STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

William Jeffrey Young, Circuit Court Judge

Opinion No. 2015-UP-568 (S.C. Ct. App. filed 12/23/2015)

13-GS-10-02277

THE STATE,

RESPONDENT,

V.

DAMIAN ANDERSON,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the Court of Appeals' Opinion issued on December 23, 2015,[1] affirming petitioner's conviction, a petition for rehearing was filed on January 7, 2016, which was granted per Order on February 24, 2016, along with an attached Substituted Opinion that affirmed petitioner's conviction. In addition, counsel for petitioner certifies that per the Court of Appeals' Substituted Opinion issued on February 24, 2016,[2] a second petition for rehearing was filed on March 10, 2016, but denied on April 22, 2016.

[1] State v. Damian D. Anderson, Unpublished Opinion No. 2015-UP-568 (S.C. Ct. App. filed December 23, 2015).

[2] State v. Damian D. Anderson, Unpublished Opinion No. 2015-UP-568, Withdrawn, Substituted and Re-filed (S.C. Ct. App. filed February 24, 2016).

QUESTION PRESENTED

The Court of Appeals erred in affirming petitioner's trial court conviction despite the statutory violation that occurred when the jury deadlocked twice and deliberated thrice by holding that S.C. Code Ann § 14-7-1330 was neither violated[3] nor implicated[4] in the case because the record established that the jurors over-deliberated and did not agree to continue deliberating, but rather were coerced to do so instead.

[3] State v. Damian D. Anderson, Unpublished Opinion No. 2015-UP-568 (S.C. Ct. App. filed December 23, 2015).

[4] State v. Damian D. Anderson, Unpublished Opinion No. 2015-UP-568, withdrawn, substituted and Re-filed (S.C. Ct. App. filed February 24, 2016).

STATEMENT OF THE CASE

Petitioner Damian D. 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 petitioner at trial, and Assistant Solicitors David Osborne and Chad Simpson appeared on behalf of the state. Judge Young sentenced petitioner to imprisonment for a period of ten years.

Petitioner appealed his conviction and sentence. On December 23, 2015, the Court of Appeals issued an opinion affirming petitioner's conviction and sentence. App.1-2. See State v. Anderson, Unpublished Opinion No. 2015-UP-568 (S.C. Ct. App. filed December 23, 2015). A petition for rehearing was filed on January 7, 2016. App. 3-9. On February 24, 2016, the Court of Appeals granted the petition for rehearing and issued a Substituted Opinion in the case. App. 10. See State v. Anderson, Unpublished Opinion No. 2015-UP-568, Withdrawn, Substituted and Re-filed (S.C. Ct. App. filed February 24, 2016). App. 11 – 13. A second petition for rehearing was filed on March 10, 2016. App. 14-22. On April 22, 2016, the Court of Appeals denied the second petition for rehearing. App. 23.

This petition for review of the Court of Appeals' decisions in petitioner's case follows.

ARGUMENT

The Court of Appeals erred in affirming petitioner's trial court conviction despite the statutory violation that occurred when the jury deadlocked twice and deliberated thrice by holding that S.C. Code Ann § 14-7-1330 was neither violated[5] nor implicated[6] in the case because the record established that the jurors over-deliberated and did not agree to continue deliberating, but rather were coerced to do so instead.

Violation of S.C. of S.C. Code Ann. § 14-7-1330

In this case, the jury deliberated three times after they deadlocked twice, which is prohibited per S.C. Code Ann. § 14-7-1330. Note that the record is devoid of any proof that the jury consented to deliberate for a third time and additionally, it was the Allen[7] charge that coerced them into continuing to deliberate in the case.

Petitioner was convicted of assault on a police officer while resisting arrest and sentenced to imprisonment for a period of ten years.

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 asked to hear petitioner's testimony. That testimony was played. Tr. 308, l. 23 – p. 309, l. 7. Thereafter, the jury indicated that they had reached a verdict finding petitioner 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

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[5] State v. Damian D. Anderson, Unpublished Opinion No. 2015-UP-568 (S.C. Ct. App. filed December 23, 2015).

[4] State v. Damian D. Anderson, Unpublished Opinion No. 2015-UP-568, withdrawn, substituted and Re-filed (S.C. Ct. App. filed February 24, 2016).

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

sent the jury back to the jury room to deliberate further. Tr. 313, l. 18 – 23. Minutes later, the jury requested two copies of petitioner'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 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 petitioner 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 and moved for a renewed objection and grounds for a mistrial regarding a coerced verdict in the case. The trial judge denied the motion. 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 of law.

On appeal, petitioner 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.

This Court of Appeals affirmed based on the following authorities:

> 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 the jury is hopelessly deadlocked); *State v. Barnes*, 402 S.C. 135, 136-139, 739 S.E.2d 629, 629-631 (2013) (holding the trial a third time); *Freely*, 105 S.C. at 248, 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. Dep't 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.

The Court of Appeals addressed this issue of whether it was proper for the trial judge to give an Allen charge; however, the efficacy of an Allen charge in the case was not the substantive issue raised on appeal. To the contrary, the issue on appeal concerned the violation of the statute that a deadlocked jury is prohibited from deliberating more than two times. See S.C. Code Ann 14-7-1330. Nonetheless, the Allen charge came into play **only** 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).

Also, the Court of Appeals 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. To the contrary, the Allen instruction took away the free will of the jury to consent to continue deliberating for a third time.

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. 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). 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[8] and that "simply because the jury expressed no unwillingness to continue, [would not translate that] into implied consent.

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 indicated the guilty verdict was not unanimous, the trial judge sent the jury back to deliberate. This was the equivalent of a deadlocked jury and that send back constituted the first send back. Then, the jury reappeared with questions and requests to rehear testimony and were apparently hopelessly deadlocked because they announced that they could not come to a decision and what would be the next step, which clearly can be interpreted as a plea for the deliberations to end rather than a desire to continue deliberating. In other words, 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.

Applicability of S.C. Code Ann. § 14-7-1330

The fact that the jury initially returned with was thought to have been a verdict that was unanimous, but morphed into a non-unanimous verdict immediately after polling, did not nullify its classification as the first deadlock. Then, the jury's second return, wherein they indicated they were deadlocked, constituted a second return. Finally, the jury's third deliberation attempt implicated[9] the applicability of S.C. Code Ann § 14-7-1330, and the question of whether S.C. Code Ann § 14-7-1330 had been violated.

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[8] 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)

[9] In its Substituted Opinion, the Court of Appeals held that "14-7-1330 was never implicated."

After **granting** petitioner's **first** petition for rehearing in the case, the Court of Appeals issued the following **Substituted** Opinion:

> We find the trial court did not err because section 14-7-1330 was never implicated. [Petitioner] 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.

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. The Court of Appeals 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 that **initial** "**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.

Clearly, to the contrary, the Court of Appeals' reading of the statute as 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 lack of unanimity materialized, 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.

Here, the particular circumstances in the case at bar established that the trial judge erred in sending the jury back to deliberate for a third time. 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**." Thereafter, when the trial judge sent the jury send back to re-deliberate, this 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. No jury actions via the

second deadlock indicated any consent (implied or express) to continue deliberations. Thus, S.C. Code Ann.§14-7-1330 was implicated and violated in petitioner's case.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant this petition and allow full briefing on the above raised points.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of May, 2016

RECEIVED

MAY 18 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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THE STATE,

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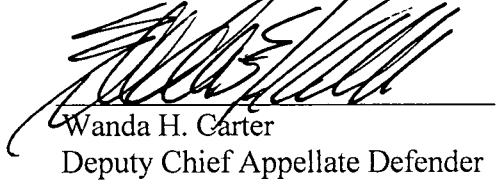
CERTIFICATE OF SERVICE

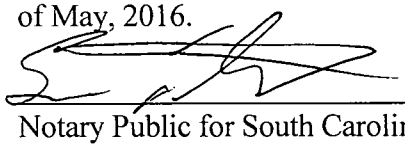
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Henry Gunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Damian D. Anderson #316387, at Marion County Prison Camp, 2723 Highway 76 East, Mullins, SC 29574 and the S.C. Court of Appeals this 18th day of May, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of May, 2016.



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