

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JAN 02 2019
S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-000329

DARRYL L. DRAYTON,

Petitioner,

V.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT’S ISSUE PRESENTED3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW5

ARGUMENT6

 The post-conviction relief court properly determined trial counsel did not provide ineffective assistance when he failed to move for a mistrial when Juror 59 saw one state’s witness, the decedent’s fiancé, Bartley, pay money to another state’s witness, Edwards, after Edwards provided crucial testimony against Petitioner, because the defense was allowed to recall the witness to ask him about this payment and the juror who saw the payment was dismissed6

CONCLUSION.....11

RECEIVED
JAN 02 2019
S.C. SUPREME COURT

RESPONDENT'S ISSUES PRESENTED

Whether trial counsel provided ineffective assistance when he failed to move for a mistrial when Juror 59 saw one state's witness, the decedent's fiancé, Bartley, pay money to another state's witness, Edwards provided crucial testimony against Petitioner?

STATEMENT

During its December 2010 term the Charleston County Grand Jury indicted petitioner for murder. App. 997-998. On October 1-5, 2012, Petitioner proceed to trial before the Honorable J.C. Nicholson, Jr, and a jury. App. 1. Jennifer K. Shealy and Timothy Finch represented the State. Id. D. Ashley Pennington and Michael Cooper represented Petitioner. Id.

Petitioner was found guilty as indicted. App. 901, ll. 19-23. Judge Nicholson sentenced Petitioner to life in prison. App. 911, ll. 8-11.

Petitioner's conviction was affirmed by the Court of Appeals. App. 985; State v. Drayton, 41 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015). Petitioner raised the following issues on appeal: the trial court erred in denying his request for the "reasonable hypothesis" circumstantial evidence charge, the trial court erred in admitting the historical cell service location information from his cellular service provider because the trial court construed the warrant as a court order and there was not probable cause to issue a warrant, and the trial court erred in limiting his cross-examination of the pathologist concerning the toxicology report relating to the victim. However, the South Carolina Supreme Court granted certiorari. Id. This Court vacated the Court of Appeals decision in regards to appellant's expectation of privacy in his historic cell site information, but affirmed Petitioner's convictions. Id.; State v. Drayton, 415 S.C. 43, 780 S.E.2d 902 (2015).

Petitioner filed a timely application for post-conviction relief on May 3, 2016. App. 914-923. Petitioner's post-conviction relief application alleged trial counsel was ineffective for

failure to move for a mistrial when a juror saw misconduct between two of the state's witnesses Bartley and Edwards. *Id.* The state made its Return on May 15, 2017. App. 925-930.

Petitioner's post-conviction relief hearing was held on December 12, 2017, in front of the Honorable Michael G. Nettles. App. 932. Chris Murphy represented Petitioner. *Id.* Justin Hunter represented the State. *Id.*

On June 23, 2018, Judge Nettles issued an order of dismissal denying Petitioner's post-conviction relief claims. App. 984-996. Petitioner filed a Petition for Writ of Certiorari on August 17, 2018, and this Return to Petitioner for Writ of Certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448; 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined trial counsel did not provide ineffective assistance when he failed to move for a mistrial when Juror 59 saw one state's witness, the decedent's fiancé, Bartley, pay money to another state's witness, Edwards, after Edwards provided crucial testimony against Petitioner, because the defense was allowed to recall the witness to ask him about this payment and the juror who saw the payment was dismissed.

The central issue is whether or not trial counsel was ineffective for failing to move for a mistrial when one of the jurors saw a witness pay another witness during the recess for lunch. The post-conviction relief court properly determined that counsel was not deficient in failing to move for a mistrial, where the defense was allowed to re-call the witness to testify as to why he paid the other witness and where the juror was dismissed. Trial counsel testified as to the strategy behind his decision to not move for a mistrial and why he felt bringing out the testimony from the witness was better for his client.

Relevant Facts

During Petitioner's trial, the jury foreman informed the court that Juror 59 saw the decedent's fiancé, Bartley, who was also a witness at trial, give money to another state's witness, Edwards, during a lunch break. Ap. 672, ll. 1-11.

Bartley testified earlier in the trial that he and the decedent, Alexis Lukaitis, knew each other for many years before they became engaged. App. 302, l. 16-305, l. 1. Bartley testified that the decedent would take prescription medication, without a prescription, from a man named "D," whom Bartley identified as Petitioner. App. 307, ll. 1-9. Bartley stated that on the night the

decedent died she was with “D” driving to Charleston to buy prescription medication. App. 311, l. 16-312, l. 22.

Edwards testified that Petitioner came to his house the day after Petitioner allegedly drove to Charleston with the decedent. App. 371, ll. 8-24. Edwards testified that Petitioner asked for a ride to the hospital to get medical attention or a cut on his hand. Id. Edwards claimed Petitioner said he sustained the injury when he got in a fight, the night prior, “with three guys from Beaufort.” App. 374, ll. 7-11.

According to Edwards, after the trip to the hospital, Petitioner directed Edwards to drive to a nearby pawn shop because he had a class ring he wanted to sell. App. 376, ll. 19-22. Edwards testified that they stayed in a hotel in Hardeeville for the next two days and that Petitioner asked Edwards to drive him to Florida, which Edwards refused. App. 378, ll. 2-16; App. 379, ll. 5-18; App. 379, l. 25-380, l. 2.

Edwards testified that he drove himself to the doctor after the second night at the hotel because he was not feeling well. App. 381, ll. 5-8. While at the hospital he claimed he saw a news report of the decedent’s murder. App. 381, ll. 16-20.

When Edwards returned home, he claimed he found, “trash on the porch... somebody didn’t put the trash in the trash can...” and when Edwards looked in the trash can, “there was a bunch of items in there which I couldn’t hardly really see. So I took a few items out--.” App. 382, ll. 1-7. Edwards testified that the items he took out of the trash can, “was a bunch of bloody stuff.” App. 382, ll.23-24. Edwards then called 911 and, when a police officer arrived, he showed the officer the bloody trash he found on his porch. App. 384, l. 14-385, l. 2.

Petitioner's trial continued and, during a recess, Juror 59 saw Bartley give Edwards money outside of the courthouse, within view of two security cameras. App. 672, ll. 3-14; App. 679, ll. 10-25; App. 695, ll. 4-6. Juror 59 informed the jury's foreman of the incident. App. 680, ll. 7-10. The foreman brought the incident to the attention of the court. App. 685, ll. 1-23.

Only Juror 59 and the foreman knew of the misconduct by Barley. App. 672, ll. 4-13. None of the other jurors were informed of the incident. App. 682, ll. 3-8; App. 683, ll. 14-17.

Judge Nicholson called Bartley to testify outside the presence of the jury. App. 675, l. 8-677, l. 23. Bartley claimed that he paid Edwards, after Edwards coincidentally provided testimonial against Petitioner, some money to eat lunch that day. App. 676, ll. 14-21. Bartley also testified that he and Edwards had never met before. App. 676, l. 24-677, l. 3.

The trial judge told the attorneys during an in-chambers conference that his initial thought was to declare a mistrial *sua sponte*. App. 672, ll. 16-17. Defense counsel stated that he and Petitioner decided against moving for a mistrial. App. 691, ll. 1-12. Even though Juror 59, was "straight and aboveboard with everything," he was dismissed. App. 693, ll. 23-24; App. 696, ll. 20-21; App. 699, ll. 2-22. The foreman was allowed to remain on the jury.

After the jury reentered the courtroom, Judge Nicholson explained that Juror 59 was removed from the jury through no fault of his own but withheld the details of why Juror 59 was dismissed. App. 707, ll. 11-19.

The trial court allowed defense counsel to recall Bartley to the stand for questioning in front of the jury about the payment he made to Edwards. App. 808, l. 14. Bartley testified that he paid Edwards twenty dollars to eat lunch. App. 809, l. 6-810, l. 19.

During closing arguments, defense counsel reiterated the impropriety involved with the payment from Bartley to Edwards and questioned Edwards' integrity as a witness. App. 852, l. 22-854, l. 22. Petitioner's trial concluded, and he was found guilty as indicted. App. 901, ll. 19-23.

PCR Testimony

Pennington testified at the PCR hearing that he decided to not move for a mistrial because it would have given the state time to test DNA found at the crime scene. App. 969, l. 21-970, l. 12. He wanted to imply Edwards was more culpable than the state made him seem. App. 955, l. 17-957, l. 4. Pennington also stated that he wanted the jury to be shocked and to infer that Edwards and Bartley were hiding something. *Id.*

At Petitioner's PCR hearing, Petitioner testified that he wanted defense counsel to move for a mistrial. App. 969, l. 16-970, l. 12. Petitioner testified that the DNA that had already been tested was inconclusive. *Id.*; App. 650, l. 23-651, l. 5. Petitioner argued that providing more time to test the DNA evidence would have benefited his case and that he, "did want the DNA tested." App. 970, ll. 13-15.

Argument

The PCR court found that defense counsel did not provide ineffective assistance when he failed to move for a mistrial after Juror 59 saw a state's witness payoff another state's witness because it was a valid trial strategy. App. 990. The PCR court held that Petitioner failed to prove he was prejudiced by defense counsel's failure to move for a mistrial. *Id.* That was not an error and did not prejudice Petitioner.

“To prove prejudice resulting from counsel’s failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court’s denial of the motion would have amounted to an abuse of discretion.” Early v. State, 418 S.C. 255, 792 S.E.2d 226 (2016). “The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes’ stated into the record by the trial judge.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (quoting State v. Simmons, 352 S.C. 345, 354, 573 S.E.2d 856, 862 (Ct. App. 2002)); see also State v. Patterson, 337 S.C. 215, 227, 552 S.E.2d 845, 851 (Ct. App. 1999) (“The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.”) “A mistrial should only be granted when ‘absolutely necessary,’ and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” Id. “The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice.” Id. “Whether a mistrial is manifestly necessary is a fact specific inquiry.” Id.

Here, Applicant has failed to demonstrate that had counsel moved for a mistrial, the trial court’s denial of the motion would have amounted to an abuse of discretion. The granting of a mistrial is an extreme measure and should only be used when the prejudice cannot be cured by some other means. Defense counsel testified that he and Petitioner agreed that they should not move for a mistrial, but should recall the witness instead. Defense counsel was able to recall the witness and question him as to the meaning of the payment to the other witness. Also, the trial judge dismissed the juror who saw the payment and did a thorough colloquy on the foreman as to his ability to remain unbiased. The trial court has wide discretion as to whether or not to grant a mistrial and that discretion was not abused in this case. Ultimately, prejudice on Petitioner was

abated by the dismissal of the juror and the ability to recall the witness to attack his credibility.

Therefore, counsel was not ineffective for failing to move for a mistrial.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari.

Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
S.C. Bar No. 100108
Senior Assistant Deputy Attorney General

BENJAMIN HUNTER LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

By: *Benjamin Limbaugh*
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

Jan 2, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

JAN 02 2019

S.C. SUPREME COURT

Appellate Case No. 2018-000329

DARRYL DRAYTON,

PETITIONER

v.

STATE OF SOUTH CAROLINA,


RESPONDENT

CERTIFICATE OF SERVICE

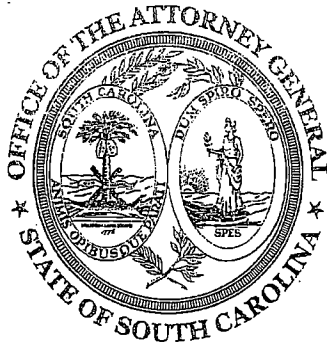
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies via interagency mail, addressed to:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia SC 29201

This 2nd day of January, 2019.



Jennifer Jamison
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

January 2, 2019

RECEIVED

JAN 02 2019

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Darryl Drayton v. State of South Carolina
Appellate Case No.: 2018-000329

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin H. Limbaugh

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jaj
Enclosures

cc: Victor R. Seeger, Esquire
Victim Advocacy Division