

RECEIVED

Apr 04 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

**APPELLANT'S REPLY TO
RESPONDENT'S REPLY TO
APPELLANT'S PETITION FOR REHEARING**

Stephen N. Garcia
Garcia Law, LLC
604 Pettigru Street
Greenville, SC 29601
(864) 271-7335
Attorney for Appellant

Andrew F. Lindemann
Lindemann, Davis & Hughes, P.A.
P.O. Box 6923
Columbia, SC 29260
Attorney for Respondent

COMES NOW APPELLANT, at the request of this Honorable Court and by and through undersigned counsel, and files this, his Reply to Respondent's Return to Appellant's Petition for Rehearing pursuant to Rule 221(a), SCACR. Respondent, in his Reply, lists various points of contention regarding Appellant's Petition for Rehearing. I will attempt to address the various points chronologically.

Respondent argues that Appellant made no attempt on day one of trial to make any objection, let alone a contemporaneous objection, and further, that Appellant made no motion for mistrial or recusal on day one of trial.

Although the Respondent is factually correct in asserting that the Appellant made no attempt to make an objection on day one of trial, respectfully, the Respondent fails to recognize the realities of a civil trial, and specifically, the realities of the trial at issue in this instant matter. Specifically, Appellant's counsel was not aware that the facial expressions and gestures occurring on day one of trial were an issue at all, although he admittedly did have some concerns and suspicions. Simply put, the way the courtroom was situated did not allow the Appellant's counsel to simultaneously observe the testifying witness, jury, *and* Presiding Judge. It is not physically possible to do so. Instead, the Appellant's counsel relied on his staff, Appellant, and designated expert (who had been observing the trial on day one) to determine that an issue arose that required an objection or statement on the record. Quite frankly, Appellant's counsel did not make an objection on the record on day one because the Appellant's counsel was not aware of the gravity of the situation until day one had adjourned. The objection (and attempted oral motion for recusal) were made at the first possible moment after returning to the courtroom on day two of trial.

Respondent argues that Appellant made no objection in the subsequent four days of trial; Respondent further argues that Appellant is improperly arguing, for the first time, that the prejudicial effect of facial expressions and gestures on day one alone was enough to warrant a new trial.

This position is factually incorrect. The Appellant's counsel indeed attempted to state an objection on the record at the opening of day two of trial.¹ The record clearly demonstrates that Appellant's counsel was not done stating his objection to what transpired on day one of trial when he was cut off by the Court.² After being accused of threatening the Court and in an attempt to seek recusal and/or a mistrial, Appellant's counsel asked the Court whether he could respond, and the Court *denied* the Appellant's counsel the opportunity to respond.³ At a minimum, the Appellant's concerns regarding facial expressions and gestures that occurred throughout day one of trial were preserved, and any shortcomings in their detailed preservation were not because the Appellant's counsel failed to state objections, but rather, because the Court prohibited the Appellant's counsel from fully stating his objections and concerns. However, looked at more favorably, under the guidance of *State v. Pace*, the Appellant was not required to pursue any further objection(s) on the record because it was clear at that point that any further objection(s) would be futile at best.⁴

That leads us to the discussion regarding whether the Appellant now improperly argues, for the first time, that the prejudicial effect of facial expressions and gestures from the Court on day one alone is grounds for a new trial. This is not a new argument at all. The Appellant has consistently argued that the facial expressions and gestures emanating from the bench from day

¹ R. p. 200-201.

² *Id.*

³ *Id.*

⁴ *State v. Pace*, 361 S.C. 71, 447 S.E.2d 186 (1994).

one of trial were prejudicial in nature.⁵ The Appellant has also argued that the facial expressions and gestures emanating from the bench throughout the pendency of trial was prejudicial and grounds for a new trial.⁶ The argument that the facial expressions and gestures emanating from the bench on day one would alone be grounds for a new trial is encompassed within the entire position of the Appellant and not a new argument.

Respondent argues that it was not until the case was over and an adverse verdict returned that the Appellant filed a written motion seeking relief.

Again, this position ignores the realities of the case at hand. It was not until after trial that the Appellant received notice from a juror that the facial expressions and gestures occurring on day one and throughout trial were perceived by the jury and potentially biased the jury. It simply was not possible to anticipate that the facial expressions and gestures of which the Appellant had previously complained would present themselves as additional evidence in the form of an Affidavit by a juror.⁷ The Motion was filed to bring to the Court's attention that additional evidence existed that went directly to the issue of bias and the effect that the facial expression and gestures had on the jury.

⁵ See Appellant's Brief, page 12, line 14.

⁶ See Appellant's Brief, page 16.

⁷ Record, p. 15 through 17.

Respondent argues that the trial judge ruled on the admissibility of the Juror's Affidavit, and further, that the ruling of inadmissibility of the Juror's Affidavit was not appealed, thereby making the inadmissibility of the Juror's Affidavit the law of the case.

The Respondent argues that the trial judge has ruled on the issue of inadmissibility of the Juror Affidavit in his Order dated July 19, 2018.⁸ This position is misplaced. The trial judge ruled that the “Court does not have jurisdiction to rule on this motion because it is improvidently filed and improperly before the court.”⁹ The trial judge, in his Order, stated again, “[T]he Court does not have jurisdiction of the motion.”¹⁰ The Court, in dicta, stated it’s opinion regarding the potential admissibility of a juror’s affidavit, but did not specifically make any ruling or finding as to the admissibility of the juror’s affidavit itself. The only ruling made by the Court regarding the Amended Motion for New Trial is that it did not have jurisdiction to rule on the Motion.

Respondent now relies on *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) for the proposition that an unappealed ruling, right or wrong, is the law of the case. However, the doctrine of the law of the case only applies to an order or ruling which finally determines a substantial right... and where an Order does not specifically rule on the issue, such issue is not the law of the case.¹¹ The only issue specifically ruled upon was that the Court did not have jurisdiction to hear the motion. The issue of whether the Affidavit was admissible or not played no part in the Court’s decision to dismiss the motion. It is respectfully submitted that the inadmissibility of the affidavit is not the law of the case.

⁸ Order denying Amended Motion for new Trial, R. p. 31.

⁹ Record, p. 29.

¹⁰ *Id.*

¹¹ *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 785 S.E.2d 778, 785 (2013).

Respondent argues that a juror's affidavit cannot be used to supplement the trial record after the fact to describe what the juror allegedly saw take place.

The Respondent softened their position a bit by stating that Rule 606 draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. Respondent admits that the rule allows evidence of extraneous influence to be introduced. On this we agree. The Affidavit of the Juror was offered to the trial judge to vet the veracity of the juror and to consider the effect that the facial expressions and gestures may have had on the jury as a whole. The trial judge refused to entertain the Motion on jurisdictional grounds. The Appellant does not simply argue that the Affidavit should be considered part of the record. More precisely, the Appellant argues that by refusing to even entertain the Amended Motion, the Appellant was divested of the opportunity to make the Affidavit part of the record, and this was error.

WHEREFORE, Plaintiff requests that the Appeal of the Orders originating from the Court of Common Pleas dated July 2, 2018 and July 19, 2018 be reexamined and reheard, and for any further relief the Court deems just and proper.

(SIGNATURE ON FOLLOWING PAGE)

Garcia Law, LLC

By: /s/ Stephen N. Garcia
Stephen N. Garcia, SC Bar No. 76191

604 Pettigru Street
Greenville, SC 29601
Dial: (864) 271-7335
For Appellant

April 4, 2022

Greenville, SC

RECEIVED

Apr 04 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

PROOF OF SERVICE

I certify that I have served the Reply to Respondent's Return to Appellants Petition for Rehearing on Katherine Hunter by email on April 4, 2022 and addressed to her attorney of record: **Andrew F. Lindemann, Esq., Andrew@LDH-Law.com.**

April 4, 2022

 /s / Stephen N. Garcia
Stephen N. Garcia, SC Bar No. 76191

604 Pettigru Street
Greenville, SC 29601
Dial: (864) 271-7335
For Appellant