ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Nos. 20010123-20010126

20010123-20010126

State of North Dakota,

Appellee,

vs.

Mark Christian Palmer,

Appellant.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
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STATE OF NORTH DAKOTA

APPEAL FROM THE JUDGMENT OF
CONVICTION UPON A JURY VERDICT

MCHENRY COUNTY DISTRICT COURT

THE HONORABLE JOHN C. MCCLINTOCK, PRESIDING

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

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ARGUMENT

I. PALMER HAS FAILED TO ESTABLISH THAT THE SUMMONS OF ADDITIONAL JURORS WAS CONDUCTED CONTRARY TO STATUTE.

Mark Christian Palmer appeals from the criminal judgment that was issued following a jury conviction in McHenry County, North Dakota. The primary grounds of his appeal is that the process of selecting additional jurors, when the original panel did not contain sufficient numbers, did not comply with N.D.C.C. § 29-17-13.

Palmer's statement of the facts is essentially correct. One omitted fact is that one of the two additional jurors that were drawn and sworn in was the alternate and did not participate in jury deliberation. (Tr. p. 538, lines 20-25, addendum p. 8.) Of the twelve deliberating jurors, only juror #44 was obtained by the sheriff's office in the "additional juror" process.

A. Palmer has failed to demonstrate that the officers were without authority.

Palmer contends that "defense counsel objected that McHenry County was actually without a sheriff to effectuate the statute." The record reflects that Attorney Schoppert stated, "Maybe I should make an objection that there is no sheriff in the county to effectuate the statute." (App. p. 8, lines 1-3.) There is no record that he actually followed up with such an objection. Failure to object constitutes a waiver of the objection.

Palmer states on page 5 of his brief that "Ms. Zahn was not the McHenry County sheriff, she was not a McHenry County deputy sheriff, and she was not a

special deputy appointed by the Sheriff. Ms. Zahn was simply an office administrator, a secretary, who was instructed by the trial court to go out and find additional jurors." Palmer assumes that Ms. Zahn is not a deputy sheriff even though his trial counsel did not ask that question on the record. Whether she is an office administrator or deputy sheriff are not mutually exclusive facts. It is inappropriate to assume that she is not a deputy sheriff simply because she is female.

At no time did Palmer object to Jennie Zahn's status, either prior to or after she participated in bringing in the eight additional jurors. Sheriffs have the power to appoint deputies and to "command the aid of as many inhabitants of the county as the sheriff may think necessary in the execution of the sheriff's duties." N.D.C.C. § 11-15-03(5).

Palmer attempted to challenge Barry Vannatta's involvement, but when the facts did not support his allegation, he withdrew the objection. (App. pp. 30-35.)

Both counsel were given the opportunity to question the officers involved in bringing in the additional jurors. See N.D.C.C. § 29-17-24. No bias was identified on the record. See N.D.C.C. § 29-17-25. Palmer has not met his burden to show that officers who obtained the additional jurors were without authority to do so.

B. Palmer has failed to demonstrate that the process did not comply with statutory requirements.

Section 29-17-20 of the North Dakota Century Code requires a challenge to a jury panel to be in writing, specifying plainly and distinctly the facts constituting the ground of the challenge. Palmer did not challenge the panel in writing, and

only generally alleged that "I don't think going to a group and asking if anybody wants to serve meets the spirit of randomness." (App. p. 36, lines 5-8.)

All that N.D.C.C. § 29-17-13 requires is that the sheriff summons from the body of the county as many persons qualified to serve as jurors as the court deems sufficient to form a jury. The court instructed Jennie Zahn and Barry Vannatta from the Sheriff's Office to seek and find eight additional jurors. (App. p. 25, lines 10-12.) Zahn and Vannatta returned eight persons qualified to serve as jurors to the courthouse. (App. p. 30, lines 11-13.)

N.D.C.C. § 27-09.1-01 provides jurors must "be selected at random from a fair cross-section of the population of the area served by the court." See State v. Torgerson, 2000 ND 105, ¶ 8, 611 N.W.2d 182. In the statutorily authorized process of summoning additional jurors when sufficient numbers cannot be obtained from the box, there is already a recognition that some statistical randomness will be sacrificed by having the sheriff go out into the community. However, randomness for jury selection purposes "means that, at no time in the jury selection process will anyone involved in the action be able to know in advance, or manipulate, the list of names who will eventually compose the empaneled jury." State v. Torgerson, id. at ¶ 9, citing Williams v. Commonwealth, 734 S.W.2d 810, 812-13 (Ky. Ct. App. 1987).

Courts have concluded juror summoning by telephone is random. State v. Torgerson, 2000 ND 105, at ¶ 11. Even after questioning the officers involved, Palmer was unable to establish that the process resulted in a systematic exclusion of anyone.

The McHenry County Sheriff obtained additional jurors as directed by the judge and authorized by statute, and there has been no showing that the process used allowed anyone to know in advance, or manipulate, the additional jurors who would compose the empaneled jury.

C. Palmer has not demonstrated a resulting exclusion of a constitutionally cognizable group.

Even if Palmer had provided a sufficient showing that there was some flaw in the process of selecting additional jurors, he would also have to show that the flaw allowed for impermissible discrimination against a constitutionally cognizable group. Torgerson, supra; Boston v. Bowersox, 202 F.3d 1001 (8th Cir. 1999). Palmer has not provided any factual basis showing the "additional juror" selection process was prejudicial, actually excluded, or systematically excluded any constitutionally protected group of people.

All seven of Palmer's peremptory challenges were available to him when juror #44 was qualified and his objections were overruled. See generally State v. McLain, 301 N.W.2d 616 (N.D. 1981) (it is settled law in this state that no error can be predicated in the overruling of a challenge for cause where the appellant has not exhausted all of his peremptory challenges).

II. THE RECORD DOES NOT SUPPORT THE ARGUMENT THAT PALMER'S TRIAL COUNSEL WAS INEFFECTIVE.

Mark Palmer contends that he did not receive effective assistance of counsel at trial. His appellate counsel does not agree that the record supports this

argument, but at Palmer's request, includes it as an issue on appeal even though the record is not developed.

A defendant claiming ineffective assistance of counsel must establish two elements:

1. Counsel's performance was deficient; and

2. Counsel's deficient performance prejudiced the defendant.

Wilson v. State, 1999 ND 222, 603 N.W.2d 47, 50 [citing State v. Robertson, 502 N.W.2d 249 (N.D. 1993)]. Palmer has failed to meet his burden on either of these prongs.

Palmer alleges that his trial counsel did not return phone calls, couldn't be located when Palmer sought to confer with him, missed scheduled office appointments that Mr. Palmer appeared for, was not prepared for trial, and did not subpoena any witnesses or documents for trial on Palmer's behalf. The record supports none of these allegations. Palmer did not file a motion for new trial or request an evidentiary hearing.

John Nolden did in fact testify at trial for the State, and was subject to cross-examination by defense counsel. (Tr. pp. 243-250.) Palmer's trial counsel called five witnesses to testify, with four of them traveling from the state of Minnesota to do so. (Tr. pp. 349, 395, 416, 425, and 431.) There is nothing in the record to support any of the other allegations of deficiency, and even if taken at face value, the failure of Attorney Schoppert to solicit irrelevant or inadmissible testimony does not prejudice Palmer.

This Court has often stated that a claim of ineffective assistance of counsel should not be brought on direct appeal, but rather through a post-conviction relief proceeding, which allows the parties to fully develop a record on the issue of counsel's performance and its impact on the defendant's case. See Decoteau v. State, 1998 ND 199, ¶ 7, 586 N.W.2d 156; State v. Antoine, 1997 ND 100, ¶ 9, 564 N.W.2d 637. Contrary to the recommendations of his appellate counsel, Palmer chose to raise the issue on direct appeal even though the record has not been developed to support his argument. Palmer's lack of evidentiary proof reduces his allegations to "nothing more than hindsight questioning of tactical decisions made within counsel's wide range of reasonable professional assistance." See Lange v. State, 522 N.W.2d 179, 181 (N.D. 1994).

Palmer has not met his burden to show that his trial counsel's performance was deficient, or that such performance prejudiced him.

CONCLUSION

Palmer has not demonstrated that the process used to obtain one additional juror was improper under the law, or that it resulted in an exclusion of a constitutionally cognizable group.

Palmer has not established from this record that his trial counsel's performance was deficient, or that he was prejudiced by it. The jury conviction should be affirmed.

Dated this 5th day of November, 2001.

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