

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED

JUL 28 2014

S.C. Supreme Court

JAMES E. WAITERS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-000426

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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There was evidence to support the PCR judge’s ruling that Respondent was denied his constitutional right to trial by an impartial jury where the record is devoid of any evidence the jury was sworn as mandated by law, and certiorari is not warranted.6

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QUESTION PRESENTED

1. Did the PCR judge err in finding Respondent met his burden of proving a violation of his constitutional right to trial by an impartial jury?

COUNTER QUESTION PRESENTED

2. Was there any evidence to support the PCR judge's ruling that Respondent was denied his constitutional right to trial by an impartial jury where the record is devoid of any evidence the jury was sworn, and contains evidence from which a reasonable inference can be drawn that it was not sworn?

STATEMENT OF THE CASE

Procedural history

Respondent was indicted at the July 25, 2006 term of the Greenville County Grand Jury for three counts of armed robbery, and possession of a weapon during a violent crime. App. 332-333; app. 336-337; app. 339-340; app. 345. His case was called to trial on March 11, 2012 before the Honorable G. Edward Welmaker, and a jury. App. 1. Timothy Sullivan represented respondent, and Douglas Webb was the assistant solicitor. App. 1.

On March 12, 2012, the jury found respondent guilty of two counts of armed robbery and possession of a weapon during a violent crime. The jury found respondent not guilty on one count of armed robbery. App. 241, ll. 1-22. Judge Welmaker sentenced respondent to concurrent terms of seventeen years imprisonment. App. 250, ll. 10-23.

Respondent was represented on appeal by J. Falkner Wilkes. Assistant Attorney General Christina Catoe represented the state. The Court of Appeals affirmed respondent's convictions in State v. James Waiters, Jr., 2010-UP-296 (March 27, 2010). App. 280-281.

Respondent then filed an application for post-conviction relief on December 23, 2010. App. 282-288. The state filed a return dated April 12, 2011 requesting an evidentiary hearing and the appointment of counsel for respondent. App. 289-293.

An evidentiary hearing was convened on November 1, 2012 before the Honorable R. Markley Dennis, Jr. R. Mills Ariail, Jr. represented respondent, and Karen C. Ratigan represented the state. App. 294.

Judge Dennis issued an order granting post-conviction relief on February 8, 2013. App. 326-329. The state sought certiorari from this Court, and this Return of respondent follows.

Relevant facts

Following jury selection, Judge Welmaker made opening remarks to the jurors, before excusing the jury to the jury room. App. 29, l. 21 – 40, l. 2. After hearing and granting a very brief motion for sequestration, Judge Welmaker called for a ten-minute break. App. 40, ll. 3-23.

Once the jury returned, the solicitor immediately proceeded with his opening argument and it was clear the jury **was not sworn because defense counsel had stated the jury was not sworn at App. 41, ll. 5-9.** App. 40, l. 24- 41, ll. 5-9; Tr. 41, l. 10 - 48, l. 5. The record, as the PCR court ultimately found, is devoid of any statement or notation that the jury was sworn, or that the jury had taken any oath or affirmation. App. 326-329.

At the post-conviction relief hearing trial counsel Sullivan testified that he had looked through the trial transcript and did not see anywhere in the record that the jury was sworn. App. 314, l. 21 – 315, l. 8. Trial counsel also said that respondent “[t]old me from day one that he wanted a trial and that he did not rob these ladies.” App. 316, ll. 7-10.

The PCR judge stated that he knew the court reporter from respondent’s trial, Deborah Garrison, and he stated that she had been his court reporter for nine years. The judge offered that he had concluded the jury was never sworn. He commented on the remedy from his research of cases from other jurisdictions, and said that he would give the Assistant Attorney General time to further research the issue before he ruled. App. 319, l. 10 – 323, l. 25.

An order granting post-conviction relief was filed on February 18, 2013. App. 326-329.

This order stated:

Based upon Applicant’s PCR application, statements of counsel, and the record as a whole, this Court makes the following findings. On March 12, 2008, Applicant was convicted of two counts of armed robbery and one count of possession of a weapon during the commission of a violent crime by a jury verdict. Following jury selection for Applicant’s trial, the trial judge made some brief, opening remarks to the jurors before excusing the jury to the jury room. After hearing a motion from Applicant’s trial counsel, the trial judge

then called for a ten-minute break. Following the break, counsel for the State addressed the jury with its opening statement. The record contains no notation or any other evidence that the jury was sworn under oath or affirmation prior to the State's opening statements or at any other point during the trial.

South Carolina Code of Laws § 14-7-1100 requires a jury in every criminal case to take an oath or affirmation. Based on the absence of notation or comparable evidence in the record, Applicant has demonstrated that Applicant's trial failed to comport with the South Carolina Code of Laws § 14-7-1100 jury oath requirement. The South Carolina Constitution guarantees all criminal defendants the right to trial by an impartial jury. See S.C. Const. art 1, § 14. Based on the absence of notation or comparable evidence in the record, Applicant has demonstrated a violation of his constitutional right to trial by an impartial jury as provided by the South Carolina Constitution.

App. 327.

ARGUMENT

There was evidence to support the PCR judge's ruling that Respondent was denied his constitutional right to trial by an impartial jury where the record is devoid of any evidence the jury was sworn as mandated by law, and certiorari is not warranted.

S.C. Code § 14-7-1100 requires that " [T]he jurors **must** be called, **sworn**, and impaneled anew for the trial of each case, according to the established practice." (emphasis added). See, also, S.C. Code §14-7-1130: "Any juror in any court of this State may make solemn and conscientious affirmation and declaration, according to the form of his religious belief or profession, as to any matter or thing whereof an oath is required and this affirmation and declaration must be held as valid and effectual as if the person had taken an oath on the Holy Bible."

Regardless of any Court's established practice, the swearing of the jurors is mandatory as it is elementary that a criminal defendant has the right, under the Fourteenth Amendment to the United States Constitution, to trial by a fair and impartial jury. See Groppi v. Wisconsin, 400 U.S. 490 (1971); Irvin v. Dowd, 366 U.S. 717 (1961); Tumey v. Ohio, 273 U.S. 510 (1927).

Although this Court has not directly ruled on the remedy for failure to swear a jury, other courts have weighed the issue and declared an unsworn jury verdict a nullity.¹ As the Court stated

¹ In State v. Hollman, 232 S.C. 489, 102 S.E.2d 873 (1958), the issue was raised and rejected largely on technical grounds to include a discussion of former Rule 4 of the Supreme Court Rules. This Court also found that the issue was made not made a ground of appeal, and a finding that the Record disclosed no factual basis to support the conclusion either that the jury was not duly sworn or the fact of said swearing was not shown in the Record of the Trial in the office of the Clerk. Here, conversely, respondent offered evidence at the PCR hearing that the jury was not sworn, the judge found this evidence credible, and this Court's standard of review is "any evidence." The judge further had personal knowledge of the competency of the court reporter. Certainly the petitioner had the opportunity to present contrary documentary or sworn evidence if it was available.

in Steele v. Indiana, 446 N.E.2d 353,354 (Ind.App. 1983):

The oath given to a jury prior to the commencement of a trial is not a mere formality. *It is intended to impress upon the jury its solemn duty to carefully deliberate on the matter at issue. Most importantly the oath serves as a safeguard of a criminal defendant's fundamental right to a trial by an impartial jury.*

(Emphasis added).

Indeed, the swearing of the jury is much more than a mere formality or tradition. Both the State and Federal Constitutions include Double Jeopardy clauses protecting the rights of the accused. Generally, it is at the swearing and impaneling of the jury when this constitutional protection attaches. Slate v. Baum, 584 S.E.2d 419, 422. (Ct. App. 2003); People v. Pribble, 72 Mich.App. 219, 249 N.W.2d 363 (1976). This critical point was not chosen at random. Rather, it is when the jury is sworn and the trial commences that the defendant's liberty rests with the jury. Downum v. United States, 372 U.S. 734, 738 (1963).

A criminal defendant's constitutional right to trial by an impartial jury commands a juror's impartial frame of mind from the very beginning of the trial, such that the juror's deliberations and ultimate verdict are influenced only by competent evidence and instructions of the trial judge. See People v. Pribble, 72 Mich. App. 219,224-225 (1976) (citing People v. Kaminschke, 3 Mich. App. 236,240-241 (1966).). "[A juror's] duty is not just a final duty to render a verdict in accordance with the law, but [it is] the duty to act in accordance with the law at all stages of trial." Pribble at 224." The oath is administered to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves *at all times*, as befits one holding such an important position. The oath is designed to protect the fundamental right of trial by an *impartial jury*" *Id.* (emphasis added).

A jury's oath is a critical component of an impartial jury, afforded to all criminal defendants by both the State and Federal Constitutions.² Because the jury's oath acts to ensure impartiality on the part of the jurors, the failure to swear a jury cannot be considered a minor procedural error in the trial process. This Court and the United States Supreme Court has held that a structural error in a criminal court is not subject to the harmless error test. Arizona v. Fulminante, 499 U.S. 279, 309-310 (1991); State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). The Supreme Court defined a structural defect or error as one which affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id* at 310. In Fulminante, the Supreme Court was careful to distinguish errors such as the absence of counsel or the presence of an impartial judge, which affect the entire trial, from those such as involuntary statements or confessions, which may be corrected by the harmless error test. *Id*.

In Rivera, this Court held the refusal to allow the defendant to testify was error, and that it could not be harmless error. In Rivera the defendant wished to testify and the judge for paternalistic reasons refused to allow this.

As previously noted above, a jury consisting of jurors who have not been sworn and have not made any affirmation cannot constitute an impartial jury. "We simply cannot know, however, whether a juror might take these civic, legal and moral obligations *less seriously* if he or she were not asked to take an oath." Alston v. State, 934 A.2d 949, 963 (Md. Ct. Spec. App. 2007) (emphasis original). An assessment of the oath's meaning to individual jurors is subjective and difficult to ascertain, making the harmless errors test useless as a remedy. *Id*. A total failure to swear a jury, as here, would require a presumption of prejudice.

² This Court can take judicial notice of the fact that its Court Reporter Manual at p. 29 while discussing parentheticals lists, as an example, "[t]he fact that an event transpired, times relating to jury actions." The PCR court reporter here, Caroline Hiskell, confirmed to the PCR judge that the swearing of the jury and witnesses were noted by the court reporter. App. 321, ll. 7-23.

In Alston, defense counsel notified the court mid-trial that the jury had not been sworn. The trial judge denied a motion for mistrial, but immediately swore the jury with what can only be considered a retroactive oath. Alston at 955.

Ultimately, the Alston court found that the jury's oath was administered early enough, before deliberations and that the judge carefully instructed the jury about its duty to listen to evidence before any evidence was presented. *Id.* at 964 Alston draw a sharp distinction between an unsworn jury and a belatedly sworn jury, holding the harmless error test usefulness was limited to belatedly sworn jury. See also People v. Clouse, 859 P.2d 228,233 (Colo. App. 1992) (holding that a complete failure to swear a jury "cannot be waived in any manner or under any circumstances.") and Grant v. State, 272 Ga. 213, 528 S.E.2d 512 (2000). (holding that failure to administer jury oath requires guilty verdict to be set aside).

Harris v. State, 956 A.2d 204, 212 (Md. 2008) states: "Turning to the matter of harmless error, the appellate courts in other states, almost unanimously, hold that complete failure to swear the jury can never be harmless error." *Id.* at 213. In Harris, the Maryland Court reiterated its view that the jury's oath was an "essential ingredient of a legally constituted jury and an impartial jury and deemed its absence a 'structural error' akin to a defective reasonable doubt instruction." *Id.* at 212-213.

Probably most attorneys trying a case have seen the power that an oath to tell the truth has had on a particular witness about to testify. The oath the jurors take to deliver a true verdict is of equal if not greater consequence.³ Certiorari should be denied in this case since there was ample

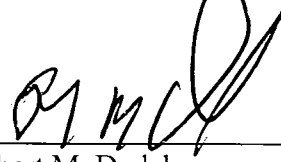
³ As seen, trial counsel testified that respondent had always maintained his innocence in this case, and the Attorney General correctly did not make any accusation of "sandbagging" by trial counsel regarding the jury being sworn since it is apparent there was none.

evidence to support the PCR court's ruling that the total failure to swear the jury in this case required a new trial.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 28th day of July, 2014

STATE OF SOUTH CAROLINA

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Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

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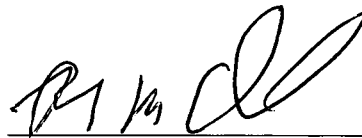
STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-000426

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 28th day of July, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 28th day
of July, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021