

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000933

RECEIVED

MAR 20 2015

S.C. Supreme Court

O'Shawn Robinson, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

KAREN C. RATIGAN
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S.C. Bar # 68331

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Did trial counsel err in failing to object to the trial judge's unduly coercive Allen¹ charge given to the jury in the case?

¹ Allen v. United States, 164 U.S. 492 (1896).

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the August 2008 term of General Sessions for armed robbery (2008-GS-23-5382, count 1), possession of a weapon during commission of a violent crime (2008-GS-23-5382, count 2), conspiracy (2008-GS-23-5383), and assault and battery of a high and aggravated nature (2008-GS-23-5384). (App.pp.360-65). Andrew Moorman, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On January 15, 2009, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of 25 years for armed robbery, 5 years for possession of a weapon during commission of a violent crime, 5 years for conspiracy, and 30 days for the lesser-included offense of assault and battery. (App.pp.264-65).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. (App.pp.267-76). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Robinson, Op. No. 12-UP-042 (S.C. Ct. App. filed Jan. 25, 2012). (App.pp.320-23). The remittitur was issued on February 14, 2012.

Petitioner filed an application for post-conviction relief (PCR) on December 5, 2012 (2012-CP-23-7606). (App.pp.303-12). A hearing was held at the Greenville County Courthouse on February 18, 2014. (App.pp.324-49). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward

Welmaker denied relief in an order dated March 19, 2014 and filed March 25, 2014. (App.pp.352-59).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective because he did not object to the Allen charge.

After closing arguments at trial, the trial judge charged the jury. (App.pp.215-26). The jury began deliberations at 10:31 a.m. (App.p.226). After the jury sent a note to the trial judge asking to hear a witness’s testimony played back, the jury reentered the courtroom at 10:56 a.m. (App.p.227). The witness’s testimony was replayed and the jury resumed deliberations at 11:26 a.m. (App.pp.228-51). The jury sent additional questions to the trial judge, and he brought them into the courtroom at 1:15 p.m. and informed them he could not answer questions of fact. (App.pp.252-53). The jury resumed deliberations at 1:17 p.m. (App.p.253). The jury sent a note to the trial judge indicating they could not reach a unanimous decision. (App.p.253). The trial judge brought the jury back into the courtroom at 2:50 p.m. and issued an Allen charge. (App.pp.253-57). The jury resumed deliberations at 2:58 p.m. and returned to the courtroom with a verdict at 4:47 p.m.

(App.pp.257-58).

At the PCR hearing, trial counsel testified there was no legal basis for him to have objected to the Allen charge. (App.p.344).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should have objected to the Allen charge." The PCR judge found "the trial judge's statement to the jury did not involve the type of language usually seen in an improper Allen charge and, therefore, there was no reason for trial counsel to have objected." (App.pp.357-58).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have objected to the Allen charge. In support of his argument, Petitioner has pointed to the following four sections taken from the entirety of

the Allen charge²:

Now I tell you that it is very unusual for a jury to go out and to quickly or immediately return with a verdict. At the same time I tell you that we usually get a verdict. So while it's normal for jurors to disagree at first we nevertheless get a verdict after the jury has laid aside all outside or extraneous matters and have determined to try the case on its merits and on the basis of the law and evidence in the case.

(App.p.254, lines 8-15).

Now it's been said that jury service is perhaps the highest service that a citizen can perform for his or her country or state during peace-time. And I certainly agree with that; however, I tell you that a juror does not render good jury service who arbitrarily says, I know what I want to do in this case, and if and when everybody agrees with me, then we'll write a verdict. And we will not write a verdict until that time.

(App.p.254, lines 16-23).

In other words, ladies and gentlemen, I tell you that a mistrial in a case is an unfortunate thing. If you cannot agree on a verdict in this case it doesn't mean anybody wins. It just means possibly that at some future time I will or one of the other judges will try this case with a jury seated where you are. The same participants will come. And the same lawyers will ask basically the same questions and I suppose probably get basically the same answers and we'll just go through the whole process again.

(App.p.256, lines 7-15).

Therefore, ladies and gentlemen, I cannot accept any report at this time that you cannot agree on a unanimous verdict in this case. I am of the opinion that you have not deliberated sufficiently long that I could in good conscience accept that report. And I tell you frankly it will take considerably more time before I am convinced that you cannot reach a verdict.

(App.p.256, line 23 – p.257, line 4).

It is clear, however, that this language was not coercive when viewed either in isolation or

² These sections, however, cannot be evaluated out of context. See Lowenfield v. Phelps, 484 U.S. 231, 237, 108 S. Ct. 546, 550 (1988) (holding that, to determine whether an Allen charge is coercive, it must be judged “in its context and under all the circumstances”) (citation omitted).

within the Allen charge as a whole.

An Allen charge is used to encourage a deadlocked jury to reach a verdict and involves instructing the jurors to, among other things, approach the evidence with an open mind and consider the opinions of their fellow jurors. See State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). “A trial judge has a duty to urge, but not coerce, a jury to reach a verdict.” Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (citing State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996)). “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.” Id. (citing State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995)). In the case at bar, the trial judge was not coercing the jury or being heavy-handed in his instructions to continue deliberations. Instead, the trial judge merely advised the jury that disagreements were normal and encouraged them to resume deliberations and attempt to resolve the case. While Petitioner argues cases such as Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002) and Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001) mandate a reversal in this case, these cases are factually very distinguishable because – as the trial judges in these cases were aware of the existence of a minority juror – the Allen charge could be perceived as being directed towards them. This factual situation was not present in Petitioner’s case. Rather, the jury merely advised the trial judge that they could not reach a unanimous decision. The rulings in Dawson and Tucker are inapposite as the trial judge in this case provided a proper Allen charge to encourage the entire jury panel to continue deliberations. As the Allen charge was not coercive, it was not incumbent upon trial counsel to have objected.

Accordingly, Petitioner failed to prove both prongs of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms and that he was prejudiced by trial counsel’s performance. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: 
ATTORNEYS FOR RESPONDENT

March 20, 2015

STATE OF SOUTH CAROLINA
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The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000933

O'Shawn Robinson, Petitioner,

v.


State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 20th day of March, 2015.


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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

March 20, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: O'Shawn Robinson v. State of South Carolina
Appellate Case No: 2014-000933
Lower Court Case No: 2012-CP-23-7606

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S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Wanda H. Carter, Esquire
Trisha Allen, Victim Services Counselor