No. 11-0206 - *Albert Postlewait, Jr. v. The City of Wheeling*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Justice, dissenting:

In this case, the majority opinion affirms the circuit court's decision to award a new trial to the City of Wheeling. The affirmation is based on two contentions by the majority: first, that the City's motion for a new trial was timely filed; and, second, that the circuit court did not abuse its discretion when it found that Juror Greathouse had failed to disclose information about her involvement in a previous lawsuit such that the City's right to a fair trial was prejudiced and impaired. I disagree with the majority's decision to uphold the circuit court's ruling regarding the juror disqualification issue; therefore, I respectfully dissent.

In its decision, the majority relied on the well-settled law from this Court that

> "[i]f it be determined that a juror falsely answered a question on *voir dire* examination, whether or not a new trial should be awarded is within the sound discretion of the trial court." [Syl. pt. 3,] *West Virginia Human Rights Commission v. Tenpin Lounge, Inc.*, 158 W. Va. 349, 211 S.E.2d 349 (1975).

See Majority opinion, Syl. pt. 3. While I agree with the majority's statement of the law, I disagree with its application to the facts of this case because the record does not support the

assertion that Juror Greathouse falsely answered a question during *voir dire* examination; thus, the prerequisite to the discretionary award of a new trial is absent in this case.

As explained in the *Tenpin* opinion,

> [j]ust as the trial court has discretion over *voir dire* examination, so should it have discretion on the question of whether a new trial should be granted because of false answers given by a prospective juror on such examination. In the exercise of its discretion in the latter instance a trial court should, when requested, permit interrogation of the prospective juror to determine the truth or falsity of such answers and the relevancy thereof to the case under consideration.

Tenpin, 158 W. Va. at 358, 211 S.E.2d at 354–55. Moreover, further guidance is provided by our discussion in *State v. Dennis*, 216 W. Va. 331, 607 S.E.2d 437 (2004), wherein we approved of the test set forth in *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984). In *Greenwood*, the United States Supreme Court set forth a test for determining whether a new trial is required when there is juror deceit during *voir dire*. This test requires the proponent of the new trial to

> first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556, 104 S. Ct. at 850, 78 L.Ed.2d 663.

In *Dennis*, the trial court expressed concern with the discovery regarding the juror in question and proceeded to conduct the necessary hearing. The hearing did not reveal any intent on the part of the juror to withhold information; rather, the record demonstrated that the juror simply misunderstood the *voir dire* question. Counsel did not question the juror during the hearing and did not demonstrate how a correct response by the juror would have provided a valid basis to sustain a challenge for cause or show that the juror was actually biased. In essence, there was no showing of prejudice or other basis for the lower court to find that injustice would result from the juror's continued participation on the panel. In *Dennis*, we found that the trial court properly employed its discretion by refusing to grant a mistrial.

In the present case, however, the contrary is true in that the lower court abused its discretion in granting a new trial. Like *Dennis*, there was no showing in the current case that the juror intended to withhold any information. In fact, the juror thought she had provided all of the necessary information, and the City's counsel failed to follow-up or to demonstrate how a different response by the juror would have provided a valid basis to sustain a challenge for cause or show that the juror was actually biased. Therefore, the lower court's decision to set aside the jury verdict on such grounds was an abuse of discretion.

The lower court's order states that:

> [t]he [City] alleged that [Juror] Greathouse failed to disclose that she initiated a lawsuit against her former employer[.] . . . Upon review of the transcript from the *voir dire* proceedings on October 20, 2010, the Court finds that . . . [i]n response to the question, "[h]ave you or any members of your immediate family ever been in or filed a lawsuit?", [Juror] Greathouse responded that she had "had a workers' comp. issue [that] . . . settled out of court."[1]

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[1]The transcript of the *voir dire* examination reveals the following exchange occurred:

> The Court: Have you or any members of your immediate family ever been in or filed a lawsuit? I think that's pretty much been answered before, but in case it was limited, have any of you ever been sued or sued anyone else?
>
> Potential Juror Greathouse: My name is Cindi Greathouse. I had a workers' comp issue.
>
> The Court: Did you go to hearing on that?
>
> Potential Juror Greathouse: We did - - well, we did not. It was settled out of court.
>
> The Court: Okay. Thank you.
>
> The Court: Okay. For any of you who have been involved in a lawsuit, with the fact that you have personally been involved in a lawsuit or you're associated closely with anyone who's been in a lawsuit, would that in any way make it difficult for you to be fair and impartial in this case? Is there anyone that that would influence?
>
> (Response in the negative.)

> Additionally, the Court finds that [Juror] Greathouse testified at the December 17, 2010[,] hearing that she thought she disclosed the lawsuit against her employer when she told the Court that she was involved in a "workers' comp. issue".[2]

(Footnotes added).

Based on the foregoing, the lower court determined that a new trial should be awarded to the City, making the following conclusions:

> In regard to [Juror] Greathouse's alleged failure to disclose the lawsuit against her former employer, the Court finds that although [Juror] Greathouse did not intentionally deceive the Court, she did fail to disclose certain information which would have been vital to the [City] in making a motion to strike for cause and in exercising her preemptory [sic] strikes. The information that [Juror] Greathouse failed to disclose involved a lawsuit, against her former employer under the deliberate intent statute wherein she recovered monetary damages from her employer. The Court finds that [Juror] Greathouse referred to the lawsuit as a workers' compensation claim, but did not disclose anything about the lawsuit. The Court finds that this failure to disclose prejudiced the [City] and impaired the [City's] right to a fair trial. The Court therefore grants the [City's] Motion for a New Trial. . . .

[2]After the trial, during the hearing on the City's motion for a new trial, the City introduced evidence that Juror Greathouse had a deliberate intent claim against her employer, Swisher International, Inc., a tobacco company, that was unrelated to the City of Wheeling, or its employees. In the *voir dire* transcript, Juror Greathouse mentioned this action as a workers' compensation issue that was settled out of court.

My review of the record reveals that the City's right to a fair trial was not impaired and that any failure to produce a fair trial was caused by the City, itself.[3] For that

[3]After the general *voir dire*, the circuit court permitted individual *voir dire* based on the request by the City's counsel that Juror Greathouse be brought into chambers for questioning. The following record was made:

> The Court: Just have a seat. You understand that you're still under oath?
>
> Potential Juror Greathouse: Yes, sir.
>
> The Court: Okay, You had indicated that you had had some disputes with the city. Were those disputes all involving your participation in a civic organization?
>
> Potential Juror Greathouse: Yes, sir.
>
> The Court: Anyone else want to ask any follow-up questions?
>
> [The City's counsel]: I thought I heard you say that you believed that those claims were settled fairly?
>
> Potential Juror Greathouse: Yes, ma'am.
>
> [The City's counsel]: You don't have any problems with the way it was settled?
>
> Potential Juror Greathouse: Oh, no. Everything was great. It worked out wonderful.
>
> [The City's counsel]: Okay. I don't have any further questions, Your Honor.
>
> [Mr. Postlewait's counsel]: That problem you had with the city, would that affect your ability to be fair, a fair juror in this case where Albert Postlewait is suing the City of Wheeling for age discrimination in a mechanic position when they hired someone

(continued...)

[3](...continued)

18 years old when he was 50?

Potential Juror Greathouse: No, it would not have any effect, sir.

[Mr. Postlewait's counsel]: You could listen to the evidence and Judge Gaughan's rulings and instructions on the law and apply that in a fair and impartial manner to both parties?

Potential Juror Greathouse: Absolutely.

[Mr. Postlewait's counsel]: I don't have anything further, Your Honor.

[The City's counsel]: I do have one follow-up question. You indicated that you maybe are or had been a union member and that you filed grievances with your union. Did you believe that those were handled fairly?

Potential Juror Greathouse: Yes, Ma'am.

[The City's counsel]: All right. Resolved to your satisfaction?

Potential Juror Greathouse: Yes, ma'am. Everything worked out great.

[The City's counsel]: Okay. Thank you.

The Court: Any follow up?

[Mr. Postlewait's counsel]: No, sir.

The Court: You may have your seat back in the courtroom.

Potential Juror Greathouse: Thank you very much.

(Whereupon Potential Juror Greathouse exited the Court's chambers and the following transpired.)

(continued...)

reason, I cannot agree with the majority's decision to reward the City with a new trial because the City failed to create a proper record when it had the opportunity to do so during the lower court's trial. While the individual colloquy contained follow-up questions of Juror Greathouse regarding other legal or quasi-legal proceedings with which she had been involved, notably absent were follow-up questions regarding the "lawsuit" where Juror Greathouse had "a workers' comp. issue" that "settled out of court." Counsel simply did not make any record on the issue.

> As has been stated previously:
>
> > A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date. *See, e.g.*, *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) ("Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences."); *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993) ("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal." (Citations omitted).).

Hanlon v. Logan Cnty Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997). Stated simply,

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[3](...continued)

> The Court: Any motion for cause?
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> [The City's counsel]: No, Your Honor.
>
> [Mr. Postlewait's counsel]: No.

> "[a] motion to set aside a verdict and grant a new trial on the ground that a juror subject to challenge for cause was a member of the jury which returned it, must be supported by proof that the juror was disqualified, that movant was diligent in his efforts to ascertain the disqualification and that prejudice or injustice resulted from the fact that said juror participated in finding and returning the verdict. Such facts must be established by proof submitted to the court in support of the motion, and not from evidence adduced before the jury upon the trial." Syl., *Watkins v. The Baltimore and Ohio Railroad Company et al.*, 130 W. Va. 268[, 43 S.E.2d 219 (1947), *overruled on other grounds by* Syl. pt. 3, *Proudfoot v. Dan's Marine Serv., Inc*., 210 W. Va. 498, 558 S.E.2d 298 (2001)].

Syl. pt 2, *State v. Dean*, 134 W. Va. 257, 58 S.E.2d 860 (1950).

Furthermore,

> "[w]here there is a recognized statutory or common law basis for disqualification of a juror, a party must during voir dire avail himself of the opportunity to ask such disqualifying questions. Otherwise the party may be deemed not to have exercised reasonable diligence to ascertain the disqualification." Syl. Pt. 8, *State v. Bongalis*, 180 W. Va. 584, 378 S.E.2d 449 (1989).

Syl. pt. 8, *Arnoldt v. Ashland Oil, Inc*., 186 W. Va. 394, 412 S.E.2d 795 (1991). *Accord* Syl. pt. 5, *McGlone v. Superior Trucking Co., Inc*., 178 W. Va. 659, 363 S.E.2d 736 (1987) ("Where a new trial is requested on account of alleged disqualification or misconduct of a juror, it must appear that the party requesting the new trial called the attention of the court to the disqualification or misconduct as soon as it was first discovered or as soon thereafter as the course of the proceedings would permit; and if the party fails to do so, he or she will be held to have waived all objections to such juror disqualification or misconduct, unless it

is a matter which could not have been remedied by calling attention to it at the time it was first discovered. *Flesher v. Hale*, 22 W. Va. 44 (1883)."[4] (footnote added)).

This case is not analogous to cases where this Court has remanded issues for the trial court to determine if an inaccurate answer to a *voir dire* question was willful. In fact, it is clear that the issue of the workers' compensation settlement was raised by Juror Greathouse in response to a *voir dire* question about previous legal proceedings. After the trial, and while still under oath, when asked the question as to why the issue of the deliberate intent workers' compensation lawsuit was not raised previously, Juror Greathouse testified that she thought she had properly mentioned it when she asserted her participation in "a workers' comp. issue" that "settled out of court." Even the lower court's order recognized that the juror's responses were not intentionally deceitful. It is not Juror Greathouse's fault that counsel for the City failed to follow-up on this issue. The City of Wheeling had both the opportunity and the obligation to determine whether Juror Greathouse's previous workers'

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[4]We note that *Flesher v. Hale*, 22 W. Va. 44 (1883) remains good law for the proposition for which it has been cited. Nevertheless, it has been overruled in the realm of felony convictions by a potential juror and the juror's concealment of the same. *See* Syl. pt. 3, *Proudfoot v. Dan's Marine Serv., Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001) ("A new trial is required when it is discovered after trial that a juror who voted on the verdict is statutorily disqualified under W. Va. Code § 52-1-8(b)(6) because the juror has been convicted of a felony; the juror concealed the felony conviction during *voir dire* in response to the specific inquiry whether any of the prospective jurors were convicted felons; and the disqualification was undiscoverable by the exercise of ordinary diligence. The complaining party is not required to show that it suffered wrong or injustice as a result of the convicted felon's presence on the jury. To the extent that *Flesher v. Hale*, 22 W. Va. 44 (1883), and its progeny are inconsistent, they are expressly overruled.").

compensation claim was limited to an event irrelevant to the present proceedings, or whether the claim was such that it could impact the City's ability to obtain a fair and impartial trial.

Because the parties were afforded the opportunity to investigate an area that was plainly set forth by the juror during *voir dire* and the parties failed to inquire further, it was an abuse of discretion for the circuit court to set aside the jury verdict and award a new trial on the basis of the juror's lack of information and its possible implications on the fairness of the trial. For the reasons stated, I dissent. I am authorized to state that Justice Workman joins me in this dissenting opinion.