

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2014-001291

Damon Jones, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the lower court properly rule on the Petitioner's presentation of testimony regarding an alleged juror misconduct issue, when the juror testified and denied any alleged statements regarding her experience as a victim of a violent crime during an evidentiary hearing?

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Petitioner was indicted at the August 2005 term of the Spartanburg County Grand Jury for murder (2005-GS-42-3371). Christopher D. Brough, Esquire, represented the Petitioner. On November 30, 2005, the Petitioner was convicted of the charge by a jury. The Honorable Paul M. Burch sentenced the Petitioner to confinement for life without parole.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Jones, Op. No. 2008-UP-424 (filed July 23, 2008). A Petition for Rehearing was filed by the Petitioner and denied by the Court on September 23, 2008. The Petitioner then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was granted on December 2, 2009. The South Carolina Supreme Court affirmed the decision of the Court of Appeals. State v. Jones, Memo. Op. No. 2010-MO-020 (filed August 23, 2010). A Petition for Rehearing was filed by the Petitioner and denied by the Court on September 22, 2010. The Remittitur was returned on September 22, 2010.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 15, 2011, and amended application filed March 9, 2012. The Respondent made its Return on or about February 16, 2012. An evidentiary hearing into the matter was convened on June 25, 2013, and concluded on June 26, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by C. Reed Teague, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

Following an evidentiary hearing, the Honorable R. Lawton McIntosh denied the application by written Order dated February 26, 2014. A timely Motion for Reconsideration and Memorandum in Support of the Motion was filed by Petitioner. The State filed a Return to the Motion. A hearing was held on May 22, 2014, and an Order dismissing the Motion for Reconsideration was signed on May 29, 2014. A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **The lower court properly ruled on the Petitioner’s presentation of testimony regarding an alleged juror misconduct issue, when the juror testified and denied any alleged statements regarding her experience as a victim of a violent crime during an evidentiary hearing.**

On December 1, 2005, following a trial by jury, Petitioner was found guilty of murder and sentenced to life without parole. (App. p. 311; p. 326). In an amendment and at the PCR hearing, Petitioner alleged a juror, #86 and later identified as Sandra McGraw, 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. (App. p. 506, lines 22-24; p. 507). Petitioner based this allegation on a letter trial counsel received from a juror in the case, Mr. Richard Kershner, following the verdict along with Mr. Kershner’s subsequent affidavit and the affidavits of Investigator Skip Smith. Petitioner now alleges that the PCR court erred in denying this claim without a full evidentiary hearing and asks this Court to remand the matter to the circuit court for a hearing on the juror misconduct allegation.

This Court held that “evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing.” McCoy v. State, 401 S.C. 363,

371-72, 737 S.E.2d 623, 628 (2013). As noted, a hearing “allows the factual circumstances to be more fully developed.” Id.

Respondent submits that an evidentiary hearing on the allegation of juror misconduct was held during the full evidentiary hearing for Petitioner’s post-conviction relief application; however, following the Petitioner’s presentation of testimony, the lower court properly denied the claim of juror misconduct. (App. p. 738). The lower court took testimony initially from Ms. Sandra McGraw, juror #86 from Petitioner’s trial. Ms. McGraw testified that she recalled serving as a juror in 2005 at Petitioner’s trial. (App. p. 516). McGraw testified that she did not specifically recall a question during voir dire regarding if someone had been the victim of a violent crime. (App. p. 517-18). McGraw denied ever stating during deliberations that her ex-husband or husband at one point placed a .357 Magnum to her head. (App. p. 518, lines 6-9). However, McGraw did testify that she recalled statements she made regarding her ex-husband and a .357 Magnum. (App. p. 518). McGraw testified that she informed the other jurors that she had at one time been afraid of guns because she had to take a gun away from her ex-husband when he was threatening to kill himself. (App. p. 518, lines 17-25; p. 519, line 1).

Respondent objected to the presentation of any testimony or evidence regarding statements allegedly said by jurors during jury deliberations based upon Rule 606, SCRE. (App. p. 510-511). Specifically, based upon the well-established rule that a juror may not testify, nor may a juror affidavit be admitted as evidence, as to “any matter or statement occurring during the course of the jury’s deliberations . . . except . . . whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.” 606(b), SCRE.

Following McGraw's testimony and Petitioner's objection to not being allowed to present additional testimony or evidence, the lower court properly found that the letter from Mr. Kershner and affidavit were inadmissible and did not allow testimony from either Kershner or Smith. (App. p. 522, lines 9-10; p. 523, lines 12-15). Petitioner was allowed to proffer the affidavits of Investigator Skip Smith and Richard Kershner, the juror who allegedly overheard the remark about the .357 being held to McGraw's head. (App. p. 522-524). Additionally, in the Order of Dismissal, the lower court found McGraw's testimony credible and found the Petitioner failed to meet his burden of proof as to the allegation. (App. p. 738).

Provided a claim of juror misconduct is timely raised, "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 challenge." McCoy at S.C. 371, S.E.2d 627. Not only was a hearing on this issue held for Petitioner, but Petitioner failed to meet his burden of proof. There was no admissible testimony or evidence to support the allegation that Ms. McGraw intentionally concealed information which would have supported a challenge for cause.

Analogous to this case is the ruling from the South Carolina Court of Appeals in Lynch v. Carolina Self Storage Centers, Inc., 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014). In Lynch, the Court of Appeals affirmed the lower court's decision to deny a post-trial motion for new trial based upon an allegation of juror misconduct when the only evidence in support of the allegation was an affidavit which "did not 'give rise to allegations of external misconduct' because it did not allege the jury received evidence or influence from outside sources." Lynch at S.C. 158, S.E.2d 118. In fact, The Court of Appeals held that in order for a hearing on the allegation of juror misconduct to be held, "[t]he party contending that misconduct occurred must make a

threshold showing that there was in fact an improper outside influence or extraneous prejudicial information.” Id. Just as the lower court found in Petitioner’s case, the Court of Appeals affirmed the court’s finding that another juror’s affidavit was inadmissible under Rule 606(b), and because Lynch presented no other evidence of juror misconduct during deliberations and therefore, no further inquiry was needed. Id.; See also State v. Franklin, 341 S.C. 555, 562, 534 S.E.2d 716, 720 (Ct.App.2000) (stating “the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process”).

There is probative evidence to support the lower court’s ruling and this denial of post-conviction relief should be affirmed and the case should not be remanded to the circuit court for additional hearings.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court’s ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
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By: 
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April 2, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2014-001291

DAMON JONES,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Robert M. Pachak, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 2nd day of April, 2015



ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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APR 2 2015

April 2, 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Damon Jones v. State of South Carolina
Lower Court Case No: 2010-CP-42-6623
Appellate Case No.: 2014-001291

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Suzanne H. White
Assistant Deputy Attorney General
SC Bar No. 78225

SHW/ah
Enclosures

cc: Robert M. Pachak, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)