

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge
—————

JOHNNY N. GREGG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001491
—————

ANDERS BRIEF
PURSUANT TO WHITE V. STATE
—————

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S.C. SUPREME COURT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Petitioner's motion for a mistrial, where a prospective juror responded "guilty" while the state and defense were striking jurors, where other jurors likely heard the remark and based their belief of the case on that juror's statement?

STATEMENT OF THE CASE

On June 8, 2017, Petitioner was indicted by a Florence County grand jury on eight counts: possession of a weapon during the commission of a violent crime, possession of a stolen pistol, possession with intent to distribute Xanax, heroin trafficking, possession with intent to distribute heroin within proximity of a school, possession with intent to distribute cocaine base, possession with intent to distribute cocaine, and possession with intent to distribute marijuana. App. 452 – 453. He proceeded to trial before the Honorable William H. Seals, Jr. and a jury on April 16, 2018. App. 1. B. Scott Suggs represented Petitioner; John Jepertinger appeared on behalf of the state.

The state dismissed the possession of a stolen pistol and possession with intent to distribute cocaine charges. App. 32 ll. 11 – 13; App. 99 ll. 13 – 18; App. 272 ll. 16 – 18; App. 329 ll. 18 – 19. After a three-day trial, the jury found Petitioner guilty of the remaining six offenses. App. 374 l. 13 – 375 l. 7. Judge Seals sentenced Petitioner to twenty-five years' incarceration on the heroin trafficking conviction, consecutive to five years on the possession with intent to distribute cocaine base. App. 378 l. 19 – 380 l. 2. The remaining sentences were concurrent, with Petitioner receiving ten years on the marijuana offense, three years on the Xanax offense, four years on the possession of a weapon charge, and eight years on the possession with intent to distribute heroin within the proximity of a school. Id. In sum, Petitioner received a thirty-year sentence.

Trial counsel did not file a notice of appeal. Petitioner filed an application for post-conviction relief on or about March 18, 2019. App. 382. It contained allegations of ineffective assistance of counsel, including contentions that counsel failed to pursue a direct appeal, failed to challenge subject matter jurisdiction, and failed to preserve issues. App. 385 – 386. An

amendment to the PCR application was filed through counsel on December 18, 2019 which added “Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant thus rendering Applicant’s counsel unprepared to properly defend Applicant at trial.” App. 390. The state filed its Return and Partial Motion to Dismiss on July 5, 2019. App. 391.

An evidentiary hearing was held before the Honorable Craig Brown on December 19, 2019. Jonathan Waller represented Petitioner, and Samuel Key appeared on behalf of the state. Petitioner and trial counsel testified at the hearing. Judge Brown granted belated appellate review under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). By way of a written order signed October 23, 2020, Judge Brown denied post-conviction relief but granted belated review of Petitioner’s direct appeal issue(s). App. 435.

This brief, filed contemporaneously with a petition for writ of certiorari under Rule 243(i)(1), SCACR, follows.

STANDARD OF REVIEW

The decision to grant or deny a mistrial is within the sound discretion of the circuit court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

ARGUMENT

The trial court erred in denying Petitioner’s motion for a mistrial, where a prospective juror responded “guilty” while the state and defense were striking jurors, where other jurors likely heard the remark and based their belief of the case on that juror’s statement.

Relevant facts

During jury selection, Juror 26 was called by the clerk as a potential juror. App. 23 l. 23 – 25 l. 11. After the solicitor requested that the juror be presented and the judge asked if the defense wished to strike, Juror 26 uttered the word “guilty.” Id. A bench conference was held where the trial judge questioned the juror. Id. When the judge asked the juror why he responded that way, he answered “I’m not sure. I’m not sure what y’all were getting to me about.” Id. Although the juror was excused, defense counsel articulated a concern regarding the other jurors who likely heard Juror 26’s remark. Id. The trial judge indicated that he would advise the jury that Petitioner is not guilty until proven guilty beyond a reasonable doubt. Id.

After jury selection, the solicitor placed the following on the record:

The other issue that came up here during jury selection, I just want this to be clear. When Juror 26 was called, he was a white male - - I don’t have his name right now in front of me - - but when he stood up in front of me he said - - I said present the juror and he looked at me and he said guilty. I don’t know if he was referring to me, referring to [defense counsel], referring to the defendant, or referring to this process as a whole. Judge, and I’m sure you will inform this jury throughout the course of this trial that this person is innocent, this defendant is innocent unless and until the state, represented by me, proves his guilt beyond a reasonable doubt.

App. 32 l. 15 – 33 l. 1.

The trial judge hypothesized that the juror was potentially giving a verdict in advance. Nonetheless, defense counsel moved for a mistrial based on the fact that the remaining jurors heard the comment. App. 33 l. 14 – 36 l. 13.

The trial judge indicated that he did not hear Juror 26's comment. Id. The mistrial motion was denied.

Discussion

Jury misconduct that does not affect the jury's impartiality will not undermine the verdict. State v. Pittman, 373 S.C. 527, 555, 647 S.E.2d 144, 159 (2007). The circuit court may exercise broad discretion in assessing the prejudicial effect of an allegation of juror misconduct due to an external influence. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000). The circuit court should consider three factors when making this determination: (1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice. Id. The circuit court's finding will not be disturbed absent an abuse of discretion. Id. at 63, 530 S.E.2d at 627–28. Under State v. Galbreath, when a defendant seeks a new trial on the basis of juror misconduct, a party must prove both the alleged misconduct and the resulting prejudice. 359 S.C. 398, 401, 597 S.E.2d 845, 847 (Ct. App. 2004).

In Petitioner's case, the trial judge failed to consider the first of the above three factors. Counsel suggested that "all of the jurors" heard the comment. App. 33 ll. 17 – 18. The judge claimed not to have heard the remark, but he was likely further away from Juror 26 than the other jurors. As a result, a fair number of the jurors likely heard the comment. As such, they possibly believed that this juror believed Petitioner was guilty. They could have based their verdicts on his comment which was made at the outset of trial.

The trial judge could have interviewed the jurors. In State v. Bantan, the circuit court separately interviewed a juror under oath and was satisfied that she had reached a fair and impartial verdict, the Court of Appeals deferred to the trial judge's decision to deny a motion for a new trial. 387 S.C. 412, 423, 692 S.E.2d 201, 206 (Ct. App. 2010) (holding that in determining juror misconduct, the circuit court is in the best position to determine the credibility of the jurors; therefore, this court should grant it broad deference on this issue). Juror 26's remark likely weighed in the minds of the jury throughout the trial. The trial court should have granted the motion and tried the case the following week as defense counsel requested.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests a new trial.

s/ Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of June, 2021.

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Counsel for Johnny N. Gregg states:

(1) He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

(2) He has reviewed the record of appellant's trial before Judge William H. Seals, Jr. and jury, which was held on April 16-18, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

(3) He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Johnny N. Gregg.

Respectfully Submitted,

s/ Taylor D. Gilliam

Taylor D Gilliam

Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of June, 2021.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

June 25, 2021.

s/ Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

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