IN THE COURT OF APPEALS 6/18/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00288 COA

ANTHONY OLIN COLLINS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOSEPH LOPER, JR.

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES C. MAYO

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: DEWITT ALLRED III

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: CONVICTED ON TWO COUNTS. SENTENCED TO SERVE TWO CONSECUTIVE LIFE SENTENCES IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., COLEMAN, AND KING, JJ.

KING, J., FOR THE COURT:

Anthony Olin Collins was convicted and sentenced to two consecutive terms of life imprisonment for the murders of George Scales and Dorothy Edmonds. Aggrieved by the conviction and sentence, he appeals and assigns as error:

I. The selection of Juror # 26, Janice Eichelberger Hopkins as a juror because she failed

to disclose upon inquiry during voir dire that her brother was a law enforcement

officer employed by the Winston County Sheriff's Department;

II. Deprivation of the effective assistance of counsel;

III. The denial of his request for a new trial or a judgment notwithstanding the verdict

because the verdict of the jury was against the overwhelming weight of the

evidence.

Because we find that Collins was prejudiced by Juror Hopkins' lack of candor during voir dire, and therefore denied a fair and impartial trial, we reverse and remand for a new trial.

PROCEDURAL HISTORY

On November 8, 1993, Collins was tried, convicted, and sentenced to two consecutive sentences of life imprisonment for the murders of George Scales and Dorothy Edmonds. Thereafter, Collins filed post-trial motions requesting that the court order a new trial or enter JNOV. Collins post-trial motions were denied, and Collins moved the court for leave to pursue an *in forma pauperis* appeal.

On January 6, 1994, the court granted Collins' motion requesting appeal *in forma pauperis* and appointed attorney Richard Burdine, who was also trial counsel, to represent Collins on appeal. Because attorney Burdine failed to perfect the appeal, the court extended the time in which Collins had to perfect the appeal and ordered attorney James Mayo to represent Collins on appeal.

On August 10, 1994, Collins filed a motion with the supreme court requesting that the cause be remanded to the trial court for an evidentiary hearing on an "Amended Motion for New Trial and Supplement of the Record." Collins also requested supplementation of the record if the trial court's ruling was adverse. In the motion, Collins alleged that he was prejudiced when juror Hopkins failed to disclose during inquiry upon voir dire that her brother was employed by the Winston County Sheriff's Office. The affidavits of Collins, the Winston County Sheriff, and Claudell Weaver were attached in support of the motion. No response to the Appellant's motion was filed by the Appellee. On January 23, 1995, the court denied Collins' motion requesting that the cause be remanded for an evidentiary hearing; however, the court ordered supplementation of the record with the affidavits, which had been attached to the motion. Thereafter, on July 5, 1995, the Appellee filed a motion requesting that the court rescind its order permitting supplementation of the record with the three

affidavits and also requesting that the court dismiss Issues I and II assigned by the appellant because they were not properly before the court. The Appellee's motion was denied. Issues I and II were passed for consideration upon the merits.

ANALYSIS OF THE ISSUE AND DISCUSSION OF LAW

During voir dire proceedings, the court inquired of the prospective jurors, "Are any of you related by blood or marriage to any person that presently serves as a law enforcement officer or has at any time in the past served as a law enforcement officer?" For clarity, the court stated, "I want to know any person that is related by blood or by marriage to any law enforcement officer that has served now or any time in the past." Several of the jurors responded; however, Juror # 26, Janice Eichelberger Hopkins, failed to reveal that her brother, Paul Eichelberger was employed by the Winston County Sheriff's Department as a jailer-dispatcher.

Voir dire examination is often the most crucial crucible in forging our primary instrument of justice: the fair and impartial jury. *Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990). In addition, the attorneys rely on the objective candor and responsiveness of prospective jurors when offering challenges for cause and peremptory challenges. *Myers*, 565 So. 2d at 558. Therefore, our State adheres to the rule that the failure of a juror to respond to voir dire warrants a new trial when the question propounded to the juror is (1) relevant to the voir dire examination; (2) unambiguous; (3) the juror has substantial knowledge of the information sought to be elicited; and (4) when prejudice in selecting the jury can reasonably be inferred from the juror's failure to respond. *Odom v. State*, 355 So. 2d 1381, 1382 (Miss. 1978); *see also Myers*, 565 So. 2d at 558 (court did not abuse its discretion in removing juror and replacing with alternate before jury retired for deliberations when it discovered that juror failed to disclose after inquiry that her husband had two federal liquor-related convictions); *Laney v.* State, 421 So. 2d 1216, 1217 (Miss. 1982) (conviction reversed because juror failed to respond to the following questions: "Is there anybody on the panel related by blood or marriage to any present law enforcement person in Montgomery County, or anywhere else?"; and "Is there any other member related by blood or marriage to any law enforcement officer or has any member ever been employed by law enforcement, at any time in the past?").

The question of determining whether a jury is fair and impartial is one initially for the trial court. *Odom*, 355 So. 2d at 1383. In the instant case, the court was not given the opportunity to determine whether Collins was prejudiced by Juror Hopkins' presence on the jury.

Because the question was (1) relevant to the voir dire examination; (2) unambiguous, and (3) within the knowledge of juror Hopkins, we find the failure to respond to be presumptively prejudicial.

We therefore reverse and remand for a new trial.

Because we are reversing and remanding the case to the circuit court for a new trial, we do not address the merits of Issue II.

THE CONVICTION AND SENTENCE OF THE CIRCUIT COURT OF WINSTON COUNTY MISSISSIPPI IS REVERSED AND REMANDED FOR A NEW TRIAL. WINSTON COUNTY IS TAXED WITH ALL COSTS OF THIS APPEAL.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, JJ., CONCUR.

SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, P.J., MCMILLIN AND PAYNE, JJ.

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SOUTHWICK, J., dissenting

The majority determines on this record that a juror improperly failed to answer a question during voir dire, and as a consequence the case must be reversed for a new trial. The information relied upon by the majority consists of affidavits attached to the appeal. I do not believe these are sufficient to require reversal. I would remand for the trial court's determination of the relevant facts regarding the juror. To reverse now is premature and potentially unnecessary.

Initially, it is important that one of the affidavits is from the Defendant himself. He is seeking a new trial because of facts that allegedly are within his personal knowledge. There is no evidence of when this information became part of his personal knowledge. If it was by the time of trial, then it is error to reverse and order a new trial on the basis of facts that could reasonably have been presented to the trial court. *Smith v. State*, 500 So. 2d 973, 975 (Miss. 1986).

Secondly, the matters raised now are properly the subject of Collins' rights under the Post Conviction

Relief Act. *See* Miss. Code Ann. § 99-39-3(2) (Supp. 1995). The orderly procedure for reviewing the claims of defendants that are based on matters outside the appellate record would be a better route to take. However, the supreme court has already suggested this appeal is the place to consider Collins' claims, and has ordered the record supplemented. I accept that consideration of the merits has been mandated by the supreme court, and proceed to do so.

Collins' affidavit states juror Hopkins had a brother who was a jailer-dispatcher with the Winston County Sheriff's Department. Another affidavit, from the Winston County sheriff, confirms that employment. The final affidavit, from another Hopkins sibling, merely affirms the relationship and not the employment. Notably, there is no affidavit from Juror Hopkins stating whether she knew that her brother-in-law was employed by the Winston County Sheriff's Department or what impact that knowledge might have had on her deliberations.

Juror Hopkins did not answer when, during voir dire, the panel was asked whether any of them had relatives involved in law enforcement. Collins did not raise this matter in the lower court, and instead sought to supplement the record and, having done so, convince the supreme court to remand the case for an evidentiary hearing. The supreme court denied the request for a remand, but did allow the record to be supplemented.

I do not find the affidavits to be conclusive. The threshold questions are whether Collins knew of this relationship at the time of trial, and nonetheless remained silent. Mere affidavits which are focused only on the facts the preparer of them wants the court to know, without the additional exploration of an evidentiary hearing, should not result in the ordering of a new trial. The ground for reversal is not the simple fact that a juror did not answer a question during voir dire, but whether the question 1) was relevant to voir dire, 2) was unambiguous, and 3) required an answer based on information that was in the juror's knowledge. When those factors are satisfied, there must then be an evidentiary determination that prejudice arose from the failure to respond. *Odom v. State,* 355 So. 2d 1381, 1382 (Miss. 1978). In *Odom,* the juror failed to answer when asked if she had a relative in law enforcement. Subsequently it became known that her brother was a police officer who had participated in the very investigation of the crime that was the subject of the trial.

The majority quotes *Odom* to the effect that the prejudice is initially an issue for the trial court. *Odom,* 355 So. 2d at 1383. All of the *Odom* factors require more facts than we presently have. The juror's brother here was a jailer-dispatcher. Was the question unambiguous, if the brother was not a uniformed officer, but merely worked at the sheriff's department in this capacity? A reasonable interpretation of "law enforcement officer" is that the phrase means a uniformed "officer," not some other employee of a police department or sheriff's office. Upon developing the facts of exactly what the juror's brother did, a better answer can be discerned by the trial court of whether the juror reasonably should have answered the voir dire inquiry. Additional fact finding would include just how knowledgeable the juror was regarding her brother, e.g., was she even aware that is where he worked?

Even if the first three factors of *Odom* are satisfied, there still is the question of prejudice. That is uniquely a fact question for the trial court, based on hearing the details of the juror's family. In addition to the other facts to be ferreted out, were the siblings even close, or was the bother's occupation about as relevant as that of a complete stranger? Prejudice in such circumstances would

be hard to find.

For all these reasons, I would consistent with *Odom* hold that this issue is uniquely one for the trial court to determine in the first instance. I would remand for a hearing on the issue. If the trial judge concludes a new trial is required, he can order one without further appellate involvement. If not, then those findings can be certified back to us.

BRIDGES, P.J., MCMILLIN AND PAYNE, JJ., JOIN THIS DISSENT.