

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2015-UP-536 (S.C. Ct. App. filed 11/25/15)

06-CP-38-0585

VONDELL SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212070

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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 ORIGINAL

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SC SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that a petition for rehearing was filed in the case on December 10, 2015, but denied by the Court of Appeals on January 21, 2016.

QUESTION PRESENTED

The Court of Appeals erred in upholding the PCR judge's ruling that a scrivener's error made by the court reporter while transcribing the polling of the jury explained why only eleven members of the jury responded to being polled because to the contrary, the trial transcript revealed clearly that the twelfth juror was missing during the polling **and** the PCR transcript revealed clearly the identity of the missing twelfth juror, who testified during the PCR hearing that she departed before voting on the charges and did not believe petitioner was guilty, as proof that a twelve member jury did not hand down guilty verdicts in the case.

STATEMENT OF THE CASE

Petitioner Vondell Sanders was convicted of possession with intent to distribute crack cocaine and possession with intent to distribute crack cocaine within proximity of a school or park during a jury trial held at the April 2004 term of the Orangeburg County General Sessions Court before Judge John L. Breeden.¹ Petitioner was sentenced to imprisonment for an aggregate period of nineteen years. Sam Kramer and Peggy Hinds represented petitioner at trial, and Assistant Solicitor Kent Collins appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed on appeal. See State v. Sanders, Op. No. 2006-UP-171 (S.C. Ct. App. filed March 22, 2006). Eleanor Duffy Cleary represented petitioner on direct appeal. App. 549-559.

On May 22, 2006, petitioner filed a PCR application with the Orangeburg County Office of the Clerk of Court. App. 560-568. The respondent filed a return dated February 2, 2007, requesting that a hearing be held in response to petitioner's PCR action. Tr. 569-575.

PCR hearings were held on September 7, 2010, and September 21, 2011, at the Orangeburg County Courthouse before Judge Diane S. Goodstein. Petitioner was present and represented by Mathias Chaplin at both hearings, and Assistant Attorney General Mary Williams appeared on behalf of the state. App. 576-629; App. 631-680. On March 8, 2012, Judge Goodstein issued an Order of Dismissal denying petitioner's PCR claims. App. 682-699.

Petitioner appealed Judge Goodstein's Order of Dismissal and filed a petition for writ of certiorari dated November 14, 2012. The respondent filed a return dated January 31, 2013. On December 16, 2014, this Court granted the petition for writ of certiorari filed on petitioner's behalf. A brief of petitioner was filed on January 15, 2015, and a brief of respondent was filed on March

¹ Petitioner was acquitted on the two marijuana charges for which he was also on trial.

19, 2015. On November 25, 2015, the Court of Appeals affirmed the PCR judge's Order of Dismissal denying PCR relief to petitioner on the juror issues raised on appeal. See Vondell Sanders v. State, Unpublished Opinion No. 2015- UP – 536 (filed November 25, 2015). Second Supp. App. 1-2. Petitioner filed a petition for rehearing dated December 10, 2015, which was denied by the Court of Appeals on January 21, 2016. Second Supp. App. 4-11. This petition for writ of certiorari requesting review of the Court of Appeals' decision in petitioner's PCR appeal follows.

ARGUMENT

The Court of Appeals erred in upholding the PCR judge's ruling that a scrivener's error made by the court reporter while transcribing the polling of the jury explained why only eleven members of the jury responded to being polled because to the contrary, the trial transcript revealed clearly that the twelfth juror was missing from the polling and the PCR transcript revealed clearly the identity of the missing twelfth juror, who testified during the PCR hearing that she departed before voting on the charges and did not believe petitioner was guilty, as proof that a twelve-member jury did not hand down guilty verdicts in the case..

At trial, Police Officers Lyn Shirer, Tigh Haigler, Joseph Avinger, and Antonio Powell testified that they all participated in the execution of a search warrant at petitioner's trailer on October 17, 2003, and that crack cocaine and marijuana were found inside the trailer. Petitioner and girlfriend Sylvia Wright were inside the trailer during the search. App. 176, l. 1-p. 187, l. 8; App. 217; l. 1-p. 226, l. 6; App. 240, l. 1-p. 249, l. 23; App. 268, l. 1-270, l. 14. Petitioner was arrested shortly after the search. Thereafter, according to Officer Powell's account, petitioner confessed that the crack cocaine belonged to him and that he obtained the crack cocaine from "a guy named Mark Johnson the Friday before." App. 269, lines 19-25.

Petitioner testified in his defense at trial. Petitioner explained that the drugs found inside the trailer did not belong to him, and that he did not confess to ownership of the drugs. Petitioner added that his sister lived with him and that his girlfriend Sylvia Wright frequently stayed overnights there. App. 429, l. 1-p. 431, l. 20; App. 439, l. 3-11. Petitioner's sister Sharon Sanders testified on behalf of the defense and admitted that the crack cocaine found inside the trailer belonged to her and that the marijuana belonged to Sylvia Wright. App. 348, l. 1-p. 352, l. 21. Sylvia Wright testified and admitted that the marijuana found inside the trailer belonged to her.² App. 400, l. 1-p. 407, l. 24.

During the PCR hearing, petitioner testified in effect that trial counsels were ineffective in failing to object to the fact that only eleven jurors returned verdicts in the case. App. 602, lines 9-14. Petitioner stated that he asked about the missing juror after the jury was polled, but that counsels advised that the issue would be covered on direct appeal. App. 604, l. 3-p. 605, l. 15.

Counsel Peggy Hinds testified at the PCR hearing and explained that she had no recollection of a jury of less than twelve people returning verdicts in the case. Counsel Hinds admitted that there were no objections made regarding the jury or its verdicts submitted in the case. App. 608, l. 20-p. 609, l. 13; App. 611, l. 22-p. 615, l. 21. Additionally, trial counsel Sam Kramer, who was unable to appear at the PCR hearings, submitted an affidavit declaring that none of the twelve jurors was missing at trial. See Supp App. 1-2.

Indeed, however, the trial transcript revealed that only eleven jurors responded to the polling and that one juror was missing at the polling.³ After ten jurors responded to the polling, the

² Petitioner was acquitted on the two marijuana charges for which he was on trial also.

³ Russell Davis, Tanya Neals, Steven Kizer, Timothy Wolfe, Keenth Garvin, Chris Furtick, Janice Generts; Lenell Void, Lasalle Jacques, BarbaraSifly, and Emma Perkins. App. 484, l. 1-p. 485, l. 14.

trial judge asked apparently missing juror number eleven about her vote, but juror number eleven never responded. Then, the trial judge went on to ask the next juror, who was juror Perkins, about her vote. After juror Perkins responded as juror number eleven, the polling was closed. The polling colloquy follows:

Clerk: Mr. Proveaux, (number eleven) was this your verdict, and is it still your verdict?

Bailiff: We don't have a Proveaux.

The Court: Who has not been polled? Is there any member of the jury panel who has not been polled?

Clerk: Emma Perkins. Was this your verdict and is it still your verdict?

Juror: Perkins: Yes Ma'am.

The Court: All of the jurors have been polled...all indicated that it was..and... still their verdict. App. 485, lines 7-20.

Note that in reality, Mr. "Proveaux" was in actuality Ms. Prioleau.

During the PRC hearing, Ms. Prioleau, who appeared to have been the missing eleventh juror, testified in response to this issue. Prioleau testified that she remembers serving on the jury in this case, but that her vote was a "not guilty" vote, and that she informed the judge of her "not guilty" vote. App. 644, l. 4-p. 645, l. 22; App. 656, l. 7-p. 659, l. 23. It was not clear when Ms. Prioleau informed the judge of her "not guilty" vote.

Petitioner's PCR counsel argued that only eleven people responded during the polling and that Ms. Prioleau voted "not guilty." App. 665, lines 21-24.

The PCR judge conceded that the record indicated that only eleven jurors responded to the jury poll conducted at the end of the case, but found that the missing juror was Ms. Prioleau. App. 690. The PCR judge found further that counsels did not err in failing to object to "a less than

unanimous, twelve member jury” because Prioleau was not absent from the polling. The PCR judge went on to rule that the trial transcript simply contained a “scrivener’s error” and that “the transcript [did] not provide a complete and accurate reflection of the actual number or nature of the responses given to [the circuit court judge] during [the] jury polling.” App. 693-694. Moreover, the PCR judge found believable counsel’s testimony that “had a juror been missing during any portion of the trial, [then any number of officers of the court] would have brought such an obvious defect to the Court’s attention.” App. 694. Additionally, the PCR judge found that petitioner did not overcome his burden of proving that the verdicts were not unanimous because Prioleau was confused about her “not guilty” votes as those “not guilty” votes were probably cast for the marijuana charges for which petitioner was acquitted.⁴ App. 696-697. The PCR court concluded that some of the officers of the court would have spoken had Ms. Prioleau given a “not guilty” answer rather than a “yes” answer at polling. App. 696-698.

Undoubtedly, the trial transcript revealed that only eleven jurors responded to the jury polling because apparently one juror was missing at the polling.⁵ After ten jurors responded to the polling, the trial judge asked missing juror number eleven about her vote, but juror number eleven never responded. Then, the trial judge went on to ask the next juror, who was juror Perkins, about her vote. After juror Perkins responded, the polling was closed. The polling colloquy follows:

Clerk: Mr. Proveaux, (number eleven) was this your verdict,
and is it still your verdict?

Bailiff: We don’t have a Proveaux.

⁴ Petitioner was acquitted on the two marijuana charges for which he was on trial also..

⁵ Only Russell Davis, Tanya Neals, Steven Kizer, Timothy Wolfe, Keenth Garvin, Chris Furtick, Janice Generts; Lenell Void, Lasalle Jacques, Barbara Sifly, and Emma Perkins answered during the jury polling. App. 484, l. 1-p. 485, l. 14.

The Court: Who has not been polled? Is there any member of the jury panel who has not been polled?

Clerk: Emma Perkins. Was this your verdict and is it still your verdict?

Juror: Perkins: Yes Ma'am.

The Court: All of the jurors have been polled...all indicated that it was...and... still their verdict. App. 485, lines 7-20.

Note that in reality, Mr. "Proveaux" was in actuality Ms. Prioleau.

At the PCR hearing, petitioner's PCR counsel argued that only eleven people responded during the jury polling. App 665, lines 21-24. It was noted that after the verdicts were issued in this case, defense counsel asked that the jury be polled and the trial judge proceeded with polling. App. 483, l. 23-p. 484, l. The transcript of the polling showed that ten jurors verified their verdict. Then, the trial judge heard no response from the next juror allegedly named "Proveaux" who was the next after juror number ten (Barbara Sifly). Then, after receiving no response from the juror whose name appeared next on the list, i.e. "Proveaux," the trial judge asked if there was a member of the jury panel who had not responded to the poll. Thereafter, Emma Perkins, who according to the transcript was juror number eleven, responded in the affirmative that her verdict was a "yes" verdict. App. 485, l. 7-15. After Perkins responded, the trial judge conceded that "[there] was the one person who didn't show," i.e., "Proveaux," and then proceeded to conclude that "all of the jurors [had] been polled." App. 485, l. 16-20. Petitioner argued, however, that the trial transcript clearly and unequivocally showed that only eleven jurors were polled. This meant that petitioner's verdicts were issued by an eleven-member jury panel rather than a twelve-member jury panel.

The eleven-member jury verdicts issue was raised on petitioner's PCR appeal as well. The Court of Appeals decided the eleven-member jury PCR appeal issue by upholding the PCR

judge's finding⁶ that the transcript, which clearly revealed that only eleven jurors were seated and polled, contained a scrivener's error and went on to hold in effect that there was a presumption that twelve jury members sat, voted, and submitted verdicts in the case. To the contrary, however, the PCR hearing record refuted the Court of Appeals' holding regarding the matter (and the PCR Judge's ruling) in the case because Mrs. Prioleau testified and explained at the PCR hearing that she was dismissed from the case by the judge. Mrs. Prioleau stated that the judge told her she was excused when she explained that she did not have anyone to look after her grandbaby and had to leave. App. 644. lines 4-9; App.650, lines 2-8. Hence, Mrs. Prioleau's absence resulted in the seating of an eleven member jury that decided petitioner's case.

The Court of Appeals adopted the PCR judge's conclusion that since neither trial counsels nor other officers of the court noticed any improper number of jurors present on the jury panel in this case, then it was unlikely that the instant jury panel was comprised of eleven members. Again, this conclusion was in direct contravention of what the trial transcript reflected, i.e., that an eleven-member jury was polled and that no twelve-member jury panel sat during petitioner's trial. The fact that counsels missed this issue did not mean that the eleven-member jury panel did not exist, but rather proof that human frailties abound.

⁶ The PCR judge found further that counsels did not err in failing to object to "a less than unanimous, twelve member jury" because Prioleau was not absent from the polling. The PCR judge went on to rule that the trial transcript simply contained a "scrivener's error" and that "the transcript [did] not provide a complete and accurate reflection of the actual number or nature of the responses given to [the circuit court judge] during [the] jury polling." App. 693-694. Moreover, the PCR judge found believable counsel's testimony that "had a juror been missing during any portion of the trial, [then any number of officers of the court] would have brought such an obvious defect to the Court's attention." App. 694. Additionally, the PCR judge found that petitioner did not overcome his burden of proving that the verdicts were not unanimous because Prioleau was confused about her "not guilty" votes as those "not guilty" votes were probably cast for the marijuana charges for which petitioner was acquitted.⁶ App. 696-697. The PCR court concluded that some of the officers

The Court of Appeals' opinion read as follows:

As to whether or not the testimony of the purported missing juror indicated a non-unanimous jury verdict: State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) (holding an issue that is not ruled upon by the trial court is procedurally barred from being appealed); Palacio v. State, 333 S.C. 506, 514 n.7, 511 S.E.2d 62, 66 n.7 (1999) (stating if a PCR court did not rule on an issue, it is not preserved for appellate review); Sheppard v. State, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (holding when a ruling goes unchallenged, right or wrong, it becomes the law of the case.)

An eleven-member jury is acceptable only if the defendant agrees to waive his right to be tried by a twelve-member jury panel. United States v. Longwell, 2011 WL 327310 (CA 4th W.Va), State v. Shuch, 278 S.C. 441, 298 S.E. 2d 95 (1985). The record in this case reflected no such agreement entered into by petitioner. In the case at bar, counsels erred in failing to object to jury verdicts issued by a jury panel composed of less than twelve members and in failing to move for a mistrial as a result.

In the alternate, if juror Prioleau, whom the trial judge referred to as "Proveau," was seated on the jury, then there was still a problem with the verdicts issued against petitioner because according to Prioleau's PCR testimony, she claimed that her vote was "not guilty" in the case. Hence, the issue of non-unanimous jury verdicts emanated in the case. App. 676, l. 20.

PCR counsel argued that Ms. Prioleau voted "not guilty." App. 665, lines 21-24. A trial judge may poll the jury to ensure that the jury verdict is unanimous. Green v. State, 351 SC 184, 569 S.E. 2d 318 (2002). In his PCR appeal, petitioner presented the question of the non-unanimous jury verdicts issued in his case.

of the court would have spoken had Ms. Prioleau given a "not guilty" answer rather than a "yes" answer at polling. App. 696-698.

A contemporaneous objection is required to preserve issues for appellate review. State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (2005). Regarding whether the issue was raised at PCR, note that PCR counsel raised this issue at App. 676, l. 20. The violation of the unanimous verdict right is a gross miscarriage of justice. Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990). The United States Supreme Court has held that the unanimous verdict law is more accurately characterized as due process and equal protection rights per the Fourteenth Amendment. See Johnson v. Louisiana, 406 U.S. 356 (1972); Opodaca v. Oregon, 406 U.S. 404 (1972); and Schad v. Arizona, 501 U.S. 624 (1991). Trial counsels' failure to object to the non-unanimous jury verdicts constituted ineffective assistance of counsel. Additionally, as a rule, non-unanimous verdicts constitute a manifest necessity for the declaration of a mistrial. State v. Robinson, 360 S.C. 187, 600 S.E. 2d 100 (2005). Thus, the non-unanimous jury verdicts handed down in this case must not stand. During the PRC hearing, Ms. Prioleau, who appeared to have been the missing eleventh juror, testified in response to this issue. Prioleau testified that she remembers serving on the jury in this case, but that her vote was a "not guilty" vote, and that she informed the judge of her "not guilty" vote. App. 644, l. 4-p. 645, l. 22; App. 656, l. 7-p. 659, l. 23. It was not clear when Ms. Prioleau informed the judge of her "not guilty" vote.

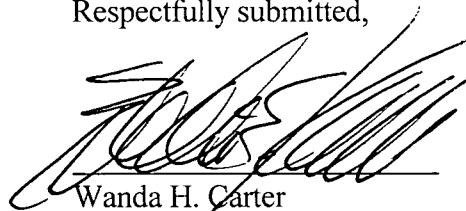
The Sixth Amendment guarantees effective assistance of counsel in criminal cases. See Strickland v. Washington, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of counsel, there must be proof that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defendant's case. Strickland v. Washington, *supra*. To establish prejudice, the defendant is required to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. In the case at bar, counsels' failure to recognize the jury violations that

occurred in the case constituted ineffective legal assistance in violation of the Sixth Amendment; and the same prejudiced him because but for counsels' error, petitioner's jury verdicts would have been vacated as unconstitutional.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

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VONDELL SANDERS,

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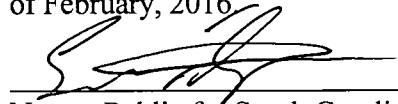
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the second supplemental appendix, in this case has been served on Clay Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Vondell Sanders #241308, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, and the S.C. Court of Appeals this 22nd day of February, 2016.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of February, 2016.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022