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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

Honorable Roger Henderson, Circuit Court Judge

MICHAEL A. RICHARDSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000964

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying defense counsel's motion for a new trial based on the fact that the alternate juror went into the jury room with the jury during deliberations which was prejudicial to Richardson because the alternate may have tainted the jury's decision in subtle ways although he denied participating in the decision?

STATEMENT OF THE CASE

On August 23, 2016, the Greenville County Grand jury indicted Petitioner Richardson on the charges of distribution of crack cocaine and conspiracy. App. 280 – App. 287. On January 18, 2017, Richardson proceeded to trial before the Honorable Roger Henderson and a jury. Richardson was represented by Stuart Sarratt, and the state was represented by Walker Miller. App. 1.

The jury found Richardson guilty of distribution of crack cocaine and conspiracy. App. 191, ll. 1 – 25. The judge sentenced Richardson to five years on the conspiracy charge and to twenty years on the distribution of crack charge third offense. The sentences were to run concurrent. App. 207, ll. 13 – 25. Richardson did not appeal his convictions nor sentences. App. 273.

Richardson filed an application for post-conviction relief on October 20, 2017 asking for a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Following an evidentiary hearing on February 23, 2018 before the Honorable Frank R. Addy, Judge Addy granted a belated direct appeal to Richardson. This initial brief follows accompanied by a petition for a writ of certiorari.

STANDARD OF REVIEW

“A denial of a new trial based on alleged jury misconduct is reviewed for an abuse of discretion.”

State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005).

“The determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the trial court.” State v. Harris,

340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000).

ARGUMENT

The trial court erred in denying defense counsel's motion for a new trial based on the fact that the alternate juror went into the jury room with the jury during deliberations which was prejudicial to Richardson because the alternate may have tainted the jury's decision in subtle ways although he denied participating in the decision.

Relevant Facts

Quincey Whitner worked with the Greenville County Sheriff's Office in an undercover capacity making undercover drug buys throughout Greenville County. He would approach known drug dealers and try to buy drugs. App. 43, ll. 21 – App. 45, ll. 5. On December 11, 2015, he was working in the area known as Buncombe and Shaw. App. 45, ll. 6 – 24.

Around eight o'clock that evening, Whitner was near the Super Safe Mart when he saw a couple of men "loitering" around the area. He knew one of them from previous encounters who was Alrad Cobbs. Deputy Whitner called Cobbs to Whitner's car and told Cobbs that Whitner was "looking to get twenty hard." "Twenty hard" was the street terminology for crack cocaine. App. 46, ll. 5 – App. 47, ll.

According to Whitner, Cobbs then yelled to Richardson: "Hey! I need a rock." "Rock" was also street terminology for a piece of crack. App. 47, ll. 15 – App. 48, ll. 4. Whitner said that he saw Cobbs hand the twenty dollars to Richardson which Cobbs had received from Whitner. Whitner's story was that he then saw the two men do a hand-to-hand transaction. Then Cobbs brought a piece of white rock-like substance to Whitner which Whitner believed to be crack cocaine based on Whitner's experience. Whitner then called other deputies who then proceeded to arrest Cobbs and Richardson. App. 49, ll. 1 – 23; App. 51, ll. 1 – App. 52, ll. 7.

On August 23, 2016, the Greenville County Grand jury indicted Richardson on the charges of distribution of crack cocaine and conspiracy. App. 280 – App. 287. On January 18, 2017, Richardson proceeded to trial before the Honorable Roger Henderson and a jury. Richardson was represented by Stuart Sarratt, and the state was represented by Walker Miller. App. 1.

Richardson’s co-defendant, Alrad Cobbs, testified at trial as a state’s witness against Richardson. According to Cobbs, he had pled guilty to the distribution charge from the December 11, 2015 incident where he said that he and Richardson had sold drugs to the undercover officer. App. 116, ll. 1 – 25. Cobbs described how he took the money from the officer who approached Cobbs asking for a “twenty hard.” Cobbs then took the money to Richardson who allegedly gave drugs to Cobbs who then delivered the drugs to the officer. App. 117, ll. 1 – 22.

Sean Collins, the drug analyst with the Greenville County Forensics, Crime Lab Report, testified that he analyzed the drugs in this case. He testified that the drug was cocaine base with a weight of 0.12 grams. App. 106, ll. 16 – App. 107, ll. 2; App. 111, ll. 1 – App. 113, ll. 23.

Following jury deliberations and before the verdict was announced, the judge said to the alternate juror:

COURT: Before I ask about the verdict, Mr. Thomas David (Alternate). All right. You are----I should actually have excluded you from the jury pool when you went back in. but did you participate in the deliberation of the verdict?

JUROR: No.

COURT: Okay. So you did not?

JUROR: No sir.

COURT: Okay. All right, sir.

App. 190, ll. 14 – 25.

The jury found Petitioner Richardson guilty of distribution of crack cocaine and conspiracy. App. 191, ll. 1 – 25.

When the judge recognized defense counsel after the verdict, counsel renewed his objections and moved the court for a new trial. Counsel said:

I understand we didn't poll the jury and the alternate indicated he did not participate in deliberations. I feel that I have an obligation to my client to make a motion for a new trial based on that. And I renew my directed verdict .

App. 194, ll. 3 – 15.

The judge denied the motions, including the motion for a new trial “with regard to the alternate being in the jury room.” The judge explained that the alternate had clearly said on the record that he did not participate in deliberations. Then the judge spoke of an “older case” where the alternate was allowed to go in the jury room and actually participated in deliberations for a while. However, according to the judge, the Supreme Court found no reversible error because of a curative instruction. App. 194, ll. 16 -App. 195, ll. 6.

The judge sentenced Richardson to five years on the conspiracy charge and to twenty years on the distribution of crack charge third offense. The sentences were to run concurrent. App. 207, ll. 13 – 25. Richardson did not appeal his convictions nor sentences. App. 273.

On June 8, 2017, Petitioner Richardson filed a PCR application. The state filed a return on October 20, 2017. App. 272. An evidentiary hearing was held on February 23, 2018 before the Honorable Frank R. Addy. Richardson was represented by Rodney W. Richey, and the state was represented by Deshawn H. Mitchell. App. 228.

Petitioner Richardson testified at the hearing that he was an innocent bystander during this incident as he had gone into the store just to get change. App. 249, ll. 1 – 14. Richardson asked his attorney to file an appeal for him following the trial but he did not get an appeal. App. 247, ll. 1 -23. Richardson said he was asking the PCR court to grant him a direct appeal. App. 253, ll. 1 – 13.

One of Richardson's issues was that his attorney did not object to the jury misconduct when the alternate juror was allowed into the jury room during jury deliberations. He was still pursuing that issue at the PCR hearing. He testified that his attorney should have asked for a mistrial due to the juror misconduct. App. 273; App. 253, ll. 14 – 19.

Trial counsel testified at the PCR hearing that he did not file a notice of appeal although he knew that Richardson wanted an appeal. Counsel said he just failed to do it. App. 242, ll. 13 – 21; App. 236, ll. 10 – 13. The PCR judge asked counsel if he saw any issue with the alternate juror staying in the jury room during jury deliberations. Counsel replied that it was very unusual. The judge agreed and said: "I don't know that I've ever heard of that happening before." App. 244, ll. 20 – App. 245, ll. 11.

Trial counsel admitted that he probably should have moved for a mistrial. But he did not since the alternate told the court that he did not take part in the deliberations. Counsel said: "And I felt that what else could I do at that point." App. 245, ll. 12 – 25.

The PCR judge issued an order on May 7, 2018 denying Petitioner Richardson's PCR application and dismissing it with prejudice with the exception of a belated direct appeal. The judge granted Richardson a belated review of his conviction pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The PCR judge also found that the issue of the alternate juror's presence in the jury room was preserved for appellate review as trial counsel asked for a new trial based on this issue. App. 278. PCR counsel filed a notice of appeal. This initial brief pursuant to White v. State, id. Follows, accompanied by a petition for a writ of certiorari.

Discussion

In United States v. Olano, 507 U.S. 725 (1993), the United States Supreme Court held that the purpose of jury privacy and secrecy was to protect the jury's deliberations from improper influence, and that the presence of alternates in the jury room during deliberations "contravened the cardinal principle that deliberations of the jury should remain private and secret." However, in Olano's case, the presence of alternate jurors in the jury room during deliberations was not plain error as the alternates had been instructed that they could sit in on the deliberations but could not participate and because it did not affect the substantial rights of the defendants.

In State v. Bonneau, 276 S.C. 122, 276 S.E.2d 300 (1981), the alternate was sent out of the courtroom along with the jury while the court discussed the charge with the parties which took about fifteen minutes. The Supreme Court held that the alternate's brief presence in the jury room had not deprived Bonneau of a fair trial. The Court held that "it was incumbent on the appellant to prove that he was denied a fair trial" due to the alternate's presence in the jury room.

In State v. Grovenstein, 335 S.C. 347, 517S.E.2d 216 (1999), the Supreme Court held that the defendant had the burden to prove that he was denied a fair trial due to the alternate juror's presence in the jury room during the first 20 to 30 minutes of deliberations. The Court also held that the error of the alternate's presence in the jury room was cured by the trial court's inquiry and jury instructions.

In Grovenstein, when the judge learned that the alternate juror was in the jury room, he removed the alternate from the jury room and questioned her about her participation in the deliberation. The alternate reported that she had discussed the case a 'little bit but not much.' The judge then called the jury to the courtroom and instructed them that they were to decide the verdict without any consideration of anything the alternate had said or done. Then the judge

asked whether the jurors could put aside anything the alternate had said or done. After counsel made no other requests for inquiry, the jury was permitted to return to continue their deliberations.

The Supreme Court then wrote:

For the benefit of bench and bar, we advise trial courts of this state, upon discovering an alternate has inadvertently been permitted into the jury room, to undertake precautionary measures similar to those taken by the trial court in this case. Initially, the trial judge should remove the alternate and inquire as to the extent of that juror's participation. The court should then conduct such *voir dire* as is necessary of the remaining jury panel, similar to that recently set forth by this Court in *Aldret*, to ascertain prejudice and, if practicable, tailor instructions requiring the jury to disregard the alternate's input and, in essence, requiring the jury to begin deliberations anew. If the trial court finds deliberations have proceeded too far, or that the alternate's impact upon remaining jury members may not be remedied, a mistrial should be had and a new trial ordered.

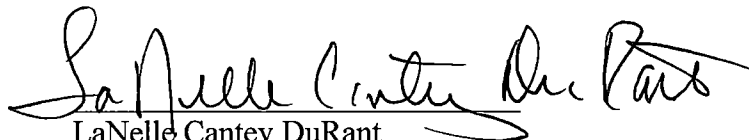
State v. Grovenstein, 335 S.C. 347, 353–54, 517 S.E.2d 216, 219 (1999)

It is clear from the Supreme Court's ruling in Grovenstein that the trial court in Richardson's case was in error in not inquiring more deeply into the influence the alternate may have had on the jury's verdict. The jury in Richardson's case had already reached a verdict while the alternate was in the jury room. The judge did not conduct any *voir dire* of the jurors but only asked the alternate about his participation. The trial judge should have declared a mistrial because the jury's deliberations had gone too far as they had already reached a verdict.

Richardson's case is also distinguished from Bonneau, in that the jury in Bonneau's case had not reached a verdict when the alternate's presence in the jury room was discovered.

CONCLUSION

Based on the above, Richardson's convictions and sentences should be reversed, and his case remanded for a new trial.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

Honorable Roger Henderson, Circuit Court Judge

MICHAEL A. RICHARDSON,

PETITIONER


V.

STATE OF SOUTH CAROLINA,


RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Michael A. Richardson, #268870, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of January, 2019.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of January, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.