IN THE SUPREME COURT OF THE STATE OF FLORIDA

PETER D. DEVONEY,

Petitioner,

vs

CASE NO.: 88,574

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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SUMMARY OFARGUMENT

Petitioner contends in Point I that the open discussion by the jurors during their deliberations in this cause of the Petitioner's prior speeding ticket, after being specifically instructed to disregard it, constitutes an "overt act" of jury misconduct. Further, the jury misconduct was not harmless. Therefore, Petitioner is entitled to a new trial.

Petitioner also contends in Point I that Petitioner did not open the door for the State to ask the question concerning Petitioner's prior speeding ticket.

ARGUMENT

1. DOES ONE OR MORE JURORS' DISCUSSION DURING THE COURSE OF JURY DELIBERATIONS, OF A MATTER ADDUCED DURING THE COURSE OF TRIAL BUT WHICH THEY WERE INSTRUCTED TO DISREGARD, CONSTITUTE AN OVER ACT OF MISCONDUCT THAT WARRANTS A NEW TRIAL?

Petitioner agrees with the proposition of law cited by the Respondent in its Answer Brief that this Court has recognized the "strong public policy against going behind a verdict to determine if juror misconduct has occurred." Powell v. Allstate Insurance co., 652 So2d 354, 356 (Fla 1995). Petitioner also agrees with the proposition of law that interviews of jurors is permissible only if the party moving for interviews has made sworn factual allegations which, if true, demonstrate overt prejudicial acts warranting a new trial. Baptist Hospital, Inc. v. Maler, 579 So2d 97, 99-100 (Fla. 1991). The only issue that the Petitioner and the Respondent appear to disagree on is whether or not the open discussion by the jurors during their deliberations of the Petitioner's speeding ticket, and of which they were instructed to disregard, constitute an overt act of misconduct that warrants the Petitioner receiving a new trial. Petitioner contends it does.

Respondent argues that the jurors in this case did not engage in actions which brought their fairness into question. Petitioner contends that the actions of the jurors in this case

does bring their fairness into question. The Petitioner, by way of the testimony of jury foreman, John Isley, presented sworn factual allegations, which the trial court found to be true, that there was discussion by a juror identified as "Bill" concerning the reference to the Petitioner's speeding ticket (T 799). Isley also testified that there was a discussion by "Bill" that the Petitioner possibly had a prior DUI (T 806). Isley further testified that there was a discussion that the prosecuting attorney possibly asked the question on purpose so that the jury would know and not let someone with a prior bad driving record go free (T 801). Isley also recalled a blonde lady discussing the Petitioner's speeding ticket 9T 801). Petitioner contends that a reasonable person would question the fairness of the jury when these issues were discussed by them, especially when they were instructed to disregard it.

Respondent also argues that the jurors were not exposed to outside information such as in cases where the jury has access to magazines or dictionaries during deliberations. Petitioner contends that the jurors were exposed to improper outside information, to wit: that Petitioner had a prior speeding ticket for going twenty (20) miles an hour over the posted speed limit. What makes this case even worse is the fact that after being told to disregard this information, the jury not only discussed it, but also speculated that Petitioner possibly had a prior DUI and

that some signal had been sent by the prosecuting attorney that Petitioner had a prior bad driving record. Such conduct constitutes an overt act of jury misconduct which entitles Petitioner to a new trial.

Respondent would have this Court believe that the jurors in this case were only exposed to an arguably imperfect trial. Petitioner realizes that no trial is perfect, but some trials are more imperfect than others. The question then comes down to whether or not the imperfection in any case entitles a party to a new trial. The imperfection, in this case, was of such a nature as to entitle Petitioner to a new trial.

Petitioner realizes, as argued by Respondent, that this case is not the first case where jurors were exposed to improper information during a trial. What set this case apart from other cases is that in this case Petitioner presented sworn factual allegations by way of the sworn testimony of jury foreman, Isley, that despite being told to disregard the reference to Petitioner's prior speeding ticket, the jurors discussed it and even speculated on the possibility that Petitioner had a prior DUI and a bad driving record. These actions constituted an overt act of jury misconduct that warrants Petitioner receiving a new trial.

In support of its argument that the discussion by jurors of Petitioner's prior speeding ticket inhered in the verdict and therefore it was improper to interview the jurors, Respondent

cites Sireci v. State, 587 So2d 450 (Fla. 1991) cert. denied 503 US 946 (1992). in Sireci the prosecutor asked a question in violation of a previous court order which revealed that Sireci had previously been sentenced to death in the case. This Court denied Sireci's argument that the trial court had erred in refusing to poll the jury concerning their use of this information. The circumstances in Sireci are totally different than the circumstances in this case. *In* Sireci at page 453, it was noted that based on other testimony presented by the defense a "halfway intelligent juror would determine that Sireci had been sentenced to death previously for this crime". In this case, without the reference to the Petitioner's prior speeding ticket, a jury would have no reason to believe that Petitioner had a prior speeding ticket, possibly a prior DUI, and a prior bad driving record,

The major difference though between the two cases is that in Sireci there was no reason to believe that the jurors considered the improper information during their deliberations whereas in this case, based on the sworn testimony of jury foreman, Isley, the jury did consider improper information during its deliberations. Such conduct constituted an overt act of jury misconduct which warrants Petitioner receiving a new trial.

Respondent argues that this Court should reject Petitioner's efforts to expand the law to allow inquiry of jurors in situations such as this as it could essentially expose every case

to post-verdict interviews for virtually every trial has some such error which could be seized upon by the loosing party. Such is not the case. The facts of this case are unique as jury foreman, Isley, testified that he sought out defense counsel after the trial and relayed to defense counsel the fact that jurors had discussed Petitioner's prior speeding ticket during their deliberations contrary to the Court's instructions. (T 802-803). Based on this information Petitioner sought from and received permission from the trial Court to present the testimony of Isley concerning the jury misconduct. Petitioner agrees that if Isley had not contacted defense counsel with this information. Petitioner would have had no right to seek an interview of the jurors. 'Therefore, answering the certified question in the affirmative in no way would expose essentially every case to post-verdict interviews.

Respondent next argues that the mention of Petitioner's speeding ticket did not affect the verdict, and that it was a tangential issue at best. Petitioner has addressed this issue in his Initial Brief. There is a reasonable possibility that the discussion of Petitioner's prior speeding ticket, the possibility that he had a prior DUI and a prior bad driving record affected the verdict. Therefore the certified question should be answered in the affirmative and the Petitioner be granted a new trial.

Finally the Respondent argues in footnote 2 that the question regarding the Petitioner's prior speeding ticket was not

improper as the defense had opened the door to the subject. Petitioner contends that the question was improper.

Petitioner did not open the door for the State to question Kim Swetich about Petitioner's prior speeding infraction. Swetich only testified that on the day in question, the Petitioner did no go over the speed limit. As stated in Statewright v. State,, 278 So.2d 652 (Fla. 4th DCA 1973) at page 655:

> "It is a cardinal principle of criminal law that the State cannot introduce evidence attacking the character of the accused unless the accused first put his good character in issue."

The testimony of Kim Swetich in no way put the Petitioner's character in issue nor was it testimony regarding Petitioner's reputation as to his driving ability.

In the case of Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985) on cross examination of Von Carter, the prosecutor made reference to a scar on Von Carter's neck. Defense counsel immediately objected and the jury was removed from the court room. The objection was sustained but defense counsel's motion for mistrial was denied. The jury was brought back into the courtroom and the trial court instructed the jury to disregard the remarks of the prosecutor. The Appellate Court found the comment to be patently improper and further stated at page 278 that:

> "It is axiomatic that unless a defendant places his character in issue, it may not be attacked by the State."

In the Von Carter case, the Appellate Court reluctantly found the error harmless because Von Carter was convicted of lesser included offenses and therefore the Appellate Court felt that the jury had disregarded the prosecutor's comments. Supra. at 279. That is contrary to the situation in this matter as based upon the testimony of juror, John Isley, the jury did consider the Petitioner's past speeding infraction.

In the case of Dixon v. State, 426 So.2d 1258 (Fla. 2nd DCA 1983) Dixon testified on direct examination that he had never hurt anybody in his life. On cross-examination, the prosecutor asked Dixon about arrests for various violent type crimes. The Appellate court reversed the convictions indicating at page 1259 that:

> "In view of the evidence code, it is doubtful that by making this gratuitous statement, the defendant can be said to have placed his character in issue..."

From the cases cited it is clear that the question asked by the prosecuting attorney was improper. It is also clear that Petitioner did not open the door for the prosecuting attorney to ask the question.

Therefore, for the reasons stated, this Honorable Court should answer the certified question in the affirmative, rule

that the jurors' discussion of the Petitioner's speeding ticket during their deliberations, despite being instructed to disregard it, constitutes an overt act of misconduct that warrants the Petitioner receiving a new trial, and direct the Fifth District Court of Appeal to enter an opinion affirming the trial court's Order granting the Petitioner's Motion For New Trial.

CONCLUSION

For the reasons stated in Point I, this Honorable Court should answer the certified question in the affirmative, and direct the Fifth District Court of Appeal to enter an opinion affirming the trial court's Order granting the Petitioner's Motion For New Trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been duly furnished by U.S. Mail to KRISTEN L. DAVENPORT, ESQUIRE, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, on this 18 day of November, A.D., 1996.

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