STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2014-001312

Luther Garner, ... Petitioner,

v.

State of South Carolina, ... Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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QUESTION PRESENTED

1. Did the post-conviction relief judge properly find trial counsel was not ineffective in failing to object to the trial judge's Allen charge where the charge did not did not directly address the minority voting jurors, did not mandate the jury reach a decision; did not further inquire into the jury's numerical division, and did not result in an immediate verdict from the jury?

STATEMENT OF THE CASE

In March 2007, the Horry County Grand Jury indicted Petitioner for murder, attempted armed robbery, and first degree burglary. (App. pp. 888-93). On May 29, 2007, Petitioner proceeded to trial before the Honorable Edward B. Cottingham ("the trial judge") and a jury. (App. p. 1). Stuart M. Axelrod, Esquire ("trial counsel"), represented Petitioner. (App. p. 1). On June 1, 2007, the jury found Petitioner guilty as indicted. (App. p. 538, l. 17 – p. 537, l. 17). The trial judge sentenced Petitioner to concurrent terms of thirty years for murder and thirty years for first degree burglary. (App. p. 555, l. 7-15). On the remaining attempted armed robbery conviction, the trial judge sentenced Petitioner to a consecutive term of ten years. (App. p. 555, l. 7-15)

Petitioner filed a timely notice of appeal, and M. Celia Robinson, Esquire, perfected the appeal. State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2010). The South Carolina Court of Appeals affirmed the convictions on April 28, 2010. Id.

Petitioner filed an application for post-conviction relief on March 13, 2012. (App. pp. 705-11). Tristan M. Shaffer, Esquire, represented Petitioner. (App. p. 720). Petitioner filed an amendment to the application titled "Supplemental Grounds for Post-Conviction Relief" on August 27, 2013. (App. pp. 718-19). The Honorable J. Cordell Maddox, Jr., ("the post-conviction relief judge") convened a hearing on the application at the Horry County Courthouse on August 27, 2013. (App. p. 720). The post-conviction relief judge denied relief in an order filed February 3, 2014. (App. pp. 861-76). Petitioner filed a motion to reconsider on March 14, 2014. (App. pp. 877-84). The post-conviction relief judge denied the motion by order dated May 2, 2014. (App. pp. 885-87).

STANDARD OF REVIEW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding trial counsel was not ineffective in failing to object to the trial judge's Allen charge.

A. The trial judge did not abuse his discretion in issuing an Allen charge.

Petitioner first argues that trial counsel should have objected to the trial court's Allen charge because the jury had been deliberating for only two hours. Respondent submits the length of deliberations is not relevant to the propriety of an Allen charge in this case.

The State has a legitimate interest in the expeditious yet fair disposition of criminal cases. See State v. Brown, 274 S.C. 592, 594, 266 S.E.2d 415, 416 (1980). There are also significant societal costs to retrial.[1] Id. As a result, a trial judge has the duty to urge a jury to reach a verdict, so long as it does not reach the level of coercion. Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). "The typical judicial mechanism for encouraging an indecisive jury is the Allen charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." State v. Williams, 386 S.C. 503, 510, 690 S.E.2d 62, 65 (2010) (quoting State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004).

Here, the jury indicated to the trial judge it had been unable to reach a unanimous verdict. Because the jury indicated it was deadlocked, the trial judge had the discretion to issues an Allen charge. See State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct.

[1] Cf. State v. Kelsey, 321 S.C. 50, 69, 502 S.E.2d 63, 73 (1998) ("The power of the court to declare a mistrial ought to be used with the greatest caution[.]" (citations omitted)); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.")

App. 2007) ("The decision to issue an Allen charge is within the sound discretion of the trial judge."). The fact the charge came after only two hours of deliberation, in light of the jury's indication of a deadlock, is irrelevant to the whether the trial judge could issue the charge. Because the trial judge did not abuse his discretion in issuing the charge, trial counsel was not ineffective in failing to object to the issuance of the charge.

B. The Allen charge, viewed as a whole, is not unduly coercive.

Petitioner also argues trial counsel was ineffective for failing to object to the Allen charge as unduly coercive. Respondent submits the post-conviction relief judge properly found the charge is not coercive in light of the entire record.

"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). 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, or states that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement. State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-76 (1995).

This Court has adopted a very fact intensive, four factor analysis in determining whether a given Allen charge is unconstitutionally coercive. Tucker at 492, 552 S.E.2d at 716 (2001) (citing Lowenfield v. Phelps, 484 U.S. 231 (1988)). The Court looks to 1) whether the charge was directed at minority jurors; 2) whether there was any "you must return a verdict" type of language; 3) whether there was an inquiry into the jury's numerical division; and 4) the timing of the verdict's return. Id. These factors are viewed together, in the particular setting at issue. Id. at 495, 552 S.E.2d at 718. In determining whether an Allen charge is unconstitutionally coercive, the Court conducts

"[a] fair reading of the actual jury charge." Green, 351 S.C. at 195, 569 S.E.2d at 324. The charge "must be judged *in its context and under all the circumstances.*"[2] Williams, 386 S.C. at 512, 690 S.E.2d at 66 (emphasis added) (citing Tucker at 490, 552 S.E.2d at 716).

The post-conviction relief judge, after the record and hearing testimony presented at the evidentiary hearing, addressed each of these factors in context and found the Allen charge given in Petitioner's trial was not coercive. App. p. 873, 886. Probative evidence supports this conclusion as to each of the four Lowenfield factors:

1. Did the charge speak specifically to minority jurors.

The post-conviction relief judge properly found the charge did not speak specifically to the minority jurors. (App. p. 886). Petitioner relies on an out of context reading of specific passages from the charge, and fails to give deference to the post-conviction relief judge's findings with regards to the entirety of the charge. A reading of the trial judge's Allen charge as it appears in the record supports post-conviction relief judge's conclusion the charge was not directed to the minority jurors, but addressed both the minority and majority, encouraging them to reexamine their position in light of the other side. Crucially, the trial judge asked the jury, upon resuming deliberations, to "have a give and take *between the majority and the minority.*" (App. p. 535, l. 10-12 (emphasis added)). The trial judge further charged he "would not ask anybody ever to give up their heartfelt opinions, but at the same time, *regardless of which side your decision is on* consider, too, the positions of the other side to ascertain whether or not that position, be it in the minority or majority, is a reasonable one." (App. p. 535, l. 13-17

[2] Cf. State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) ("In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial.").

(emphasis added)). The language highlighted by Petitioner, taken alone, may be coercive. But, when read in conjunction with the equally strong language noted above, Petitioner's highlighted language is not unduly coercive.

Petitioner's cited cases support this sort of context-driven conclusion. The contested language in Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002), for example, was only found to be coercive "[u]nder the circumstances" of that particular case. The Court further emphasized that any perception that the contested language was directed toward the minority was "depend[ent] on the context." Id.

The context and circumstances that led the Dawson Court to find that charge targeted the minority and was coercive are not present in this case. 352 S.C. 15, 572 S.E.2d 445. It was the language, together with the fact that the trial judge "confirmed the existence of one minority juror *immediately before* the Allen charge" that led the court to conclude the language was "clearly directed to the 'holdout.'" Id. at 21, 571 S.E.2d at 447-48. The trial judge in Dawson also failed to warn the jury not to disclose their division in the future, which led to subsequent disclosures. Id at 17-18, 20, 571 S.E.2d at 446-47. Similarly, in Tucker, 346 S.C. at 493, 552 S.E.2d at 717, the key factors were that "the trial judge knew, and apparently the jury knew that he knew" the numerical split; that there were fewer holdout jurors than the night before; and that there was a specific alignment as to guilt or innocence.

In contrast, this Court has held in Green, 351 S.C. at 195, 569 S.E.2d at 324, that an Allen charge was not prejudicial where there was "nothing in the record to suggest the minority view was favorable to [the defendant]." The court of appeals has also ruled that an Allen charge is not directed at the minority juror where "nothing in the record

indicates the judge knew how the jury was aligned concerning guilt or innocence." State v. Jones, 320 S.C. 555, 559, 466 S.E.2d 733, 735 (Ct. App. 1996).

In each of the cases finding Allen charges coercive, this Court found the offending language inappropriately targeted the minority jurors where the judge understood which jurors were in the minority. See also State v. Elmore, 279 S.C. 417, 423, 308 S.E.2d 781, 785 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (charge coercive where judge told the jury he "knew what members of the jury panel were opposed to the concept of capital punishment").[3] In the present case, the post-conviction relief judge found the record did not contain evidence the trial judge had knowledge of the jury's division. Although the trial judge may have known the exact numerical division, there is no evidence he knew the alignment. There is also no evidence the trial judge made any inquiries as to the alignment or that his lack of a warning not to disclose the alignment led to a subsequent disclosure. See Green, 351 S.C. at 195, 569 S.E.2d at 324 ("One may speculate just as freely the minority view at that juncture of deliberations wished to convict Green."). Furthermore, innocent knowledge of the numerical division is not sufficient to make a charge *per se* coercive. Williams, 386 S.C. at 515, 690 S.E.2d at 68 ("Here, without solicitation the jury disclosed its numerical division to the trial judge who then informed the trial attorneys."). Therefore, the mere fact the trial judge knew of the division does not make his Allen charge coercive where he otherwise encouraged the minority jurors to not abdicate their position simply because they were in the minority.

[3] Respondent also notes many cases involving coercive Allen charges were capital cases where the death penalty was imposed.

Finally, Petitioner argues the trial court's tone in delivering the Allen charge made it unconstitutionally coercive. Petitioner cites not authority for this proposition, and none exists. The only relevant "tone" in an analysis of an Allen charge is that of the charge itself, when read as a whole. As noted supra, the charge here was not coercive. Thus, this Court must presume the jury followed the trial judge's instruction, irrespective of the tenor of his voice when he delivered it. Cf. State v. Lindsey, 372 S.C. 185, 194, 642 S.E.2d 557, 562 (2007) (court "will not presume a juror engaged in misconduct").

2. Was there any "you must return a verdict" type of language.

The post-conviction relief judge properly found that the Allen charge did not mandate the jury reach a decision. (App. p. 886). It is not coercion to charge that the failure to reach a verdict will require a new trial at additional expense. State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996). Here, the jury specifically asked the trial judge whether, in the event they could not reach a unanimous verdict, they would have to return a not-guilty verdict. (App. p. 531, l. 18-20;537, l. 3-6). In response, the trial judge clarified that a verdict must be unanimous—whether it be guilty or not guilty. (App. p. 531, l. 21-22). The judge further explained that in the event they were unable to reach a unanimous verdict, the alternative was a "hung jury," or a mistrial. (App. p. 531, l. 23; p. 537, l. 3-10). The trial judge's language is clear and unambiguous: the jury's options are either a unanimous verdict or a mistrial. The trial judge did not err in informing the jury of the costs of failing to reach a verdict.

3. Was there an inquiry into the jury's numerical division.

Importantly, Petitioner does not allege that the trial judge made any actual inquiry into the jury's numerical division. Instead, Petitioner merely argues the trial judge was

aware of the division. However, mere knowledge of the division is not sufficient to find the charge coercive. Williams, 386 S.C. at 515, 690 S.E.2d at 68; Green, 351 S.C. at 195, 569 S.E.2d at 324; Jones, 320 S.C. 555, 559, 466 S.E.2d 733, 735. The record contains no evidence the trial judge knew the alignment of the jury. It also contains no evidence the trial judge requested the jury keep him abreast of the alignment.

4. What was the timing of the return of the verdict?

The post-conviction relief judge found that the Allen charge did not set an inappropriate time limit on jury deliberations. (App. p. 886). Petitioner highlights the fact the jury came back with a verdict of guilty less than an hour after being given the Allen charge. However, the time spent deliberating after being read the charge is not that great in light of the time previously spent deliberating.

The jury began deliberating at 6:12 p.m. (App. p. 523, l. 23). They spent approximately two hours deliberating before being dismissed for the evening, with no indication of a deadlock at that point. (App. p. 526, l. 21-23). The jury returned at 10:00 a.m. the next morning. (App. p. 528, l. 18-20). They sent a question to the trial judge at 10:15 a.m., and entered the courtroom at 10:33 a.m. (App. p. 528, l. 18-20). The verdict was then read at 11:27, just under an hour later. (App. p. 538, l. 14). Regardless of the time between the end of the charge and the final verdict, the roughly one hour of deliberations the next morning constitutes approximately one-third of the total time the jury spent deliberating on the issue. Viewed appropriately, the jury in the present case cannot be said to have spent so short a time after the Allen charge was given so as to create an inference of coercion. Cf. Youmans ex rel. Elmore v. S.C. Dept. of Transp., 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008) (overview of the "spate of juridical

writings" limiting the discretion to overturn a jury verdict based on the length of deliberations).

Petitioner highlights many instances of potentially troubling language in the trial judge's Allen charge. However, those instances are few and far between the relatively innocuous portions of the charge that encourage the jury to "listen to what the other side had to say; to be open to change one's mind; and to not change one's mind if it would do violence to one's conscience." Green, 351 S.C. at 195, 569 S.E.2d at 323-24. Respondent submits the overall tone of the Allen charge was neutral and not aimed at the minority jurors, and therefore not unduly coercive. Accordingly, the post-conviction relief judge's finding trial counsel was not ineffective in failing to object to the language of the charge is supported by probative evidence.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: _____
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April 9, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

LUTHER GARNER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Lara M. Caudy
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 9th day of April, 2015

Norma Bigbee

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 9 2015
S.C. Supreme Court

April 9, 2015

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

RE: **Luther Garner v. State of South Carolina**
Appellate Case No: 2014-001312

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Lara M. Caudy, Esquire (2 copies)