge stated that he was not going to punish the juror by removing her from the jury because the juror was honest enough to tell the court about her husband’s employment status even though it was not asked of her. (R. p. 207.) Because the trial court found the juror to be fair and impartial and there is no evidence of any prejudice, this Court should affirm the trial court’s ruling. See State v. Evins, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007); Patton v. Yount, 467 U.S. 1025, 1038 (1984) (instructing that a trial judge’s determinations on the impartiality of a prospective juror are presumed to be correct and are entitled to special deference on appeal). Not only can Petitioner not point to any prejudice but, in fact, Petitioner was acquitted of three counts of attempted murder. Thus, Petitioner received a fair trial.

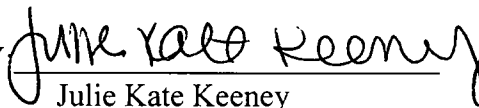
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 30, 2014

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 30th day of January, 2014.



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