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Dec 07 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

*Appeal from Charleston County
Court of General Sessions*
The Honorable Bentley J. Price, Circuit Court Judge

The State,

Respondent,

v.

John Joseph Erb,

Appellant.

Appellate Case No. 2023-001683

**STATE'S MEMORANDUM OF LAW PURSUANT TO
ORDER OF NOVEMBER 9, 2023**

Appellant filed a notice of appeal from a General Sessions Order regarding a pending murder charge. The State has moved to dismiss the appeal. On November 9, 2023, this Court issued an order requesting additional materials and directing the parties to “serve and file memoranda addressing the question of double jeopardy and the application of *Blueford v. Arkansas*, 566 U.S. 599 (2012) and *State v. Brown*, 437 S.C. 550, 878 S.E.2d 364 (2022).” The State files this memorandum in compliance with the Order and submits there can be no double jeopardy bar to retrial as there was no unanimous verdict for the court to accept. However, the State maintains the appeal is interlocutory and the notice should be dismissed. Further, the petition for supersedeas should be dismissed as there is no viable appeal.

In support of its position, the State would respectfully show the Court:

Blueford v. Arkansas and State v. Brown

The request for additional briefing addressing *Blueford* and *Brown* brings focus to the nub of the potential issue here: whether Appellant may be retried on the murder charge. Both cases are directly on point in resolving that Appellant's substantive argument lacks merit (and that is set out below), but as an initial matter, it should not be overlooked that *Brown* was not an interlocutory appeal. Brown's first trial ended in a mistrial. He moved to dismiss one of his indictments (armed robbery) prior to retrial. *Brown*, at 554, 878 S.E.2d at 366. That was denied, and the trial continued through verdict and sentencing. *Id.*, at 554, 562-563 and 565, 878 S.E.2d at 366 and 370-372. In contrast, Appellant has not yet been tried, convicted and sentenced. The notice of appeal should be dismissed.¹ *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) (dismissal of appeal warranted where "Petitioner has not been convicted and sentenced, there has been no final judgment"). Even so, *Brown* also shows Appellant's double jeopardy argument² lacks merit.

¹ Appellant filed with his notice a "Petition for Writ of Supersedeas" seeking a stay of the order denying a request to declare an acquittal on the murder charge. That petition should be dismissed for many reasons, but the most narrow and immediate reason is that supersedeas fails in the absence of a properly filed notice of appeal. See Rule 241, SCACR. Consequently, the petition should be denied when the notice is dismissed. Moreover, Rule 241 is pointedly geared toward stays in civil actions. Appellant has not filed a civil action but filed a petition in his General Sessions case. But again, the dismissal of the notice requires dismissal of the supersedeas as its purpose is "to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot," essentially, to keep the status quo until a proper appeal could be resolved. See Rule 241 (c), SCACR. There is no such purpose to fulfill where the appeal is improper and not allowed.

² "The Double Jeopardy Clause provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *Blueford*, at 605 (citing U.S. Const., Amdt. 5). "The Clause 'guarantees that the State shall not be permitted to make repeated attempts to convict....'" *Id.* (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977)). However, a mistrial if warranted on the basis of "manifest necessity," retrial is not barred. See, e.g., *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). "[D]eclaring a mistrial" because "the

This Court in *Brown* reviewed the reasoning and holding in *Blueford* and found *Blueford* controlling. *Id.*, at 565, 878 S.E.2d at 372. Consequently, it is helpful to first review critical points in the *Blueford* case. In *Blueford*, the jury informed the trial court it was deadlocked and further that the jury had found the defendant not guilty of murder (capital and murder first degree), though there was no agreement on a lesser offense. 566 U.S. at 603-604. The trial court gave an *Allen*³ charge (the second such charge in *Blueford*'s trial), and the jury resumed deliberations; however, the foreperson later returned and reported they had not reached a verdict at which time a mistrial was granted. *Id.*, at 604. *Blueford* agreed there was no "formal verdict" but argued "the foreperson's announcement of the jury's unanimous votes on capital and first-degree murder" constituted "a resolution of some or all of the elements of those offenses in *Blueford*'s favor." *Id.*, at 606. In reviewing the defendant's double jeopardy claim, the Supreme Court of the United States resolved "[t]he foreperson's report was not a final resolution of anything." *Id.* This was so because the jury was still able (and did) continue deliberations. *Id.* Though *Blueford* argued that the jury instructions indicated the jurors should only move to the next offense if they "resolv[ed] the greater offense in his favor," that mattered not because "[t]he jurors were never told that once they had a reasonable doubt, they could not rethink the issue. The jury was free to reconsider a greater offense, even after considering a lesser one." *Id.*, at 607.

In *Brown*, the defendant was indicted for four separate charges in separate indictments. At his first trial, the jury sent out a note that "indicated the jury had reached a unanimous verdict of 'not guilty'" of armed robbery, "but was unable to reach a unanimous decision on the

jury was unable to reach a verdict—has long been considered the 'classic basis' establishing ... necessity" for a mistrial. *Blueford*, at 609 (citing *Arizona v. Washington*, at 509).

³ *Allen v. United States*, 164 U.S. 492 (1896).

remaining indictments.” *Brown*, at 553, 878 S.E.2d at 366. The trial court gave an *Allen* charge and the jury returned to deliberations, however, they “remained deadlock,” with the foreperson later reporting to the trial judge that they “had ‘just not been able to come to a unanimous decision on any of the indictments.’” *Id.*, at 553-554, 878 S.E.2d at 366. This Court found *Blueford* “controlling in *Brown*’s case for two reasons: (1) there was an additional period of deliberation in *Brown*’s first trial after the circuit court received the jury’s note indicating the jury had reached a verdict on armed robbery; and (2) following this period of deliberation, the jury foreperson announced, ‘We, Your Honor, have just not been able to come to a unanimous decision on any of the indictments.’” *Id.*, at 565, 878 S.E.2d at 372. The court concluded that “the circuit court did not err in denying *Brown*’s motion to dismiss the armed robbery indictment. *Id.*, at 566, 878 S.E.2d at 373. There was nothing to show “the jury did not continue deliberating or even reconsider its decision regarding *Brown*’s armed robbery charge following the *Allen* charge.” *Id.*, at 564, 878 S.E.2d at 372.

In reaching that conclusion, this Court also cited to *State v. Combs*, 297 Neb. 422, 433, 900 N.W.2d 473 (2017), for further support. *Brown*, at 565, 878 S.E.2d at 373. The facts in the *Combs* case also bear on this case, particularly in that they show: “[w]hile the jury may have voted or tentatively voted to acquit *Combs* on three of the counts in its deliberations, it did not reach a verdict. The verdict form was not filled out or signed, the jury did not announce a verdict and was not available to be polled by the parties, nor was any verdict accepted by the district court.” 900 N.W.2d at 482-483. The Nebraska decision, citing a statutory provision from that state, underscored that verdicts do not become final until “received and accepted by the trial” court. *Id.*, at 483. That includes the opportunity for polling. *Id.*

Moreover, and notably, this Court also pointed to *Nickson v. State*, 293 So. 3d 231, 237 (Miss. 2020), as contrary non-binding precedent, *Brown*, at 565-566, 878 S.E.2d at 373, but that precedent does not support different treatment here for a critical difference – in *Nickson*, “the foreperson announced that the jury had reached a verdict on two counts and had delivered a verdict in writing and in proper form. The jury was then polled and the trial court determined that the jury’s verdict was unanimous.” *Nickson v. State*, 293 So. 3d 231, 237 (Miss. 2020). The record here shows the trial court began polling and found there was no unanimous verdict to accept.

Again, both *Blueford* and *Brown* (and the above cited cases in *Brown*) show Appellant’s position to be without merit when the facts of this matter are carefully considered.

Relevant Facts

As set out in the State’s motion to dismiss, Appellant stood trial before a Charleston jury in September on the charge of murder. The jury indicated that they had reached a purportedly unanimous verdict and returned to the courtroom.⁴ The jury foreman reported a verdict for manslaughter; however, upon request by the defense,⁵ the jurors were polled. During the polling, one juror indicated that was not her vote. The transcript shows that the judge stopped at that juror, Juror No. 16. The remaining juror was never polled. (Motion Attachment, Tr. p. 4). And, because there was no agreement, the judge directed the jury to return to the jury room for the possibility of further deliberations. (Motion Attachment 1, at 4-5). The judge then had the juror

⁴ The portion of September 2023 transcript that starts at that point was provided as an attachment to the State’s Motion to Dismiss.

⁵ Polling is mandatory upon the defendant’s request. Indeed, “the denial of a defendant’s request for individual polling is reversible per se.” *State v. Wright*, 439 S.C. 101, 103, 886 S.E.2d 206, 207 (2023).

who did not affirm her verdict return to the courtroom and inquired whether the juror would deliberate further.⁶ The juror indicated not just that deliberations would not be helpful but that her vote “was always not guilty, and I just wanted to get it over with because they were all in there screaming and yelling at me and I just - - I’ll never change my - - like, it’s not guilty. I’m sorry.” (Motion Attachment 1, at 7). With the juror refusing to deliberate, and without unanimity in a verdict, the judge declared a mistrial. (Motion Attachment 1, at 8). Appellant did not object, but he later filed a “petition for writ of habeas corpus” in the General Sessions case and moved under various theories to have the court declare and acquittal on the murder charge. At the hearing on the petition,⁷ the defense argued that *Blueford* reflected a “breakdown of the jury” and was distinguishable as deliberations continued before a mistrial was granted. (October 12, 2023 Tr., at 3). The defense distinguished *Brown* by arguing that “there were multiple charges” in *Brown*, while here, “the only charge keeping John Erb in jail is the murder charge....” (October 12, 2023 Tr., at 3).⁸ That was “the reason for the habeas petition in addition” to “a request of the judge to enter a not guilty verdict under Rule 29.” (October 12, 2023 Tr., at 3-4).

The State argued that the mistrial was appropriately granted for a proper reason – “the judge’s opinion that the jury will be unable to reach a verdict.” (October 12, 2023 Tr., at 5). The State argued that the jury was sent back to the jury room, but ultimately the opportunity for further deliberations was stopped when the juror who did not affirm the verdict asserted that would be futile. (October 12, 2023 Tr., at 5-6). The State argued the defense had objected to any

⁶ As in *Blueford*, nothing prohibited that jury from reconsidering a prior vote.

⁷ Appellant provided the transcript to this Court on November 22, 2023, at the Court’s request. The receipt of the transcript prompted the filing of the memorandum of law as directed by this Court in the Order of November 9, 2023.

⁸ This offered distinction notably does not account for *Blueford*, where the jury considered lesser offenses. *Blueford*, at 602. Respondent submits it is not a distinction of difference.

Allen charge. (October 12, 2023 Tr., at 5; Motion Attachment 1, at 6).⁹ The State also argued that Rule 29 would not apply to this case in pre-trial posture. (October 12, 2023 Tr., at 8).

In reply, the defense argued that rather than return for actual deliberations after the partial polling, the jury was instructed not to deliberate, that the court could make a double jeopardy determination “based on the amount of time that they supposedly deliberated,” that his objection to an *Allen* charge was restricted to the individual juror and not in general from the court, and that Rule 29 would be a proper vehicle “for the Court to enter a verdict on the murder charge...” (October 12, 2023 Tr., at 9).¹⁰

The judge denied the petition finding that Appellant could be retried because the mistrial was properly granted based on the juror’s responses and the futility of further deliberations. (October 12, 2023 Tr., at 10). The judge also declined to “enter a judgment on the ... charge.” (See Notice of Appeal, Appellate Case No. 2023-001683, October 23, 2023, Order, at 3).

Analysis

To be sure, the partial trial transcript before this Court shows that the jury had indicated agreement, and the trial court was poised to accept a purportedly unanimous verdict, but polling determined there was no unanimous verdict to accept. Polling is not an empty process, but one

⁹ The defense at the October 12, 2023, appeared to recall that there was not an objection to an *Allen* charge but an objection to “questioning the outspoken juror individually, because my belief is that deliberations couldn’t continue after she was individually questioned.” (Oct. 12, 2023 Tr., at 9). The portion of the trial transcript available, though, reflects: “... the objection I’m making comes under *State v. Taylor*, which recently was handed down by the Court of Appeals ... [w]here they discourage giving *Allen* charges once - - we know the breakdown of the jury.” (Motion Attachment 1, at 6).

¹⁰ Rule 29(a), SCRCrimP, provides for motions post-trial and after imposition of a sentence. Appellant has neither had a completed trial nor been sentenced. This rule does not afford Appellant a vehicle to make the request.

by which the court must determine and hold the jury to the requirement of unanimity. Our Supreme Court in *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981), explained:

Polling is a practice whereby the court determines from the jurors individually whether they assented and still assent to the verdict. *Sanders v. Charleston Consolidated Railway & Lighting Company*, 154 S.C. 220, 151 S.E. 438 (1930). In *Sanders* this Court noted that “until a verdict has been published and recorded, it may be recalled and altered by the jury, and if it is made known to the court, when it is proposed to render the verdict, that any one of the jurors does not then assent to it, such verdict cannot be received, but the record should be recommitted to the jury with directions to retire to their room until they have agreed...” 151 S.E. at 447 quoting *Devereux v. Champion Cotton Press Company*, 14 S.C. 396, 399 (1880) (Emphasis in original).

The trial judge must be satisfied that the verdict is unanimous. A jury poll is not absolutely required if the trial judge is otherwise assured that the above requirements have been met and if no request for a poll has been made by a party. Whether a poll of the jury will be conducted is discretionary with the trial judge unless a polling is requested. If the request is made, a poll must be taken. We establish this rule to dispel any doubt a party might entertain as to the propriety of a jury verdict as rendered. ...

276 S.C. at 308–09, 278 S.E.2d at 338. *See also State v. Wright*, 439 S.C. 101, 102-103, 886 S.E.2d 206, 207 (2023) (affirming the importance of individual polling and the rule in *Linder*); *Nickson, supra* (reference a verdict not just announced in court, but a unanimous decision was confirmed by polling). Similar to the facts in *Blueford* and *Brown*, there was simply no evidence of final unanimity, or even if unanimity, nothing that would bar reconsideration.

The fact that polling was incomplete firmly undermines any reliance on the initial report. *See Brown*, at 565, 878 S.E.2d at 372 (“A verdict of a jury should be presented in open court by the jury, properly published, *assented to by all the jury, received by the court*, and ordered placed [on] record before the final discharge of the jury.”) (emphasis added) (quoting *State v. Bilton*, 156 S.C. 324, 324, 153 S.E. 269, 273 (1930)); *see also Nickson, supra*. Moreover, another fact

against Appellant’s position is that the verdict form does not exist¹¹ because one was never accepted as no unanimous verdict could be confirmed.¹² The only reason deliberations did not resume was because the juror who did not affirm her verdict would not participate in further deliberations. That itself undercuts a theory of unanimity. But the fact remains, that the judge was not “satisfied that the verdict [was] unanimous,” *Linder, supra.*, when the eleventh juror failed to affirm. Nothing would bar the jury from further deliberations apart from the one juror’s decision not to participate. Thus, in light of these facts of record and the guiding principles in *Blueford* and *Brown*, Appellant’s argument that double jeopardy bars a retrial lacks merit.

However, the State reasserts the appeal is interlocutory and must be dismissed.

Interlocutory Appeal

It is well-established and has been “consistently held that a criminal defendant may not appeal until sentence is imposed.” *State v. Rearick*, 417 S.C. 391, 400, 790 S.E.2d 192, 196 (2016); *State v. Looper*, at 390, 807 S.E.2d at 206 (“in the criminal context, a judgment is final when sentence is imposed”); *see also State v. Hubbard*, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) (“An appeal in a criminal case must attend the final judgment rendered on the indictment” or must be dismissed). Our Supreme Court has repeatedly found that “a criminal defendant may

¹¹ Appellant’s counsel has reported that he “was not able to locate the verdict form from the Appellant’s trial after requesting it from the trial judge, the court reporter, and a representative of the Charleston County clerk of court.” (Nov. 22, 2023 Letter, Appellate Case No. 2023-001683). Respondent agrees that these requests were made, but to be clear, the clerk’s representative responded with the indictment and an assertion that “The Clerk’s Office was not provided a verdict form in this case.” (Email dated November 14, 2023).

¹² The judge, having received the initial report, had the foreman write “manslaughter,” on the indictment. (Sept. 2023 Tr., at p. 2). That was prior to polling which required the judge to determine unanimity, which the judge found did not exist. Thus, the foreman’s notation was properly stricken by the trial judge upon declaring the mistrial. (*See* Indictment 2023-GS-10-03932).

not appeal until sentence is imposed.” *State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 680 (2013) (collecting cases). Moreover, Appellant is attempting to litigate a double jeopardy claim. Our Supreme Court has expressly considered whether such claims could be raised in interlocutory fashion, prior to trial and sentencing, and has consistently decided they may not. *Rearick*, at 404-405, 790 S.E.2d at 199; *see also State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986) (“an order denying a double jeopardy claim is not immediately appealable”). Appellant has filed an improper, interlocutory appeal that must be dismissed.

CONCLUSION

For all the above reasons, the State maintains the appeal must be dismissed, the petition seeking supersedeas, a stay, or any other relief,¹³ consequently, must be denied.

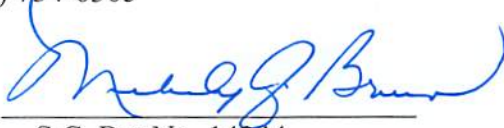
Respectfully submitted,

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December 7, 2023
Columbia, South Carolina.

¹³ The Court’s Order of November 9, 2023, references a potential to brief “bond issues.” However, bond was not a ruling in the order on appeal and cannot be raised in this proceeding. Further, the provision for “bail pending appellate review” is in Rule 243, SCACR which governs procedure in appeals from post-conviction relief actions. It is not applicable here.

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CERTIFICATE OF SERVICE

I certify that as per the March 20, 2020 Order of the Chief Justice, the State's Memorandum of Law Pursuant to Order of November 9, 2023, and Certificate of Service, has been forwarded to Appellant's counsel, Benjamin A. Mack, Esquire and Cameton J. Blazer, Esquire via email today at the following addresses, BMack@charlestoncounty.org and CBlazer@charlestoncounty.org. at the time of submission to the Court of Appeals via email.

This 7th day of December, 2023.



MELODY J. BROWN

Senior Assistant Deputy Attorney General