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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Kershaw County
Casey Manning, Trial Judge
G. Thomas Cooper, Jr., PCR Judge

MITCHELL LOGAN HINSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

APPELLATE CASE NO. 2018-001643

BRIEF OF RESPONDENT

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Petitioner's Issues

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the Allen charge when the jury had not yet indicated that it was deadlocked?

2. Did the PCR judge err in finding that Petitioner knowingly and intelligently waived his right to a direct appeal?

Respondent's Counterstatement of Issues

1. The PCR court properly found trial counsel was not ineffective for failing to object to the Allen charge when the charge as a whole was not unconstitutionally coercive and the trial court acted within its discretion in giving the charge.

2. The State has conceded evidence does not support the PCR court's finding that Petitioner knowingly and intelligently waived his right to a direct appeal.

STATEMENT OF THE CASE

Petitioner Mitchell Logan Hinson is presently confined in the South Carolina Department of Corrections serving a fifteen-year sentence. In January of 2011, he was arrested after a home video surveillance captured him entering the home of his schoolmate and removing several items. In March of 2011, the Kershaw County Grand Jury indicted Petitioner for first-degree burglary. Petitioner proceeded to a jury trial before the Honorable L. Casey Manning on June 27-29, 2011. Public Defender Cornelius J. Riley represented Petitioner and Assistant Solicitor Ron Moak prosecuted the case. The jury convicted Petitioner as indicted, and Petitioner was sentenced on June 29, 2011.

On July 8, 2011, trial counsel filed a motion to reconsider the sentence or, in the alternative, a motion for a new trial. On November 3, 2015, Petitioner filed an application for post-conviction relief (PCR). Because his post-trial motions were still pending, the State moved to summarily dismiss his PCR application without prejudice. On January 12, 2016, the Honorable Alison Renee Lee dismissed Petitioner's first PCR application without prejudice.

On April 4, 2016, the trial court denied Petitioner's post-trial motions. Petitioner did not appeal. Petitioner commenced this current PCR action on November 4, 2016. On July 19, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper. Kristy Goldberg represented Petitioner and Assistant Attorney General Jessica E. Kinard represented the State. On April 12, 2018, Judge Cooper issued an order denying relief and dismissing the application. Petitioner filed a motion to alter or amend, which was denied on September 5, 2018.

Petitioner filed a notice of intent to appeal on September 10, 2018. On April 26, 2019, he filed a petition for writ of certiorari. The South Carolina Supreme Court transferred this case to the South Carolina Court of Appeals on September 24, 2019, pursuant to Rule 243(l), SCACR.

On December 10, 2021, the South Carolina Court of Appeals granted the petition for writ of certiorari as to issues three and four. In issue four, Petitioner alleged the PCR court erred in not granting a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

In a motion dated April 5, 2022, Respondent conceded the PCR court erred in finding Petitioner did not knowingly and intelligently waive his right to a direct appeal and moved to hold the time for filing Respondent's brief in abeyance until Petitioner filed his White v. State brief. On April 19, 2022, this Court issued an order denying the abeyance motion and directing the parties to file briefs pursuant to White v. State.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENTS

1. The PCR court properly found trial counsel was not ineffective for failing to object to the Allen charge when the charge as a whole was not unconstitutionally coercive and the court acted within its discretion in giving the charge.

Petitioner does not challenge the substance of the trial court's charge; rather, Petitioner argues the trial court improperly gave the charge because there was no indication the jury was deadlocked. Petitioner thus contends trial counsel was ineffective for failing to object to the charge without indication the jury was deadlocked. However, Petitioner's failure to challenge the PCR court's finding that the wording of the charge constituted a correct statement of the law renders that finding law of the case and precludes any finding of prejudice. Further, Petitioner cannot show prejudice because the charge was not unconstitutionally coercive. Regarding deficiency, the trial court acted within its discretion in giving the charge, making counsel's failure to object reasonable under prevailing professional norms. Finally, Petitioner's argument lacks merit when no standard requires a jury to announce it is deadlocked before a court can give an Allen-type charge.[1]

[1] Much of Petitioner's argument is premised on speculation because the Appendix does not conclusively establish that the jury never said it was deadlocked. C.f. Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 324 (2002) (noting "mere speculation" was a "fatal flaw" in petitioner's allegation of ineffectiveness based on failure to object to Allen charge). Although the trial transcript does not clearly indicate the jury said it was deadlocked, evidence in the Appendix suggests the jury may have conveyed it was deadlocked. Prior to giving the charge, the trial court indicated on the record it had held a conference in chambers with the attorneys. (App. 184). Additionally, right before giving the charge, the court stated, "As I indicated to you back in the jury room—I shared my conversation with the lawyers that I had with you in the room and **this is the additional charge I was telling you about."** (App. 184-85, emphasis added). Based on the foregoing—especially the court's statement to the jury—it is reasonable to infer the jury may have conveyed its inability to reach a verdict to the trial court. Unfortunately trial counsel's memory at the PCR hearing, which occurred six years after trial, was somewhat fuzzy. Although he initially testified he did not recall the jury stating it was deadlocked, he later qualified that by testifying:

> That puzzles me. You know, had I not been able to read over the transcript of the trial, I would have sworn that they had somehow communicated to the judge that

"There is a strong presumption trial counsel provided adequate assistance." Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, "the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Green, 351 S.C. at 192, 569 S.E.2d at 322. "A reasonable probability is one sufficient to undermine confidence in the trial's outcome." Id. If a petitioner fails to prove prejudice, an appellate court does not need to consider deficiency. See Jones v. State, 332 S.C. 329, 342, 504 S.E.2d 822, 828 (1998) ("Because Jones clearly fails to meet Strickland 's prejudice prong, we need not address the first prong of the test.").

a. Petitioner cannot prove prejudice because he did not appeal the PCR court's ruling that the trial court did not err in the language of the charge, making it law of the case. Further, the charge was not unconstitutionally coercive, and thus no reasonable probability exists that the outcome would have been different if the court had not given the charge.

Petitioner glosses over his prejudice argument, merely asserting he was prejudiced because (1) the jury reached a verdict shortly after the court improperly gave an Allen charge, and (2) the trial court gave the charge when the jury had not yet indicated it was deadlocked or had completed deliberations. However, the only legitimate way to measure whether the outcome of the trial would have been different without the charge is to analyze whether the charge was unconstitutionally

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> they were unable to reach a unanimous verdict. But the transcript doesn't reflect that, so I think the judge just felt that after sending out three different questions, that that indicated that there was some sort of problem that surfaced in the jury room reaching a decision.

(App. 267-68, 292). His statement suggests that prior to reviewing the transcript, trial counsel believed the jury had communicated it was deadlocked.

coercive. Notably, Petitioner does not argue the language of the charge was unconstitutionally coercive.[2] This is likely because, when viewed as a whole, the charge was not unconstitutionally coercive. Because it was not unconstitutionally coercive, it is not reasonably likely the outcome of trial would have been different without the charge.

"Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)). "South Carolina approves the use of a modified Allen charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority." State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019).

> No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four factors: (1) whether the charge speaks "specifically to minority jurors"; (2) whether the charge includes "you must return a verdict" type language; (3) whether there was an "inquiry into the jury's numerical division," which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion.

Id. at 214-15, 829 S.E.2d at 727 (citing Tucker, 346 S.C. at 492-95, 552 S.E.2d at 178-19). "Like most multi-factor constructs, the Tucker test does not tell us the relative weight each factor carries, nor is the list of factors exclusive." Id. at 215, 829 S.E.2d at 727.

Here, the PCR court found the charge was "even handedly delivered to both the minority and majority jurors, did not convey to the jury that reaching a verdict was mandatory, and constituted a correct statement of the law." (App. 339-40). Petitioner has not challenged this

[2] Petitioner's argument regarding coerciveness focuses only on the fact the court gave the charge "before any indication from the jury that the deliberations were complete and the jury was deadlocked." (Pet. Br. 10). Petitioner never points to any language of the charge that he contends is unconstitutionally coercive.

finding, making it law of the case. See Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (providing an unappealed ruling is the law of the case). Because this finding is law of the case, Petitioner is precluded from demonstrating prejudice.

Further, the PCR court did not err in this finding because the charge was not unconstitutionally coercive. Relative to the first factor set forth in Tucker, the court charged:

> Each juror must decide the case for himself but only after impartial consideration of the evidence by fellow jurors. You should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. Each juror who finds themselves to be in the minority must consider his view in light of the opinions of the majority jurors. Conversely, each juror finding himself in the majority should give equal consideration to the views of the minority.

(App. 190). The charge did not speak specifically to minority jurors but rather addressed minority and majority jurors equally. (App. 190). Likewise, immediately after asking each juror to consider the perspectives of other jurors, the court reminded the jury that "[n]o juror, however, should surrender his conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict." (App. 190). Thus, under the first Tucker factor, this charge was not unconstitutionally coercive.

Regarding the second factor, the trial court did not admonish the jury that it must return a verdict. Notably, the court informed the jury, "[I]if you simply cannot reach a verdict, then return to the Courtroom and I will declare this case mistried and discharge you with appreciation for your services." (App. 189). The court also informed the jury it would be better for it to *not* reach a verdict than to reach one that violated any juror's individual consciences and beliefs. (App. 191). Finally, each time the court informed the jury of its duty to deliberate and reach a verdict, it qualified that duty by adding language such as "if you can do so without violating your individual judgments." (App. 185, 188-90). See Green, 351 S.C. at 194, 569 S.E.2d at 323 ("It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to

reach a verdict."); Taylor, 427 S.C. at 218, 829 S.E.2d at 729 ("The most troubling thing about the charge here is what it did not say: it did not tell the jurors they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict, **an essential message that sometimes saves borderline charges from crossing the line into coercion."** (emphasis added)). Overall, the court did not admonish the jury it must return a verdict, and thus the second Tucker factor does not support a finding that the charge was coercive.

Likewise, the court never asked about the numerical division of the jury, and the jury did not volunteer that information. Thus, the third Tucker factor does not support a finding of coerciveness.

Finally, although it is unclear from the record what time the court gave the charge, it occurred prior to lunch. (App. 191-92). Assuming the jury received lunch sometime between noon and 1:00—typically the time trial courts break for lunch—it is reasonable to infer the jury heard they charge before noon and no later than 1:00 p.m. Assuming *arguendo* the jury received the charge as late as 1:00 p.m., it would have deliberated for an hour and forty-five minutes before rendering a verdict at 2:43 p.m., which is at least three times as long as the thirty-two minutes the jury in Darr deliberated after being "urged" by the court to reach a verdict. (App. 192). See State v. Darr, 262 S.C. 585, 586-87, 206 S.E.2d 870, 870 (1974) (finding trial court did not coerce a jury that deliberated for only thirty-two minutes after the court "urged it" to reach a verdict). Overall, the Tucker factors do not support a finding that the charge was unconstitutionally coercive.

Finally, although the trial court briefly mentioned the expense of trial, this brief reference did not render the charge unconstitutionally coercive. See State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-76 (1995) ("It is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a new trial at additional expense . . . ."). Specifically, the court

charged: "If you are unable to reach a verdict, it is possible this case will be tried again, and it is obvious that that means to the State and a Defendant anxiety and effort." (App. 188). Shortly thereafter the court charged, "This is an important case, as to time, effort and money by the Defense and the Prosecution, and if you fail to agree on a verdict the case is left open and undecided. Like all cases, it must be disposed of and decided at some time. (App. 189). These brief references to the anxiety, effort, and cost of trial, viewed in context of the charge as a whole, did not render the charge unconstitutionally coercive. Thus, Petitioner has not shown a reasonable probably exists that the outcome would have been different without the charge.

In support of his prejudice argument, Petitioner first contends he was prejudiced by the charge because the jury reached a verdict shortly after the judge issued the charge. As discussed above, the length of time this jury deliberated does not conclusively establish prejudice, especially when our Supreme Court has affirmed a challenge to a charge where the jury deliberated for only thirty-two minutes after receiving the charge. See Darr, 262 S.C. at 586-87, 206 S.E.2d at 870 (finding trial court did not coerce a jury that deliberated for only thirty-two minutes after the court "urged it" to reach a verdict).

Finally, Petitioner contends he was prejudiced simply because the charge was given before the jury announced it was deadlocked. This contention lacks merit. Although South Carolina does not appear to have a case on point, at least one jurisdiction has recognized an Allen-type charge is less coercive if given when a jury is not deadlocked. See People v. Hardin, 421 Mich. 296, 313, 365 N.W.2d 101, 109 (1984) ("[T]he effect of delivering the ABA [Standard 15- 5.4[3]] charge prior to deliberation differed from its effect when given in a deadlocked situation. 'When given during

[3] The ABA Standard 15-5.4 charge is akin to a modified Allen charge. It is discussed more thoroughly in the next section.

the original instructions, the ABA charge's coercive impact upon the jury is greatly diminished.'" (quoting People v. Goldsmith, 309 N.W.2d 182 (Mich. 1981)). Because the charge is less coercive if given before a jury announces it is deadlocked, it follows that no reasonable probability exists that the outcome of Petitioner's trial would have been different had counsel objected to the giving of the charge on the basis the jury had not announced a deadlock. Thus, Petitioner has failed to prove prejudice.

b. The PCR court properly determined trial counsel was not deficient when the trial court acted within its discretion in giving the charge, and no standard requires a jury to announce it is deadlocked before a court can give an Allen charge.

Petitioner argues trial counsel was deficient for not objecting to the court giving an Allen charge when the jury had not indicated it was deadlocked. However, the trial court acted within its discretion in giving the charge, rendering trial counsel's failure to object reasonable under prevailing professional norms. Further, no standard requires a jury to announce it is deadlocked before a court can give an Allen charge.

South Carolina does not appear to have any case squarely on point. However, in Darr, our Supreme Court affirmed a conviction in a seemingly similar situation. There, the jury began deliberating at 3:10 p.m. 262 S.C. at 586, 206 S.E.2d at 870. "At 5:42, the trial judge recalled the jury, which had not yet reached a verdict, and instructed it upon the importance of reaching a verdict." Id. Following a question from a juror, the trial court recharged the jury on self-defense. Id. The jury retired at 5:51 p.m. and returned a verdict of guilty at 6:23 p.m." Id. On appeal, the defendant argued the trial court "erred in urging the jury to reach an agreement." Id. at 587, 206 S.E.2d at 870. Our Supreme Court found this contention to be without merit, reasoning, "It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them." Id. Although the facts of the Darr opinion are sparse, nothing indicates the jury had conveyed it

was deadlocked prior to the court "urging [it] to reach an agreement." Id.

Petitioner attempts to distinguish his case from Darr, arguing the trial court's Allen charge coerced the jury to reach a verdict because the jury reached a verdict shortly after the court gave the charge. However, Petitioner does not challenge the wording of the charge itself. It is disingenuous to agree the wording of the charge was not coercive but argue the charge was coercive just by being given without any indication the jury was deadlocked.

Further, due to the length of time the jury had been deliberating and the court's duty to "urge the jury to agree upon a verdict provided he does not coerce them," the court did not abuse its discretion in giving the charge, making trial counsel's failure to object reasonable under prevailing professional norms. Id. at 587, 206 S.E.2d at 870; State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) ("[T]he conduct of a criminal trial is left largely to the sound discretion of the presiding judge and [appellate courts] will not interfere unless it clearly appears that the rights of the complaining party were prejudiced in some way."); Taylor, 427 S.C. at 214, 829 S.E.2d at 727 ("A trial judge has a duty to urge jurors to reach a verdict, but must do so in a way that does not coerce them, eroding their independence and impartiality."); id. at 212, 829 S.E.2d at 726 (noting "the trial court's superior position to observe the courtroom atmosphere, the jury's demeanor, and the tenor and rhythm of the trial").

Here, the jury began deliberating sometime after lunch on June 28, 2011, and continued deliberating until the court questioned whether it should order dinner.[4] (App. 160, 175). Thereafter the jury retired for the evening and was instructed to return at 9:30 the next morning. (App. 177-78). Sometime after deliberations resumed the following morning, the court stated, "In the next hour and a half from now if they haven't made a decision, perhaps we should consider the

[4] Regrettably the transcript does not contain the times the jury deliberated.

Allen charge." (App. 179-80). The court later recharged the jury on burglary (at the jury's request) and addressed other unrelated matters while the jury continued deliberating. (App. 180-84). Shortly after the court gave the Allen charge, the judge stated, "Let's feed them lunch, and it will probably take them a while to consider all of that." (App. 184-92). This suggests the jury deliberated most of the morning prior to receiving the charge and received the charge before lunch, which presumably occurred sometime between noon and 1:00 p.m. At 2:43 p.m., the jury returned to the courtroom with a verdict. (App. 192). Due to the length of time the jury had been deliberating and the court's duty to urge it to reach an agreement, the court did not abuse its discretion in giving the charge. See Darr, 262 S.C. at 870-71, 206 S.E.2d at 870 (finding trial court did not err in "urging the jury to reach an agreement" two hours and thirty-two minutes after the jury began deliberating). Because the court acted within its discretion, trial counsel's failure to object was not unreasonable or constitutionally deficient.

Further, assuming *arguendo* the jury did not indicate it was deadlocked, trial counsel was not deficient for not objecting to the charge because no standard requires a jury to announce it is deadlocked before a court can give an Allen-type charge. In fact, the American Bar Association, in proposing Criminal Justice Standards for a Trial by Jury, has proposed the following:

> **Standard 15- 5.4. Length of deliberations; deadlocked jury***
>
> (a) *Before the jury retires* for deliberation, the court may give an instruction which informs the jury:
>
> > (1) that in order to return a verdict, each juror must agree thereto;
> >
> > (2) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
> >
> > (3) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

> (4) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and
>
> (5) that no juror should surrender his or her honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in section (a). The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

America Bar Association Criminal Justice Standards for Trial by Jury, Standard 15-5.4, available at https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk/#5.4 (last visited 6/2/2022) (emphasis added).[5] Notably, the ABA standard permits a trial court to give an Allen-type charge *prior to* deliberations. Although South Carolina has not adopted this standard, our appellate courts have not issued any opinions directly contradicting it or otherwise indicating an Allen-type charge may only be given *after* a jury announces it is deadlocked.[6] In the absence of any South Carolina case contradicting or rejecting this standard, it strains credibility to suggest that a South Carolina criminal defense attorney would be acting *below the prevailing professional norms* in not objecting to an Allen-type charge prior to a jury announcing it is deadlocked when the ABA standard permits a similar charge *prior to deliberations*.

[5] In addition to being consistent with South Carolina law, the trial court's language was consistent with what is proposed in this ABA standard.

[6] To support his proposition that a jury must indicate it is deadlocked before a court can give an Allen-type charge, Petitioner cites a footnote from State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007), wherein the Court quoted the definition of an Allen charge from Black's Law Dictionary. (App. Br. 8). However, Lee-Grigg did not involve the propriety of an Allen charge and cannot be relied on for creating a standard as to when such charges may be given.

II. The State has conceded no evidence supports the trial court's finding that Petitioner knowingly and intelligently waived his right to a direct appeal.

In a motion filed with this Court on April 5, 2022, the State conceded that no evidence supported the PCR court's finding that Petitioner knowingly and intelligently waived his right to a direct appeal. See "Motion to Hold Time for Filing Brief of Respondent in Abeyance Until Brief of Petitioner Pursuant to White v. State is Filed," pg. 3. Should this Court agree, Respondent respectfully requests the Court consider the issue raised in the White briefs in conjunction with the issues raised herein.

CONCLUSION

Based on the foregoing, this Court should affirm the PCR court's finding that Petitioner failed to prove trial counsel was ineffective for not objecting to the trial court's decision to give an Allen charge.

Respectfully Submitted,

s/Danielle Dixon
Assistant Attorney General

ATTORNEY FOR THE RESPONDENT

This 20th day of June, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO KERSHAW COUNTY

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PROOF OF SERVICE

Pursuant to Rule 262, SCACR, as amended on May 6, 2022, the undersigned hereby certifies a true copy of the Brief of Respondent in the above-referenced case has been served upon opposing counsel's primary e-mail address as listed in the Attorney Information System:

Kathrine Haggard Hudgins
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This 20th day of June, 2022.

s/Danielle Dixon
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