STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Honorable D. Craig Brown, Circuit Court Judge

FARON M. CLEMENTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002178

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

1.

Whether the PCR judge erred when he found that trial counsel was not ineffective for stipulating to deliberation by eleven jurors when there is no record Petitioner consented to the stipulation, particularly where the defense was unable to secure the presence of a key witness thereby making a mistrial all the more necessary?

2.

Whether the PCR judge erred when he applied the Strickland test to the structural error made by trial counsel when she stipulated to deliberation by eleven jurors without conferring with Petitioner?

STATEMENT

On October 9, 2014, a Williamsburg County grand jury indicted Petitioner for two counts of second degree criminal sexual conduct with a minor. App. 1. His trial was held on October 13, 2014 before the Honorable Clifton B. Newman and a jury. Kimberly V. Barr represented the state and M. Amanda Shuler represented Petitioner. App. 1. An eleven person jury found Petitioner guilty as charged. App. 224, ll. 21 – 23. Judge Newman sentenced Petitioner to eleven years' imprisonment on each count. App. 266, l. 25 – 267, l. 1.

Petitioner filed a post-conviction relief (PCR) application on June 20, 2016 alleging, ineffective assistance of trial counsel because "counsel without explaining to me what stipulate with eleven jurors meant, she chose to go forward." App. 270 – 276.

On March 31, 2017, before the Honorable D. Craig Brown, Petitioner's PCR hearing was held. App. 285. Lance S. Boozer represented Petitioner and Julie A. Coleman represented the state. Id. On June 21, 2017, Judge Brown dismissed Petitioner's PCR application with prejudice. App. 336 – 345. This petition follows.

ARGUMENT

1.

The PCR judge erred when he found that trial counsel was not ineffective for stipulating to deliberation by eleven jurors when there is no record Petitioner consented to the stipulation, particularly where the defense was unable to secure the presence of a key witness thereby making a mistrial all the more necessary.

Relevant Facts

On May 30, 2013, when she was thirteen years old, Complainant ran away from home. App. 54, ll. 7 – 10. She believed she met Petitioner on June 2, 2013[1]. App. 56, ll. 6 – 7. She told Petitioner she was sixteen when they met and Petitioner offered her a ride, which she accepted. App. 58, ll. 15 – 18; App. 59, l. 4.

Petitioner and Complainant went to Petitioner's home. App. 60, ll. 22 – 23. Complainant said she saw a male looking out the window as they approached. App. 60, l. 24 – 61, l. 1. Complainant claimed Petitioner left her at the home with the other man. She further claimed the man offered to pay her $50 for oral sex, but she refused. App. 63, ll. 20 – 22. Additionally, she stated the man asked her to have sex with him, but when she refused, he raped her in the living room. App. 64, ll. 8 – 9.[2]

According to Complainant, when Petitioner returned home, she and he "ended up having sex." App. 65, ll. 8 – 9. Petitioner then took a shower and left the home. Complainant went to sleep. App. 65, l. 24 – 66, l. 13.

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[1] According to the indictment, the first sexual encounter occurred "on or about June 1, 2013" and the second occurred "on or about June 2, 2013." App. 346 – 347.

[2] Complainant did not disclose this alleged sexual encounter to the police, until her trial testimony. App. 146, ll. 1 – 9.

The next morning, Complainant cooked and cleaned. App. 71, ll. 5 – 8. She claimed that she performed oral sex on Petitioner and they had sex again. App. 71, ll. 14 – 25; App. 138, ll. 10 – 14.

The following day, Complainant decided she wanted to leave so she called a friend to pick her up using Petitioner's phone, to which she had access the entire time she was there. App. 81, ll. 12 – 13; App. 82, ll. 15 – 17. Before leaving, Complainant hid a blanket under one of the beds and combed out some of her hair and put it in the bathroom sink. Complainant did these things "because if [she] were caught they would know that [she] was there and stuff like that." App. 81, l. 21 – 82, l. 11.

Complainant was picked-up by police on June 4, 2013. App. 118, l. 3 – 4. The police transported Complainant to the local hospital. App. 137, ll. 7 – 9. No rape kit was performed because that hospital would not perform rape kits on juveniles. App. 137, ll. 10 – 13. When asked why the police did not take Complainant to Florence where a rape kit could be done, the investigating officer responded, "Well, the time we got her was 11:00 at night. Of course the Care House was not open or Durant Center was not open. And they both require three day window of opportunity to do one. By the time we would [have] gotten her there with appointment it'd have been past, three days would have passed." App. 137, ll. 14 – 21.[3] The investigating officer could not answer whether the Durant Center or Care House would open for an emergency. App. 137, ll. 22 – 24. Further, the investigating officer opined that there would not have been any evidence anyway because Complainant had bathed several times. App. 138, ll. 15 – 21.

[3] According to the indictment and Complainant's statement to police, the last sexual encounter occurred on June 2, 2013, which would have been within the three days the investigating officer claimed was required in order for the Durant Center or Care House to perform a rape kit.

Before the trial started trial counsel moved for a continuance for Rule 5 violations and a missing witness. App. 32, ll. 1 – 17; Rule 5 SCRCrimP. Trial counsel gave law enforcement two subpoenas for witnesses on September 30 and they were not served until October 9. Id. The day before the trial, after the jury was pulled, trial counsel got a note that one of the witnesses for the defense, Fred Morris, would be unavailable for the trial because he was going to be having surgery at the VA. Id. This witness was material to the defense and would have testified he was at Petitioner's house that weekend, even when Petitioner was gone, and that he did not see any inappropriate contact between Petitioner and complainant. App. 33, l. 21 – 34, l. 10; App. 304, ll. 2 – 7.

At trial, after the alternate jurors were excused and when the jury was about to deliberate, one juror complained of sickness and had to be relieved. App. 205, ll. 3 – 9. The judge asked the parties what they would like to do, he specifically asked Petitioner's counsel if they wanted a mistrial. App. 205, ll. 12 – 16. Without any evidence on the record trial counsel conferred with Petitioner or that Petitioner waived his right to be tried by a full jury complement, trial counsel stipulated that Petitioner would allow deliberation by eleven jurors. App. 209, ll. 22 – 24.

In the Order of Dismissal the trial judge states that there is evidence Petitioner consented to proceed with eleven jurors, but he only cites trial counsel's statement that Petitioner is ready to proceed. App. 347. However at PCR, when asked if he wanted his lawyer to stipulate to having eleven jurors or if he wanted a mistrial, Petitioner testified, "For the mistrial. I was looking for the mistrial." App. 304, ll. 9 – 12. Petitioner testified that he told his attorney, "Let's go for the mistrial." App. 304, l. 15.

Therefore, trial attorney's decision to stipulate to eleven jurors without conferring with Petitioner and while on notice of the absence of material witness testimony from Fred Morris,

that could have been available to testify if a mistrial was granted, was an error and that error prejudiced Petitioner.

Discussion

Petitioner's right to a trial by a full jury complement was taken from him when his trial counsel unilaterally consented to proceed with eleven jurors.

To prevail on appellate review of a PCR court's decision, Petitioner must show an error of law or that there was no evidence to support the PCR court's decision. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997); Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

To prove a claim of ineffective assistance of counsel, the petitioner must show that counsel provided was deficient and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688, 104 S.Ct. at 2064. An attorney's performance is measured against prevailing professional norms. Id. at 688, 104 S.Ct. at 2065.

In State v. Shuck, 278 S.C. 441, 298 S.E.2d 95 (1982), appellant was convicted of housebreaking and petty larceny. Prior to introduction of any evidence, a juror was disqualified and replaced with an alternate. Id. at 442, 298 S.E.2d at 96. During recess before closing arguments, another juror was excused leaving only eleven jurors. Id. The trial judge advised the appellant he could waive his right to a twelve person jury and also asked appellant's trial counsel to advise appellant of his rights and discuss the decision with him. Id.

After consulting with counsel, *appellant* informed the court that he wished to waive his right to a twelve-member jury and proceed with the eleven remaining jurors. Id. (emphasis added) The court accepted his waiver and he was found guilty. Id. This court found appellant's waiver was informed, intelligent, and voluntary and therefore, there was no error in proceeding with eleven jurors. Id. at 442, 298 S.E. 2d at 96.

At PCR trial counsel claimed that she did consult with Petitioner and that it was his decision to go forward; however, there is no trial record of trial counsel consulting with Petitioner about whether to waive his right to trial by twelve jurors, nor is there a record of Petitioner informing the court he wished to waive his right to a twelve member jury. App. 316, ll. 6 – 11; App. 209, ll. 22 – 24. Trial counsel moved for a continuance before the trial started because the delay from the sheriff's office in serving subpoenas for defense witnesses. This caused a material witness, Fred Morris, to be unavailable for trial. App. 33, l. 21 – 34, l. 10. The motion for a continuance showed that trial counsel believed the testimony from Morris was material to the case. Moreover, at PCR trial council admitted she could have moved for a mistrial and it would have been granted. App. 323, ll. 10 – 15.

Trial counsel provided ineffective assistance of counsel because she did not confer with Petitioner regarding her decision to proceed with less than twelve jurors. Petitioner testified that he wanted to move for a mistrial and not rush the jury's decision. App. 304, l. 15; App. 305, ll. 4 – 7. Furthermore, rather than unilaterally deciding to move forward without a full jury complement, trial counsel could have accepted the judge's suggestion of a mistrial. A mistrial would have changed the outcome of the trial. Therefore, stipulating to deliberate with eleven jurors without first discussing that decision with Petitioner was an error that prejudiced the outcome of the trial.

2.

The PCR judge erred when he applied the Strickland test to the structural error made by trial counsel when she stipulated to deliberation by eleven jurors without conferring with Petitioner.

Discussion

Trial counsel's ineffective assistance, when she unilaterally stipulated to deliberation by eleven jurors, constituted a structural error in Petitioner's case and the PCR judge erred when he applied the test from Strickland, supra, because if a Petitioner alleges a structural error he does not need to prove Strickland prejudice.

A common characteristic among structural errors are that they present consequences that are, "necessarily unquantifiable and indeterminate." State v. Rivera, 402 S.C. 225, 248, 741 S.E.2d. 694, 707 (2013) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557). Although there is no South Carolina case which states whether violation of a defendant's right to a full jury complement constitutes structural error, the Fourth Circuit has decided on this issue.

In United States v. Curbelo, 343 F.3d 273 (2003) the Fourth Circuit held that the district court committed structural error, which required reversal without a showing of prejudice, when it permitted the verdict to be rendered by eleven jurors without a valid waiver from the defendant.

Curbelo was convicted of multiple counts of narcotics trafficking and conspiracy. Id. at 274. Before the start of the third day of the trial, the court informed the parties that one of the jurors would have to be excused. Curbelo did not waive his right to a jury of twelve members, but the court proceeded with eleven jurors anyway. Id. at 275.

On appeal, the state argued that the error by the court was harmless. Id. at 278. However the fourth circuit found that the error by the court was a structural error and, "structural defects in the constitution of the trial mechanism... defy analysis by the 'harmless error standards,'" because they are "*necessarily unquantifiable and indeterminate.*" Id., See Sullivan v. Lousiana, 508 U.S. 275, 281-282, 113 S.Ct. 2078, 2083 (1993) (emphasis added). Structural errors, "'infect the entire trial process' that they require reversal without regard to the evidence in a particular case. Id. at 281. See Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827.

The Fourth Circuit furthered, "like other structural errors, the error here has repercussions that are "necessarily unquantifiable and indeterminate." See Sullivan, 508 U.S. at 282, 113 S.Ct. 2078. This is particularly true given the rules of evidence and the restrictions that they quite legitimately place on any inquiry into jury deliberations. See generally Tanner v. United States, 483 U.S. 107, 107 S.Ct. 2739 (1987). "*We simply cannot know what affect a twelfth juror might have had on jury deliberations.* Attempting to determine this would involve pure speculation." United States v. Curbelo, 343 F.3d 273, 281 (2003) (emphasis added). "To be sure, we could... make an independent assessment of Curbelo's guilt. However, the United States Supreme Court has repeatedly instructed that such determinations are exclusively reserved in our system of justice for the jury, and are *not* to be undertaken by an appellate court. Id. Therefore, application of the harmless error analysis is improper because the judge committed a structural error when he allowed the eleven member jury to proceed without a valid waiver from Petitioner.

The decision in Curbelo was based on violation of Rule 23(b) of Federal Rule of Criminal Procedure which mandates a jury size of twelve persons unless an exception applies. Fed. R. Crim. P. 23. Since Petitioner is in state court, the federal rules of criminal procedure do not apply. Moreover, the United States Constitution does not guarantee a trial by twelve jurors.

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970). However Article 5, Section 22 of the South Carolina State Constitution states that a petit jury must have 12 jurors. See State v. Coleman, 54 S.C. 282, 32 S.E. 406 (1899). Therefore, Petitioner has a constitutional right to a trial by twelve jurors and a court abridging that right, without a valid waiver, commits structural error.

To establish a valid waiver of a constitutional right, "the State must show that the waiver was knowing, intelligent, and voluntary under the 'high standard of proof for the waiver of constitutional rights set forth in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938).'" Maryland v. Shatzer, 559 U.S. 98, 104, 130 S.Ct. 1213, 1219 (2010). We enforce stipulations "absent circumstances tending to negate a finding of informed and voluntary assent of a party to the agreement." United States v. Montgomery, 620 F.2d 753, 757 (1980).

This Court has held that, "waiver may be discerned through conduct, but silence alone is never enough." State v. Pendergrass, 270 S.C. 1, 8, 239 S.E.2d 750, 753 (1977). There is no South Carolina case specifically regarding silence as a waiver of the right to a trial by twelve jurors.

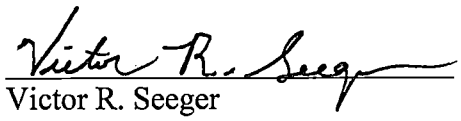
However, in the Fourth Circuit, there is case law showing that the defendant must make an affirmation to the court that he waives his right to a full jury complement. U.S. v. Fisher, 912 F.2d. 728 (1990) (The court addressed the defendant individually, and he expressly affirmed his willingness to proceed with eleven jurors.) Other jurisdictions have case law that shows that the defendant must make the stipulation to proceed with eleven jurors affirmatively and on the record. State v. Roland, 15 Kan.App.2d 296 (1991); State v. Morfitt, 25 Kan.App.2d 8 (1998); People v. Maes, 236 Cal.App.2d 147 (1965); People v. Loving, 67 Cal.App.3d Supp. 136 (1977).

Petitioner did not waive his constitutional right to a jury of twelve members. The record showed Petitioner was silent when trial counsel stipulated to eleven jurors. Petitioner was not asked to waive his right to a jury of twelve members nor did Petitioner make any action implying consent to waive that right. The court prepared a form of consent to allow less than twelve jurors to deliberate which was signed by the judge, solicitor, and defense counsel. App. 269. However the form did not even have a place for Petitioner to sign. Preparing a form in this nature is tantamount to questioning the defense attorney alone for consent to waive Petitioner's right to a full jury complement. Which indicates that Petitioner, the individual whose rights were being waived, did not give consent to deliberate with less than twelve jurors.

The error by trial counsel in stipulating to deliberation by eleven jurors constituted a structural defect in the trial the effects of which are too speculative and unquantifiable to be evaluated under the harmless error standard. Therefore, Petitioner does not need to show prejudice for this Court to grant relief and the PCR judge erred when he applied the Strickland prejudice test.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to remand Petitioner's case for a new trial.



Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Honorable D. Craig Brown, Circuit Court Judge

FARON M. CLEMENTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari has been served on Faron Maurice Clements, #298780, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 14th day of February, 2018.

Victor R. Seeger

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of February, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.