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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Court of Common Pleas Case No. 2011-CP-26-3907
(Capital PCR Action)
Appellate Case No. 2014-000904

LOUIS MICHAEL WINKLER, JR.,

RESPONDENT- PETITIONER,

V.

STATE OF SOUTH CAROLINA

PETITIONER- RESPONDENT.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. This Court should grant the State's petition for writ of certiorari; trial counsel was not ineffective in not objecting to the trial court's refusal to answer the jury's question on what occurs if the jury could not reach a unanimous verdict, and trial counsel was not ineffective in his handling of the Allen charge given by the trial court.

A. Trial counsel was not ineffective in not objecting to the trial court's refusal to answer the juror's question.

Trial counsel were not deficient when they did not object to the trial judge's decision not to answer the questions. The trial court was well within its discretion in refusing to answer the initial questions asked by the jury, and, as a result, counsel had no basis for objecting. S.C. Code Ann. § 16-3-20(C) states:

> If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

The South Carolina Supreme Court has held that this sentencing portion of the subsection (C) does not need to be shared with the jury.

> The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

State v. Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Copeland, 278 S.C. 572, 584-85, 300 S.E.2d 63, 70 (1982); see State v. Spann, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983)(finding harmless error when judge instructed jury that any sentence for life imprisonment must be unanimous because jury need not be instructed of

legal effect of unalterable divided jury). "[T]he Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381 (1999).

> We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." Allen v. United States, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896). We further have recognized that in a capital sentencing proceeding, the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." Lowenfield v. Phelps, 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (citation and internal quotation marks omitted). We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest.

Jones, 527 U.S. at 382 (footnote omitted).

The questions posed by the jurors specifically asked what would happen if they did not reach a unanimous verdict. In light of the longstanding precedent against informing jurors of what would occur if they did not reach a unanimous verdict, it was proper for the trial court to not respond to the jurors' questions on that subject. Thus, trial counsel had no basis for objecting to the trial court's refusal to answer the questions. As a result, counsel was not deficient.

This case is not akin to Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994). In Simmons, the United States Supreme Court held the jury was entitled to learn of a defendant's parole ineligibility because his future dangerousness was at issue before the jury. Simmons, 512 U.S. at 171, 114 S. Ct. at 2198. The Supreme Court noted that in assessing future dangerousness, the actual duration of a defendant's prison sentence was indisputably relevant, and it was reasonable for a sentencing jury to find a

person who was eligible for parole posed a greater risk to society than one who was not. Id. at 163-64, 114 S.Ct. at 2194. Unlike parole eligibility, the underlying issue of the result of a divided verdict in sentencing is not relevant to a jury's determination of a defendant's sentence. To the contrary, an instruction on the result would instead run the risk of undermining the jury's responsibility to attempt to reach a verdict. See Jones, supra; see also Brogie v. State, 695 P.2d 538, 547 (Okla.Crim.App.1985)("Such an instruction would amount to an invitation to the jury to avoid its difficult duty to pass sentence on the life of an accused."); Justus v. Com., 220 Va. 971, 979, 266 S.E.2d 87, 92 (1980)(noting that such an instruction "would have been an open invitation for the jury to avoid its responsibility and to disagree."); State v. Hutchins, 303 N.C. 321, 353, 279 S.E.2d 788, 807 (1981) (stating "such an instruction is improper because not only would it be of no assistance to the jury, it would also permit the jury to escape its responsibility to recommend the sentence to be imposed.").

Winkler cannot show that he was prejudiced by counsel not objecting to the trial court's refusal to answer those questions from the jury. First, as already noted, the trial court's refusal to answer the questions was proper. Thus, any objection would have been without merit. See, e.g., Werts v. Vaughn, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); see also Almon v. U.S., 302 F.Supp.2d 575, 586 (D.S.C.2004) ("There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable.").

B. The Allen charge given by the trial court was not unduly coercive, and trial counsel was not ineffective in neither objecting to the charge nor requesting an Allen charge be given earlier.

Winkler asserts trial counsel should have objected to this charge because they were improper and were given in unduly coercive circumstances. The State submits this contention is without merit.

> Neither the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); see also Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090 (1999) (no constitutional requirement that capital jury be informed of consequences of its failure to agree). Whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances." Lowenfield, supra.

Tucker v. Catoe, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716 (2001).

> In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. 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.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (citations omitted).

In determining whether an Allen charge is unconstitutionally coercive, a court should look to whether (1) the charge spoke specifically to the minority juror(s); (2) the judge included in his charge any language such as "You have got to reach a decision in this case;" (3) there was an inquiry into the jury's numerical division, which is generally coercive; and (4) whether the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion; and if so, whether the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge. Tucker, 346 S.C.

at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237, 108 S.Ct. 546); see State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010), cert. denied, 131 S. Ct. 230, 178 L. Ed. 2d 153 (2010).

The State submits the Allen charge given in Winkler's case was not coercive. The language utilized in the charge was similar to the language upheld in Lowenfield and to the charge upheld in Williams. Further, the charge did not speak directly to the minority jurors. The trial court never intimated that the jury had to reach a verdict. The trial court never inquired into the jury's numerical division. And while the jury returned its verdict approximately one hour after hearing the charge, there is no indication in the record that such coercion was readily apparent. Since the Allen charge was not coercive, counsel was not deficient in not objecting to the charge.

Winkler also cannot show that he was prejudiced by counsel not objecting to the Allen charge. First, such an objection would have been without merit because the charge was not coercive. Thus, any objection would have been dismissed. The State submits Winkler failed to show that he was otherwise prejudiced by counsel not objecting.

To the extent Winkler contends that counsel should have requested an Allen charge be given in response to one of the jury's earlier questions, the State submits this assertion is without merit. First, the record clearly reflects that all agreed during the trial that it was unclear if the jury was indicating it was deadlocked when it sent the first two questions. An Allen charge was therefore not warranted. Furthermore, the State submits that Winkler did not show that requesting an Allen charge earlier would have led to a different result at trial.

II. The PCR Court did not abuse its discretion in denying Winkler's request for a continuance; the denial is supported by the record.

How the issue arose below

Counsel for Winkler were appointed to represent him in the PCR action on June 24, 2011. As required under S.C. Code Ann. § 17-27-160(C), a status conference was convened to discuss the scheduling of the evidentiary hearing on July 7, 2011. After the scheduling conference, the PCR Court issued an Order setting the schedule for the litigation in the PCR action. In that Order, the PCR Court noted that the hearing in the case was continued beyond the 180 day time limit set forth in S.C. Code Ann. § 17-27-160(C) because Winkler's counsel were able to provide good cause for such a continuance.

By Order filed September 21, 2011, the PCR Court set the evidentiary hearing for June 18, 2012. On November 30, 2011, Winkler filed and served a Motion to Alter PCR Scheduling Order. In the Motion, Winkler requested a ninety day continuance to file his first amended PCR application, and further requested that other adjustments be made in the scheduling of the action accordingly. In support of the Motion, Winkler noted that while counsel had diligently pursued an investigation, they had not developed any specific claims. Counsel also noted that an expert had recommended additional testing in regards to Winkler's mental health and cognitive functioning. Counsel further noted the PCR Court had authorized funding for additional testing, and noted that it would take four to six weeks for the initial testing to be completed and another six weeks before additional analysis could be done.

In response, the PCR Court issued an Amended Scheduling Order granting Winkler an additional sixty-three days in which to file the first Amended PCR application. No other scheduling deadlines were changed.

On April 10, 2012, Winkler filed a second Motion to Alter PCR Scheduling Order. In this Motion, Winkler requested an additional 180 days to continue investigating and preparing his case for hearing. In the Motion, counsel noted that Winkler was unable to have a PET scan done because Winkler had untreated diabetes. Counsel contended that it would need an additional six to eight weeks before Winkler would be able to have a PET scan, and would further need an additional six weeks for the scans to be analyzed. Further, counsel complained they had issues obtaining documents from various sources.

By Order filed April 20, 2012, the PCR Court denied the Motion. In its Order, the PCR Court stated as follows:

> Although the applicant's attorneys state that they have been diligently pursuing these investigations, the court feels that the applicant has had ample time to formulate his pleadings and prepare for the trial of this case. Applicant's attorneys were appointed nine months ago, the trial date was scheduled seven months ago and, now, approximately two months prior to trial, the applicant seek an additional 180 days to amend his pleadings and prepare for trial. The court feels that the applicant's attorneys have had ample opportunity to investigate matters pertaining to the applicant's "potential brain damage" and "mental health disorder." Further, the applicant has not filed any motions to compel production of documents and, according to the subpoenas attached to this motion, did not subpoena documents until March and April, 2012. Therefore, the applicant's Motion to Alter PCR Scheduling Order should be denied.

(Order Denying Motion to Alter PCR Scheduling Order, at p. 2).

Standard of Review

The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989); State v. Mansfield, 343 S.C. 66, 72, 538 S.E.2d 257, 260 (Ct.App.2000). Reversals based upon a trial court's handling of a motion for a continuance "'are about as rare as the proverbial hens' teeth.'" State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct.App.2007)(quoting State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002))(citing State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)).

An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct.App.2006). If there is any evidence to support the trial judge's decision, the appellate courts will affirm it. State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 829 (2001); State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (Ct.App.2004). Even without any evidentiary support, "[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant." State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct.App.2005); see also State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

> A tribunal necessarily exercises wide discretion in managing a case, and decisions denying a request for a continuance are "rarely" overturned. Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)); M & M Group, Inc. v. Holmes, 379 S.C. 468, 475, 666 S.E.2d 262, 265 (Ct.App.2008). "Every

reasonable presumption in favor of a proper exercise of the trial court's discretion will be made." 17 C.J.S. Continuances § 5 (2011).

Trotter v. Trane Coil Facility, 393 S.C. 637, 650, 714 S.E.2d 289, 295 (2011).

A. The PCR Court did not abuse its discretion in denying Winkler's motion for a continuance.

The State submits Winkler cannot establish the PCR Court abused its discretion in denying his request for a continuance. The PCR Court's Order is supported by the facts. When the Order was issued, PCR counsel had been representing Winkler for nine months and twenty-seven days. The evidentiary hearing date had been set seven months prior to the Order denying the motion to amend the scheduling order. Also, at the time the Order was issued, there had been no motions filed to seek assistance in securing the documents which Winkler had indicated he had difficulties obtaining in his motion. The subpoenas that were included as exhibits to the motion were served on April 4, 2012 and March 29, 2012, respectively. (Exhibits 7, 9 to Motion). In all, the PCR Court was in the best position to make a determination as to whether additional time was needed by Winkler to prepare for the evidentiary hearing. The PCR Court was aware of any and all ex parte requests for funding. Thus, the PCR Court would have been well aware of developments in Winkler's preparation for the hearing based upon funding requests. Since the PCR Court's Order is factually supported, the denial of the motion for a continuance was not an abuse of discretion and should be affirmed.

B. Winkler's claim regarding the denial on the motion for a continuance cannot serve as additional sustaining ground.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

> The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). The State submits that this claim now raised as additional an sustaining ground cannot serve as such. As with the claims upon which Winkler has sought writ of certiorari, this alleged additional sustaining ground was a claim upon which the PCR Court denied relief. As such, Winkler cannot utilize it as a potential additional sustaining ground because he was not the prevailing party upon the claim. See generally I'On, 338 S.C. at 419, 526 S.E.2d at 723 (noting prevailing party is the winner upon claims in lower court). Since Winkler did not appeal the denial of relief upon this claims as he did with the claims he raises in his cross-appeal, he abandoned this claim and the denial of relief by the PCR Court upon it has become law of this case.[1] See generally McCray v. State, 317 S.C. 557, 559, 455 S.E.2d 686, 687 (1995) (issue must be raised in petition for writ of certiorari to be preserved for review); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling becomes law of the case and should not be reconsidered on appeal).

[1] To the extent this Court disagrees, the State would further assert that even if this claim could be considered could be considered as an additional sustaining ground, it would be unwise to do so in light of the fact the PCR Court's denial of relief upon it was clearly supported by the record.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, Petitioner-Respondent respectfully requests this Court grant this petition for writ of certiorari and reverse the grant of post-conviction relief and life sentence by the PCR Court.

Respectfully submitted,

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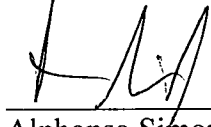
By: 

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February 6, 2015

STATE OF SOUTH CAROLINA
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STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

PROOF OF SERVICE

I, Alphonso Simon, Jr., of counsel for the Petitioner/Respondent, certify that I served two (2) copies of the Reply to the Return to Petition for Writ of Certiorari via U.S. mail to each of his attorneys of record, Emily C. Paavola, Esq., Death Penalty Resource and Defense Center, 900 Elmwood Avenue, Ste. #101, Columbia, South Carolina 29201, and John R. Mills, Esq., Law Offices of John R. Mills, 3145 Geary Blvd., #213, San Francisco, California 94118.

I further certify that all parties required by Rule to be served have been served.

This 6th day of February, 2015.

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