IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

No. 33919

FILED
March 13, 2009
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

BILLIE DAWN HATLEY,
Defendant Below, Appellant

Appeal from the Circuit Court of Lewis County
Honorable Thomas H. Keadle, Judge
Criminal Action No. 06-F-1

REVERSED AND REMANDED

Submitted: January 14, 2009
Filed: March 13, 2009

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE ALBRIGHT not participating.

SENIOR STATUS JUSTICE McHUGH sitting by temporary assignment.

JUSTICE KETCHUM concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syllabus Point 1, *State v. Wilson,* 157 W. Va. 1036, 207 S.E.2d 174 (1974).

2. "Actual 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." Syllabus Point 5, *State v. Miller,* 197 W. Va. 588, 476 S.E.2d 535 (1996).

3. "When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror." Syllabus Point 3, *O'Dell v. Miller,* 211 W. Va. 285, 565 S.E.2d 407 (2002).

4. "Where a prospective juror is one of a class of persons represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not *prima facie* grounds for disqualification of that juror." Syllabus Point 3, *State v. Audia,* 171 W. Va.

568, 301 S.E.2d 199 (1983).

5. "[I]f a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error." Syllabus Point 8, in part, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995).

Per Curiam:[1]

[1]Pursuant to administrative orders entered September 11, 2008 and January 1, 2009, the Honorable Thomas E. McHugh, Senior Status Justice, was assigned to sit as a member

Appellant Billie Dawn Hatley appeals her conviction for first degree robbery under W. Va. Code § 61-2-12 (2000), and her sentence of a ten-year determinate term of incarceration. Because we find that the circuit court abused its discretion in failing to strike a juror for cause, we reverse the appellant's conviction and sentence, and we remand for proceedings consistent with this opinion.[2]

I.

FACTS

This case arises from a purse snatching. The evidence below indicates that Nancy Ellen Bailey was walking into a Walmart store when Billie Dawn Hatley, the appellant, came up to Ms. Bailey and tugged on her purse. There is evidence to indicate that Ms. Bailey was not otherwise touched by the appellant. Ms. Bailey briefly resisted before

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of the Supreme Court of Appeals of West Virginia commencing September 12, 2008, and continuing until the Chief Justice determines that assistance is no longer necessary, in light of the illness of Justice Joseph P. Albright.

[2]The appellant raises four assignments of error on appeal. In addition to the trial court's failure to strike a prospective juror for cause, the appellant also alleges error in failing to instruct the jury on petit larceny as a lesser included offense of robbery; failing to read to the jury the robbery statute in regard to what constitutes violence; and in sentencing the appellant to ten years which the appellant says is a constitutionally impermissible sentence under these facts. Although these assignments of error may have merit, because we reverse on the issue of failing to strike the prospective juror for cause, we find it unnecessary to address these alleged errors.

the appellant got Ms. Bailey's purse, jumped into a vehicle, and was driven away. The appellant later admitted to a police officer that she took $40 out of the purse and then discarded the purse and its contents, which the police subsequently found.

The appellant was indicted and tried for first degree robbery under W. Va. Code § 61-2-12 (2000).[3] During *voir dire*, Prospective Juror Boyd Conrad disclosed that he had hired the prosecuting attorney, Joseph Wagoner, a couple of years earlier to prepare deeds for him, and that he would again use the services of Mr. Wagoner if the need arose. Mr. Conrad indicated, however, that he believed that he could be fair and impartial at trial. The appellant objected to Mr. Conrad remaining on the jury panel but the trial court overruled the objection. The appellant ultimately struck Mr. Conrad, and he did not serve on the jury.

At the close of the evidence, the jury returned a verdict of first-degree robbery, and the trial court sentenced the appellant to a determinate term of 10 years. The appellant now appeals.

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[3]The pertinent part of this code section provides:

> (a) Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating . . . is guilty of robbery in the first degree and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than ten years.

II.

STANDARD OF REVIEW

We are called upon in this case to decide whether a prospective juror should have been excused from the jury panel for cause. "The determination of whether a prospective juror should be excused to avoid bias or prejudice in the jury panel is a matter within the sound discretion of the trial judge." *O'Dell v. Miller*, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002) (citations omitted). Thus, we review the trial court's ultimate decision not to strike Prospective Juror Conrad for cause under an abuse of discretion standard.

III.

DISCUSSION

The sole issue that we address in this case is whether Prospective Juror Conrad should have been disqualified from serving on the jury panel below because he had a prior attorney-client relationship with the prosecutor in the case and he professed that he would seek out the same relationship with the prosecutor in the future if the need arose.

A defendant in a criminal trial is entitled to an impartial jury. "The object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but

who are also free from the suspicion of improper prejudice or bias." *O'Dell,* 211 W. Va. at 288, 565 S.E.2d at 410. This Court has explained that "[t]he true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syllabus Point 1, *State v. Wilson,* 157 W. Va. 1036, 207 S.E.2d 174 (1974). We have further indicated 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." Syllabus Point 5, *State v. Miller,* 197 W. Va. 588, 476 S.E.2d 535 (1996). Moreover, "as far as is practicable in the selection of jurors, trial courts should endeavor to secure those jurors who are not only free from but who are not even subject to any well-grounded suspicion of any bias or prejudice." *O'Dell,* 211 W. Va. at 289, 565 S.E.2d at 411 (citations omitted). Finally, we have held that,

> When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror.

Syllabus Point 3, *O'Dell, supra.*

This Court has had occasion to consider whether a prospective juror's current attorney-client relationship with the prosecuting attorney mandated the juror's disqualification. In *State v. Audia,* 171 W. Va. 568, 301 S.E.2d 199 (1983), the prosecuting

attorney informed the court during *voir dire* that he represented prospective juror Hughes, along with 30 to 40 members of Mr. Hughes' family, in a partition suit then pending in the circuit court. While the prosecutor had dealt directly with Mr. Hughes' sister in the case, he had never met Mr. Hughes, and Mr. Hughes was not even aware that the prosecutor was involved. Defense counsel moved to excuse Mr. Hughes from the jury panel for cause because he was a client of the prosecutor, but the court denied the motion.

In discussing whether the trial court acted properly, this Court explained in *Audia*:

> We have not yet considered the situation presented here, where the prospective juror is a client of the prosecuting attorney at the time of trial. Such a relationship is not one of the grounds for disqualification set forth in our statutes, [W. Va. Code § 52-1-8 (2007)] and 56-6-12 [1923],[4] nor is it one of our

[4]W. Va. Code § 52-1-8 provides, in part:

> (b) A prospective juror is disqualified to serve on a jury if the prospective juror:
> (1) Is not a citizen of the United States, at least eighteen years old and a resident of the county;
> (2) Is unable to read, speak and understand the English language. For the purposes of this section, the requirement of speaking and understanding the English language is met by the ability to communicate in American sign language or signed English;
> (3) Is incapable, by reason of substantial physical or mental disability, of rendering satisfactory jury service; but a person claiming this disqualification may be required to submit a physician's certificate as to the disability and the certifying physician is subject to inquiry by the court at its discretion;

> common law causes of *prima facie* grounds for disqualification from jury service. *See State v. Riley*, 151 W. Va. 364, 151 S.E.2d 308, 320 (1966) [*overruled on other grounds by Proudfoot v. Dan's Marine Service, Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001)]; *State v. Dushman*, 79 W. Va. 747, 91 S.E. 809 (1917).[5] In addition, we find no other jurisdiction which

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> (4) Has, within the preceding two years, been summoned to serve as a petit juror, grand juror or magistrate court juror, and has actually attended sessions of the magistrate or circuit court and been reimbursed for his or her expenses as a juror pursuant to the provisions of section twenty-one [§ 52-1-21] of this article, section thirteen [§ 52-2-13], article two of this chapter, or pursuant to an applicable rule or regulation of the Supreme Court of Appeals promulgated pursuant to the provisions of section eight [§ 50-5-8], article five, chapter fifty of this code;
> (5) Has lost the right to vote because of a criminal conviction; or
> (6) Has been convicted of perjury, false swearing or other infamous offense.

According to W. Va. Code § 56-6-12 [1923],

> Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. And in every case, unless it be otherwise specially provided by law, the plaintiff and defendant may each challenge four jurors peremptorily.

[5]*Audia* quotes in a footnote *State v. Dushman*, 79 W. Va. 747, 749, 91 S.E. 809, 810 (1917), which states:

> At the common law the principal causes of challenges,

> has held such a relationship to be *prima facie* grounds for disqualification of a prospective juror.[6] We find no prejudice, *per se,* in the attorney-client relationship between the prosecutor and Hughes, particularly where, as here, the representation is of a class of people and he has little, if any, contact with the particular individual who is the juror.

171 W. Va. at 574, 301 S.E.2d at 205-206. The Court went on to note that,

> Hughes' responses during *voir dire* revealed no bias or prejudice on his part, and showed that he would be able to render a fair and impartial verdict solely on the evidence presented to him. We have already noted the limited contact, if any, between Hughes and the prosecutor before this trial. Perhaps, the more prudent course by the trial court would have been to excuse Hughes. We hold, however, that its failure to do so in this case was not an abuse of discretion and was not reversible error.

Audia, 171 W. Va. at 574, 301 S.E.2d at 206. Finally, in Syllabus Point 3 of *Audia,* we held:

> Where a prospective juror is one of a class of persons

> prima facie disqualifying jurors, were: (1) Kinship to either party within the ninth degree; (2) was arbitrator on either side; (3) that he has an interest in the cause; (4) that there is an action pending between him and the party; (5) that he has taken money for his verdict; (6) that he was formerly a juror in the same case; (7) that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him; and causes of the same class or founded upon the same reason should be included.

[6]*Audia* cites in a footnote *Harris v. State,* 46 Ala.App. 497, 243 So.2d 770 (Ala.App.1970); *People v. Wilkes,* 44 Cal.2d 679, 284 P.2d 481 (1955); *State v. Wilcoxen,* 200 Iowa 1250, 206 N.W. 260 (1925); *State v. Ekis,* 2 Kan.App.2d 658, 586 P.2d 288 (Kan.App.1978); *State v. Grant,* 394 S.W.2d 285 (Mo. 1965); *State v. Radi,* 176 Mont. 451, 578 P.2d 1169 (Mont. 1978); *State v. Glover,* 21 S.D. 465, 113 N.W. 625 (1907); *State v. Lewis,* 31 Wash. 75, 71 P. 778 (1903); *see also* Annot., 72 A.L.R.2d 673 (1960); *but cf. Klinck v. State,* 203 Ind. 647, 179 N.E. 549 (1932) [indicating challenge might have been sustained if attorney-client relationship had existed at time of trial.]

> represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not *prima facie* grounds for disqualification of that juror.

Another case in which this Court considered attorney-client relationships between attorneys at trial and prospective jurors is *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002). In *O'Dell*, we determined that the trial court abused its discretion by not striking a challenged juror for cause where the juror was a former patient of the defendant doctor and was currently a client of the law firm that represented the defendant. We noted that,

> While no West Virginia case squarely addresses the issue of attorney-client relationships between attorneys and prospective jurors, the Supreme Court of Virginia has reversed and remanded a personal injury lawsuit for a new trial on the ground that the trial court should have removed a prospective juror for cause who was at the time of trial a client of the law firm representing the plaintiff. *Cantrell v. Crews*, 259 Va. 47, 523 S.E.2d 502 (Va. 2000). In *Cantrell v. Crews*, the Virginia Supreme Court commented that "[p]ublic confidence in the integrity of the process is at stake. It cannot be promoted when a sitting juror is, at the time of trial, a client of the law firm representing one of the parties[.]" *Id.*, 259 Va. at 51, 523 S.E.2d at 504.
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> In many West Virginia communities, prospective jurors will often know the parties and their attorneys. Nevertheless, this familiarity does not remove the trial court's obligation to empanel a fair and impartial jury as required by West Virginia's *Constitution*, Article 3, § 10. This obligation includes striking prospective jurors who have a significant past or current

relationship with a party or a law firm.

O'Dell, 211 W. Va. 290-291, 565 S.E.2d at 412-413 (footnote omitted). It is apparent from our discussions in *Audia* and *O'Dell* that while an attorney-client relationship between a prospective juror and the prosecuting attorney does not *per se* disqualify that juror, such a relationship merits the closest scrutiny by the trial court, and the more prudent course may be to excuse the juror.

In the instant case, we find that the trial court abused its discretion in failing to strike Prospective Juror Conrad for cause. Significant to this finding is the fact that the prosecuting attorney's representation of Mr. Conrad was fairly recent, only a couple of years prior to the appellant's trial, and Mr. Conrad indicated that he would again hire the prosecuting attorney in the future in the event he needed legal work done. This Court previously has stated that the attorney-client relationship is one of trust and confidence. *See Delaware CWC Liquidation Corp. v. Martin,* 213 W. Va. 617, 622, 584 S.E.2d 473, 478 (2003) ("[a]n attorney's nondelegable duty of loyalty to his client and the level of trust a client places in his attorney are also essential elements of the attorney-client relationship" (citations omitted)); *Lawyer Disciplinary Bd. v. Ball,* 219 W. Va. 296, 309, 633 S.E.2d 241, 254 (2006) ("trust and honesty . . . are indispensable to the functioning of the attorney-client relationship," *quoting Matter of Discipline of Babilis,* 951 P.2d 207, 217 (Utah 1997)). Mr. Conrad's willingness to hire the prosecuting attorney to represent him in the future indicates that he had established a relationship of trust with the prosecuting attorney.

Because of the attorney-client relationship between the prosecuting attorney and Mr. Conrad, we believe that the trial court was obligated to strike Mr. Conrad for cause. While this is a close case, we conclude that the fact that the prosecuting attorney had recently represented Mr. Conrad and Mr. Conrad would hire the prosecuting attorney to do legal work for him in the future raises a well-grounded suspicion of bias or prejudice. Moreover, we believe that Mr. Conrad's assertion that the prosecuting attorney's previous representation of him would not bias or prejudice him is insufficient to allay this suspicion. Mr. Conrad's recent attorney-client relationship with the prosecuting attorney and potential future relationship raised a legitimate doubt that absent more, should have in this case been resolved in favor of excusing Mr. Conrad.

This Court has indicated that "if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error." Syllabus Point 8, in part, *State v. Phillips,* 194 W. Va. 569, 461 S.E.2d 75 (1995). Accordingly, we find that it was reversible error for the trial court to fail to strike Mr. Conrad from the jury panel, and we remand for further proceedings consistent with this opinion.[6]

[6]The State contends that the prosecutor's representation of Prospective Juror Conrad occurred well in the past and involved only the drafting of a deed. Also, says the State, Prospective Juror Conrad responded unhesitatingly that he had no bias that would prevent him from acting impartially. Finally, the State asserts that the drafting of a deed does not

IV.

CONCLUSION

For the reason set forth above, we reverse the judgment of the Circuit Court of Lewis County and we remand for further proceedings consistent with this opinion.

Reversed and remanded.

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generally entail a great deal of work on the part of the attorney or much involvement between the attorney and client. For the reasons expressed in the body of this opinion, we find no merit to the State's arguments.