

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-091679

06/11/2004

HONORABLE JAMES H. KEPPEL

CLERK OF THE COURT
L. Mitchell
Deputy

FILED: 06/18/2004

STATE OF ARIZONA

JASON KALISH
ARTHUR G HAZELTON JR.

v.

DAVID WAYNE KIEHLE

THOMAS A GORMAN

APPEALS-SE
VICTIM SERVICES DIV-CA-SE

MINUTE ENTRY

State's Attorney:	Arthur Hazelton
Defendant's Attorney:	Thomas Gorman
Defendant:	Present
Court Reporter:	Laurie Yazwa

In previous proceedings in this matter, Mr. Kiehle, through counsel, filed a Petition for Post-Conviction Relief alleging that he was denied a Sixth Amendment right to a fair trial because of juror misconduct. Defendant claimed that a female juror conducted an experiment at home to disprove the defense theory of suicide and reported the results to the other jurors. He claimed that the jury improperly considered this information during its deliberations and argued that, because of jury misconduct, he was entitled to a new trial. The Court denied summarily the Petition for Post-Conviction Relief. The case was taken to the Court of Appeals on a Petition for Review. The Court of Appeals disagreed with this Court's ruling and remanded this matter for a hearing, which has been conducted. Testimony has been heard from several jurors, including the juror who conducted the experiment in question. Prior to commencement of the trial, the Court gave the jurors preliminary instructions, including the following, which appeared on page 5 of the instructions:

"The admonitions also preclude you from consulting any type of outside source with regard to the case or any of the issues presented to you. For example, you are not to do any type

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of legal or factual research or investigation". Further, in the final instructions on Page 1, the jury was instructed, "Determine the facts only from the evidence produced in court".

In this case, the juror in question admitted that the water pistol used by the juror was not an exhibit admitted in trial and, therefore, it was extrinsic evidence. She said she had the water pistol at home, it was not introduced during the course of the case. There is nothing to suggest that juror's water pistol was similar to the weapon used in the crime either as to shape, size, weight or any other relevant characteristic. The experiment conducted by the juror and the results thereof constituted extra-record facts which were not properly before the jury. The experiment was central to the petitioner's defense that the victim in this case committed suicide. Only one of the jurors conducted this experiment with that water pistol, it was done outside the presence of the remaining jurors, who, therefore, could not independently judge its validity and the results were conveyed by hearsay report from the experimenting juror.

The Supreme Court has held that if the jury improperly receives extrinsic evidence, a defendant is entitled to a new trial if it cannot be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. The Court further held in State v. Hall, that juror misconduct warrants a new trial if the defense shows actual prejudice or prejudice may be clearly presumed from the facts and, if the defendant shows that the jury has received and considered extrinsic evidence, prejudice must be presumed and new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict.

With regard to the juror's testimony in this case, the juror did state that when she conducted the experiment at home, she had not decided whether or not the death in this case was a suicide or a homicide. It was after she conducted her experiment at home that she decided the death could not have been a suicide and that Mr. Kiehle must have committed the murder.

Under these circumstances, it is very clear from the Supreme Court decision in State v. Hall that it is impossible for the Court to find beyond a reasonable doubt that the jury decision in this case was not tainted by this extra-judicial experiment conducted by the juror. Accordingly,

The petition for post-conviction relief is granted and a new trial will be ordered.

IT IS ORDERED that the original terms of release that were in place prior to Mr. Kiehle's conviction shall be reinstated, subject to review at the appropriate time if counsel wishes to revisit the issue.

ISSUED: Release Order (no bond).

IT IS ORDERED setting Status Conference on 07/09/2004 at 8:30 a.m. in this division.

The delay having been occasioned on behalf of the defendant,
Docket Code 028

Form R000D

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IT IS ORDERED excluding time.

NEW LAST DAY: 09/07/2004.