4-3-1979

Brief in Support of Motion of Defendants to Vacate and Set Aside Their Sentences and Judgments of Conviction Because of Misconduct of Jurors

Lewis Steel '63

STATE OF NEW JERSEY - RESPONDENT -against- RUBIN CARTER - DEFENDANT-APPELLANT	: SUPERIOR COURT OF NEW JERSEY LAW DIVISION : ON ORDER OF REMAND FROM THE SUPERIOR COURT APPELLATE DIVISION : CARTER DOCKET NO. A-5166-76 : ARTIS DOCKET NO. A-5167-76
STATE OF NEW JERSEY - RESPONDENT -against- JOHN ARTIS - DEFENDANT-APPELLANT	: INDICTMENT NO. 167-66 : CRIMINAL ACTION

BRIEF IN SUPPORT OF MOTION OF DEFENDANTS CARTER AND ARTIS TO VACATE AND SET ASIDE THEIR SENTENCES AND JUDGMENTS OF CONVICTION BECAUSE OF MISCONDUCT OF JURORS

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PRELIMINARY STATEMENT

This brief relies on the allegations of jury and guard misconduct as sworn to by alternate juror John Adamo.

ARGUMENT

THE MISCONDUCT OF 1976 TRIAL JURORS AND GUARDS REQUIRES THAT THE SENTENCES AND JUDGMENTS OF CONVICTION BE VACATED AND SET ASIDE.

The fundamental principles and appropriate procedures in considering allegations of misconduct are stated in Panko v. Flintkote Co., 7 N.J. 55, 61, 80 A.2d 302 (1951), as follows:

> "The fundamental right of trial by a fair and impartial jury is jealously guarded by the courts. A jury is an integral part of the court for the administration of justice and on elementary principles its verdict must be obedient to the court's charge, based solely on legal evidence produced before it and entirely free from the taint of extraneous considerations and influences. A jury can act only as a unit and its verdict is the result of the united action of all of the jurors who participated therein. Therefore the parties to the action are entitled to have each of the jurors who hears the case, impartial, unprejudiced and free from improper influences. (Citations omitted).
>
> It is well settled that the test for determining whether a new trial will be granted because of the misconduct of jurors or the intrusion of irregular influences is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so. The stringency of this rule is grounded upon the necessity of keeping the administration of justice pure and free from all suspicion of corrupting practices. It is said to be "imperatively required to secure verdicts based on proofs taken openly at the trial, free from all danger by extran-

eous influences." (Citations omitted).

The misconduct in the case at bar, separately and cumulatively, clearly constitutes "irregular influence" that on its face had a "tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the Court's charge." Thus, the twofold test of Panko is met by any of alternate juror Adamo's allegations.

Indeed, the Panko test is more easily met in a case such as the one at bar where the jurors were specifically questioned and advised in an attempt to avoid extraneous influences and where the respective voir dires put each of the jurors on notice of their obligations to act without prejudice, without prejudgment and without consideration of any knowledge gained outside of the courtroom. See State v. Kociolek, 20 N.J. 92, 98 (S.Ct. 1955).

Though the principles overlap, the failure of jurors on voir dire to be candid on key issues is recognized as a separate ground for automatic reversal. The leading case is Wright v. Bernstein, 23 N.J. 284, 295 (1975), where the court stated, after reiterating the principles enunciated in Panko v. Flintkote Co., supra:

> "What happened in this case had the effect of nullifying the purpose of the examination and was as effective as though the trial court had denied the right of challenge. The denial of the right of peremptory challenge is the denial of a substantial right. When it is not waived by conduct, it is prejudicial per se and harmful, and a party is not required to make an affirmative showing that the denial of his right to peremptory challenge had resulted in prejudice and injury to his cause

of action on the merits."

The Wright case was recently discussed in State v. Thompson, 142 N.J. Super. 274 (1976) which set aside a conviction and granted a new trial where a juror failed to advise counsel, in response to an appropriate voir dire inquiry, that he had previously served as a guard in a correctional institution. In following Wright the Appellate Court found it irrelevant whether the juror failed to respond to the voir dire inquiry because of deliberateness or whether he was in fact prejudiced or whether his background tainted his verdict or that of his fellow jurors. The Court stated:

> "The key determinant is whether defendant has been deprived of a fair trial by jury by virtue of his inability to exercise a peremptory challenge because of the failure of the juror to make a candid response to the inquiry relating to a significant fact of potential bias." 142 N.J. Super. at 280.

The Thompson opinion stresses the fact that the exercise of a peremptory challenge is a valuable incident of the trial process as to which the defendant cannot be mislead or prejudiced; that that right is "as substantial as the right to challenge for cause"; and that what is at issue is the right to a fair trial and impartial jury as guaranteed by the Sixth Amendment to the Federal Constitution and New Jersey Constitution, Article I Para. 9. 142 N.J. Super. at 280-281. Thompson concludes that the denial of the right of peremptory challenge is prejudicial per se and "warrants a new trial even in the absence of a showing of actual prejudice." 142 N.J. Super. 281-282 (citing Federal and State authorities).

It need hardly be argued that the information obtained by the juror Alario from his wife (prior to the commencement of the trial and after being carefully warned by the judge against even speaking to his wife and against obtaining any outside information from anyone) was information which that juror was required to bring to the attention of the court and counsel before the entire jury was sworn in at the commencement of the trial. Thus the juror, by his non-disclosure, not only violated the Court's directions and obtained enormously prejudicial extraneous information, but deprived the defendants of their right to exercise a peremptory challenge.*

We also submit that under the circumstances at bar and given the extensive voir dire of the jurors, the demonstrated prejudgment and racial bias of jurors Armellino and Demetriadis and of alternate juror Fischer, make it unquestionable that their answers at the voir dire were fatally tainted by lack of candor as well as being equivalent to misrepresentations which rendered them unfit to serve as jurors.

In State v. Thompson, 142 N.J. Super., supra, at 282, the Court eschews legalistic labels and holds that "where a juror has failed to respond to a voir dire question patently addressed to the possible existence of bias" then "the conclusion is inescapable that defendant has been deprived of a

* Appellants did not exercise all of their peremptory challenges during the jury selection process.

fundamental right to a fair trial and that his conviction cannot stand." The Court further holds that the matter is not one of discretion for the determination of the trial judge because the error "involves the deprivation of a fundamental right of a party and does not relate to a trial occurrence which lends itself to superior evaluation by the judge on the scene." 142 N.J. Super. at 282.

The situations involved in Wright v. Bernstein and State v. Thompson are concerned with peremptory challenges and failure of jurors to provide information that would have been an obvious basis for their exercise. Yet what we are dealing with in this case is a much more serious situation. It involves information that would have been adequate bases for challenges for cause.

Moreover, in regard to the racial bias exhibited by juror Armellino in his derogatory interchanges with guards in the presence of other jurors, there is no doubt that New Jersey will not tolerate a verdict so deeply infected with prejudice. The same conclusion applies to the racial bias exhibited by juror Demetriades and alternate juror Fischer. This conclusion is especially inescapable given the peculiar facts of this case and the State's contention at trial that racial motive brought about the slaying of three whites by two blacks. The Supreme Court has already spoken definitively on the subject in situations which do not even begin to approach the serious improprieties in the case at bar. See State v. Levitt, 36 N.J. 266 (S.Ct. 1961); State v. LaFera, 42 N.J.

97 (1964).

In Levitt the issue of the defendant's religion and that of the character witnesses had been improperly injected into the jury deliberation, thus giving rise to the possibility of passion and prejudice. The Court observed that: "it makes little difference that the infection was only slight so long as it is present". 36 N.J. at 270. See full discussion of basic principles and leading cases in 36 N.J. at 270-271. The Levitt court rejected the State's argument that comments of the jurors were legitimate observations and deductions made during the course of the trial; and that they should not be grounds for a new trial because it would work a substantial impairment to the jury system.

In upholding the trial court's determination that the introduction of religion into the jury room belittled the integrity of Jews and exhibited an adverse prejudice in the jury's deliberations, the Levitt court went on to discuss other jurisdictions which recognize remarks to the jury "evincing racial or religious bias" as grounds for impeaching the jury's verdict. 36 N.J. at 272. The latter included Commonwealth v. Thompson, 328 Pa. 27, 195 A. 115 (S.Ct. 1937) which found that "a remark by a juror disparaging Negroes generally would show disrespect for defendant's race and render the juror incompetent and void the verdict."

The remarks and holdings in Levitt would of course apply directly to the comments attributed to jurors Armellino, Fischer and Demetriades as well as to the failure of other

jurors who heard those comments to take any action concerning the prejudicial remarks. Also the principles in question would be invoked by the comments of the guards in their interchanges with Armellino; and the attempt by a guard to influence the jurors' verdict in relating a story about blacks who had committed a shotgun hold-up and escaped conviction by legal loopholes, especially since the guard (in drawing an analogy to the case at bar) referred to Carter and Artis as "bastards" who would probably also get away with it.

Even the strong policy against probing jurors' deliberations must fall before a charge of bias; and the latter must be heard upon a sufficient preliminary showing. State v. LaFera, 42 N.J. 97, 110-111 (1964).

The issues that arise from the misconduct of the guards present separate issues. It is clear that members of the jury as well as bailiffs assigned to shepherd them violated the court's instructions and acted improperly. The attempt by one guard to influence the jurors in discussing the prejudicial analogy of another facially similar crime in Paterson and his pejorative references to the defendants was in itself a most fundamental violation of statutory and constitutional rights to fair trial and due process and to Appellants' right of confrontation.

Parker v. Gladden, 385 U.S. 363 (1966) is exemplary and determinative in those respects. In Parker the Court reversed a second-degree murder conviction after a petition

for post-conviction relief and a hearing. The trial court had found that the bailiff assigned to shepherd the sequestered jury had stated to a juror: "Oh, that wicked fellow, he is guilty" and to another juror "If there is anything wrong [in finding him guilty] the Supreme Court will correct it." The Statements were overheard by at least one regular juror or an alternate. The Supreme Court found that the bailiff's statements violated Sixth Amendment commands, made applicable to the States by the Fourteenth Amendment; and that the accused was thereby deprived of his right to trial by an impartial jury and his right to confrontation of witnesses against him. In reviewing the basic principles involving the right to an impartial jury, confrontation and the impropriety of "outside influence" (385 U.S. at 364-366) the court emphasized the official position which the bailiff holds in finding his unauthorized conduct inherently prejudicial and an automatic deprivation of due process.

This case of course involves the most extreme imaginable example of the denial of right of confrontation in regard to juror Alario. A juror who deliberated was given information that the defendants failed a lie detector test on the subject of their guilt. The courts have uniformly kept such tests from jurors because of the judicial understanding that these tests would take away from the jurors the very issues which they are impaneled to determine. In the minds of laymen, the presumption of innocence and the concept that the prosecution has the burden of proof become a mockery once the juror

is infected with such information. Because defense counsel had no knowledge that such infection had occurred, they were utterly unable to confront the "evidence". In this case, there is a special irony. There are disputed typewritten reports by the polygrapher, unsupported by graphs or notes, which conclude defendants failed their tests. Defendants, based upon their own understanding and actual contemporaneous notes taken by Chief Investigator DeSimone at the time the polygraph tests were taken, have contended that they passed their polygraph test. Their contention in this regard is proven by DeSimone's report in writing to the Assistant Prosecutor who presented the case to the first grand jury in 1966 and DeSimone's oral testimony before that first grand jury (which did not indict) that Carter and Artis had in fact passed the tests.

CONCLUSION

For all the foregoing reasons, this Court should grant defendants' motion seeking an order vacating and setting aside their sentences and judgments of conviction; and should grant such other and further relief as may be just and proper.

Dated: April 3, 1979

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April 3, 1979

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Re: State v. Carter & Artis

Dear Jimmy:

I enclose copies of motion papers and brief which were sent and filed today.

Sincerely,

Myron Beldock

MB/sjg

Encls.

cc: Ronald Busch, Esq.
Lewis Steel, Esq.
Jeffrey Fogel, Esq.
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Melvin Wulf, Esq.
Eric Schnapper, Esq.
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Mr. John Artis (Encl.)