THE STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAMIAN ANDERSON,

APPELLANT

APPELLATE CASE NO 2014-001779

Appeal from Charleston County

William Jeffrey Young, Circuit Court Judge

Opinion No. 2015-UP-568

SECOND PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel would petition for rehearing in the above titled appeal regarding this Court's holding that S.C. Code. Ann § 14-7-1330 (1976) "was never implicated" in the instant case because this Court erroneously misinterpreted the statute by placing an irrevocable attachment to the jurors' **initial** report upon their "**return**" to court by requiring a verdict of unanimity or a deadlock to be immediately etched in stone with no recognition of a verdict declared unanimous upon their **initial** "**return**" that **morphed** into a non-unanimous verdict after polling as in this case. In support of this motion, counsel would submit the following points.

1.) Appellant was convicted of assault on a police officer while resisting arrest and sentenced to imprisonment for a period of ten years. In the case at bar, the jurors deliberated twice, which is prohibited, after they deadlocked twice, and did not agree expressly or impliedly to consent to deliberate for a third time, but deliberated for a third time nonetheless per an Allen[1] charge which in effect forced a coerced third jury deliberation to occur in violation of 14-7-1330.

2.) During jury deliberations, the jurors stopped to inquire as to what constituted "under arrest" and "how does one know if not being told that they are under arrest" and "when does resisting arrest cross the line to assault." App. 309, l. 3 – 9. Then, the jury stopped and requested to hear appellant's testimony. That testimony was played. Tr. 308, l. 23 – p. 309, l. 7. Thereafter, the jury returned indicating that they had reached a verdict finding appellant guilty as charged, but when polled, juror # 391 stated that her verdict was not guilty. Tr. 309, l. 22 – p. 313, l. 17. As a result, the trial judge sent the jury back to the jury room to deliberate further. Tr. 313, l. 18 – 23. Minutes later, the jury requested two copies of appellant's testimony. Tr. 313, l. 24 – p. 314, l. 11. Defense counsel objected on the ground of "undue influence." Tr. 314, l. 9 – 13. Soon afterwards, the jury returned indicating that they were deadlocked. Tr. 315, l. 5 – 6. In response, the judge gave an Allen charge to the jury. Defense counsel's objection 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…I was just worried, Judge, because – when she came out the first time… maybe she was coerced in going along with the other 11, and when she came out in the open

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

> courtroom, feels more comfortable to share her views. App 315, l. 14 – 23.

At this juncture, the trial judge overruled the objection under 14-7-1330, issued the Allen charge to the jury, and vowed to declare a mistrial if the deadlocked persisted. Tr. 316, l. 8 – p. 318, l. 11. Finally, the jury returned with a verdict finding appellant guilty as charged. Tr. 319, l. 19 – 24. A jury polling followed, after which time each juror answered in the affirmative. Tr. 320, l. 3 – p. 322, l. 21. Trial counsel renewed the motion regarding error in having the jury deliberate three times and moved for a renewed objection and added a ground for a mistrial regarding a coerced verdict in the case. The trial judge denied the motions. Tr. 325, 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.

3.) On appeal, appellant raised the following issue:

> The trial judge erred in forcing the deadlocked jury in this case to deliberate for a third time without their consent.

4.) This Court affirmed and addressed the issue on appeal as follows:

> State v. Freely, 105 S.C. 243, 247 89 S.E. 643, 644 (1916), (stating the purpose of the statute is to prevent forced verdicts and to prevent undue severity of jury service); State v. Kelly, 372 S.C. 167, 171-172 641 S.E.2d 468, 470-71 (Ct. App. 2007) (holding "[t]here is no case law requiring or suggesting that an Allen charge be given when a juror retracts her verdict during polling and this [c]ourt will not impose such a requirement" and finding that when a juror states the announced verdict is not her verdict during jury polling, it does not necessarily indicate they jury is hopelessly deadlocked); State v. Barnes, 402 S.C. 135, 136-139, 739 S.E.2d 629, 629-631 (2013) (holding the trial court is not required to inform the jury its consent is

> necessary before deliberating a third time; Freely, 105 S.C. at 249, 89 S.E. at 644 ("if the circumstances satisfied the [court], in a wise exercise of [its]discretion, that the jury consented to the return, then it was lawful to return to them." State v. Robinson, 360 S.C. 187, 194, 600 S.E.2d 100, 103 (Ct. App. 2004) ("The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial [court's] comments." (quoting Buff v. S.C. Dept. of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000); State v. Rowell, 75 S.C. 494, 509, 56 S.E.23, 28-29, (1906) (holding the jury's consent was implied when the jury did not indicate it was unwilling to deliberate a third time.

5.) On February 4, 2016, this Court granted petitioner's **first** petition for rehearing where the following challenge to this Court's first opinion in this case follows:

> Pursuant to Rules 221 and 240, SCACR, appellate counsel would petition for rehearing in the above titled case with respect to this Court's holding that S.C. Code Ann §14-7-1330 (1976) was not violated despite the fact that the jurors deliberated thrice, which is prohibited, after they deadlocked twice where there was nothing in the record indicating that the jury consented to re-deliberate for a third time, and because it was the Allen charge in effect that forced the jury to deliberate three times. In support of this petition, counsel would submit the following points.

6.) After **granting** petitioner's **first** petition for rehearing in the case, this Court issued the following **substituted** opinion:

> We find the trial court did not err because section 14-7-1330 was never implicated. [Appellant] argues the trial court's instruction to return to deliberations after polling was a "**return**" under 14-7-1330. However, when a jury states the announced verdict during jury polling it does not necessarily indicate that the jury is deadlocked. State v. Kelly, 372 S.C. 167, 171-172, 641 S.E.2d 468, 470-71 (Ct. App. 2007)...See also State v. Drakeford, 120 S.C. 400 113 S.E. 307, 309 (1922) ("By the express terms of the statute there must first be a returned of the jury into court without having agreed upon a verdict. Therefore, we find that the jury did not "**return** into Court without having agreed upon a verdict" when polling indicated the verdict was not unanimous.

7.) When the jurors first **returned** to the courtroom, they indicated that one unanimous verdict had been reached, but when polled, juror 341 stated that her verdict was not guilty. This Court held

in effect that since the jury's **initial** "**return**" signaled one unanimous verdict had been reached, although later upon polling the verdict morphed into non-unanimous verdict; nonetheless, because the jury's **initial** "**return**" did not pronounce a deadlock, but rather morphed into a deadlock, then their "**return**" to court did not constitute a deadlock within the meaning of the statute and hence their second deliberation was not actually "in fact" a second deliberation.

8.) Clearly, to the contrary, this Court's reading of the statute to require an irrevocable attachment to the jury's **initial** declaration of unanimity or a deadlock upon its "**return**" as **immediately** etched in stone **without** the flexibility of honoring a jury verdict that appeared initially to be unanimous, but subsequently changed from unanimous to non-unanimous thereafter at polling while the jury remains at the "**return**" **stage of the case**, as in this case, would constitute a statutory misinterpretation of S.C. Code Ann. § 14-7-1330. In Hodges v. Rainey 341 S.C. 79, 533 S.E.2d 578 (2000), the Court reiterated that "the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature and that under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute, and that where the statute's language is plain and unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. In the case at bar, a jury's "**return**" to court after not having agreed on a verdict, regardless of when the non-unanimity occurred, either initially or subsequently, is a deadlocked jury "return" within the meaning of the statute in question no matter when the deadlocked surfaces in time (rather immediately upon their return or whether the deadlock surfaces shortly after their return, as in this case when the polling of the jury revealed a deadlocked appeared to exist ultimately). In other words, a deadlock that would appear initially in time or later in time upon a jury's "return" to court would constitute a return as a deadlock with the issue of time being of no consequence.

9.) Additionally, this Court held that "even if the statute was implicated we find the jury impliedly consented to return to deliberations." To the contrary, the coercive Allen instruction issued by the trial judge as they returned to deliberate for a third time meant there was no implied consent by the jury in this case to return to deliberate for a third time.

10.) In other words, this Court held in effect that there was an indication that the jury gave implied or express consent to return to the jury room for a third time after it returned deadlocked per its second deliberation. The record is devoid of any such proof establishing that the jury consented to re-deliberate for a third time. Without a doubt, the Allen instruction took away the free will of the jury to consent to continue deliberating for a third time. The Allen charge did come into play as a major influence because it was precisely the Allen charge that forced the jury to deliberate three times and denied them the autonomy of consenting to deliberate for a third time. Thus, the Allen charge was coercive in its relevance to the 14-7-1330 violation in the case.

A judge has a duty to urge a jury to reach a verdict, but a judge cannot coerce a jury to reach a verdict. Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002); Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001); State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951). However, a judge is prohibited from returning a jury for further deliberations, without its own consent, if it returns twice without having reached a verdict. Buff v. South Carolina Department of Transportation, 342 S.C. 416, 537 S.E.2d 270 (2000), reversing the Court of Appeals in Buff v. Department of Transportation, 332 S.C. 472, 505 S.E.2d 360 (1998); 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 undue severity of jury service, and that a trial may return the jury to deliberate for a third time if the jury consents to do so or is willing to do so. When a jury has twice indicated it is deadlocked, the jury's consent to resume or discontinue deliberations is determined (either expressly or impliedly) by the

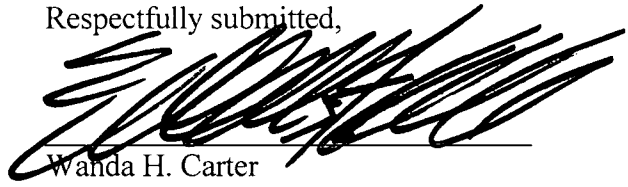
trial judge. Compare coercion in the case of State v. Kelley, 45 S.C. 659 24 S.E. 45 (1896), where the foreman stated that they had deliberated for twenty four hours and could not agree, and thus the judge's instructions for them to continue resulted in a coerced jury verdict. Also, compare the dissent in Buff to the extent that it was noted that the jury's silence was not tantamount to implied consent to continue deliberating[2] and that "simply because the jury expressed no unwillingness to continue, [would not translate that] into implied consent.

11.) Here, the circumstances of the case established that the trial judge erred in sending the jury back to deliberate for a third time in the case. After the first polling of the jury revealed that the guilty verdict was not unanimous upon their **initial first** "**return**" to court, despite the fact that the jury did not declare the deadlock immediately, but rather the deadlock morphed while they were still at the **initial** stage of their first "**return** to court," this ultimate deadlock counted as the jury's first "**return**." Likewise, the trial judge's jury send back to re-deliberate at that point constituted the first send back. Alas, when the jury re-appeared with questions and requests to rehear testimony and were apparently hopelessly deadlocked because they announced afterwards that they could not come to a decision and what would be the next step, then this was clearly a plea for their deliberations to end rather than a desire to continue deliberating. Thus, the second deadlock did not represent any consent (implied or express) to continue deliberations. Therefore, the trial judge's subsequent Allen charge that was given to the jury in this case and his order for then to continue deliberating resulted in a violation of a § 14-7-1330 and a coerced jury verdict.

[2] 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)

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing to argue that S.C. Code Ann. § 14-7-1330 was implicated and violated in this case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 10th day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMIAN ANDERSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Second Petition for Rehearing in the above-entitled case has been served upon Henry Gunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Damian D. Anderson, at Marion County Prison Camp, 2723 Highway 76 East, Mullins, SC 29574, this 10th day of March, 2016.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 10th day of March, 2016.

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