

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-10-082

Appellee

Trial Court No. 2008CR0322

v.

Carl Schwirzinski

**DECISION AND JUDGMENT**

Appellant

Decided: August 10, 2012

\* \* \* \* \*

Paul A. Dobson, Wood County Prosecuting Attorney, Heather M. Baker and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Jeffrey M. Gamso, for appellant.

\* \* \* \* \*

**SINGER, P.J.**

{¶ 1} Appellant appeals a summary judgment issued in favor of the state on his petition for postconviction relief in the Wood County Court of Common Pleas. Because we conclude that the basis of appellant's petition was insufficient pursuant to Evid.R. 606(B), we affirm.

{¶ 2} In 2009, a jury convicted appellant, Carl Schwirzinski, of one count of rape of a child under age 13 and two counts of gross sexual imposition. On appeal, we reversed one of the counts of gross sexual imposition, but affirmed appellant's conviction for rape and the other count of gross sexual imposition. *State v. Schwirzinski*, 6th Dist. No. WD-09-056, 2010-Ohio-5512, *appeal not accepted*, 128 Ohio St.3d 1427, 2011-Ohio-1049, 943 N.E.2d 573.

{¶ 3} Concurrent with his appeal, appellant filed a petition for postconviction relief pursuant to R.C. 2953.21 in the trial court. Appellant claimed that juror misconduct denied him his constitutional right to a fair trial, adjudication by a neutral fact-finder, and due process.

{¶ 4} Appellant supported his claim with the affidavit of an alternate juror who averred that, prior to deliberations, one of the jurors had reported a telephone call with a friend. The friend, according to the alternate juror's account of what the juror said, had offered an opinion of appellant's guilt, even after being advised that such a conversation was prohibited. The juror did not report the conversation to the court as she had been instructed to do.

{¶ 5} The alternate juror reported a second incident of purported juror misconduct by a different juror. This second juror, according to the alternative juror, told other jurors that appellant should be forced to testify and answer the allegations against him. This, in spite of the fact that this juror, when asked during voir dire, tacitly approved appellant's

right not to testify. The alternative juror offered the opinion that this inconsistency implied the second juror would infer guilt if appellant did not testify.

{¶ 6} The state responded to appellant's postconviction relief petition with a motion for summary judgment, arguing that the affidavit of the alternative juror was incompetent evidence pursuant to Evid.R. 606(B). Since the alternate juror's affidavit provided the only support for appellant's claim of relief, appellant failed meet his burden of coming forth with supporting evidence and the state was entitled to judgment as a matter of law.

{¶ 7} When the trial court granted appellee's motion without a hearing, appellant instituted this appeal. Appellant sets forth two assignments of error:

1. The trial court committed error when it failed to hold an evidentiary hearing to determine whether a juror's misconduct in failing to respond honestly to a material question on voir dire violated appellant's rights under the constitutions of the United States and the state of Ohio.

2. The trial court committed error when it failed to conduct an evidentiary hearing to determine whether a juror's misconduct in hearing opinions on appellant's guilt from a non-juror and failing to report the improper communication to the court was prejudicial to appellant's rights under the constitutions of the United States and the state of Ohio.

{¶ 8} A postconviction proceeding is a collateral civil attack on a judgment of conviction. *State v. Steffan*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). Such

proceedings are governed by the civil rules and the specific statutory requirements articulated in R.C. 2953.21 et seq. Civ.R. 56(C) provides that summary judgment may be granted only if (1) no genuine issue of material fact remains to be litigated; (2) it appears from the evidence that reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to summary judgment as a matter of law. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 9} To prevail on a petition for postconviction relief, the defendant must establish a violation of his constitutional rights which renders the judgment of conviction void or voidable. R.C. 2953.21. In this matter, appellant maintained that he was denied his right to a fair trial and to have his case adjudicated before an impartial trier of fact because of juror misconduct.

{¶ 10} Although the trial court elected to reach the merits of appellant's assertions, it failed to address the state's argument that the alternate juror, whose affidavit formed the entirety of appellant's evidence of juror misconduct, was not competent to give evidence. In our view, this is a threshold consideration that must be addressed first.

{¶ 11} Evid.R. 606(B) provides:

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 that 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. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes.

{¶ 12} The rule codifies the longstanding maxim that “the verdict of a jury may not be impeached by the evidence of a member of the jury unless foundation for the introduction of such evidence is first laid by competent evidence aliunde, i.e., by evidence from some other source.” *State v. Adams*, 141 Ohio St. 423, 427, 572, 48 N.E.2d 861 (1943). The purpose of the rule is to protect the integrity of jury deliberations and finality of the verdict and to ensure that jurors are insulated from defeated parties. *State v. Schiebel*, 55 Ohio St.3d 71, 75, 564 N.E.2d 54 (1990).

In order to permit juror testimony to impeach the verdict, a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from sources other than the

jurors themselves and the information must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence aliunde being introduced first. (Citation omitted.) *Id.*

{¶ 13} The prohibition against the introduction of evidence from a juror absent evidence aliunde applies equally to alternate jurors. *State v. Reiner*, 89 Ohio St.3d 342, 731 N.E.2d 662 (2000), paragraph one of the syllabus, *rev'd on other grounds, Ohio v. Reiner*, 536 U.S. 940, 122 S.Ct. 2621, 153 L.Ed.2d 804 (2002). "Evidence received from an alternate juror, without other outside evidence, is insufficient *aliunde* evidence under Evid.R. 606(B) upon which a court may rely in order to conduct an inquiry of other jurors into the validity of a verdict." *Id.* at paragraph two of the syllabus.

{¶ 14} Here, appellant attacks the verdict, suggesting that one juror may have been influenced by an outside communication and another was secretly predisposed to disbelieve a defendant who exercised his right not to testify. The only evidence appellant presents to support this allegation of misconduct is the affidavit testimony of an alternate juror. There is no evidence aliunde. The testimony does not concern a threat or attempted threat, bribe or attempted bribe, or any impropriety by an officer of the court. By the plain terms of Evid.R. 606(B) and the syllabus law of *Reiner*, this is not competent testimony to impeach the verdict, nor to instigate an inquiry of other jurors into the validity of the verdict.

{¶ 15} Appellant's reliance on *Grundy v. Dhillon*, 120 Ohio St.3d 415, 2008-Ohio-6324, 900 N.E.2d 153, and *State v. Phillips*, 74 Ohio St.3d. 72, 656 N.E.2d 643 (1995), is misplaced. Although *Grundy* provides an analytic construct for examining a juror's alleged misrepresentations during voir dire, there was no assertion that the *Grundy* juror's testimony was precluded by Evid.R. 606(B). Indeed the *Grundy* court expressly stated that it was offering no opinion on how the rule might be applied had there been a dispute. *Id.* at ¶ 60.

{¶ 16} In *Phillips*, the improper contact between jurors and an outsider occurred and was brought to the attention of the court during the trial, before there was a verdict. *Phillips* at 88. By its own express terms, Evid.R. 606(B) applies only after there has been a verdict or, in the case of a grand jury, an indictment. The rule, therefore, does not preclude a juror from reporting improprieties to the court while the court may take corrective measures, but operates after the verdict is rendered.

{¶ 17} In this matter, the state properly disputed the competency of the alternate juror's affidavit as incompatible with the rule articulated in Evid.R. 606(B). Since the affidavit was incompetent, pursuant to the rule, the trial court was not required to order a hearing or otherwise consider the merits of appellant's postconviction petition. Accordingly, both of appellant's assignments of error are not well-taken.

{¶ 18} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. It is ordered that appellant pay costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

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