017

IN THE SUPREME COURT OF FLORIDA

PETER D. DEVONEY,

Petitioner,

v. CASE NO. 88,574

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

SUMMARYOFARGUMENT. 5

ARGUMENT:

DISOBEYING A COURT'S INSTRUCTION BY DISCUSSING A MATTER THEY WERE TOLD TO DISREGARD DOES NOT CONSTITUTE AN OVERT ACT OF JUROR MISCONDUCT WARRANTING A NEW TRIAL. 6

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

CASES:

Bawtist Hospital, Inc. v. Maler,
579 so. 2d 97 (Fla. 1991) 7

Fletcher v. State,
619 So. 2d 333 (Fla. 1st DCA),
rev., 629 So. 2d 132 (Fla. 1993) . . . . . , 9

Hernandez v. State,
569 So. 2d 857 (Fla. 2d DCA 1990) . . , ... 9

Hill v. State
616 So. 2d '1160 (Fla. 5th DCA),
rev. denied 624 So. 2d 266 (Fla. 1993) 10

Johnson v. State,
593 so. 2d 206 (Fla.),
cert. denied, 113 s. ct. 119 (1992) 7

Keen v. State,
639 So. 2d 597 (Fla. 1994) . . . . . , ... 8,12

Marks v. State Road Dewartment,
69 So. 2d 771 (Fla. 1954) . , ... , ... 7

McAllister Hotel, Inc. v. Porte,
123 So. 2d 339 (Fla. 1959) . . . . . , . . 7

Powell v. Allstate Insurance Co.,
652 So. 2d 354 (Fla. 1995) 6,8

, 1ms v. S a.,e,
444 so. 2d 922 (Fla. 1983),
cert. denied, 467 U.S. 1246 (1984) 7

Sireci v. State,
587 So. 2d 450 (Fla. 1991),
cert. denied, 503 U.S. 946 (1992) 10,11

Songer v. State,
463 So. 2d 229 (Fla.),
cert. denied, 472 U.S. 1012 (1985) 7

State v. Devoney,
675 So. 2d 155 (Fla. 5th DCA 1996) 4

State v. Hamilton,
574 so. 2d 124 (Fla. 1991) 8,13

Tanner v. United States,
483 U.S. 107, 107 S. Ct. 2739,
97 L. Ed. 2d 90 (1987) . . . , ... 6,11,12

Wilding v. State,
674 So. 2d 114 (Fla. 1996) 8

STATEMENT OF FACTS

The State submits the following additions to Devoney's Statement of the Case and Facts:

Peter Devoney was found guilty of **DUI** manslaughter and **DUI** causing serious bodily injury after he lost control of his corvette and crossed the median of 1-4, hitting the victims' car. (R. 136-**38).**

The results of Devoney's blood test showed that his blood alcohol content at the time of the test was .11. (T. **301).** The State's expert testified that Devoney's blood alcohol content at the time of the accident would have been even higher -- .12 or .13. (T. **307-08).** The expert testified that she could not address the defendant's alcohol consumption hypothetical without being given more information, (T. **323-24).**

The State also presented the testimony of several witnesses who stated that when they saw Devoney at the accident scene he showed signs of intoxication, such as glassy or blood shot eyes and the odor of alcohol on his breath. (T. **37, 80-81, 134, 155, 188,** 216-17). The State's expert noted that at a .11 blood alcohol level the defendant would have appeared to be essentially normal, but his fine motor skills (i.e., the skills used in driving) would be impaired. (T. 312-14).

Witnesses testified that the corvette was going very fast when it lost control -- their estimates of the car's speed ranged from 80 to 100 mph. (T. 53-57, 73-76). The accident reconstruction expert estimated that the car was traveling 85 mph when it began to slide. (T. 421-22).

Devoney told the police that his car lost control either because he was cut off by another car or because one of his tires blew out. (T. 177). Law enforcement found no evidence supporting either of these scenarios.

Witnesses saw no cars near Devoney when he lost control, and there was no paint transfer on the corvette, as would be expected if the car had been struck. (T. 57, 78, 106, 245, 362-63). Neither the traffic homicide investigator nor the reconstruction expert found any evidence that a tire had blown out on Devoney's car prior to the accident. (T. 364, 373-74, 425-26).

During the presentation of the defense case, Devoney called a friend, Kim Swetich, to testify on his behalf. Mr. Swetich stated that he was with Devoney the afternoon prior to the accident. According to Swetich, Devoney drove very conservatively, never even going over the speed limit, and Devoney "has always been a real calm, controlled person." (T. 462).

On cross-examination, the prosecutor attempted to explore the basis for Swetich's opinion, He asked Swetich if he was aware that Devoney had a speeding ticket in 1992 for going 20 miles an hour over the posted speed. (T. 469). Devoney objected to this question, and it was never answered.

The trial court denied Devoney's motion for a mistrial, but it gave a strong curative instruction -- telling the jury that the question and "whatever answer might be made" were totally irrelevant to the case and should not be considered by them in any way. The court further told the jury to "disregard it totally" and not to consider it in its deliberations. (T. 470-71).

Devoney alleged juror misconduct for the first time at the hearing on his motion for a new trial. Devoney's counsel was made aware of the alleged misconduct when the jury foreperson, John Isley, contacted one of Devoney's friends after the trial. Isley felt bad about his guilty vote and wanted to correct his mistake if he could. (T. 854-56).

During the juror interviews, five of the six jurors testified that they did not recall any discussion of Devoney's prior speeding ticket whatsoever during their deliberations. (T. 826-27, 829-31, 846, 848, 850-51). In fact, two of these jurors did not even

recall this evidence being mentioned at trial. (T. 825-26, 848-49).

Only John Isley remembered any conversation regarding Devoney's driving record. According to Isley, the jurors were discussing the blood test result when one of them brought up the driving record. The jurors then speculated on other possible problems in Devoney's record, including the possibility of a prior DUI, and concluded that they couldn't turn Devoney loose, as he could kill someone else. (T. 799, 805-06, 853-54, 859-60).

The trial court granted Devoney's motion for a new trial, finding that the jury had improperly disregarded his curative instruction and considered Devoney's driving record in reaching its verdict. (R. 211-12). On appeal by the State, the district court reversed, finding that there was no overt act of juror misconduct in this case. State v. Devoney, 675 So. 2d 155 (Fla. 5th DCA 1996). On rehearing, the court certified the following as a question of great public importance:

> 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 OVERT ACT OF MISCONDUCT THAT WARRANTS A NEW TRIAL?

Id. at 161.

SUMMARY OF ARGUMENT

The district court properly overturned the order granting a new trial in this case, and the certified question should be answered in the negative.

The jurors in the present case were not exposed to any outside information, nor did they exhibit any disqualifying bias. Rather, they were exposed to an imperfect trial, as most jurors are, and they apparently disobeyed the trial court's instruction to disregard the improper information before them. The jurors' use of this information is clearly a matter which inheres in the verdict, and Devoney failed to demonstrate any valid basis for juror interviews.

Disobeying a court's instruction by discussing a matter they were told to disregard does not constitute an overt act of juror misconduct warranting a new trial. A holding to the contrary would allow post-verdict inquiry in virtually every trial, for a dissatisfied litigant could almost always find some sort of trial error to be investigated. Such a result would clearly be contrary to the strong public policy against invading the sanctity of jury deliberations.

ARGUMENT

DISOBEYING A COURT'S INSTRUCTION BY DISCUSSING A MATTER THEY WERE TOLD TO DISREGARD DOES NOT CONSTITUTE AN OVERT ACT OF JUROR MISCONDUCT WARRANTING A NEW TRIAL.

Protecting the sanctity of jury deliberations has been universally recognized as essential to the effective functioning of the jury system. As the United States Supreme Court has noted, if jury verdicts were held open to public scrutiny jurors would be endlessly harassed by dissatisfied litigants, eviscerating the finality of verdicts and ultimately destroying the frankness and freedom of discussion so essential to jury deliberations. Tanner v. United States, 483 U.S. 107, 119-21, 107 S.Ct. 2739, 97 L.Ed. 2d 90 (1987).

This Court, too, has specifically recognized the "strong public policy against going behind a verdict to determine if juror misconduct has occurred." Powell v. Allstate Ins. Co., 652 So. 2d 354, 356 (Fla. 1995). In fact, the Evidence Code provides that a juror is not even competent to testify about any matter which inheres in the verdict. § 90.607(2)(b), Fla. Stat. (1993).

Recognizing the necessity of guarding jury deliberations from post-verdict probing, this Court has strictly limited the

situations wherein interviews of jurors are allowed. Such an inquiry 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 Hosp., Inc. v. Maler, 579 So. 2d 97, 99-100 (Fla. 1991).[1]

Matters which inhere in the verdict itself may not be explored through juror interviews. For example, in Maler this Court held that allegations the jurors reached their verdict based on speculation that the defendant hospital had insurance did not provide adequate justification for juror interviews. Id. Similarly, allegations that jurors misunderstood or failed to follow the trial court's instructions are likewise not proper subjects of inquiry, for such matters inhere in the verdict. See, e.g., Johnson, 593 so. 2d 206, 210 (Fla.), cert. denied, 113 S.Ct. 119 (1992); Songer v. State, 463 So. 2d 229, 231 (Fla.), cert. denied, 472 U.S. 1012 (1985); Sims v. State, 444 So. 2d 922, 925 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984); McAllister Hotel, Inc. v. Porte, 123 So. 2d 339, 344 (Fla. 1959).

---

[1] Examples of such overt acts include a juror being approached by a party or attorney, or conversations of witnesses as to the facts of the case outside the courtroom and in the presence of jurors, or a specific agreement to abandon deliberations and determine the verdict by lot. Dep't v. State Road ___, 69 So. 2d 771, 774 (Fla. 1954).

This **case** does not involve the type of overt act of misconduct which forms a basis for relief, **and** therefore jury interviews were clearly improper. The jurors in this case did not engage in actions which brought their fairness into question, such **as** in **cases** where they tell racial jokes or discuss their fear of the defendant. See Wilding v. State, 674 So. 2d 114, 118 (Fla. 1996); Powell, **652 So.** 2d at 357. Neither were the jurors in this case exposed to outside information, such as in **cases** where the jury has access to magazines or dictionaries during deliberations. See Keen v. State, 639 So. 2d 597, 599 (Fla. 1994); State v. Hamilton, 574 so. 2d 124, 126-28 (Fla. 1991).

Rather, the jurors in this case were simply exposed to a trial, albeit an arguably imperfect one. During this trial, the jury heard an allegedly inappropriate question by the prosecutor

which conveyed improper information to them.[2] The court instructed the jury to disregard this information, but some of the jurors apparently disobeyed this instruction, discussing the ticket briefly and then engaging in speculation as to the hidden message behind the prosecutor's reference to the ticket and the possibility that Devoney would be let loose to "kill again."

The juror's disobedience of the court's curative instruction, and their improper use of the information they gained, is clearly a matter which inheres in the verdict. The improper reference to Devoney's speeding ticket was a trial error, and the jury's reaction to such error is not a proper basis for inquiry.

This is certainly not the first case where jurors were exposed to improper information during a trial. While in an ideal world such imperfection in a trial would be a rarity, realistically this

---

[2]The State submits that the question was not even improper, as the defense had opened the door to this subject. On direct examination, Mr. Swetich testified that Devoney drove very conservatively after their golf game, never even going over the speed limit, and that Devoney "has always been a real calm, controlled person." (T. 462). In light of this testimony, the State was entitled to cross-examine the witness as to the basis for his opinion, including asking the witness if he was aware that Devoney was anything but a calm, controlled driver on the occasion of the speeding ticket. (T. 469). Cf. Fletcher v. State, 619 So. 2d 333, 334 (Fla. 1st DCA), rev. denied, 629 So. 2d 132 (Fla. 1993); Hernandez v. State, 569 So. 2d 857, 859 (Fla. 2d DCA 1990).

Accordingly, the State submits that there was no improper information for the jury to have considered, and this case can be resolved on this basis, without even answering the certified question.

type of error occurs in virtually every case, civil or criminal. Improper questions are asked or improper remarks are made, objections are raised, and the trial court deals with the problem -- by instructing the jury or, in severe cases, declaring a mistrial. The trial court's resolution of the situation is then subject to review by the appellate court.

Evaluating the effect of trial error on the verdict has always been deemed an appropriate function of the courts, and such a function has always been executed without the necessity of input from the jurors. See Hill v. State, 616 So. 2d 1160, 1162 (Fla. 5th DCA) (disapproving trial court's use of "special verdict" to evaluate whether evidentiary error was harmless), rev. denied 624 so. 2d 266 (Fla. 1993).

This Court approved a trial court's refusal to allow juror interviews in a situation nearly identical to the present case -- Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, 503 U.S. 946 (1992). In Sireci, the prosecutor violated a pretrial order when, on cross-examination of a defense expert, he asked a question which revealed that the defendant had previously been sentenced to death for his crime. Id. at 452.

On appeal, this Court rejected the defendant's claim that the trial court had erred in refusing to poll the jurors concerning

their use of this information, noting that such inquiry would be improper under the Evidence Code. Id. at 453. The effect of the improper remark was evaluated by this Court as a matter of law, Id. at 452-53. No input from the jurors was deemed necessary to resolve the matter.

The same result should apply here. The prosecutor's remark was evaluated by the trial court when it happened; a curative instruction was given, and the defendant's motion for a mistrial was denied. On direct appeal of his judgment and sentence, the defendant can challenge this ruling, and the district court will evaluate the issue as it does all trial errors. The jurors' input on this matter is not necessary and should never have been received.

This Court should reject Devoney's efforts to expand the law to allow inquiry of jurors in situations such as this, where the alleged misconduct is the juror's failure to follow an instruction to disregard an improper comment at trial. Allowing inquiry in this case would essentially expose every case to post-verdict interviews, for virtually every trial has some such error which could be seized upon by the losing party.

As the Supreme Court noted in Tanner, "[t]here is little doubt that postverdict investigation into juror misconduct would in some

instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." 483 U.S. at 120.

The certified question should be answered in the negative, as the alleged "misconduct" in this case inheres in the verdict and should not be the subject of juror interviews.

Finally, even if this Court finds that Devoney had a valid claim of misconduct which warranted interviewing the jurors, the trial court still erred in ultimately granting relief on this basis.

Evaluating the only even arguably proper testimony,[3] it is clear that the mention of Devoney's speeding ticket did not affect the verdict. Five of the jurors did not even remember any conversation regarding the ticket, and the one juror who did remember such conversation emphasized not the ticket, but blatant speculation as to other possible improprieties in Devoney's driving

---

[3]John Isley's testimony that he was influenced by the discussion of Devoney's driving record was clearly improper. Even if Isley could testify to discussions he had regarding the speeding ticket, he was clearly incompetent to testify as to how these discussions affected his decision-making process, or that of the other jurors. See, e.g., Keen, 639 So. 2d at 599.

history and the clear worry that he would be let loose to "kill again."

It is clear on this record that the ticket was a tangential issue at best, and there is no reasonable possibility that its brief discussion in the jury room affected the verdict, especially considering the overwhelming evidence of guilt. Hamilton, 574 So. 2d at 129. The trial court erred in granting a new trial on this basis, even if the interviews themselves were proper.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court answer the certified question in the negative and approve the decision of the district court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief has been furnished by U.S. mail to James R. Valerino, P. 0. Box 106, Sanford, Florida 32772, this 29th day of October, 1996.

Kristen L. Davenport
Counsel for Respondent