

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

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SC SUPREME COURT

VONDELL SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212070

SECOND SUPPLEMENTAL APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Vondell Sanders, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212070

Appeal From Orangeburg County
John L. Breeden Jr., Trial Court Judge
Diane Schafer Goodstein, Post-Conviction Relief Judge

Unpublished Opinion No. 2015-UP-536
Heard October 13, 2015 – Filed November 25, 2015

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant
Attorney General Megan Harrigan Jameson, and
Assistant Attorney General James Clayton Mitchell III,
all of Columbia, for Respondent.

PER CURIAM: In this post-conviction relief (PCR) action, Vondell Sanders contends the PCR court erred in finding both of his trial counsels effective despite their failure to move for a mistrial when the trial transcript reflects responses from only eleven jurors during polling. Sanders also argues that even if the missing juror was present during polling, the PCR hearing testimony shows the verdicts were not unanimous because one juror testified she voted "not guilty." We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the PCR court erred in ruling the missing response during jury polling was an error in the transcript rather than a verdict from an eleven-member jury: *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding in order to prove ineffective assistance of counsel, petitioner must show both that counsel rendered deficient performance and this departure resulted in prejudice); *id.* at 690 (stating reviewing courts presume counsel was effective); *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) ("No prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt."); *Anderson v. State*, 338 S.C. 629, 633, 527 S.E.2d 398, 400 (Ct. App. 2000) ("[T]he regularity of proceedings in a court of general jurisdiction 'will be assumed' absent evidence to the contrary." (quoting *Pringle v. State*, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986))); *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (stating an appellate court gives a great amount of deference to the PCR court's findings of fact and conclusions of law); *Lee v. State*, 396 S.C. 314, 320, 721 S.E.2d 442, 446 (Ct. App. 2011) ("Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal."); *id.* at 319, 721 S.E.2d at 445 (stating when considering matters of credibility, this court should "give deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses").

2. As 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).

AFFIRMED.

FEW, C.J., and KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

VONDELL SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212070

Appeal from Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2015-UP-536

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, petitioner’s counsel would petition for rehearing with respect to this Court’s holding that there was sufficient evidence of probative value to uphold the PCR judge’s ruling that the jury polling results from the transcript revealing that an eleven-member jury submitted the guilty verdicts reflected a scrivener’s error when the PCR record clearly refuted such a finding; and furthermore, counsel would petition for rehearing in reference to this Court’s holding that the non-unanimous jury verdicts issue in the case was an unpreserved issue and thus not reviewable when counsel’s failure to address this issue at trial was precisely the ground presented in support of petitioner’s ineffective assistance of counsel claim in that matter.

1.) Undoubtedly, the trial transcript revealed that only eleven jurors responded to the jury polling because apparently one juror was missing at the polling.¹ 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.

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.

2.) 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 (Babara Sifly). Then, after receiving no response from the juror

¹ 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.

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.

3.) The eleven-member jury verdicts issue was raised on petitioner's PCR appeal as well. This Court decided the eleven-member jury PCR appeal issue by upholding the PCR judge's finding² 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 this Court's 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

² 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.² 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.

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.

4.) Also, this Court 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.

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.

5.) 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. Ap. 676, l. 20.

6.) 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.

7.) This Court responded on appeal to petitioner's non-unanimous jury verdicts issue raised in his PCR appeal 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.)

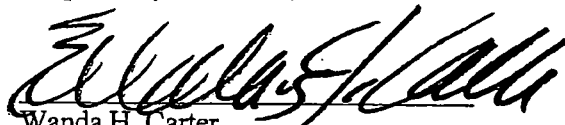
8.) A contemporaneous objection is required to preserve issues for appellate review. State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (2005). Regarding whether the issue was raised at PCR, note that PCR counsel raised this issue at App. 676, l. 20. The violation of the unanimous verdict right is a gross 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.

10.) 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, counsel’s 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 counsel’s error, petitioner’s jury verdicts would have been vacated as unconstitutional.

WHEREFORE, based on the foregoing points, counsel for petitioner would request a rehearing with respect to this Court’s affirmance of this PCR appeal.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 10th day of December, 2015.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

VONDELL SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon 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, this 10th day of December, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 10th day
of December, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The South Carolina Court of Appeals

Vondell Sanders, Petitioner,


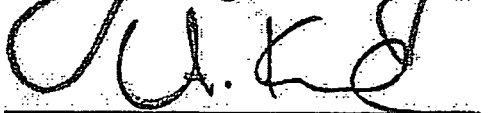
v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212070

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.

 J.

Columbia, South Carolina

cc:
Wanda H. Carter, Esquire
James Clayton Mitchell, III, Esquire
Alan McCrory Wilson, Esquire
Megan Harrigan Jameson, Esquire

FILED

January 21, 2016