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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 24-0345

AUG 12 2024

Bowen Greenwood
Clerk of Supreme Court
State of Montana

SUPREME COURT OF THE STATE OF MONTANA

STATE OF MONTANA,

CAUSE # DA 24-0345

plaintiff/appellee,

VS.

APPELLANTS BRIEF

DUANE ANGELO BURCHILL,

(Appealing Gallatin Co. District

defendant/appellant

Court - DC 16-368A)

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3-15-405, M.C.A.

46-16-702(1), M.C.A.

46-15-106, M.C.A.

STATEMENT OF ISSUES FOR REVIEW

① Did the District Court err not ruling on pending Motion for Subpoena for production of evidence.

② Did the District Court err in denying Motion for New Trial

③ Did the District Court err in not allowing an evidentiary hearing to determine proper ruling of Motion for ~~New~~ Trial.

STATEMENT OF THE CASE

Duane Angelo Burchill went to jury trial between July 28th and August 2nd, 2017, for four pending offenses of (two) Robberies, (one) Deceptive Practices Exceeding \$1,500 and (One) Criminal Possession of Dangerous Drugs. The verdict was guilty on all counts, and sentencing occurred on February 13, 2018. Burchill appealed his conviction to the Montana Supreme Court and all counts were affirmed, December of 2019.

Burchill filed a timely Petition for Post Conviction Relief in March of 2020 and was denied by district Court and then appealed to the Supreme Court of Montana, which also affirmed the Petition,

in 2024.

Burchill discovered new evidence in the fall of 2023, of non-compliance impaneling jury selection of Statute 3-15-405, M.C.A., at the time of Burchill's jury trial. In January of 2024, Burchill filed a Pro Se Motion for a New Trial ^[Docket 195] and then filed for Motion for Subpoenas for Production of Evidence ^[Docket 197]. District Court denies Motion for a New Trial ^[Docket 205] and leaves Motion for Subpoena for Production of Evidence pending and evidentiary hearing silently out.

Burchill appeals to the Montana Supreme Court ^[Docket 206] for the denial of Motion for New Trial. Burchill first files a Motion to Stay appeal and Remand back to the District Court on pending Motion for Subpoena for Production of Evidence and the Montana Supreme Court denies Stay and Remand and Orders Burchill to prepare for Appeal Brief, which Burchill can opt to discuss details of Motion for New Trial and Pending Motion for Subpoena for Production of Evidence, which brings us up to current.

SUMMARY OF ARGUMENT

The pending Motion for Subpoenas should be ruled on and Motion for New Trial reversed and

remanded back to the District Court. When the subpoenas for sworn affidavits are Ordered as Burchill requested, the outcome of the rulings and potentially appeal would be different whether the Motion for a New Trial is granted or denied. Burchill has a Constitutional Right, U.S. Constitution, 14TH Amendment and Montana Constitution, Article II, section #9 to have access to the requested verified evidence. The preponderance of presumptive evidence of non-compliance to Statute 3-15-405, M.C.A. at the time of Burchill's jury trial is what brought Burchill to filing Motion for a New Trial and Motion for Subpoenas for Production of Evidence. Burchill has a "right to know" and it fully appears that Burchill's Constitutional Rights were indeed violated, U.S. Constitution 6TH and 14TH Amendments and Montana Constitution, Article II, sections #9, #17, #24 and #26. Burchill has a Constitutional Right to have a fair and impartial jury trial, as well as have access to the evidence requested, in determining whether Burchill's Constitutional Rights were violated at the time of Burchill's trial.

ARGUMENT

Standard of Review: "Our review of a district court's ruling on a motion for a new trial where the basis

of the motion is insufficiency of the evidence is de novo." "Like the district court, we determine whether there was substantial evidence to support the verdict," *Renville V. Taylor*, 2000 MT 217, P14, 301 Mont. 99, P14, 7 P.3d 400, P14.

"We review a district court's denial of an evidentiary hearing for a clear abuse of discretion." *State V. Terronez*, 2017 MT 296, 19, 389 Mont. 421, 406 P.3d 947 (citing *State V. Schulke*, 2005 MT 77, 10, 326 Mont. 390, 109 P.3d 744)

"An abuse of discretion occurs when the district court acts arbitrarily without employing conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *State V. Knowles*, 2000 MT 186, 22, 357 Mont. 272, 239 P.3d 129.

"We review orders granting or denying requests for discovery for an abuse of discretion." *City of Billings V. Peterson*, 2004 MT 232, 13, 322 Mont. 444, 97 P.3d 532

Issue No. 1, Did the District Court Err not ruling on pending Motion for Subpoena for Production of Evidence: Due to the preponderance of presumptive "newly discovered evidence" Burchill sought verified

evidence to determine if Burchill's Constitutional Rights were violated in impaneling a jury for Burchill's 2017 jury draw selection, as U.S. Constitution 6th Amendment and Montana Constitution Article II, Section 24 and 26, which guarantees a criminal defendants "fundamental right to a fair and impartial jury." State V. Lamere, 2000 MT 35, 298 Mont. 358 2 P. 3d 204, while the Gallatin County Clerk of District Court and Sheriff were substantially not complying with Statute of Mandatory Language, 3-15-405, M.C.A. and that is why Burchill filed the Motion for Subpoenas for Production of Evidence requesting sworn affidavits that were sent to the Court, for compliance of said [Statute 3-15-405] [M.C.A.] at the time of Burchill's trial in 2017.

Burchill has a Constitutional "Right to Know" when filing to the Court, Montana Constitution Article II, Section 9, "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of the State ~~government~~ and its subdivisions,..." and this "right to know" allows Burchill the transparent integrity of the presumptive evidence on determining the impact of Constitutional Violations and the remedy necessary in ~~up~~ holding the Statute 3-15-405, M.C.A. and the "Mandated Shall's"

of non-compliance that occurred impaneling jury selection, at the time of Burchill's jury trial.

Burchill has a "liberty interest" in a fair and impartial jury. Civil rights is guaranteed in Burchill's Constitutional Right, protected in U.S. Constitution, 14TH Amendment "no life, liberty or property." The Due Process prohibits States from depriving any person of life, liberty or property without due process of law. Thus if one possesses a "liberty interest", the question becomes what process is due." Statute of Mandatory Language - 'Liberty Interest' is created when legislature expressly mandates to an agency the performance of some activity to be carried out within specific parameters which include definitions, criteria and 'mandated shalls.' " Orozco V. Day, 281 Mont. 341, Cause #96-344, (#351), 1997 Mont. Lexis 38. (MANDATED SHALLS).

"The clerk of Court shall serve notice by mail on persons drawn as jurors and require the persons to respond by mail as to their qualifications to serve as jurors. If a person fails to respond to the notice, the clerk shall certify the failures to the Sheriff, who shall serve notice personally on the person and make reasonable efforts to require the person to respond to the notice", 3-15-405, M.C.A.

Burchill's "liberty interest" exists and was violated as both State and Federal Constitutions protect an individual's right to a fair and impartial jury and the "Due process Clause" in achieving such and preserving Burchill's Rights and determining the violations. U.S. Constitution, 6th and 14th Amendment and Montana Constitution, Article II, sections #9, #17, #24 and #26. "Montana Statutes governing the procurement of trial jury could not be treated as harmless, because the right to an impartial jury was so essential to a fair trial that its violation could never be considered harmless." Case Summary (OVERVIEW), Case Summary (OUTCOME), "The judgement of the trial Court was reversed and remanded." Robbins V. State, 2002 MT 116, cause # 01-245.

The Court must allow the verified evidence to determine the assessment of the remedy Burchill seeks in the Constitutional violations of a fair and impartial jury. The Motion for Subpoenas for Production of Evidence would readily support the State or the defendants allegations and Burchill has a "right to know", as does this Court.

ISSUE No. 2, Did the District Court err in denying the Motion for a New Trial? For starters the

District Court should have allowed the "verified evidence" and information Burchill requested even if the Court determined after receiving that information that it now had, an analysis of proper ruling of what truly occurred, instead of claiming Burchill had "...not supported his Motion with an affidavit and has not provided any facts in Support of his assertion that the Clerk of District Court failed to properly convene a jury in 2017." ^{(Docket 205) [Pg. 2]} even if the Court ~~now~~ denies Burchill's Motion, the analysis and ruling would be much different and accurate, instead of a simple denial. The Constitutional violations that certainly appeared ^(EXHIBIT-C) with the preponderance of presumptive evidence; ^(Docket 201) gives Burchill the motivation to clearly assess how substantial the violations were at the time of his 2017 jury trial and as such file appropriate Motion for a New Trial, 46-16-702(1) "...in the interest of justice." M.C.A., and Motion for Subpoenas for Production of Evidence, 46-15-106; M.C.A., to determine proper remedy.

Substantial non-compliance of Montana Statute, 3-15-405, M.C.A., "...governing the procurement of a trial jury is structural error." State V. Lamere, 2000 MT 45,

50, 298 Mont. 358, 2 P.3d 204.

The District Court after focusing on Burchill had "not supported his Motion with an affidavit...", the Court then shifts his analysis on the denial by stating "[Docket 201] [Pg. 5]" he cites instances from Cascade and Flathead Counties in which courts have determined the jury selection statutes were not followed, "as well as Burchill did utilize Gallatin County evidence of current evidence on "Gallatin County Sheriff's Office" making strong attempts to now reel in "3,600 outstanding" non-responders on social media in 2023 and Counsel Jami Rebsom adding verified evidence that her client Shelby Bryan Ragner, in Ragner's Postconviction Petition and his "... rights to Due Process, Fair Trial, and right to Fair and Impartial jury were violated...", dated November 20th, 2023 and as professional testimony Cascade County Clerk of Court, Tina Henry "... it is likely that the faulty method currently employed in this County is also being used elsewhere in Montana.", yes Burchill's preponderance of presumptive evidence does not fall short in investigating a thorough inspection of substantial non-compliance and allowing the verified evidence that Burchill requested as to the Constitutional violations of Statute, 3-15-405, M.C.A. at the time of Burchill's 2017 jury trial.

Burchill's "right to know" is valid and as presented in Burchill's Motion to STAY ^(EXHIBIT-B) ^(Pg. 3) with the Supreme Court, other Counties in the State of Montana are bringing forward the subpoenas and sworn affidavits as to compliance by the Clerk of Court of Statute 3-15-405, M.C.A. **MOTION to STAY DA-24-0345-EX-A, EX-B**

The Gallatin County District Court also addressed the Motion for a New Trial was "untimely". Burchill's Counsel, District Court, Clerk of Court and Sheriff were all unaware at the time of Burchill's 2017 trial and as the State of Montana's Counties are bringing their compliance of Statute 3-15-405, M.C.A. up to speed and likely Legislation in 2025 will amend Statute 3-15-405, M.C.A., most were unaware until 2023 and 2023 was when Burchill was now aware and Burchill's investigation of due diligence began.

"The 1999 Montana Legislature amended M.C.A. 46-16-702(1) to specifically allow the Court to order a new trial... The Legislature did not place any limitations on the courts authority to grant a new trial whenever required by the interests of justice." State V. Morse, 2015 MT 51, 2015 Mont. Lexis 56, Cause # DA-14-0052, (Lexis Nexis Headnotes). "Errors involving jury selection are structural because they

proceed the trial and affect the fundamental constitutional right to an impartial jury." State V. Deveraux, 2022 MT 130, 25,409 Mont. 177, 512 P.3d 1198.

Burchill has shown "good cause" and "in the interest of justice" in establishing the violations of Burchill's Constitutional Rights and Due Process in a fair and impartial jury trial and this "newly discovered evidence" is not evidence that was presented at Burchill's jury trial, but failures of non-compliance of Statute 3-15-405, M.C.A. and these failures to not comply constitute structural error that preceded the trial; which is "presumptively prejudicial and automatically reversible." State V. Hardy, 2023 MT 110, 57,412 Mont. 383, 530 P.3d 814
"The Legislature did not insert a time limitation on the Court's authority to act under subsection(1), nor did it restrict the manner in which the issue may be raised." M.C.A., 46-16-702(1), Morse, headnotes, (Lexis 56)

Burchill is responding to the Constitutional violations that Burchill became aware of in 2023, during the fall and other Counties filing as well and these violations occurred at the time of Burchill's 2017 jury trial and Burchill seeks appropriate remedy, granting Burchill a new trial. Untimeliness is irrelevant.

"The rules of Statutory construction require the language of a **Statute** to be construed according to its plain meaning. If the language is clear and unambiguous, no further interpretation is required."

Ravalli County v. Erickson, 2004 MT 35, 11, 320 Mont. 31, 85 P.3d 772. The language of 3-15-405, M.C.A. is clear and unambiguous.

"...counsel had a right to rely on the judge and clerk to follow their statutory duties." Solberg v. County of Yellowstone, 203 Mont. 79, 84, 659 P.2d 290, 291, 292 (1983). "...if counsel does not have the knowledge, or means of knowledge, of the irregularity in the drawing of the jury or the panel from which it is selected until after the verdict, the question may be raised for the first time on motion for new trial." Dvorak v. Huntley Project Irrigation District, 196 Mont. 167, 171-22, 639 P.2d 62.

Gallatin County Courts, as of 2023 have ordered the Clerk of Court and Sheriff to comply with Statute 3-15-405, M.C.A. Burchill asks this Court why would Gallatin County Court and prosecution not want to see the subpoenas from the compliance of Statute, M.C.A. 3-15-405 granted and the "verified evidence" brought forward to support their argument, as Burchill does.

ISSUE NO. 3, Did the District Court Err not allowing an evidentiary hearing to determine proper ruling of Motion for New Trial: The Court left the ruling silent on Burchill's request for alternatively an evidentiary hearing and appointment of Counsel to question the Gallatin County Clerk of Court and Sheriff about compliance with M.C.A. 3-15-405, at the time of Burchill's jury was impaneled. ^(Docket 195, pg. 10) Gallatin County Attorney ^(Docket 198, pg. 7) opposed Burchill's request "... the State asserts a hearing is not necessary. ... the defendant here did not present any evidence demonstrating he was entitled to new trial." Burchill would like to appeal on that statement and say that the County Attorney did not respond to Burchill Motion for Subpoenas for Production of Evidence, as well as Burchill sent ^(MOTION to STAY) Subpoenas to the Court and the Court also did not respond to Burchill's ^(Docket-197) Motion for Subpoenas or grant Subpoenas sent. To state that Burchill's Motion was "untimely" and does not make a "prima facie" does not allow Burchill the defendant's Constitutional "Right to Know", Montana Constitution, Article II, Section #9 and #17. Burchill has "Right to Know" and obviously if the Court or the Attorney of Gallatin County weren't opposed to the "verified evidence" Burchill requested, or leave the

request for "alternatively giving Burchill an evidentiary hearing" silent and then not rule on Burchill's Motion for Subpoena or respond to it from the State, they would have simply allowed the requested "verified evidence" and sworn affidavits to be brought to the Court supporting their rulings and denials and opposition to Burchill's Motion for a New Trial, of the obvious Substantial non-compliance of Statute 3-15-405, M.C.A., at the time of Burchill's 2017 trial.

"A district court's discretionary rulings, including whether to grant or deny discovery, are reviewed for an abuse of discretion." State V. Soto, 2020 MT 265, 8401 Mont. 545, 474 P.3d 815. "... the State cannot deny defendants ... access to a material witness." State V. Smith, 206 Mont. 99, 108, 670 P.2d 96, 100-01(1983).

It would appear to any intellectual, rational person, that the "verified evidence" Burchill requested or the alternative evidentiary hearing, were all means to support Burchill's Motion for a New Trial and obviously, this evidence does not support the State's Response in opposition, or give simple evidence to support the Court's denial of Burchill's Motion for a New Trial, 46-16-702(1) "... in the interest of justice."

CONCLUSION

The Courts denial of Burchill's Motion for a New Trial, 46-16-702(1) "... in the interest of justice," should be reversed because the Court erred in denying it before gathering the "verified evidence" of substantial non-compliance to Statute 3-15-405, M.C.A., by the Clerk of Court and Sheriff in properly impaneling jury selection for trial at Burchill's 2017 Constitutional Right to a fair and impartial jury trial, U.S. Constitution 6th and 14th Amendments, Montana Constitution, Article II, Section #24 and #26. The Court erred in leaving pending Motion for Subpoena for Production of Evidence, 46-15-106, M.C.A., silent and Burchill requests this Court respectfully in reversing Burchill's Motion for a New Trial, remand it back to rule on this Motion for Subpoenas and bring forth the "verified evidence" to support Burchill's "preponderance of presumptive evidence" and Burchill does have a Constitutional "Right to Know" and utilize "Due Process Clause", U.S. Constitution, 14th Amendment and Montana Constitution Article II, Section #9 and #17, and Burchill's "Liberty Interest" being upheld with the Statutes of Mandatory Language and "Mandated Shalls."

Finally, Burchill regests an evidentiary hearing after gathering the information and verified evidence, bringing all these factors to the record to properly prepare for a transparent ruling of integrity and accuracy supporting Burchill's Constitutional Rights addressed.

The defendant respectfully requests that his Motion be reversed and remanded back to the district Court and the pending Motion be ruled on.

Dated this 7TH day of August, 2024.

Duane Burchill

Duane Angelo Burchill, Pro-Se

Certificate of Service

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