

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

VONDELL SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212070

BRIEF OF PETITIONER.

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ISSUE PRESENTED

Trial counsels erred in failing to recognize that petitioner's jury verdicts were unconstitutional because the record revealed that one juror was missing at polling and one juror stated adamantly that she voted "not guilty" in the case.

STATEMENT

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. This brief of petitioner follows.

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

ARGUMENT

Trial counsels erred in failing to recognize that petitioner's verdicts were unconstitutional because the record revealed that one juror was missing at polling and one juror stated her vote was "not guilty" 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-

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

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 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.

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

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.

A.) DENIAL OF RIGHT TO A TWELVE-MEMBER JURY

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. During the polling, 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 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. However, 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.

A trial judge polls the jury to ensure that the jury verdict is unanimous. Green v. State, 351 SC 184, 569 S.E. 2d 318 (2002). 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. Clearly, this conclusion was in direct contravention of what the trial transcript reflected, i.e., that an eleven-member jury was polled and that the record revealed that no twelve-member jury panel sat during

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

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.

B.) DENIAL OF RIGHT TO A UNANIMOUS VERDICT

In the alternate, if juror Prioleau, whom the trial judge referred to as "Proveau," was the missing juror indeed, 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 problem of non-unanimous jury verdicts would become ripe for adjudication. 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. The PCR judge's rationale that Prioleau's "not guilty" vote referred to the marijuana charges for which petitioner was tried and acquitted constituted mere speculation and lacked any basis in fact or from the record.

C. SUMMARY

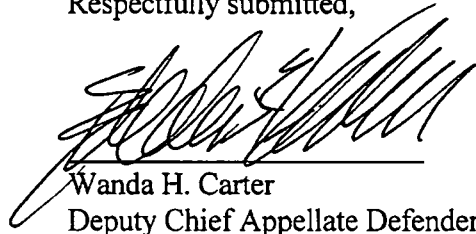
The Sixth Amendment guarantees effective assistance of counsel in criminal cases. See Strickland v. Washington, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of counsel, there must be proof that counsel's performance fell below on objective standard of reasonableness, and that counsel's 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 and the same prejudiced him because his jury verdicts should have been vacated as unconstitutional.

CONCLUSION

Based on the foregoing argument, petitioner requests that his convictions and sentences be reversed and his case remanded to the lower court for a new proceeding.

Respectfully submitted,

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

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 15th day of January, 2015

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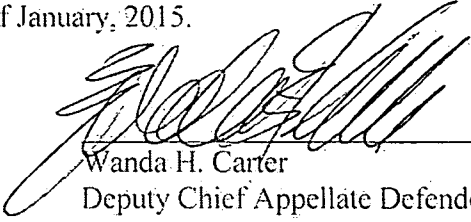
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Megan Harrigan, 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 15th day of January, 2015.

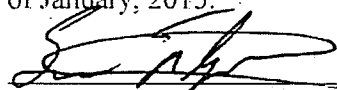


Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of January, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022