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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Georgetown County Court of General Sessions
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2022-000671

The State of South Carolina.....Respondent

v.

Terron G. Dizzley..... Appellant

INITIAL BRIEF OF APPELLANT

WILLIAM G. YARBOROUGH, III
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES

- I. WHETHER THE RETRIAL OF APPELLANT IN 2014 VIOLATED HIS RIGHT TO DOUBLE JEOPARDY WHEN HIS FIRST TRIAL ENDED IN AN IMPROVIDENTLY GRANTED MISTRIAL.

- II. WHETHER THE RETRIAL OF APPELLANT IN 2014 VIOLATED HIS RIGHT TO DOUBLE JEOPARDY WHEN THE TRIAL JUDGE EFFECTUATED THE GRANTING OF DIRECTED VERDICT WHEN DISMISSING THE JURY AT HIS FIRST TRIAL.

STATEMENT OF THE CASE

The Georgetown County Grand jury indicted Appellant for murder (2009-GS-22-00778) during its July 2009 term. The charge arose out of a murder of Aundrey Evans, Jr. at the Club Paradise in Georgetown County late in the evening on December 1, 2008. Deputy Solicitor Scott Hixon, then Assistant Solicitor, prosecuted the case. Charles Barr, Esq. represented Appellant.

Appellant was first tried by jury before the Honorable J. Michael Baxley from August 27th – 30th, 2012. The jury began deliberating on August 29, 2012 at 1:07 p.m. (Trial Transcript, p. 116). At approximately 3:57 p.m., the jury requested to hear audio transcripts from four defense witnesses regarding the issue of alibi . (Trial Tr. pp. 116-118). The jury resumed their deliberations at approximately 4:52 p.m. after listening to the tapes. (Trial Tr. p. 119). At approximately 5:23 p.m., the jury sent a note stating they were unable to reach a verdict at that time and the court adjourned for the day. (Trial Tr. pp. 119 – 123). Deliberations resumed the following morning of August 30, 2012 at approximately 9:42 and continued until 11:12 a.m., at which time the jury sent a note stating that they were deadlocked. (Trial Tr. 308). The judge accordingly issued an *Allen* charge and the jury returned to the jury room to resume deliberation again. (Trial Tr. pp. 310 – 313). At 12:20 p.m., the jury sent a note stating it was still deadlocked and was unable to reach a verdict in this case. (Trial Tr. pp. 313-314). Without consulting either party's counsel, or considering whether to issue a second *Allen* charge, or asking the jury whether any additional time would aid in their decision-making, the judge dismissed the jury upon their immediate reentry into the courtroom and a mistrial was ultimately issued.¹ (Trial Tr. pp. 313-315).

¹ The actual mistrial order does appear on the record available from the first trial. In dismissing the jury, the trial judge informed the jury that a mistrial was going to happen and assured them it was not a failure on their part. Proceedings in the case thereafter operated as though a formal

Furthermore, while defense counsel's initial motion and renewed motion for directed verdict were both denied, the judge made the following remarks, in pertinent part, when dismissing the jury:

Now, what you've told us is that you cant's reach a unanimous decision, and I would say to you that that's not a failure on your part. That's actually a strong message to the Prosecution that they are unable to meet the burden of proof to the extent that they can bring back a unanimous verdict.

(Trial Tr. p. 314, lines 3-8).

In April 2014, Appellant was tried by jury for a second time before the Honorable Roger L. Couch. Appellant was again represented by Charles Barr, Esq. Assistant Solicitor Erin Bailey represented the State. He was ultimately found guilty and sentenced to thirty-five years (35) years imprisonment.

Represented by Jeremy Thompson, Appellant filed a direct appeal with the Court of Appeals following his second trial. The appeal was later withdrawn pursuant to a signed waiver with a motion to dismiss on the basis that Appellant wished to withdraw his appeal in order to swiftly pursue post-conviction relief instead. Appellant's subsequent post-conviction relief application was ultimately dismissed on December 2, 2019 following an evidentiary hearing. Appellant sought appeal with the South Carolina Supreme Court to review the dismissal of his PCR, but the appeal was dismissed for failure to file the petition for writ of certiorari.

The instant appeal arises from the denial of Appellant's "Emergency Petition for Ex Parte Motion of Terron Dizzley pursuant to Immediate Release, Double Jeopardy, False Imprisonment,

mistrial order was made on record but note that the actual mistrial order it is not reflected on the record.

Lack of Trial Court’s Jurisdiction to Impose Sentence” by Judge Benjamin H. Culbertson on April 12, 2022. (“Emergency Petition”, and Order of Denial, Apr. 12, 2022). Appellant filed a Notice of Appeal with this Court, which remanded the matter back to the Georgetown County Court of General Sessions upon notification that Appellant filed an “Emergency Motion to Alter or Amend” on April 25, 2022. (“Emergency Motion to Alter or Amend”)². On November 17, 2022, a hearing was held before Judge Culbertson on the “Emergency Motion to Alter or Amend”. (Transcript of Motion Hearing, Nov. 17, 2022). Undersigned Counsel was retained to appear for Appellant at the hearing. Judge Culbertson denied the motion by form order on November 17, 2022. (Order, Nov. 17, 2022). With the denial of the “Emergency Motion to Alter or Amend”, this appeal was consequently taken out of abeyance.

² The filings in Georgetown County Court of General Sessions as well as the early appellate filings in this case were filed by Appellant’s mother and wife under their incorrect understanding of a Power of Attorney Appellant had previously executed.

ARGUMENT

I. APPELLANT'S FIRST TRIAL ENDED BY WAY OF AN IMPROVIDENTLY ORDERED MISTRIAL, THEREBY RENDERING HIS RETRIAL IN 2014 IN VIOLATION OF DOUBLE JEOPARDY.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions are in accord. The federal constitution provides that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb...” U.S. Const. amend. V. The South Carolina counterpart similarly provides that “[n]o person shall be subject for the same offense to be twice put in jeopardy of life or liberty...” S.C. Const. art. I, § 12. *See State v. Easler*, 327 S.C. 121, 132, 489 S.E.2d 617, 623 (1997) (“Article I, section 12 of the S.C. Constitution is essentially identical to the Fifth Amendment and, on its face, confers no greater rights than the federal constitution.”) Pursuant to this clause, a defendant, such as Appellant Dizzley in this case, is protected from multiple prosecutions for the same offense after an improvidently granted mistrial. *See generally, State v. Kirby*, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977); *State v. Baum*, 355 S.C. 209, 214, 584 S.E.2d 419, 421 (Ct. App. 2003). Indeed, if, in a criminal trial, a mistrial is declared “without an absolute necessity for it, the [mistrial] is equivalent to an acquittal, and may be pleaded as a bar to a subsequent indictment.” *State v. Bilton*, 156 S.C. 324, 342, 153 S.E. 269, 276 (1930) (internal quotation marks omitted).

If a jury, following additional deliberations in the wake of an *Allen* charge, remains deadlocked, section 14-7-1330 of the South Carolina Code of Laws is triggered. The statute reads, in pertinent part, “[b]ut if [the jury] returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.” S.C. Code Ann. § 14-7-1330 (1976). At the second indication of deadlock, courts typically inquire as to whether more deliberations would be beneficial to the jury, and the

issue of consent is determined from the jury's response. See *Buff v. South Carolina Dep't of Transp.*, 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) (“[W]hen a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments.”)

Here, after the jury notified the court they were still deadlocked after having been given an *Allen* charge an hour and 15 minutes before, the trial judge, either sua sponte or after bench conference off the record, declared a mistrial. (Trial Tr. pp. 310-314). The actual mistrial order was not captured on record. Additionally, before dismissing the jury and before declaring a mistrial, the judge did not ask the jury whether they believed further deliberation may allow them to come to a verdict. It also does not appear that the judge gave the State or the defense the option of giving another *Allen* charge and having the jury deliberate further in lieu of declaring a mistrial. Because the trial judge did not make such inquiry with the jury or undertake any of the other described alternatives, a mistrial was premature and improvidently ordered. *Cf. State v. Robinson*, 360 S.C. 187, 193-94, 600 S.E.2d 100, 103 (Ct. App. 2004). Therefore, because the mistrial at his first trial was improvidently ordered, the retrial of Appellant in 2014 violated his double jeopardy rights. The 2014 conviction thus cannot stand.

II. THE RETRIAL OF APPELLANT IN 2014 VIOLATED HIS RIGHT TO DOUBLE JEOPARDY BECAUSE THE TRIAL JUDGE EFFECTUATED THE GRANTING OF DIRECTED VERDICT WHEN DISMISSING THE JURY AT HIS FIRST TRIAL.

At Appellant's first trial, defense counsel's initial motion and renewed motion for directed verdict were denied; however, the trial judge made the following remarks, in pertinent part, when dismissing the jury:

Now, what you've told us is that you can't reach a unanimous decision, and I would say to you that that's not a failure on your part. That's actually a strong message to the Prosecution that they are unable to meet the burden of proof to the extent that they can bring back a unanimous verdict.

(Trial Tr. p. 314, lines 3-8). The trial judge's remarks effectively mean that the State failed to meet their burden in proving beyond a reasonable doubt that Appellant was guilty of murder. Retrial for the same offense after a directed verdict at a previous trial violates double jeopardy. *See supra*. Thus, Appellant's double jeopardy rights were violated when he was retried and convicted in 2014. The 2014 conviction thus cannot stand.

CONCLUSION

In light of the foregoing reasons, this Court should vacate the Appellant's conviction and sentence.

Respectfully Submitted,

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