STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMIAN D. ANDERSON,

APPELLANT

APPELLATE CASE NO 2014-001779

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in coercing the deadlocked jury in this case to deliberate for a third time without their consent in violation of S.C. Code Ann. § 14-7-1330 (1976).

STATEMENT OF THE CASE

Appellant D. Damian Anderson was convicted of assault on a police officer while resisting arrest per jury trial held during the August 2014 term of the Charleston County General Sessions Court before Judge W. Jeffrey Young. Jason King and John C. Kozelski represented appellant at trial, and Assistant Solicitors David Osborne and Chad Simpson appeared on behalf of the state. Judge Young sentenced appellant to imprisonment for a period of ten years.

Appellant appealed his conviction and sentence. This brief follows.

ARGUMENT

The trial judge erred in coercing the deadlocked jury in this case to deliberate for a third time without their consent in violation of S.C. Code Ann. §14-7-1330 (1976).

This case involved a traffic stop made on February 1, 2013, that ultimately resulted in the arrest of driver William Backman and passenger, who was the appellant. Based on the events that occurred at the scene, the state indicted appellant on the offense of assault on a police officer while resisting arrest, which he was found guilty of at trial. However, the jury was deadlocked twice during its deliberations at trial, and the reasons for the impasse were understandable since the case was a swearing/credibility match between the testimony of the police officers versus the testimony of the occupants of the vehicle and an eyewitness.

The state's case consisted of the testimony of the four police officers[1] from the scene, and the case for the defense consisted of the testimony of driver Backman, appellant (passenger), and appellant's mother (eyewitness). The officers declared that appellant was non-compliant, resisted arrest, and assaulted them during the traffic stop in question. The defense witnesses (vehicle occupants and eyewitness) testified to the contrary, i.e., that appellant was compliant and that the police officers assaulted appellant.

Police Officer Eric Light testified that on December 18, 2012, he initiated a traffic stop at Fleming Road and Central Park Road in Charleston County because the driver of the vehicle crossed over yellow double lines to make a turn. Officer Light explained that after the vehicle had stopped, he approached and smelled alcohol emanating from inside the vehicle and saw brown liquid in a cup located inside the center console. Note that Officer Light called for police backup immediately thereafter. Upon learning that driver Backman was driving with a suspended license,

[1] Police Officers Eric Light, Mathew-Summerlin, William Villenruve and Joseph Harvill

Officer Light asked Backman to exit the vehicle and that upon doing so, he (Backman) was placed under arrest. Officer Light stated that Backman cooperated with his requests and was arrested without incident. Officer Light stated in effect that the arrest of appellant, who was the passenger, was difficult to accomplish. Officer Light explained that appellant refused to exit the car as requested and that ultimately, a tussle ensued between appellant and Officers Villeneuve and Harvill before he was subsequently subdued. R. 6, l. 2 – R. 38, l. 15.

Officer Mathew Summerlin testified that he drove Officers Villeneuruve and Harvill to the scene and witnessed appellant refusing to end his cell phone call per the officers' requests, and that he also witnessed appellant refusing to exit the vehicle per the officers' requests. Officer Summerlin added that the officers had to extract appellant from the car, despite appellant's "thrashing around," in order to arrest him. R. 70, l. 8 – R. 78, l. 23.

Officer William Villeneauve testified that he smelled alcohol and saw a plastic cup containing a brown colored liquid in the vehicle as soon as he approached appellant at the passenger side of the vehicle. Officer Villeneuve testified that after appellant surrendered his identification (license), he repeatedly asked appellant to stop talking on his cell phone and exit the vehicle, but that appellant did not comply with his requests. Thereafter, Officer Villeneuve stated that he made the decision to arrest appellant and had to reach in the vehicle to pull him out, and that in the process of doing so a struggle ensued wherein appellant was "worming" and "kicking" and "swinging" around until the arrest was complete. R. 89, l. 4 – R. 105, l. 4.

Officer Joseph Harvill testified that Officer Villeneuve had no choice but to "pull [appellant] out" of the passenger seat of the car after he [appellant] would neither hang up the phone nor exit the vehicle in response to the officers' repeated requests to do so. Officer Harvill stated that they

struggled to handcuff and subdue appellant because he (appellant) "kicked and pushed himself away from them." R. 118, l. 13 – R. 129, l. 22.

Defense witness William Backman (driver of the vehicle in question) testified that he heard the officers tell appellant to put the phone down and exit, but that appellant never had an opportunity to obey the orders because in a few seconds the officers were already pulling him out of the vehicle before appellant could obey the orders. Backman stated that the officers did not repeatedly ask appellant to exit and get off the phone, and that appellant did not assault or kick the officers during the incident. R. 147, l. 20 – R. 155, l. 18.

Appellant's mother Cynthia Anderson stated that this incident occurred right in front of her residence and that she witnessed the officers pull her son out of the car and throw him to the ground. Anderson added that appellant did not hit the officers. R. 164, l. 17 – R. 167, l. 17.

Appellant testified at trial and explained that as soon as he surrendered his identification, the officers immediately took his phone and pulled him out of the vehicle. Appellant stated that the officers "roughed" him up, and added that he was not asked repeatedly to get out of the vehicle. Appellant stated that he did not hit or kick in any way or resist arrest in effect because that would have been impossible time-wise as they immediately grabbed him out of the car and handcuffed him. R. 171, l. 22 – R. 179, l. 20. Appellant was charged with open container of alcohol, violation of obeying a police officer's order, and malicious injury to real property.

During jury deliberations, the jurors stopped to inquire as to what would constitute "under arrest" and "how does one know if not being told that they are under arrest" and when would "resisting arrest cross the line to assault." R. 218, l. 3 – 9. R. 242. Then, the jurors interrupted their deliberations with a request to hear appellant's testimony. The testimony was played. R. 217, l. 23 – R. 218, l. 7. Thereafter, the jury indicated that they had reached a verdict finding appellant guilty

as charged, but one juror (#131) stated during the polling that her verdict was "**not guilty**." R. 218, l. 22 – R. 222, l. 17. In light of this information, the trial judge sent the jury back to the jury room to deliberate further. R. 222, l. 18 – 23. This send back was the jury's second attempt to reach a verdict. Minutes later, the jury requested transcripts (two) of appellant's testimony and asked to hear the police officers' testimony. R. 222, l. 24 – p. 314, l. 11. Before the playing of the taped testimony of appellant and the officers, defense counsel objected on the ground that sending the jury back was the equivalent of "undue influence." R. 223, l. 9 – 13. The Court's ruling follows:

> The Court: They do want the transcript of Mr. Anderson and also Villeneuve and Light, if available. If they want to listen to it, they can do that. I don't know they want to, but I will tell them if they would like to listen to it, they can listen to it, but it's not available in a transcript. R. 223, l. 22 – R. 224, l. 14.

Soon afterwards, the jury returned indicating that they were deadlocked and had reached an impasse and asked for "the next step." R. 224, l. 5 – 6; R. 225, l. 4-7. Nonetheless, the judge decided to send the jurors back to deliberate for a third time, but gave them an Allen[2] charge prior to doing so. Note that this was the jury's third attempt to reach a verdict. At this juncture, defense counsel's objection per S.C. Code Ann. 14-7-1330 (1976) follows:

> Defense Counsel: I will put an objection on the record. Under 14-7-1330, says when a jury, after doing thorough deliberations, returns into the court without having agreed upon a verdict, the Court may state evidence, or any part of it, and explain to it a new applicable to the case and send it for deliberations. I would argue when the jury came out before, they had come out once and were – had not agreed upon a verdict. So if they come back again, I don't think they can be sent back without their consent. R. 224, l. 13 – 23.
>
> Defense Counsel: I was just worried, Judge, because – when she came out the first time, I was worried maybe she was

[2] Allen v. United States, 164 U.S. 492 (1896).

> coerced in going along with the other 11, and when she came out in the open courtroom, feels more comfortable to share her views. R. 227, lines 12-16.

In response, the trial judge overruled the objection under 14-7-1330, issued the Allen charge to the jury, sent them back to deliberate (attempt #3), and vowed to declare a mistrial if the deadlocked persisted. R. 225, l. 8 – R. 227, l. 11.

Soon, the jury returned with a verdict finding appellant guilty as charged. R. 228, l. 19 – 24. A jury polling followed after which time each juror answered in the affirmation regarding their issuance of the guilty verdict. R. 229, l. 3 – R. 231, l. 21.

Immediately thereafter, trial counsel renewed the objection per 14-7-1330 and moved for a mistrial on the ground that the guilty verdict was a coerced guilty verdict in the case. The trial judge denied the motion. R. 234, line 8 – 23.

S.C. Code Ann. § 14-7-1330 reads as follows:

> When a jury, after due and thorough deliberation upon any cause, return into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of law.

In other words, a judge is prohibited from returning a jury for further deliberations, without its own consent, where it has twice returned without having reached a verdict. Buff v. South Carolina Department of Transportation, 342 S.C. 416, 537 S.E.2d 270 (2000); Tucker v. Moore, 56 F. Supp. 2d 611 (1999). In Buff, the Court held that the purpose of the S.C. Code Ann. § 14-7-1330 is to prevent coerced jury verdicts and undue severity of jury service, and that a trial judge may return the jury to deliberate for a third time if the jury consents to do so or is willing to do so. The Buff Court added that when a jury has twice indicated it is deadlocked, the jury's consent to resume

or discontinue deliberations (either expressly or impliedly) must be determined by the trial judge. See State v. Freely, 105 S.C. 243 89 S.E. 643 (1916); State v. Rowell, 75 S.C. 494 56 S.E. 23 (1906) and State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1822), all of which were cases where the Court found no unwillingness on behalf of those juries to continue deliberating. Likewise, in Buff, the jury was silent, and the Court held that the jury did not demonstrate any unwillingness to comply with the judge's request to continue deliberating, which in turn meant that § 14-7-1330 was not violated.

To the contrary, however, compare the jury coercion in the case of State v. Kelley, 45 S.C. 659 24 S.E. 45 (1896), where the foreman stated that they had deliberated for 24 hours and could not agree, but the judge instructed them to continue deliberating. Compare also, the dissent in Buff where Justice Pleicones' view was that the jury's silence in the case was not tantamount to their consent to continue deliberating[3] and that "simply because the jury expressed no unwillingness to continue, [did not mean that] its consent [was] implied."

Here, the circumstances of the case established that the trial judge erred in sending the jury back to deliberate for a third time because it was clear that the jury was unwilling to do so and wanted to go to the "next step" as it was clear that they were hopelessly deadlocked and could not read a unanimous verdict that was not coerced. For example, the jury asked three questions and twice asked to hear appellant's testimony (actually the jury requested transcripts of appellant's testimony) and once asked to hear Light's and Villeneuve's (offices) testimony. Additionally, there were apparently unknown troubles and juror issues because it was not until the jury, which initially

[3] This was the Court of Appeals holding in Buff, 332 S.C. 472, 505 S.E.2d 360 (1998), prior to the South Carolina Supreme Court's reversal in Buff, 342 S.C. 416, 537 S.E.2d 279 (2000).

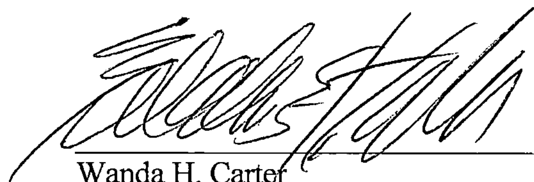
informed the court that a unanimous verdict had been reached, was polled for the first time that one juror admitted that its verdict was **not guilty**.

When the first polling of the jury occurred and one juror indicated a not guilty verdict, the send back at that point constituted their second attempt to reach a verdict. Ultimately, when the jury reappeared and announced that they could not "come to a decision" and "what would be the next step," this clearly indicated a plea for their deliberations to end (because a unanimous vote was not possible), rather than a request for the desire to continue on deliberating in the case. In other words, at the second deadlock the jury did not represent any consent, either implied or expressly, to continue their deliberations; and as a result, the trial judge's subsequent Allen charge that was given prior to their third send back to continue deliberating violated §14-7-1330, and ultimately led to a coerced jury verdict of guilty in the case. Therefore, the coerced jury verdict of guilty submitted in appellant's case cannot stand as it was submitted in violation of S.C. Code Ann. 14-7-1330.

CONCLUSION

Based in the foregoing argument, appellant's case should be reversed and remanded to the lower court on the issue of the coerced jury verdict of guilty handed down at trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

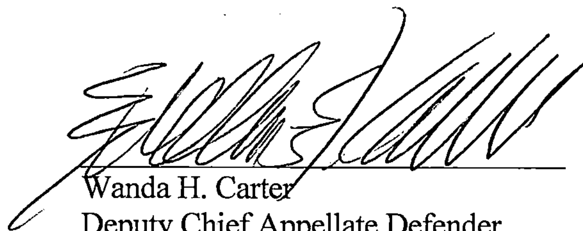
ATTORNEY FOR APPELLANT

This 22nd day of June, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

June 22, 2015



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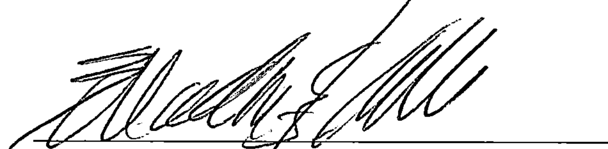
CERTIFICATE OF SERVICE

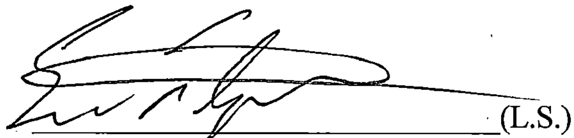
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina Catoe Bigelow, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of June, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of June, 2015.



______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.