3-27-2017

Carver v. State Appellant's Reply Brief Dckt. 44164

IN THE SUPREME COURT OF THE STATE OF IDAHO

TODD W. CARVER,	)	
	)	S.Ct. No. 44164
Petitioner-Appellant,	)	Idaho Co. CV-2014-43148
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Second Judicial District of the State of Idaho in and for the County of Idaho

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HONORABLE GREGORY FITZMAURICE,
District Judge

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II. ARGUMENT IN REPLY

A. *The court erred in failing to rule upon Mr. Carver's claim that his right to an impartial jury was violated.*

Mr. Carver argued that the court erred in failing to rule on his claim that he was deprived of his right to an impartial jury. Opening Brief, pg. 10-12. The state responds by pointing out that a party may not complain about the lack of findings on appeal unless they raised that issue with the trial court first. State's Brief, pg. 11, citing I.R.C.P. 52(b). But that response is a non sequitur. Mr. Carver does not complain about the lack of findings; his complaint is with the absence of a ruling. *See Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 380, 234 P.3d 699, 704 (2010) (error to fail to rule on party's I.R.C.P. 60(b) motion).[1]

The court did find that "[Mr.] Carver has not provided convincing evidence that [the trial judge] abused his discretion" in not *sua sponte* disqualifying Ms. Landmark. It based this finding in part on the legal proposition that the "Court is entitled to rely on a juror's assurance of impartiality." R 424. But that is no answer to the question of whether Mr. Carver's right to an unbiased jury was violated. The evidence before the court raises a *prima facie* case that Ms. Landmark lied to the court and was actually biased against Mr. Carver.

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[1] The state now attributes the court's failure to address the claim to "the manner in which [Mr.] Carver pled such a claim." State's Brief, pg. 11, n. 2. However, it had no problem identifying the claim below. In its memorandum in support of its motion to dismiss, the state lists Mr. Carver's fourth claim as: "The petitioner was deprived his right to trial to jury by an impartial jury under the US Constitution." R 380-81.

Finally, the court's finding that Mr. Carver had "not shown that there likely was prejudice to [him] because {Ms. Landmark] was on the jury" (R 425), misses the point. Mr. Carver did not need to show prejudice. The absence of an unbiased jury is structural error. "The bias or prejudice of even a single juror is enough to violate that guarantee." *Dunlap v. State*, 159 Idaho 280, 304, 360 P.3d 289, 313 (2015), *cert. denied*, — S.Ct. — (2016)*, citing United States v. Olsen*, 704 F.3d 1172, 1189 (9th Cir. 2013) (*quoting United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000)).

Summary dismissal of the deprivation of an impartial jury claim should be vacated.

B. *The court erred in refusing to consider Mr. Pineda's affidavit.*

Mr. Carver argued that the court also erred by refusing to consider Mr. Pineda's affidavit, which was admissible for several purposes. The state responds that "[n]one of these arguments are preserved." State's Brief, pg. 12. That assertion is incorrect because of the nature of appellate review of summary dispositions. "[W]hen reviewing the summary dismissal of a petition for post-conviction relief, this Court must determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. Appellate courts freely review whether a genuine issue of material fact exists." *Takhsilov v. State*, — Idaho —, — P.3d —, 2016 Ida. LEXIS 380, at *4 (Nov. 23, 2016). *Cf., State v. Smith*, — Idaho —, — P.3d —, 2017 Ida. LEXIS 32, at *11-13 (Feb. 2, 2017) ("Although neither party argued on appeal whether the

statement was made by a co-conspirator during the course of and in furtherance of the conspiracy, it clearly was. [¶] The issue should be decided on the applicable law, and the statement was not hearsay under Idaho Rule of Evidence 801(d)(2)(E).”). Thus, this Court must decide, for itself, whether the affidavit contains admissible facts, irrespective of the arguments below.

The state does not address Mr. Carver’s arguments why the evidence was not hearsay because it was not offered for the truth of the matter asserted, or why the evidence was admissible under I.R.E. 801(c) and 803(1) and (3). Opening Brief, pg. 12-13. Thus, no reply is required.

C. *Mr. Carver presented a prima facie case that he was deprived of an impartial jury.*

The state asserts that Mr. “Carver did not present evidence sufficient to show that Juror V. L. was ‘actually incapable of rendering an impartial verdict based upon the evidence and the law.’” State’s Brief, pg. 13-14, quoting the Second Amended Petition for Post-Conviction Relief, pg. 3 (R 253). *See State v. Moses*, 156 Idaho 855, 862, 332 P.3d 767, 774 (2014) (“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. . . Thus, the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law.”) (internal citations omitted). But that is not the question before the Court. At this point, the question is whether Mr. Carver’s evidence, taken in the light most

favorable to him, raises a question of material fact as to whether Ms. Landmark was incapable of rendering an impartial verdict.

Moreover, under Idaho statutes jurors cannot serve if they have actual or implied bias. I.C. §19-2019. Actual bias exists when the state of mind of a juror, in regard to a party, leads to an inference that the juror will not act with entire impartiality. I.C. §19-2019(2). Implied bias includes the finding that a juror has "formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged." I.C. § 19-2020(8).

Ms. Landmark said she thought Mr. Carver "was guilty" prior to hearing any evidence in this case. Taken in the light most favorable to Mr. Carver, this shows that Ms. Landmark was not eligible to serve as a juror due to her implied bias. It raises a legitimate question of whether she was incapable of rendering an impartial verdict. The fact that she told the court and counsel something else, raises a question of whether she answered the questions put to her during voir dire truthfully, particularly her assertion that she could put the relatives' comments aside and not consider them.

The state argues that it is not clear when Ms. Landmark made the statement. However, the evidence shows that the statements made during voir dire were false because Mr. Pineda heard Ms. Landmark's comments after she returned from being questioned. He observed that Ms. Landmark was among those jurors taken "into another room" to be interviewed and that she later said that "she was

surprised that they had *kept her* on the jury because she knew the relatives of the child and had discussed the facts of the case with those persons." (Emphasis added.) She would not have used that phrase if she had not already been questioned. This all occurred before she said that she thought "he was guilty," showing that she was not able to put the comments aside as she claimed under oath. R 303-304.

The state's reliance upon *State v. Ellington*, 151 Idaho 53, 253 P.3d 743 (2011), is misplaced. There the judge asked if any venire members had formed an opinion that Mr. Ellington was guilty. Three of them said yes, but none of them served on the jury. While two jurors expressed some concern about the other jurors' opinion both "assured the court that they . . . would be able to be fair and impartial in continuing to sit on the jury." The Court held "Mr. Ellington ha[d] not shown that the jurors in question were partial or biased." 151 Idaho at 70, 253 P.3d at 744. Here, Ms. Landmark served on the jury. Moreover, Mr. Carver does not need to prove at this point that Ms. Landmark was actually biased against him. He only needs to raise a genuine question as to whether she was biased.

In addition, the state's partial quote from *Ellington* is misleading. The Supreme Court does say that the "trial court does not need to find jurors that are entirely ignorant of the facts and issues involved in the case" and "[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is [in]sufficient to rebut the presumption of a prospective juror's impartiality[.]" See State's Brief, pg. 14, quoting *Ellington*. However, the Court

goes on to conclude, "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *State v. Ellington*, 151 Idaho at 69, 253 P.3d at 743 (2011) *quoting State v. Hairston*, 133 Idaho 496, 506, 988 P.2d 1170, 1180 (1999) (internal citations and quotations omitted). It is this latter requirement which is missing from both the state's quotation and from Ms. Landmark's jury service. There is a legitimate question whether she was able to put aside the opinion formed by her pre-trial discussions with the child's relatives. She told the court and counsel she could, but admitted outside the court's presence that she still believed Mr. Carver "was guilty" just moments after being passed for cause.

Mr. Carver deserves an evidentiary hearing on this claim.

D. *The court abused its discretion in denying the motion for discovery.*

Mr. Carver argued that the court abused its discretion under *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991), when it denied his motion for discovery because the court did not act consistently with the rules applicable to specific choices before it. The state argues that there was no error "because Carver would not be able to ask Juror V.L. whether she was impartial, as she said she would be." State's Brief, pg. 16. It goes on to say that the "plan language of the rule prohibits inquiry into the precise area [Mr.] Carver seeks to 'discover[.]'" *Id*, at 17. That is not the case. Idaho Rule of Evidence 606 states that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring *during the course of the jury's deliberations* or *to the effect of anything upon the juror's or any other juror's mind or emotions* as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith[.]"

(Emphasis added.) Thus, Mr. Carver should have been allowed to discover whether the statements occurring prior to the trial caused Ms. Landmark to know at the time of voir dire that she was actually incapable of rendering an impartial verdict. The requested discovery could show that Ms. Landmark was untruthful during voir dire and did in fact have a pre-existing belief that Mr. Carver was guilty which she could not put aside. This would not require inquiry into a prohibited area under I.R.E. 606.

The discovery also went to the question of whether relief should be granted due to juror misconduct. In this regard, the state fails to address *Levinger v. Mercy Med. Ctr., Nampa*, 139 Idaho 192, 197, 75 P.3d 1202, 1207 (2003), which held that "that I.R.E. 606(b) does not bar the introduction of juror affidavits revealing dishonesty during voir dire." Moreover, Rule 606 expressly allows a juror to testify on the question of "whether extraneous prejudicial information was improperly brought to the jury's attention." In *United States v. Boney*, 68 F.3d 497 (D.C. Cir. 1995), the defendant filed a new trial motion after it was discovered that a juror did not reveal a prior felony conviction during voir dire. The court held that Rule 606 did not bar inquiry into whether the juror had disclosed his prior felony or experiences with the criminal justice system to other jurors during deliberations:

"Although it is expected that jurors will bring their various life experiences into the jury room, [the juror's] experience as a felon is the one matter that should not have been before the jury at all because no ex-felons should have been on the panel. Therefore, any discussion of [the juror's] felon status would surely seem to be 'extraneous,' and possibly 'prejudicial' as well." 68 F.3d at 503. Likewise, discovery should been granted to determine whether Ms. Landmark's pre-trial belief in Mr. Carver's guilt led her to the reveal the substance of the pre-trial conversations to the jury.

The requested discovery was necessary to protect Mr. Carver's substantial rights and the motion should have been granted.

III. CONCLUSION

For the reasons set forth above and in the Opening Brief, Mr. Carver asks this Court to vacate the denial of his petition and remand the matter so that the matter can proceed to an evidentiary hearing after requested discovery has been conducted.

Respectfully submitted this 27th day of March, 2017.

/s/Dennis Benjamin
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Attorney for Todd Carver

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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Dated and certified this 27th day of March, 2017.

/s/Dennis Benjamin
Dennis Benjamin