

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

v.

DEMETRICE ROOSEVELT JAMES,

PETITIONER

RECEIVED

JAN 24 2017

SC Court of Appeals

APPELLATE CASE NO. 2014-002125

Appeal from Richland County
Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2017-UP-028

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Demetrice Roosevelt James petitions the Court for rehearing. Counsel respectfully submits that the Court overlooked the fact that Petitioner was prevented from demonstrating prejudice stemming from the premature jury deliberations by the trial judge's refusal to question the jurors about the nature of the premature deliberations.

There is no question in the present case that the jury engaged in premature deliberations. A bailiff informed the judge that the jurors "were discussing the two prisoners that came in." (R. p. 400, lines 11 – 12). The bailiff, however, "couldn't hear the rest of the discussion." (R. p. 400,

lines 15 – 17). When questioned by the judge, the foreman of the jury admitted, “We’re discussing the testimony that we’ve heard so far.” (R. p. 402, lines 5-6).

Prior to the judge questioning the bailiff and the jury foreman, counsel for Petitioner asked, “And, Your Honor, are you going to ask the nature of the conversation?” (R. p. 397, lines 6-7). The judge answered, “I’m going to ask what was heard, and I’m not going to go into great detail. Well, I will get the foreman in and get him to give us some idea of what the conversation was. As I understand it from the bailiff, it had to do with the fact – well, I better not speculate. But I’ll find out from the foreman what was the nature. But as to my questioning, do you have any comments?” (R. p. 397, lines 8-14). Petitioner then moved for a mistrial. (R. p. 397, line 19 – p. 398, lines 1-14). The judge took the mistrial motion based on premature jury deliberations under advisement. (R. p. 399, line 18 – 25).

After the jury foreman admitted that the jury had engaged in premature deliberations by discussing the testimony, the judge asked the foreman if he could still be impartial. (R. p. 402, lines 10-25). The foreman, not surprisingly, answered, “Yes. I think we can be impartial or I can; yes, sir.” (R. p. 402, lines 19-20). The judge did not ask any further questions in regard to the nature of the improper discussions by the jury. Before the judge questioned the other jurors about their ability to remain impartial, Petitioner asked:

If we could, before the next juror comes in. If I may, based on what Mr. Crowell said that they’ve been discussing the testimony that they’ve heard up to this point, would Your Honor be willing to ask them what they were talking about? Because there’s been a lot of testimony from a lot of different people.

(R. p. 403, line 21 – p. 404, line 1). The judge refused to ask the jurors what testimony in particular they had been discussing. The judge stated:

Well, we could be here ‘til 12 – no, I’m not going to ask that. We have 13 people and two , three days almost of testimony, two full days. If they’ve been discussing

it, we can assume they've discussed a little bit of all of it, and from my perspective I'm treating it as though they've been discussing everything. So – and I think if we bring them in and ask each one what they've been discussing, we'll be here 'til midnight tonight.

(R. p. 404, lines 2-9). The judge then noted, "So – but you're on the record as to that." (R. p. 404, line 11). The judge then questioned the remaining jurors about their ability to remain impartial. (R. pp. 404-416). The judge did not ask about the nature of the prior discussions.

After the judge questioned all of the jurors, Petitioner again moved for a mistrial. (R. p. 416, line 23 – p. 417, lines 1-20). The judge denied the mistrial motion stating, "I deny the motion. I find that there's not any manifest necessity. I don't believe – the case law, the Aldret case, says it is up to the party alleging premature deliberations to establish prejudice. We're not alleging premature deliberation; we know there was premature deliberation. But I think the prejudice factor is still one that the Court must consider and the courts have set forth the procedure and – to voir dire the jurors, as I have, and it says, 'If practicable, tailor a cautionary instruction to correct the ascertained damage.'" (R. p. 417, line 23 – p. 418, lines 1-7).

Counsel for Petitioner responded, "Just without further information about what they were discussing, especially with Mr. – with the bailiff indicating that specifically what he heard was the two prisoners, that they were discussing that testimony in particular which were basically the two factual witnesses that have come in against my client, I believe the concern is without more information that I can only assume that they've formed opinions at this point." (R. p. 419, lines 5-12). Counsel for Petitioner further stated, "Just very briefly, Your Honor, just for record purposes, of course, that I would like to put on the record that we've asked Your Honor to further inquire exactly what the discussions were and I know that Your Honor said that you just assumed that it was everything. I just would like to put on the record that you denied that we inquire further on that issue specifically." (R. p. 422, lines 6-12). The trial judge erred in refusing to question the jurors

about what they discussed during the premature deliberations. The trial judge's error prevented Petitioner from establishing prejudice.

The trial judge and this Court both correctly state that the party moving for a mistrial based on premature deliberations must demonstrate prejudice as a result of the premature deliberations in order to be entitled to a new trial. See State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999). In the present case, Petitioner moved for the mistrial based on the premature deliberations and was required to demonstrate prejudice in order to be entitled to a new trial.¹ In order to demonstrate prejudice, Petitioner needed to know the nature of the premature deliberations and what the jury discussed. In refusing to question the jurors about what they discussed, the trial judge prevented Petitioner from establishing prejudice. The general questioning of the jury about their ability to remain impartial was insufficient without knowing what the discussions were about.

In United States v. Resko, 3 F.3d 684, 694 (3d Cir. 1993), a case very similar to the present case with regard to premature jury deliberations, the Third Circuit Court of Appeals wrote:


Although ordinarily a defendant must establish prejudice before a new trial will be ordered, in the circumstances here, in which there is unequivocal proof of jury misconduct discovered mid-trial coupled with a failure by the district court to evaluate the nature of the jury misconduct or the existence of prejudice, we conclude that a new trial is warranted. Given the importance of the Sixth Amendment rights at stake and the relative ease with which the district court here could have properly assessed the impact of the jury misconduct, it would be unfair to penalize the defendants for the lack of evidence of prejudice. We are thus willing, in these limited circumstances, to carve out an exception to the rule that a defendant must demonstrate prejudice before a new trial is warranted.

There is unequivocal proof of jury misconduct in the present case in the form of premature deliberations. The judge failed to evaluate the nature of the jury misconduct as

¹ The judge seemed to indicate that if the State moved for a mistrial, that the motion would be granted. (R. p. 421, lines 2-7).

requested by counsel for Petitioner. The judge could not have evaluated the existence of prejudice without knowing the nature of the jury's discussions. Under these limited circumstances, as in Resko, Petitioner is entitled to a new trial. Based on this argument, Petitioner seeks rehearing, reversal of the trial judge's denial of the mistrial motion and a remand for a new trial.

Respectfully Submitted,



KATHRINE H. HUDGINS
Appellate Defender

This 24th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Demetrice R. James, #361608, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 24th day of January, 2017.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day of
January, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026

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