

No. 1-03-3550

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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<b>PEOPLE OF THE STATE OF ILLINOIS,</b>	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Plaintiff-Appellee,	)	
	)	
-vs-	)	No. 02 CR 26570.
	)	
<b>TERANT PEARSON,</b>	)	Honorable
	)	Diane Cannon,
Defendant-Appellant.	)	Judge Presiding.

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**BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT**

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**ORAL ARGUMENT REQUESTED**

**I. *People v. Zehr* imposes a duty upon the court or defense counsel to query potential jurors about the following essential propositions: that the defendant is presumed to be innocent, that the defendant has no duty to present evidence in his behalf, that he must be proved guilty beyond a reasonable doubt, and that the failure to testify is not evidence of guilt. The failure in this case of either the court or defense counsel to question potential jurors about these essential propositions constitutes reversible error .....6**

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**II. This case should be remanded for the trial court to admonish Terant Pearson properly, pursuant to Supreme Court Rule 605(a) where the trial court failed to advise Mr. Pearson of his right to file a written motion to reconsider sentence and failed to advise Mr. Pearson that this motion was necessary to preserve issues for appellate review.....14**

—Section Redacted for Length—

**III. The compulsory extraction and perpetual storage of Mr. Pearson’s DNA violated his Fourth Amendment right to be free from unreasonable searches and seizures because the State lacked a reasonable suspicion to seize Mr. Pearson’s DNA, the State’s primary objective in taking the DNA was for general law enforcement purposes, and the State’s interests in taking the DNA were not advanced and were outweighed by Mr. Pearson’s substantial privacy interest in his bodily integrity and genetic information .....18**

—Section Redacted for Length—



## NATURE OF THE CASE

Terant Pearson was convicted of aggravated unlawful use of a weapon after a jury trial and was sentenced to eight years in prison.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

## ISSUES PRESENTED FOR REVIEW

1. Whether *People v. Zehr* imposes a duty upon the Court or defense counsel to query potential jurors about the following essential propositions: that the defendant is presumed to be innocent, that the defendant has no duty to present evidence in his behalf, that he must be proved guilty beyond a reasonable doubt, and that the failure to testify is not evidence of guilt.

2. Whether this case should be remanded for the trial court to admonish Terant Pearson properly pursuant to Supreme Court Rule 605(a) where the trial court failed to advise Mr. Pearson of his right to file a written motion to reconsider sentence and failed to advise Mr. Pearson that this motion was necessary to preserve issues for appellate review.

3. Whether the compulsory extraction and perpetual storage of Mr. Pearson's DNA violated his Fourth Amendment right to be free from unreasonable searches and seizures because the State lacked a reasonable suspicion to seize Mr. Pearson's DNA, the State's primary objective in taking the DNA was for general law enforcement purposes, and the State's interests in taking the DNA were not advanced and were outweighed by Mr. Pearson's substantial privacy interest in his bodily integrity and genetic information.

## **JURISDICTION**

Terant Pearson appeals from a final judgment of conviction in a criminal case. He was sentenced on November 4, 2003. (C.161) Notice of appeal was timely filed on November 14, 2003. (C.179) Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 603 and 606.

## STATEMENT OF FACTS

On September 21, 2002, Chicago police officers McDermott, Suchocki and Burzinski were on patrol in a marked police car near the 3500 block of West Ohio. (R. G44, G46, G83) As the police drove east on Ohio, someone in a crowd on the corner of Ohio and St. Louis shouted “He’s got a gun.” (R. G47, G85) The officers stopped the car, and Officers Suchocki and McDermott got out to investigate. (R. G48) According to the officers, Mr. Pearson reached over and removed a handgun from his waistband. (R. G49, G86) Still holding the gun, Mr. Pearson ran away. Officers McDermott and Suchocki chased him on foot. (R. G50, G88)

The footchase covered very little ground, ending less than a block away, but encompassed a number of twists and turns through gangways and across parkways. (R. G51) Just before Officer Suchocki caught up with Mr. Pearson, Mr. Pearson lobbed the gun backwards over the officer’s head. (R. G92) Officer McDermott was a short distance behind the other two men and recovered a weapon from the fenced-in parkway at 3450 W. Ohio. (R. G54) He then assisted Officer Suchocki, who was taking Mr. Pearson into custody in the backyard of 604 N. Trumbull. (R. G93, G56)

After Mr. Pearson elected to have a jury trial, *voir dire* was conducted entirely by the court. The court asked the potential jurors, as a whole, whether any would fail to sign a “guilty” verdict form, should the State meet its burden of proof of guilt beyond a reasonable doubt. Receiving no response from the panel, the court next inquired if any would be unable to sign a “not guilty” verdict form if the State *failed* to meet its burden of proof of guilt beyond a reasonable doubt. (R. 48-49) Without inquiring into the panel’s acceptance of the presumption of innocence and without assessing how the potential jurors would react to Mr. Pearson’s failure to

testify, the court moved to individual *voir dire*. Potential jurors were not asked further questions concerning the burden of proof and the presumption of innocence, nor were they asked if they could accept the premise that Mr. Pearson need present no evidence of his innocence.

One potential juror was stricken for cause at the request of the State because she demonstrated possible bias against officer testimony. (R. G31-32, G10) Another was stricken peremptorily at the request of the defense. (R. G32) No other challenges were made, and neither the defense nor the State requested additional questioning of the venire persons.

The State presented the testimony of Officers Suchocki and McDermott. The defense, however, offered no witnesses. The jury convicted Mr. Pearson (R. C162), and the trial court sentenced him to eight years. (R. C161) A motion for new trial was heard and denied on November 4, 2003. (R. C175-176) Notice of appeal was filed on November 4, 2003. (R. C-177)

## ARGUMENT

- I. ***People v. Zehr* imposes a duty upon the court or defense counsel to query potential jurors about the following essential propositions: that the defendant is presumed to be innocent, that the defendant has no duty to present evidence in his behalf, that he must be proved guilty beyond a reasonable doubt, and that the failure to testify is not evidence of guilt. The failure in this case of either the court or defense counsel to question potential jurors about these essential propositions constitutes reversible error.**

Mr. Pearson was denied his right to a fair and impartial jury because the venire persons were not properly questioned regarding basic biases and prejudices. In a criminal case, Illinois law requires that each and every juror understand and accept four principles related to the presumption of innocence, burden of proof, and the decision to present a case on the defendant's behalf. *People v. Zehr*, 103 Ill. 2d 474, 469 N.E.2d 1062 (1984). Failure to question potential jurors about these basic guarantees created prejudicial error in his case, and Mr. Pearson was denied his right to a fair and impartial jury. U.S. Const. Amend. VI; Ill. State Const. Art. I, Sec. 8. Accordingly, this court should reverse Mr. Pearson's conviction and remand for a new trial.

The standard of review in this matter is *de novo* because questions asked of the prospective jurors can be determined by consulting the written record and are not in dispute. *Sosin v. Hayes*, 258 Ill.App.3d 949, 951, 630 N.E.2d 969 (1<sup>st</sup> Dist. 1994).

*Voir dire* in Mr. Pearson's case was conducted entirely by the court, which is properly within the court's discretion. *People v. Allen*, 313 Ill. App. 3d 842, 845-847, 730 N.E.2d 1216, 1219-21 (finding the court need not permit attorneys to ask direct questions of potential jurors where its own questions adequately cover issues of particular concern to the attorneys). The court

queried the potential jurors as a whole whether any of them could not sign a verdict of guilty “should the State meet their burden of proof beyond a reasonable doubt.” (R. 48-49) Receiving no response, the court then asked the pool of potential jurors if any would be unable to sign a verdict of not guilty, “[s]hould the State fail to meet their burden of proof beyond a reasonable doubt. . . .” (R.49) The court proceeded to individual questioning of the potential jurors. At the close of questioning, the court offered the attorneys the opportunity to ask questions of the jury pool, and both declined. (R. 73) At no point did the court inquire whether the potential jurors could accept that Mr. Pearson was presumed innocent. The court also did not determine, either individually or of the group as a whole, whether the potential jurors understood that Mr. Pearson had no duty to present a case in his own behalf and whether any would hold Mr. Pearson’s failure to testify against him. Because these inquiries were not made, the jury was not properly qualified under the line of cases following *Zehr*.

A. The Court has a Duty to Qualify Potential Jurors with Regard to the Basic Guarantees Elucidated in *People v. Zehr*

In *Zehr*, the Illinois supreme court elucidated basic principles about the function of *voir dire* in criminal trials and the responsibility of the presiding judge with regard to those principles. As a result of the holding in *Zehr*, the Illinois Supreme Court Rules concerning *voir dire* in criminal trials were revised. *Zehr* and the new rule have been interpreted as requiring queries about the four *Zehr* principles in *voir dire*. The trial court is entrusted with the duty to see that all persons are given a fair trial. *People v. Burrows*, 148 Ill.2d 196, 249, 592 N.E.2d 997 (1992). To ensure a fair trial, the Supreme Court has found that the trial court has a *sua sponte* duty to

instruct a jury on lesser-included offenses even where the parties do not request such an instruction. *People v. Garcia*, 188 Ill.2d 265, 282, 721 N.E.2d 574 (1999). In a similar vein, the trial court should ensure that every juror in a criminal case understands and accepts the essential *Zehr* principles regardless of whether the State or defense counsel choose to do so. Therefore, this Court should find that the trial court has a *sua sponte* duty to secure responses to the *Zehr* principles when the parties fail to do so in order to follow *Zehr*'s requirement that each juror deciding a criminal case understand and accept these essential principles.

Cases which follow *Zehr* impose a duty on the court to qualify jurors with regard to the *Zehr* guarantees. It is the trial court's pre-eminent duty is to ensure that a criminal defendant receives a fair trial by a panel of impartial jurors. *People v. Moore*, 243 Ill.App.3d 1045, 1051, 614 N.E.2d 152 (1<sup>st</sup> Dist. 1993). A person is not competent to sit as a juror if that person's state of mind or mental attitude is such that, with him or her as a member of the jury, the defendant will not receive a fair and impartial trial. *People v. Peebles*, 155 Ill.2d 422, 462-63, 616 N.E.2d 294 (1993). To insure the selection of competent jurors, the Illinois Supreme Court held that each juror in a criminal case must understand and accept that: 1) the defendant is presumed innocent; 2) the defendant is not required to offer any evidence in his own behalf; 3) the State has the burden to prove the defendant guilty beyond a reasonable doubt; and 4) the defendant's failure to testify in his own behalf cannot be held against him. *Zehr*, 103 Ill.2d at 477; *see also People v. Whitehead*, 169 Ill.2d 355, 662 N.E.2d 1304 (1996); *People v. Carson*, 238 Ill.App.3d 457, 606 N.E.2d 363 (1<sup>st</sup> Dist. 1992).

The First District has held that *Zehr* is an expansive rule. *People v. Gregg*, 315 Ill. App. 3d 59, 68, 732 N.E.2d 1152, 1159-60 (1<sup>st</sup> Dist. 2000). Although *Gregg* can be distinguished from

the case at hand, in *Gregg*, this Court offers extensive guidance on the duty of the trial court with regard to *voir dire* and the *Zehr* questions. *Voir dire* serves a dual purpose of identifying jurors who are free from bias or prejudice and giving attorneys an informed, intelligent basis for peremptory challenges, *Gregg*, 315 Ill. App. at 65, and it is the function of the court to ensure *voir dire* fulfills these purposes. *Id.*, citing *People v. Terrell*, 185 Ill. 2d 467, 484, 708 N.E.2d 309, 318 (1998); see also *People v. Strain*, 194 Ill. 2d 467, 477; 742 N.E.2d 315, 320 (2000). This Court in *Gregg* assumed a duty on the part of the court to query potential jurors according to *Zehr*, stating that “[the *Zehr* factors] should be the subject of questioning on *voir dire* . . . because . . . the defendant has the right to discover prejudice or bias in areas which are basic . . . to a fair trial.” *Gregg*, 315 Ill. App. 3d at 70. This Court cited the amendments to Rule 431, and the committee comments to the amended rule, which followed *Zehr*, to explain why the court viewed asking *voir dire* questions over these basic principles to be a duty.

In support of this reasoning, the *Gregg* court cited two capital cases, *People v. Macri*, 185 Ill. 2d 1, 705 N.E. 2d 772 (1998), and *People v. Buss*, 187 Ill. 2d 144, 718 N.E.2d 1 (1999), in which the Illinois Supreme Court found no error in the trial courts’ refusals to ask additional questions of potential jurors concerning the unanimity requirement for the death penalty because the trial courts in *Buss* and *Macri* gave jurors clear instructions about the unanimity requirements, and because additional questions of the jurors on the subject fell outside the basic guarantees of *Zehr*. *Gregg*, at 71, 1161, citing *Buss*, 187 Ill. 2d at 183. See also *Macri*, 185 Ill. 2d at 37-38 (recognizing that the essential qualifications of jurors are those enumerated under *Zehr*). In *Macri*, the court found no correlation between the proffered, and rejected questions, and the court’s duty to ferret out juror prejudice or bias against the basic guarantees which ensure a fair

trial: namely, the presumption of innocence, that defendant need present not evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt and that his decision not to testify cannot be held against him *Macri*, 185 Ill. 2d at 46-48.

Because *Zehr* is an expansive rule, a duty exists on the part of the trial court, under the pre-eminent duty to ensure a fair trial, to confirm that potential jurors are qualified to accept the essential principles of the presumption of innocence, burden of proof and extent of the case presented by the defendant. Because jury instructions are not sufficient to cure jurors of prejudice against the presumption of innocence, or of prejudice which results from the defendant's failure to testify or, in fact, offer any evidence in his behalf, jurors must be questioned about their ability to accept these fundamentals principles before they *begin* service as jurors. This duty lies foremost with the court itself. The jurors in Mr. Pearson's trial were not questioned about the four *Zehr* principles, and it is, therefore, not possible to determine if they were prejudiced against the *Zehr* principles and whether the verdict resulted from that prejudice.

B. Defendant's Counsel has a Duty to Qualify Potential Jurors with Regard the Basic Guarantees Elucidated in *People v. Zehr*

Alternately, *Zehr* imposes a duty on defendant's attorney to see that the potential jurors are properly qualified with regard to the issues identified in *Zehr* as basic guarantees. A criminal defendant is constitutionally entitled to the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const., Amends. VI, XIV. To obtain the reversal of a conviction based on ineffective assistance of counsel, the defendant must show that counsel's performance was outside of the range of professionally competent assistance and that the

defendant was prejudiced by his counsel's deficient performance. *Strickland*, 466 U.S. at 693; *People v. Albanese*, 104 Ill.2d 504, 536, 473 N.E.2d 1246 (1984). With regard to the "prejudice prong" of the *Strickland* test, the question is not whether a different verdict would have been rendered, but whether the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *People v. Moore*, 279 Ill. App. 3d 152, 161-162, 663 N.E.2d 490 (5<sup>th</sup> Dist. 1996).

Defense counsel's failure to question the jury venire regarding the *Zehr* principles in order to assess potential prejudice, or to request that the trial court do so, denied Mr. Pearson a fair trial and resulted in a verdict unworthy of confidence. Both the United States and the Illinois Supreme Courts have recognized that the right to a trial by an impartial jury is so fundamental that a violation of this right requires reversal. *See Irwin v. Dowd*, 366 U.S. 717, 722 (1961); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *People v. Aleman*, 313 Ill. App. 3d 51, 59, 729 N.E.2d 20 (2000). Defense counsel did not act as a professionally competent attorney because he failed to ensure that Mr. Pearson's jury was without bias or prejudice since he neither questioned the prospective jurors directly nor did he request that the trial court question them regarding the *Zehr* principles.

The prejudice prong of *Strickland* is also met. As *Zehr* and its progeny dictate, jurors in a criminal case must be aware that a defendant is presumed innocent, that he is not required to present evidence, that the State must prove him guilty beyond a reasonable doubt, and that the defendant's failure to testify cannot be used against him. *People v. Zehr*, 103 Ill.2d 472, 474, 469 N.E.2d 1062 (1984); *People v. Whitehead*, 169 Ill.2d 355, 662 N.E.2d 1304 (1996); *People v. Carson*, 238 Ill.App.3d 457, 606 N.E.2d 363 (1<sup>st</sup> Dist. 1992). Such knowledge, as *Zehr*

proclaims, is essential to the qualification of jurors in a criminal case. *Zehr*, 103 Ill.2d at 474. Because defense counsel failed to inquire into the potential prejudice of the jury venire with respect to the *Zehr* principles, it is not known whether the jurors who convicted Mr. Pearson understood and accepted these essential principles. Therefore, Mr. Pearson's conviction was the result of a jury verdict not worthy of confidence.

This Court very recently rejected an ineffective assistance of counsel claim based on counsel's failure to ask for *voir dire* on the *Zehr* guarantees. *People v. Benford*, 812 N.E. 2d 714, 2004 Ill.App. LEXIS 818 (2004). The court in *Benford*, however, erred in its reading of *Zehr*. Although this Court did state correctly that *Zehr* does not require that potential jurors be queried *individually* over the four issues, the court was incorrect in its statement that jury instructions regarding the defendant's refusal to testify cured any error. *Zehr* holds that jury instructions do not cure errors related to the qualifications of jurors on those enumerated issues. "If a juror has a prejudice against any of these basic guarantees [that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him], an instruction given at the end of the trial will have little curative effect." *Zehr*, 103 Ill. 2d at 477. *Benford* is distinguishable from the case at hand. There, the trial court queried potential jurors *en mass* over three of the four guarantees, failing to mention that the defendant's decision not to testify could not be held against him, although explaining that he need not present a case in his own favor. Additionally, *Benford* did not touch on the issue of whether the court was required to inquire into the guarantees without prompting from counsel.

Defense counsel's failure either to question potential jurors about the *Zehr* principles or to request that the trial court do so fell below a reasonable standard of performance. Without an indication of whether the jurors were properly free of prejudice, the jury verdict is not worthy of confidence. Therefore, counsel's failure to raise the *Zehr* principles during jury selection created prejudice under the *Strickland* standard.

### Conclusion

The Court in *Zehr* recognized that certain fundamental questions were essential to guaranteeing that a potential juror could be fair in a criminal trial. These questions should elicit a juror's attitude toward the basic propositions of a fair trial: that the defendant is presumed to be innocent, that the defendant has no duty to present evidence in his behalf, that he must be proved guilty beyond a reasonable doubt, and that the failure to testify is not evidence of guilt. Cases which follow *Zehr* have shown it to be an expansive rule and agree that prejudice in such a crucial, axiomatic matter cannot be cured with a jury instruction at the close of trial. Because the paramount duty of the trial court is to guarantee the fairness of the trial, the court has a duty to qualify potential jurors on the *Zehr* principles. Alternately, where the court does not ask these questions during *voir dire*, it is defense counsel's duty to request that the court do so.

Because the jurors in Mr. Pearson's trial were not properly questioned with regard to the *Zehr* principles, it is not possible to determine if the verdict was tainted by juror prejudice about those principles. This Court should therefore reverse his conviction and remand for new trial.

**[Sections II & III redacted]**

## CONCLUSION

Because *voir dire* in his case was not competent, Terant Pearson, Defendant-Appellant, respectfully requests that this Court reverse his conviction and remand the cause for a new trial. As alternative relief, the defendant respectfully requests that this Court remand to the trial court for proper admonishments pursuant to Rule 605(d) and the opportunity to present sentencing issues for review. As further alternative relief, Defendant-Appellate respectfully requests that this Court declare 730 ILCS 5/5-4-3 an unconstitutional violation of his Fourth Amendment right against unreasonable searches and seizures. In addition, if the State has in fact extracted Mr. Pearson's DNA, Mr. Pearson respectfully requests that this Court order the State to expunge Mr. Pearson's DNA record from the State and national DNA identification indexes and to destroy any samples, analyses, or other documents relating to such record.

Respectfully submitted,

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