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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

DAMON JONES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2014-001291

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether petitioner's case should be remanded for a full hearing on his claim that Juror #86 committed juror misconduct when she failed to reveal during voir dire that she was a victim of a violent crime, which would have led to counsel striking her from the jury?

STATEMENT

Petitioner was convicted of murder after a jury trial held before the Honorable Paul M. Burch on November 29 – 30, 2005, in Spartanburg County. He was sentenced to life imprisonment without parole. Christopher D. Brough, Esquire, was trial counsel. Barry Barnette, Esquire, and Jennifer Jordan, Esquire, were the assistant solicitors. (App. p. 1 – p. 327).

Petitioner appealed his conviction and it was affirmed by the Court of Appeals on July 23, 2008. State v. Jones, Op.No. 2008-UP-424. (App. p. 330 – p. 394). A petition for rehearing was filed and was denied on September 23, 2008. (App. p. 395 – p. 401). A petition for writ of certiorari was filed with the South Carolina Supreme Court and it was granted on December 2, 2009. (App. p. 402 – p. 417). The Court affirmed the decision of the Court of Appeals on August 23, 2010. State v. Jones, Memo. Op.No. 2010-MO-020. (App. p. 459 – p. 461).

Petitioner filed an application for post-conviction relief on December 15, 2011, and an amended application on March 9, 2012. Respondent filed a return dated February 16, 2012. (App. p. 462 – p. 499). An evidentiary hearing was held on June 25 – 26, 2013, before the Honorable R. Lawton McIntosh. Petitioner was present and was represented by C. Reed Teague, Esquire. Respondent was represented by Suzanne H. White, Assistant Attorney General. Petitioner testified at the hearing and he presented the testimony of Sandra McGraw, Ila Simmons, Atiba Keita Long, Mignon Williams, Barry Barnette, Robert Talanges, and trial counsel, Christopher Brough. (App. p. 500 – p. 651). On February 26, 2014, Judge McIntosh issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 724 – p. 742). A motion to alter or amend was filed on March 18, 2014. A memorandum in support of the motion was filed on May

21, 2014. (App. p. 743 – p. 762). A hearing was held on the motion on May 22, 2014. The motion was denied on May 29, 2014. (App. p. 763 – p. 777).

This petition follows.

ARGUMENT

Petitioner's case should be remanded for a full hearing on his claim that Juror #86 committed juror misconduct when she failed to reveal during voir dire that she was a victim of a violent crime, which would have led to counsel striking her from the jury.

During jury voir dire, the prospective jurors were asked, "Anybody on the panel ever been the victim of a violent crime or had a close personal friend or a family member that's been the victim?" (App. p. 25, line 11 – 13). Juror #86 did not respond.

At the PCR evidentiary hearing, an affidavit was submitted from Vaughn Kershner who was on the jury at petitioner's trial. He overheard Juror #86, Sandra McGraw, tell another juror that her former husband had pointed a gun to her head and she knew how that felt. Kershner felt that the comment invited a verdict on an emotional basis. He learned later that Ms. McGraw did not answer the voir dire question about anyone being the victim of a violent crime. (App. p. 652 – p. 653).

An affidavit by Calvin Smith, a private investigator, was introduced into evidence. He interviewed Mr. Kershner and confirmed what Juror #86 had said about a gun being pointed to her head. He said he understood that defense counsel would have struck the juror if he had known she had been the victim of a violent crime. (App. p. 654). He explained that he had spoken to Juror #86 and she denied saying anything about a gun in the jury room, but she admitted her ex-husband had pointed a .357 Magnum at her with a cocked hammer and that she feared for her life. (App. p. 655). In a subsequent affidavit, Investigator Smith said Juror #86 told him she did not mention anything about a gun being pointed at her in the jury room. And her husband said she would not sign an affidavit. (App. p. 657 – p. 658).

At the evidentiary hearing, Juror #86 was called to testify. She was asked during jury voir dire if she recalled a question that said, Have you ever been the victim of a violent crime? She said

she did not recall that. Then she was asked if she recalled stating that her ex-husband at one point placed a .357 Magnum to her head? She said, No. She explained that she did say during deliberations that one time she had to take a gun away from her ex-husband, that he was saying he was gonna kill himself and she talked him into handing it over to her. The PCR judge then found on the basis of that testimony, they were not going to go any further on the subject. He did allow counsel to make a proffer. Counsel went on to proffer basically what was in the affidavits that were mentioned above, along with what their testimony would be. The affidavits were made court exhibits. (App. p. 516, line 1 – p. 523, line 5). Counsel wanted to recall Juror #86 and confront her with her prior statements, but that was not allowed. (App. p. 521, lines 16 – 25). He also objected to not being allowed to have private investigator Smith and Juror Kershner testify. (App. p. 523, lines 11 – 18).

In the order of dismissal, the PCR judge noted that the respondent had objected to any testimony regarding statements allegedly said during jury deliberation based upon Rule 606, SCRE, and hearsay. The PCR judge also ruled any other testimony would be hearsay. (App. p. 737 – p. 738). The PCR judge's findings were in error.

In McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013), the Court held that a claim of juror misconduct should not be summarily dismissed and a full hearing on the issue should be held, “which allows the factual circumstances to be more fully developed.” A “new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) 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.” 401 S.C. at 371 – 372, 737 S.E.2d at 627 – 628.

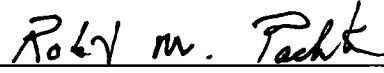
“All criminal defendants have the right to a trial by an impartial jury.” State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001). Intentional concealment by a juror on voir dire prejudiced a defendant’s right to exercise a peremptory challenge. State v. Woods, supra. When extraneous influence is alleged, juror testimony may be used as a basis for impeaching a jury verdict. State v. Hunter, 320 S.C. 85, 463 S.E.2d 314 (1995). Both juror testimony and affidavits are admissible to prove an allegation of extraneous information or influence under Rule 606(b), SCRE. State v. Franklin, 341 S.C. 555, 534 S.E.2d 766 (2000).

The PCR judge should have held a full hearing under McCoy v. State with consideration of all the affidavits and the testimony of the private investigator and Mr. Kershner. It is interesting to note that in the affidavit submitted by the private investigator, Juror #86 did admit to him that her ex-husband had pointed and held a .357 Magnum with the hammer cocked back at her and she feared for her life. She, however, did not remember saying it in the jury room (App. p. 655). But, how else would Mr. Kershner ever know about this incident unless she did say this in the jury room?

CONCLUSION

Petitioner's case should be remanded for a full hearing on the issue of juror misconduct.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2014.

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DAMON JONES,

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of November, 2014.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of November, 2014.

Palal M. Key (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.