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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019—001570

State of South Carolina.....Respondent,

vs.

Devin Zachary Elijah Ruttle.....Appellant.

REPLY TO RETURN TO MOTION TO SUSPEND APPEAL AND FOR LEAVE TO FILE MOTION REGARDING DISQUALIFICATION OF JUROR OR, ALTERNATIVELY, FOR EXTENSION OF TIME TO FILE

On April 27, 2020, Respondent filed a Return to Appellant's Motion to suspend this appeal and for leave to file a motion for a new trial due to a juror's intentional concealment of information plainly requested during voir dire. Appellant files this Reply responding to Respondent's Return.

Although Respondent attempts to defeat Appellant's procedural Motion to suspend the appeal by raising substantive factual disputes as to the discovery of Juror 92's misconduct and whether it could have been discovered earlier through the exercise of due diligence, Respondent's dispute as to the facts of the timing of the discovery, in and of itself, dictates that a "hearing [before the trial court] is necessary to resolve this critical issue." McCoy v. State, 401

S.C. 363, 370, 737 S.E.2d 623, 627 (2013) (holding that, in the context of whether a juror's voir dire misconduct was timely raised for purposes of a PCR application, "[b]ased on [a] factual dispute [between the State and the petitioner as to whether "the juror's misconduct could have been discovered earlier through the exercise of due diligence"], a hearing [was] necessary to resolve this critical issue") (emphasis added). Appellant respectfully provided this Court with insight into the grounds of the underlying substantive new trial motion he seeks to file with the trial court for purposes of establishing that this prerequisite procedural Motion to suspend the appeal was filed in good faith and for good cause; however, substantive factual uncertainties as to timeliness, due diligence, and the elements of intentional juror concealment should be determined by the trial court. State v. Miller, 398 S.C. 47, 52, 727 S.E.2d 32, 35 (Ct. App. 2012) (holding that due to "potentially important facts missing from the record" with regard to a claim of intentional juror concealment, it was "necessary" for the trial court to make a "ruling on the facts")[1], vacated as moot, 409 S.C. 312, 762 S.E.2d 394 (2014); State v. Hawkins, 121 S.C. 290, 114 S.E. 538, 541 (1922) (discussing the practice for moving for a new trial while an appeal is pending and stating that "if the case is pending in the Supreme Court, a motion should be made before that court to suspend the appeal, in order that the motion for a new trial may be made before the circuit court…the only court that may hear such motions upon their merits").

However, assuming arguendo that it would be proper for this Court to determine the critical factual issues concerning the timeliness of the discovery of Juror 92's misconduct and

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[1] Interestingly and as noted by Justice Few in Miller, the State has previously acknowledged "that if a factual finding is required on the question of intentional concealment, [the Court of Appeals] should remand for the trial court to make the finding." State v. Miller, 398 S.C. at 52 n. 2, 727 S.E.2d at 35 n.2.

Appellant's opportunity to raise these issues by proper motion, the State's argument as to the untimeliness of Appellant's discovery and filing of this Motion are unavailing. Most notably, the State's argument ignores several critical points of fact and law. First, the State's entire argument that Appellant and his father should have known Juror 92 at the time of trial is premised on the fallacy that the relationship, knowledge, and recognition between persons who appear before large groups of people and those in the audience is reciprocal. The falsity of the State's underlying premise is easily illustrated by the example: while I may have attended thirty-five Jimmy Buffet shows and would certainly know that I attended the shows and recognize Jimmy Buffet's name and visage if asked, sadly, Jimmy Buffet would not know that I had attended all those shows, and would not know my name or recognize me. Such is the case with Appellant and his father and the nonreciprocal nature of Juror 92's knowledge and recognition of Appellant and his father.

As previously stated in Appellant's Motion, Appellant and his father were focal points for the congregation, with Appellant running the sound board and his father leading services. Accordingly, while Appellant and his father would be recognizable figures to members of the congregation, it is unreasonable under the extremely stressful circumstances of Appellant being on trial for murder to require Appellant or his father, based on nothing more than Juror 92 standing and her name being said a single time when selected for the jury, after she had just denied any connection to or knowledge of Appellant or his father during juror qualification, to contemporaneously realize or discover that Juror 92 did in fact have connections to Appellant through school and church. To place the burden on a defendant to object to a juror because the defendant suspects that a juror could have a connection to the defendant or his family is an

"unreasonable expectation" and substantively diminishes a defendant's right to rely on the truthfulness of jurors' answers during voir dire. Long v. Norris & Assocs., LTD., 342 S.C. 561, 572, 573, 538 S.E.2d 5 (Ct. App. 2000) (quoting 47 Am. Jur. 2d Jury § 191 (1995)) (holding that for voir dire to function properly as an essential means of protecting the right to an impartial jury, "[f]ull knowledge of all relevant and material matters that might bear on the possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily.") (emphasis added).

Moreover, even assuming arguendo that Appellant or his father did have suspicions at the time of trial that Juror 92 might have had some connection to Appellant or his father, Appellant and his father had "no evidence during trial to support their concerns." Id. at 572 (emphasis added). Significantly, it is Juror 92's lack of honesty and candor during voir dire that denied Appellant and his trial counsel the very evidence that is essential to determining whether Juror 92 harbored any bias or prejudice against Appellant. State v. Coaxum, 410 S.C. 320, 327, 764 S.E. 2d 242, 245 (2014) ("Trial judges and attorneys cannot fulfill their duty to screen out biases jurors without accurate information.") (citation omitted); State v. Woods, 345 S.C. 583, 590, 550 S.E.2d 282 (2001) ("Because Juror B did not respond to any of the questions asked during voir dire, any potential biases she might have had toward the State were not discovered until after the trail.").

Despite Juror 92's misconduct frustrating Appellant's efforts to discover any potential biases during voir dire, Appellant, through his family, "promptly mobilized after judgment" to discover the truth about Juror 92. Long, 342 S.C. at 572 (holding that where "[d]efendants had no evidence during trial to support their concerns about [a juror]", the defendants timely raised a

juror concealment issue post trial where they "promptly mobilized" to examine the juror's background following trail). Although Appellant was able to determine that Juror 92 did in fact have connections to Appellant through school and church by July of 2019, because the trial court took until September 10, 2019, three days short of an entire year, to issue a one (1) page Order denying Appellant's motion for post-trial relief, a transcript of the trial was not received by the Appellate Division of the South Carolina Commission on Indigent Defense ("SCCID"), Appellant's original appellate counsel, until October 25, 2019. Thus, due to the trial court's inexplicable delay in issuing it's one (1) page denial of Appellant's post-trial motion, it was not until October 25, 2019 that Appellant was able to for the first time review the specific questions posed by the trial judge during voir dire to determine whether Juror 92 did in fact engage in intentional concealment that should be brought to the attention of the courts by proper motion. Thereafter, upon being substituted as counsel on March 10, 2020 undersigned counsel, while dealing with the obstacles created by the COVID-19 pandemic, promptly and diligently developed and filed this Motion with all due haste. Accordingly, Appellant brought Juror 92's misconduct to the Court's attention"at the first opportunity by proper motion", and it would be improper and unjust to deny Appellant the opportunity to be heard on this issue because of a delay that was created not by Appellant but by the trial court itself. Long, 342 S.C. at 572 (citing S.C. Jur. Appeals and Error § 81 (1992)).

In addition to the above-noted issues with the State's opposition to Appellant's Motion, the State also incorrectly applies the one (1) year deadline applicable to new trial motions based newly discovered evidence to Appellant's Motion based on juror misconduct. As unequivocally held by the Supreme Court in McCoy, "juror misconduct discovered post-trial is to properly

considered 'newly discovered evidence'; rather, it is a separate basis for a new trail." 401 S.C. at 371, 737 S.E.2d at 627. "Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard." Id. Accordingly, although Rule 29(b), SCRCrimP, only addresses new trial motions based on newly discovered evidence and does not address motions based on juror misconduct, Rule 60(b), SCRCP, is instructive as to the time for filing for a new trial based on juror misconduct. Specifically, Rule 60(b), SCRCP, limits the one year deadline for new trial motions to (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; and (3) fraud, misrepresentation, or other misconduct of an adverse party, leaving motions based on a judgment being void, such as in a case where a party's fundamental right to a fair and impartial jury has been violated, to be filed within a reasonable time. Accordingly, although it is Appellant's position that he filed this Motion within a year of his discovery of Juror 92's connections through school and church to Appellant and his father, even if the Court were to make the factual finding that Appellant did not file this Motion within a year of his discovery, Appellant has diligently investigated and raised Juror 92's misconduct in a reasonably timely and proper manner. [2]

WHEREFORE, based on the foregoing Appellant hereby requests that the Court suspend the appeal and grant Appellant leave to file his motion for new trial based on juror misconduct with the trail court. Subject to any restrictions or delays caused by the COVID-19 pandemic, in

[2] The propriety of applying a reasonable time requirement and allowing this motion to proceed as timely is further supported by the concept of judicial efficiency given that it appears that the issue of juror misconduct could properly be the subject of a later PCR application. Accordingly, in the interest of preserving judicial resources and resolving all of Appellant's issues in a single appeal, it is prudent to allow this issue to be determined at this time.

the event the Court grants this Motion, Appellant in no way objects to the State's proposal to expedite the resolution of the contemplated motion for new trial.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have filed with the Court of Appeals and served Appellant's Reply to Return to Motion to Suspend Appeal and for Leave to File Motion Regarding Disqualification of Juror or, Alternatively, for Extension of Time to File on Respondent's attorney, Melody J. Brown, by email, mbrown@scag.gov, on May 22, 2020.

Respectfully submitted,

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