No. 11-0378 Michael Coleman, Acting Warden, Mount Olive Correctional Complex, Respondent Below, Petitioner, v. Michael Brown, Petitioner Below, Respondent

FILED
June 1, 2012
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, C. J., dissenting:

In *United States ex rel. McCann v. Adams, Warden*, 126 F.2d 774 (2nd Cir. 1942), Judge Learned Hand observed that, in a trial by jury, an individual may forfeit his or her liberty "at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came." That observation, *a fortiori*, focuses attention on the safeguard found in the Constitution of the United States and the Constitution of West Virginia that the accused is entitled to trial "by an impartial jury." In the current matter, although this Court affirmed Michael Brown's convictions on direct appeal in *State v. Brown*, 210 W.Va. 14, 552 S.E.2d 390 (2001), the assignments of error therein substantially concerned the legitimacy of the jury. In fact, both dissents in *Brown* concerned the jury. Now another and, in my view, a more serious issue has been raised in the habeas proceeding, this time concerning the service of juror Wickline.

In the direct appeal in *Brown*, the majority acknowledged that no physical evidence linked Brown to the crimes, and one of the dissenting opinions asserted that "only the testimony of a self-serving criminal implicated the defendant," 210 W.Va. at 30, 552 S.E.2d at 406. In fact, co-defendants Fortner and France were ultimately arrested in Florida in connection with an unrelated

robbery and were found in possession of the weapon used in the Cabell County shootings of Davis and Black. Those circumstances coupled with a problematic jury, concerning which is now added the material non-disclosures of juror Wickline, suggest a result at trial which is forever tainted. Although the matters surrounding juror Wickline's son would have logically precluded her presence on the jury, her intentional non-disclosure of those matters rendered the voir dire process, at least as to her, meaningless. Accordingly, the majority's reversal of the new trial granted by the habeas court is unwarranted, and I therefore dissent.

Throughout the habeas proceedings, each party asserted that juror Wickline, no doubt, favored the other in the underlying trial. Whereas Michael Brown contended that Wickline sought to convict him to curry favor with the State in view of her son's impending prosecution, the State cited Wickline's deposition, given ten years after the trial, stating that she "was more apt to show mercy toward Michael Brown, if anything." The import of those respective assertions, however, is obvious. Had juror Wickline responded properly to the questions on voir dire, the issue of her impartiality would have been joined, and either the State or Brown may have discovered justification for a challenge for cause or a peremptory strike.

Unlike the anonymous melting into the community referred to by Judge Hand, the lack of candor on voir dire in this case mandated a revisiting, at long last, of Wickline's participation on the jury, a jury in a capital case the outcome of which was two consecutive life sentences. As mentioned above, this Court was not unanimous in upholding that result on direct appeal. The opinion of the majority in the current proceeding minimizes the facts. As her deposition revealed, Wickline was

a party in an unrelated juvenile proceeding against her son long before her son's indictment in 1998. The majority focuses on the 1998 indictment in conjunction with its discussion of Wickline's service on the jury in the Brown case. The 1998 indictment charged Wickline's son with second degree sexual assault, kidnaping and aiding and abetting. Significantly, both the unrelated juvenile proceeding and the later case against Wickline's son, initiated by the 1998 indictment, were before Circuit Court Judge O'Hanlon, the trial judge in the Michael Brown case. Adding to the circumstances is that, at one point during the trial of Brown, the trial of Wickline's son on the indictment was to be *the very next trial* on Judge O'Hanlon's docket.

Wickline had attended the proceedings in her son's felony case and had posted his bond. Moreover, she retained his attorney, Lee Booten. As it happened, Booten also represented Matthew Fortner, the State's key witness and former co-defendant in the Michael Brown case. Upon seeing Booten in the courtroom during the Michael Brown trial, Wickline deduced that her son's attorney also represented Matthew Fortner. Moreover, Wickline knew that Joseph Martorella, mentioned during voir dire in the Brown case, was the prosecutor assigned to her son's case.

None of the above facts were disclosed by juror Wickline during voir dire or otherwise during the trial of Michael Brown.

In the underlying trial of Brown, the prospective jurors, including Wickline, were advised that they were about to engage "on one of the most serious matters that can ever occur in the criminal justice system, the trial of a man charged with first degree murder." Judge O'Hanlon then stated:

> Although none of us like to be nosey and get into your personal or private business, obviously, we're going to have to ask you some question, the answers to some of which may be embarrassing for you. And, so, if you feel that the answer to a question is something you would rather not be talking about out here in front of God and country, say, Judge, I wonder if I could come over to the side bar and talk to you about that. * * * So, we'll be happy to come over here and take it up in private with you at a side bar conference so that you don't have to tell some personal thing about yourself or your family to everyone else here when it's none of their business.

Thereafter, the prospective jurors were sworn to answer any and all questions asked of them, and, during the course of voir dire, 13 jurors were excused for cause. Among the questions, the prospective jurors were asked whether "[a]ny of you have family members who have been defendants in a criminal case?" Juror Wickline gave no response. Worth noting as to that question is *W.Va. Code*, 56-6-14 [1923], which provides: "No person shall serve as a juror at any term of a court during which he has any matter of fact to be tried by a jury, which shall have been, or is expected to be, tried during the same term." As indicated above, at one point during Brown's trial, the trial of Wickline's son, under the 1998 indictment for sexual assault, kidnaping and aiding and abetting, was to be the very next trial on Judge O'Hanlon's docket. Juror Wickline had attended the proceedings in her son's case and had posted his bond.

In granting relief in habeas corpus, Judge Cummings concluded:

> While the juror may have made his or her own decision about his or her qualifications to serve, a prospective juror is not the judge of his or her own qualifications. The *Dellinger* case makes it clear that a juror who engages in this lack of candor takes away the ability of counsel or the Court to determine a juror's ability to serve or for counsel to determine whether or not to make a challenge. * * *

> Had she been forthcoming, any doubts the Court may have had about Ms Wickline's service likely would have been resolved in favor of dismissing Ms. Wickline as a juror for cause. Ms Wickline also observed other jurors presenting their backgrounds to the court and to counsel and stating their relationships to the accused, the prosecution team, and witnesses.

I find the comments of Judge Cummings well taken. Although questioning during voir dire in a criminal case should never be an endurance contest, nor is it a trivial matter. Whereas it may be helpful to distinguish on a fact basis various decisions of this Court concerning voir dire, the uniformity of those decisions is made clear in the acknowledgment of their centralized source of authority, the constitutional right to an impartial jury as made certain through the disclosure by prospective jurors of material facts.

I am authorized to state that **JUSTICE McHUGH** joins with me in this dissent.