STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0478 (Boone County 07-F-38)

Jason Gillispie,
Defendant Below, Petitioner

FILED
June 13, 2012
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Richard H. Lorenson for Petitioner.
Laura Young, Attorney General's Office, for the Respondent.

MEMORANDUM DECISION

This is an appeal by Jason Gillispie (hereafter "Petitioner") of the March 1, 2011, order of the Circuit Court of Boone County by which his motion for a new trial based on newly discovered evidence was denied and he was resentenced for the underlying second degree murder conviction.

This Court has reviewed the briefs and oral arguments of the parties and the appendix on appeal as supplemented. Upon consideration of the standard of review and the appendix presented, the Court finds no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

At a well-attended Christmas party at a bar in Boone County on December 23, 2006, Walter McDerment, Jr. was struck twice in the head with a pool stick. Mr. McDerment subsequently died from the blows which Petitioner admitted he inflicted. There had been an on-going feud between Petitioner and the victim's family due to an affair Petitioner had with the victim's former daughter-in-law.

Petitioner was arrested on December 24, 2006, and later indicted for first degree murder. Prior to his indictment, several petitions were circulated in the county regarding pre-trial release of Petitioner on bail. The petitions which were sent to the circuit court contained roughly 1,200 signatures. The trial judge brought up the subject of the petitions at the pre-trial conference at which he told the parties that he wanted the fact of the petitions to be raised on voir dire. According to the record, the voir dire questions regarding

the signing of petitions in the case pre-trial were posed by the prosecution. No prospective juror admitted to signing such a petition.

The seven day trial began on February 12, 2008. As part of the State's case, seven pool sticks were admitted into evidence. As explained by the testimony of a police officer, the pool sticks had been collected at the bar by the police after being told by the bar owner that the stick used in the commission of the crime had been picked up and placed on the pool rack. The pool rack held a total of seven sticks. It was made clear during the trial that the actual pool stick used to inflict the fatal blows was never determined by the police. To explain why the pool stick did not break upon impact, one of the pool sticks admitted at trial was cut in half so as to reveal the metal interior. At a pre-trial hearing the State had requested permission to alter evidence by cutting the lightest pool stick. Hearing no objection, the trial court said that the evidence would be a demonstrative aid. At trial, defense counsel objected to the admission of the pool sticks on the bases that the officer testifying was not an expert on pool sticks, and the pool stick which was cut was not known to be the pool stick used to inflict the head injury. The objection was overruled.

The jury returned its verdict on February 22, 2008, finding Petitioner guilty of second degree murder. Petitioner was sentenced to twenty-five years in prison by order entered May 7, 2008. While serving his sentence, Petitioner obtained copies of the petitions that had been circulated and sent to the court before his trial. He discovered that the jury foreman in his trial had signed one of the petitions requesting that Petitioner not be granted bond. He informed the lower court of the newly discovered evidence by letter of April 12, 2009, in which he also indicated that his counsel was not communicating with him.

Due to numerous resentencing orders,[1] a motion for a new trial based on the newly discovered evidence of juror misconduct was timely filed on October 7, 2009. W. Va. Cr. P. R. 33. As no appeal was pending at the time the motion was filed, the lower court entertained the motion at a December 2, 2010, hearing. The lower court denied the motion at the conclusion of the hearing. A resentencing order was entered on December 9, 2010. On March 1, 2011, an Amended Order Denying Motion for New Trial and Resentencing Defendant, was entered incorporating by reference the reasons for the denial of the new trial as stated on the record. It is from the March 1, 2011, order that this appeal is taken.

Admission of Pool Stick Evidence

[1]It appears from the portions of the record before the Court that the resentencing orders were necessary for due process purposes since the various appointed counsel were for reasons undeterminable from the record unable to perfect an appeal.

Petitioner maintains that nothing established that the pool stick admitted was the one used in the crime, and the police officer who altered the stick by cutting it to expose the metal core was not an expert on the construction of pool sticks. He contends that because the actual pool used to strike the victim was unknown and the officer who performed the "test" of cutting one of the sticks was not an expert on construction, the evidence was not sufficiently accurate to allow the jury to assume that the pool stick actually used to inflict the fatal injury would share the same physical properties as the exemplar. He proposes that this evidence did not satisfy the evidentiary requirement that tests be conducted under the same or similar conditions as those prevailing at the time and place of the event. Syl. Pt. 6, *Spurlin v. Nardo*, 145 W.Va. 408, 114 S.E.2d 913 (1960). He further asserts that the cutting open of a random pool stick results in confusing the key issue of how the stick used in the crime was made, thus making it improper for admission as unfairly prejudicial under Rule 403 of the West Virginia Rules of Evidence.

A trial court's evidentiary rulings are accorded great deference upon review and will not be disturbed unless an abuse of discretion is found. Syl. Pt. 10, *State v. Huffman*, 141 W. Va. 55, 87 S.E.2d 541 (1955), overruled on other grounds, *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994). A review of the record reveals no abuse of discretion in this case. Petitioner was charged with committing first-degree murder, and he admitted he hit the victim in the head twice with a pool stick at the bar. The coroner testified that the victim died of blunt force trauma caused by blows to the head. The seven possible murder weapons were admitted into evidence with the lightest of the seven cut open to expose a metal core to demonstrate that the pool sticks were not simply a piece of wood and could have inflicted a blow without breaking. Even if the pool stick used in the demonstration was not *the* murder weapon, it helped the jury understand the nature of the weapon used to commit the crime and was relevant and not unfairly prejudicial. Since "scientific, technical, or other specialized knowledge" regarding the pool stick was not being offered by the police officer who testified regarding the pool sticks in question, the officer did not have to be qualified as an expert in order to testify. W. Va. R. Evid. R. 702. Finally, no test was performed on the pool stick that was altered, it was simply cut to expose the core. Consequently, case law governing admissibility of tests or experiments is inapplicable.

Juror Misconduct

Petitioner asserts that the trial court's refusal to grant a new trial based on juror misconduct constitutes reversible error. He maintains that he was denied his constitutional right to a fair trial because the jury foreman, who is now deceased, failed to disclose during voir dire that he had signed a petition asking the court to deny pre-trial release of Petitioner

on bond.[2] He argues that "a criminal defendant is entitled to insist upon a jury composed of persons who have no interest in the case, have neither formed nor expressed any opinion, who are free from bias or prejudice, and stand indifferent in the case." *State v. Dellinger*, 225 W. Va. 736, 741, 696 S.E.2d 38, 43 (2010). He concludes that the juror in question, Robert L. Burke, expressed an opinion about the case by signing the petition. Because Mr. Burke did not disclose that he signed a petition when directly asked about it during voir dire, Petitioner did not have information to challenge him for cause or exercise a peremptory challenge. Since Mr. Burke is now dead, it is impossible to directly question him regarding the matter to establish actual bias or prejudice. Essentially, Petitioner is requesting that impartiality be presumed under these facts.

The review of the trial Court's denial of a motion for a new trial involves a two-prong deferential standard. "We review the ruling of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 3, in part, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

As stated in syllabus point 4 of *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996), "[t]he relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant." This Court went on to hold in syllabus point 5 of *Miller* that "[a]ctual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." Additionally, as this Court has repeatedly stated, "'"'A trial court's failure to remove a biased juror from a jury panel does not violate a defendant's right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice." Syl. Pt. 7, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995).' Syllabus Point 6, *State ex rel. Quinones v. Rubinstein*, 218 W. Va. 388, 624 S.E.2d 825 (2005)." Syllabus Point 6, *State ex rel. Farmer v. McBride*, 224 W. Va.

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[2]The exact wording on the petition signed by the juror states:

> To the honorable Judge William S. Thompson: We the undersigned citizens of Boone County respectively request that Jason Gillispie not be granted a bond in the case of the death of Walter Paul "BUBBY" McDerment.

469, 686 S.E.2d 609 (2009).' Syl. Pt. 6, *Coleman v. Brown*, ___ W. Va. ___, ___ S.E.2d ___, 2012 WL 1987140, W. Va. June 1, 2012 (No. 11-0378). Importantly, this Court has said that in less than clear cases of actual bias, the conclusion regarding bias or prejudice is "finally drawn from the totality of the responses." *O'Dell v. Miller*, 211 W. Va. 285, 289, 565 S.E.2d 407, 411 (2002).

Based upon our careful review of the voir dire proceedings, the facts taken as a whole do not show that Mr. Burke had such prejudice or connection with the parties at trial that bias must be presumed as concluded by Petitioner. The following questions were asked during voir dire regarding the pre-trial petitions:[3]

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[3]Although the trial judge at the hearing on the motion for a new trial said that he asked the relevant questions during voir dire, the transcript of the proceedings reflects that the prosecution posed the questions with regard to the petitions. The complete ruling on the motion for a new trial based on juror misconduct as stated on the record at the December 2, 2010, hearing is as follows:

> I've reviewed the record. I've looked at the motion and specific portions of the record and , frankly, I don't know what I could have done at this trial. The Court was well aware of the petitions. The parties were well aware of the petitions. The Court itself asked of the jury, "Were you aware; did you sign a petition?"
>
> The Defendant had a copy of the petition and his counsel had a copy of the petition. And I'm aware how these so-called petitions work in this county. Sometimes these are put up at a convenience store and people start signing them without reading them.
>
> I will say for the record, for what it's worth, if I would have known, if it were brought to my attention by Defense Counsel that he signed the petition I would have probably struck Mr. Burke. I feel this might be more grounds for habeas relief than a motion for a new trial.
>
> I don't know what else the Trial Court could have done about it. I asked about it. I think both parties were aware of the

(continued...)

> Now, a few months ago there was a couple of different petitions going around regarding this case. There were some petitions, you know, asking for one thing, and some petitions asking for another thing. Were any of you ever approached by anybody asking you to sign a petition regarding this case at all?
>
> Nobody was? Nobody even approached you and said, "Hey, I'm doing this"? Were any of you aware of any of these petitions?
>
> So did any of you sign a petition? That seems to follow logically, but I thought I would ask?

None of the prospective jurors, including Mr. Burke, responded affirmatively to any of these petition-related questions. However, this obviously was not the only question posed during voir dire. From Mr. Burke's response to the general voir dire questions, he did not know either the victim or the defendant, was not related to either by blood or marriage and did not know anyone in their families. He did not have knowledge of the facts of the case, had not formed or expressed any opinion about the guilt or innocence of the defendant, and had no interest in the result of the trial. He affirmatively answered the general question posed about being able to fairly and impartially try the issue and render a

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[3](...continued)
> petition and nothing was done in secret. In fact, we had discussed the number of people that had signed the petition and we thought about eliminating the entire community where most of the names came from. I believe there was some discussion on that on the record earlier.
>
> I would have struck him if the motion was made, but the motion was not made. I'm going to go ahead and deny the motion[.]

With specific regard to the contents of the numerous petitions which were presented to the trial court, it appears that they were not all the same. When he raised the issues of the petitions during pre-trial conference, the judge stated: "That is something that I want taken up at voir dire is the fact that there's these petitions. I don't really care if people talk about the petitions, just ask if a petition was signed, because I think the petitions went both ways on this case."

verdict based on the evidence. Mr. Burke did acknowledge that he had involvement with the police and was individually questioned regarding that involvement. He readily admitted knowing and having dealings with the county sheriff and knowing a state trooper, but he denied that his dealings with the police would influence his thinking or his fair evaluation of the evidence by stating:

> Well, unless I go deaf, I can listen to the evidence. As far as dealing with the officers, that was strictly a – as if you would call an officer to come out to help you. That's what we pay them for . . . . I don't judge anybody.

The prosecution asked during the individual questioning of Mr. Burke if he would place any blame on the victim in this case for the fact that he was at a bar. This questioning led to the following exchange:

> A. That's his choice. If he wants to drink, fine.
>
> Q. Do you think that a crime committed in a place like that, a bar, a drinking establishment, is any more or any less serious than a crime committed anywhere else?
>
> A. It all depends on the evidence and the situation.
>
> Q. But just the fact alone that it was off in a bar, you don't think that makes it any more or less serious?
>
> A. It wouldn't make any difference to me. It could have been in a church.

Defense counsel also participated in the direct questioning of Mr. Burke to the following extent:

> Q. Do you know the McDerment family?
>
> A. No.
>
> Q. Let me represent the victim in this case is - -
>
> A. No, I don't even know you.

Q. I understand. I have a note here. I'm not sure if it's you or somebody else, that you might know the deceased in this case, Walter McDerment; is that not true?

A. I have no idea who he is.

Q. All right.
No further questions.

The questions surrounding the pre-trial petitions were not the model of clarity. Nonetheless, Mr. Burke did sign one of the petitions. However, signing a petition requesting that Petitioner not be released on bond does not establish that Mr. Burke had a fixed opinion about the case which would interfere with his fairly judging the evidence on the merits. The totality of Mr. Burke's responses to the general and specific voir questions does not provide the type of "proof of specific facts which show the juror has such a prejudice or connection with the parties at trial" that he could not be impartial in deciding the case. *State v. Miller,* 197 W. Va. at 605, 476 S.E.2d at 552. The Court concludes there was no abuse of discretion in denying the motion for a new trial.

Based upon the foregoing, the March 1, 2011, order of the Circuit Court of Boone County is affirmed.

Affirmed.

ISSUED: June 13, 2012

CONCURRED IN BY:
Chief Justice Menis E. Ketchum, writing separately.
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

Chief Justice Ketchum concurs and reserves the right to file a concurring opinion.

No. 11-0478 - *State of West Virginia v. Jason Gillespie*

Ketchum, Chief Justice, concurring:

I concur with the result in this case. There is no evidence of the juror intentionally concealing information. However, the majority opines that a defendant must show actual prejudice in order for a defendant to succeed on a claim of juror misconduct.

The sounder rule is that a juror's intentional failure to disclose material information during *voir dire* raises a presumption that, if unrebutted by the prosecution, is sufficient to warrant a new trial. To rebut the presumption of prejudice, the state must affirmatively prove that no prejudice existed or that there was no reasonable probability of actual harm to the defendant. *See*, Jennifer H. Case, *Satisfying the Appearance of Justice When a Juror's Intentional Nondisclosure of Material Information Comes to Light*, 35 U. Mem. L. Rev. 315 (2005).