STATE OF WISCONSIN v. STEVEN A. AVERY

MANITOWOC COUNTY CASE NO. 05-CF-381

DEFENDANT'S OFFER OF PROOF

FILED UNDER SEAL

STATE OF WISCONSIN | CIRCUIT COURT BRANCH I | MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

Case No.: 05-CF-381
Judge: Patrick L. Willis

FILED UNDER SEAL

STATE'S RESPONSE TO DEFENDANT'S OFFER OF PROOF WITH REGARD TO DISCHARGED JUROR R.M.'S PROPOSED TESTIMONY

INTRODUCTION

Defendant seeks to admit the testimony of discharged juror R.M. in his efforts to gain a new trial. Essentially, defendant alleges a statutory and/or constitutional violation of his state and federal constitutional rights to trial by jury. Particularly, defendant asserts the court erred in failing to conduct an on-the-record colloquy with counsel and defendant present before discharging juror R.M.; in the alternative, he argues that the discharge of juror R.M. was without "cause." The discharged juror's testimony is inadmissible for at least three reasons: 1) the testimony is irrelevant; 2) information in the offer of proof not already a matter of record is barred by application of Wis. Stat. § 906.06(2); and 3) the testimony is barred by application of the forfeiture/waiver rule because the issue was not adequately preserved by objecting to the procedure when it occurred.

In the event the court permits the testimony of juror R.M., the state does not object to the procedure set forth in defendant's brief with the parties being permitted to question the juror. The state likewise believes that since the burden is on the defense to go forward, they would have the right to question juror R.M. first, the state would then conduct cross-examination, and the defense would then have the right to re-direct. The state at the court's discretion, might be permitted to re-cross if the testimony so merits.

I. THE PROPOSED TESTIMONY OF THE DISCHARGED JUROR IS IRRELEVANT.

Juror R.M.'s testimony is irrelevant to the determination of whether the trial court erred in failing to question him on the record with court and counsel present. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Nothing R.M. said on the evening of March 15, 2007, and more importantly anything he says now, is material in the determination of whether the court erred in discharging him without conducting an on-the-record voir dire with him. This is so patently obvious that no further argument is necessary. This is exclusively a question of law and not a question of fact.

Second, juror R.M.'s testimony is irrelevant because defendant's primary claim is that the "removal of a deliberating juror without cause mandates his convictions be vacated. No further showing of prejudice is needed." In essence, defendant argues that the procedure employed by the trial court constituted a "structural error." *See* defendant's original Postconviction Motion at p. 9, ¶ 17. Consequently, if the claim is

that structural error occurred by virtue of the discharge itself, including the procedural means by which the discharge occurred, then juror R.M.'s testimony has nothing to do with and is irrelevant and immaterial to the assessment and review of the matter. Close examination of defendant's Postconviction Motion reveals that the true nature of the claim is that the discharge occurred at all and that the subsequent substitution of juror N.S. was so procedurally flawed that it really does not matter whether there was "just cause" or not. If that is the case, nothing juror R.M. has to say about the matter is relevant.

In addition, defendant alternately argues that if "cause" does matter, then there was no cause for the discharge of juror R.M. based on the record that was made. Regardless, R.M.'s proposed testimony is still irrelevant in determining whether the court's decision process which commenced on the evening of March 15 and concluded on the morning of March 16 constituted error. R.M.'s testimony today cannot be used to impeach the decision that the trial court made two years earlier based on information provided by R.M. on March 15, 2007. At best, R.M. is viewed as having provided incomplete information about his situation from which a determination of just cause was necessarily made by the court. At worst, the proffered testimony of R.M. reveals him to be a prevaricator, who wanted to get off the jury because he could not handle the strain of deliberations or wished to escape the responsibility of reaching a verdict. There is no reason offered now, because there is none, as to why R.M. did not confide in the judge on the night in question and reveal all of this "additional" information. If he had, the

decision to discharge him would very likely have been delayed until further investigation was made the following morning.

Third, R.M.'s testimony is irrelevant because in assessing whether trial counsel were ineffective; *i.e.*, whether they rendered deficient performance and whether defendant was prejudiced as a result thereof, the determination must be based on the facts as they were known on March 15-16, 2007, and not as they are represented today.

To prove a claim of ineffective assistance of counsel, defendant must prove deficient performance and prejudice resulting therefrom. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *State v. McMahon,* 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). There is nothing juror R.M. can say that will assist the trial or appellate court in evaluating the decisions of trial counsel according to the standard of objective reasonableness. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from *counsel's perspective at the time.*" *Id.* at 669 (emphasis added). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. Given those guidelines, there is absolutely nothing juror R.M. can tell us today that either the trial court or the appellate court may consider in evaluating the reasonableness of trial counsel's decisions; let alone whether he was prejudiced by those decisions. Therefore, his proposed testimony is irrelevant; and inadmissible.

II. THE DISCHARGED JUROR'S TESTIMONY IS BARRED BY APPLICATION OF WIS. STAT. § 906.06(2).

While the defendant correctly cites the law "generally" with respect to Wis. Stat. § 906.06(2), the state takes issue with the conclusions reached with respect to the testimony to be offered by juror R.M. At first blush, defendant's argument is attractive when he argues the statute has no applicability when juror testimony is offered in an inquiry unrelated to the validity of the verdict (Defendant's brief at p. 2). However, this is clearly an indirect attack on the validity of the verdict reached by the presiding jurors who rendered it. The essence of the defendant's claim is that the verdict reached by the jurors in this case is a nullity. This conclusion is reached only if defendant shows that the process regarding the removal of juror R.M. was error, and it was not. Thus, defendant attempts to impeach the actual verdict rendered in this case by impeaching the process during which one deliberating juror was removed (with his consent) and replaced by another.

The state acknowledges that not all of the proffered testimony is barred by application of § 906.06(2). Paragraphs 1, 2, and 4 are simply background information, much of which is already a matter of record, as are paragraphs 6 and 7. They are, as previously argued, entirely irrelevant to any determination the court must make at this point in the proceedings. However, paragraphs 3 and 5 are directly within the purview of § 906.06(2). Any discussion regarding juror R.M.'s problems with another juror, in this case C.W. (who actually deliberated to reach a verdict), as well as to the status of the deliberations and any preliminary votes are clearly the type of information which are

barred by § 906.06(2). He was a deliberating juror at the time of those occurrences. Similarly, in paragraph 5, the proffer provides information about defendant's mood as it relates to his exchange with juror C.W. and the problems referenced in paragraph 3. These thoughts and observations are of the nature and type of juror interactions associated with the deliberation process which the rule seeks to prohibit. To argue that testimony from R.M. is not offered to show how the jury reached its verdict, but rather how the court's failure to follow proper procedure is nothing more than a veiled attempt at impeaching the verdict that was rendered in this particular case. R.M.'s testimony that there was no accident, that another juror suggested he try to get off the jury and that he was feeling stressed from the deliberative process, is information relative to the ongoing deliberative process of a jury. This testimony is of the type which is specifically prohibited by application of the rule.

Finally, paragraph 8 of the proffer, although not barred by operation of § 906.06(2), is entirely irrelevant.

III. JUROR R.M.'S TESTIMONY IS INADMISSIBLE AS TO THE CLAIMS OF STRUCTURAL/CONSTITUTIONAL OR STATUTORY ERROR BECAUSE THE ISSUE WAS NOT PROPERLY PRESERVED AT TRIAL.

Defendant complains now about a procedure to which he failed to object when provided the opportunity. Defendant did not object to the discharge of juror R.M. when the opportunity presented itself. The court questioned the defendant on the morning of March 16, and the defendant himself controlled his destiny. Although R.M. had been dismissed the night before, the defendant could have objected to R.M.'s removal

regardless of his personal participation in the process. The defendant did not object. The defendant was given three options: declare a mistrial, proceed with eleven jurors, or agree to the replacement of R.M. with alternate juror N.S. (Trial Tr. 03/16/07 at pp. 4-8.) In fact, it is interesting to note that the defendant claims error because he was afforded a third option (proceed with a substitute), an option from which he benefited and now claims was prohibited by law. With the advice of counsel, defendant *chose* to proceed with the substitute juror, thereby assuring his constitutional right to a jury of twelve. By failing to object, and by embracing the very procedure to which he now objects, he has forfeited his right to complain by virtue of the contemporaneous-objection rule. *See, e.g., State v. Davis,* 199 Wis. 2d 513, 545 N.W.2d 244 (Ct. App. 1996); *State v. Huebner,* 200 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727.

In *Wainwright v. Sykes,* 433 U.S. 72 (1977), the Supreme Court discussed the application of the contemporaneous-objection rule to constitutional error. The court reasoned:

> A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest. . . . It enables the judge who observed the demeanor of those witnesses to make factual determinations necessary for properly deciding the federal constitutional question.

Id. at 88.

There are strong policy reasons underlying the forfeiture/waiver rule. It is a poor use of judicial resources to address claims on appeal that could have been raised and resolved at trial. *State v. Erickson,* 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). Similarly, those very same policy reasons are applicable in the postconviction context.

See generally, *State v. Ndina,* 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. The trial court has no opportunity to prevent or to avoid the claimed error now. It is too late. The contemporaneous-objection rule contributes to the finality of litigation and encourages the parties to view the trial itself as a significant event that should be kept as error free as possible. *State v. Davis,* 199 Wis. 2d 513, 518, 545 N.W.2d 244 (Ct. App. 1996). "The failure . . . to require compliance with the contemporaneous-objection rule tends to detract from the perception of the trial . . . as a decisive and portentous event. . . . Society's resources have been concentrated at that time and place in order to decide . . . the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable." *Wainwright v. Sykes,* 433 U.S. at 90. Significantly, "the rule prevents attorneys from 'sandbagging' errors, or *failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.*" *State v. Huebner,* 235 Wis. 2d 486, ¶ 12 (emphasis added).

The normal procedure in criminal cases is to address a waived (forfeited) claim of error within the ineffective assistance of counsel framework. *Erickson,* 227 Wis. 2d at 776-68. Ordinarily, a criminal defendant who did not preserve a claim of error with a timely trial objection can obtain relief only by showing that the failure to object constituted ineffective assistance of counsel. *State v. Koller,* 2001 WI App 253, ¶ 44, 248 Wis. 2d 259, 635 N.W.2d 838. *See also State v. Tulley,* 2001 WI App 236, ¶ 14, 248 Wis. 2d 505, 635 N.W.2d 807.

In the case at bar, defendant offers no reason for his failure to object or, for that matter, his choice to embrace the very procedure he now claims is error. It appears respondent wishes to avoid responsibility for the strategy decisions made at the time of trial. This is a case of buyer's remorse, and the court should not give aid and comfort to that remorse by permitting testimony from R. M. and argument on the matter.

This court should apply the forfeiture/waiver rule and preclude the testimony of R.M. In fact, the court should decline to address this issue entirely, except in the context of an ineffective assistance of counsel claim.

CONCLUSION

Juror R.M.'s testimony should not be permitted. His testimony is irrelevant to the issues which must be decided by the court at this time. Second, paragraphs 3 and 5 are clearly and directly barred by application of § 906.06(2) because they are an attempt to impeach the final jury verdict as well as the status of the deliberations as of March 15, 2007. Lastly, the testimony is barred by application of the forfeiture/waiver rule because

he not only failed to object to the discharge, but he actually chose the procedure he now claims is error.

Dated this 7th day of August, 2009.

Respectfully submitted,

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