

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2016-001905

THE STATE,RESPONDENT,

v.

CHARLES BRANDON RAMPEY,APPELLANT.

RESPONDENT'S PETITION FOR REHEARING

On August 19, 2020, this Court issued an unpublished opinion in which it reversed Appellant's conviction for third-degree CSC with a minor. State v. Rampey, 2020-UP-245 (S.C. Ct. App. Filed August 19, 2020). This unpublished opinion, without referencing specific language upon which this Court based its reversal, found the trial judge erred in charging the jury pursuant to Allen v. United States, 164 U.S. 492 (1896). Due to the limited information within the opinion itself, and the fact that the Court issued this reversal without oral argument, the State is unsure of the exact basis upon which this opinion was issued. However, the State believes the facts presented in its brief show that the Allen charge issued in this case was, without question, not coercive to the jurors. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes this Court misapprehended and overlooked the facts, law, and standard of review in reaching its rulings on both issues.

The Allen Charge Provided by the Trial Judge

The trial judge provided the following Allen charge to the jury:

All right. Ladies and gentlemen, I've received your note and I sympathize with you. I recognize this is a difficult case and it's difficult to come to a resolution. It's hard enough for two people to agree on anything, so it's particularly difficult, oftentimes, for 12 people who have just met each other and have been thrust into a jury room to deliberate to agree on a verdict in the case. So I sympathize with you in that regard. I sympathize with you because I recognize this is a very difficult decision for each of you to make, both collectively and personally.

But I do want to impress upon you that there have been many resources that've been brought to bear this week to bring this case to trial. The State of South Carolina, the County of Pickens, the parties to this case have expended substantial and significant resources to bring this case to trial. If you were to fail to come to a verdict in this case, then this case would simply have to be tried again. Twelve other people in the county of Pickens would come to trial and would hear the same witnesses, the same evidence, same arguments and would be tasked with deliberating on the case. Now, there are no 12 other people in the county of Pickens who are more capable, who are more able, who are more competent to reach a decision in this case than you are.

Now, I recognize that it's a very difficult decision to make, but these parties deserve finality and they deserve a decision. So I would ask you to return to your jury room and continue deliberations. Those of you who may be in the minority, I would ask you to consider the position of the majority. Those of you who are in the majority, I would ask you as well to consider the position of the minority again and see if you can come to some resolution in this case. I know that's not what you wanted to hear when I brought you back out there, but, again, this is important and a lot of resources have been expended to get to this point in time. And these parties deserve a verdict. So I ask you to return to your jury room and attempt to come to a verdict. Thank you very much.

(R.p.221, line 20–R.p.238, line 11).

Analysis

“An Allen charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's arguments.” State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007) (internal quotation marks omitted), aff'd 387 S.C. 310, 692 S.E.2d 895 (2010). “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, 490, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)).

“In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel.” Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). “Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other’s views.” Id. “A trial judge has a duty to urge, but not coerce, a jury to reach a verdict.” Id. In Tucker, the Supreme Court of South Carolina adopted the standard established by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. Those factors are:

- (1) Whether the charge spoke specifically to the minority juror(s);
- (2) The language of the charge, including statements such as “You have [] to reach a decision in this case”;
- (3) Whether the trial judge inquired into the jury’s numerical division, a question generally considered coercive; and
- (4) Weighing the length of time between the issuance of the Allen charge and the jury’s return of a verdict (with verdicts returned “shortly after” the supplemental charge suggesting a possibility of coercion) against trial counsel’s failures to object either to the charge itself or an inquiry whether the jurors believed further deliberation would result in a verdict.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237).

Pursuant to the Tucker factors, two of the Lowenfield factors immediately favor the State: the trial judge’s charge neither spoke specifically to the minority jurors, nor did he inquire into the jury’s numerical breakdown. Even Appellant does not contest these factors in his brief: Appellant directly concedes the first factor and fails to mention the third¹ factor.

¹ In his brief, Appellant refers only to three Lowenfield factors in his brief, and states the length of the jury’s deliberations is the third factor. (Br. of Appellant pp.11–12)

The fourth factor, the length of time between the issuance of the Allen charge and the jury's verdict, also supports the charge's constitutionality. While it is true the jury only deliberated from 2:11 p.m. to 3:28 p.m. after receiving the charge, such a period was very reasonable in that situation. The pre-Allen deliberations occurred from 11:45 a.m. to 12:40 a.m., and 12:43 p.m. to 2:07 p.m., totaling 2 hours, 19 minutes; over a third of the jury's deliberations occurred after the trial judge issued the charge. In Tucker, the Supreme Court of South Carolina stated the post-Allen deliberation period, approximately an hour and a half, was a "relatively short period of time" in that case because deliberations in that case began at 1:33 p.m. on the first day of deliberations, the jury became deadlocked around 5:00 p.m. that day, and the jury received an Allen charge around 11:00 a.m. on the second day, returning with a verdict around 12:27 pm. In total, the jury deliberated for approximately eight and a half hours, over half of that deadlocked before receiving the Allen charge. Id. at 485–88, 494, 552 S.E.2d at 713–14, 718. Here, unlike Tucker, the post-Allen discussions constituted a significant portion of the jury's deliberations. Moreover, unlike Tucker, the jurors here spent a minority of the deliberations "deadlocked."

As to the second factor, the charges, overall, conveyed the appropriate, constitutional charge to the jury. The trial judge never told the jury they were required to reach a decision in the case: while he did state the parties "deserve[d] finality," he clearly asserted that he was only asking the jurors to return to the jury room and "attempt" to reach a verdict also informed the jurors that if they failed to reach a verdict, the case would simply be retried. This is a drastic difference from the Allen charge presented in the Taylor case, cited by this Court in its opinion. In State v. Taylor, 427 S.C. 208, 829 S.E.2d 723 (Ct. App. 2019), the trial judge repeatedly told the jurors they "should come to a decision" in that matter. Id. at 211–12, 829 S.E.2d at 725. In

fact, the Taylor court itself explained, “[t]here is a glaring difference between the trial court’s obligation to tell jurors they have a duty to attempt to reach a unanimous verdict and telling them they ‘should come to a decision.’” Id. at 215, 829 S.E.2d at 727. Notably, the Taylor court found that the trial judge’s instructions “skirt[ed] close” to prohibited language; thus, the trial judge’s instruction, which utilized the “attempt” language also found in Taylor, were safely within the realm of acceptable, non-coercive instructions which did not violated the second Lowenfield factor. See id.; also State v. Logan, 405 S.C. 83, 90–91, 747 S.E.2d 444, 448 (2013) (“A jury charge is correct if, when read as a whole, the charge adequately covers the law.”) (citing State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011)).

Accordingly, the traditional Tucker/Lowenstein factors all weigh against this Court’s reversal of Appellant’s conviction.

Taylor and its Expansion of Tucker

The State believes, based on the limited information available in this Court’s unpublished opinion, this decision to reverse Appellant’s conviction is based primarily upon this Court’s consideration of an additional factor to the four stated in Tucker: the absence of language instructing the jurors they “should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict.” See Taylor, 427 S.C. at 218, 829 S.E.2d at 729. However, this Court’s creation of this new factor and application of it to both the instant case and Taylor is problematic for several reasons.

First, it is worth emphasizing that Taylor appears to create a “new” fifth factor which, without consideration of the other Lowenstein factors, is a basis for reversing a verdict. This interpretation of Taylor appears to be confirmed in the Court’s unpublished opinion of the instant

case, in which it fails to perform any analysis of the traditional Lowenstein factors and skips directly to portions of Taylor from which the State draws this interpretation:

The Tucker Criteria have never been deemed comprehensive. . . . The most troubling thing about the charge . . . is what it did not say: it did not tell the jurors they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict, an essential message that sometimes saves borderline charges from crossing the line into coercion.”

See Taylor, 427 S.C. at 218–19, 829 S.E.2d at 729.

The addition of this factor, which ignores and/or trumps the other factors, is problematic for two main reasons. First, Allen and its progeny consistently emphasize that the constitutionality of an Allen charge must be considered “in its context and under all the circumstances.” See, e.g., Lowenfield at 237. Second, the consideration of language instructing jurors to not surrender their conscientiously held beliefs simply for the sake of reaching a verdict is already a part of the Lowenfield test. For example, the Tucker court, when determining whether the Allen charge spoke specifically to the minority jurors, explained that the trial court’s instruction that jurors “should not do ‘violence to his or her own conscience’ in order to reach a verdict” was language weighing against a finding of coercion. See Tucker at 492–93.

Notably, the cases upon which Taylor relies are distinguishable from it and do not support its addition of the fifth factor. In fact, these cases are entirely consistent with the traditional treatment of “conscience” instructions within the Tucker framework. In Buff v. S.C. Dep’t of Transp., 342 S.C. 416, 537 S.E.2d 279 (2000), the Supreme Court considered instructions related to S.C. Code § 14-7-1130, which provides that if a jury reports deadlock to the trial court a **second time**, “it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of law.” 342 S.C. at 419-20, 537 S.E.2d at 281. The significant fact for the issue on appeal was whether the jury expressed consent to

further deliberations. 342 S.C. at 423, 537 S.E.2d at 283. The referenced statute has the dual purpose of “prevent[ing] forced verdicts, **and** to prevent undue severity of jury service.” 342 S.C. at 402, 537 S.E.2d at 281 (quoting State v. Freely, 105 S.C. 243, 247, 89 S.E.643, 644 (1916)) (emphasis added). The inquiry for error does not share the same focus as that of review of an Allen charge. Id. See also State v. Barnes, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) (finding relief due under the statute where jury did not consent to being sent out again). At any rate, the Court did not pass on the propriety of an Allen charge. Thus, the case lends no direct and necessary support to the Court’s reasoning.

Further, in Blake by Adams v. Spartanburg Gen. Hosp., 307 S.C. 14, 413 S.E.2d 816 (1992), the Supreme Court considered the effect of bailiff comments to the juror that “urg[ed] the jury to reach a verdict,” including “the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers.” 307 S.C. at 16, 413 S.E.2d at 817. In distinguishing bailiff comments from a judge’s charge, the court noted “a trial judge has the duty to ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict.” 307 S.C. at 18, 413 S.E.2d at 818. The court also found “the bailiff’s remarks were not offset by a statement that each juror should not surrender his conscientious convictions merely to reach an agreement,” consequently, “under the facts of this case,” it found no abuse of discretion in granting a new trial. Id. The Supreme Court did not pass on the propriety of an Allen charge, or even accept the bailiff comments would not be error if the additional language was included. Blake does not support the necessity of the language in an actual Allen charge. As with Buff, the Blake opinion does not lend direct and necessary support to the Court’s reasoning.

The last, and perhaps most significant, problem with Taylor and its application to the instant case is that by ignoring the totality of the circumstances surrounding the charge, this

Court also ignores arguably the most important evidence that jurors were not unconstitutionally coerced: confirmation by the jurors themselves. After the jury rendered its verdict, the trial judge, seeking to confirm the Allen charge did not unduly coerce the jurors into reaching a verdict, asked them to raise their hands if any of them felt they “compromised a firmly-held position and simply agreed to go along with the remaining [jurors]” in reaching their verdict. None of the jurors raised their hands. (R.p.238, line 12–R.p.242, line 11). This action by the trial judge actually sets this case apart from Tucker and other South Carolina cases involving the Allen charge because none of the other cases involved confirmation from jurors themselves that they were not coerced. This Court’s opinion overlooks this critical piece of evidence which shows, even without the language requested by Appellant, the jury’s verdict was unaffected by the trial judge’s instructions.

In summary, the State accepts and acknowledges that language instructing jurors to not compromise their beliefs simply to reach a unanimous verdict is an important consideration when determining the constitutionality of an Allen charge. However, the State believes that pursuant to Tucker and other Allen cases, it is best utilized within the traditional Lowenfield framework. By failing to consider the totality of the circumstances surrounding the Allen charge in the instant case, this Court assumed the jurors were improperly coerced into their verdict despite the jurors themselves indicating the opposite.


Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court reinstate Appellant’s conviction for third-degree CSC with a minor.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

By: 

William F. Schumacher, IV
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3713

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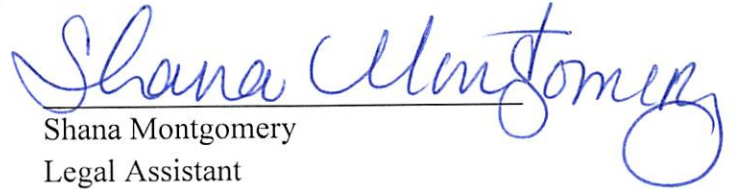
CHARLES BRANDON RAMPEY,APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Petition for Rehearing on Appellant via electronic email to the address listed by the attorney in AIS, and by depositing one copy of the same in the United States mail, postage prepaid, to:

William G. Yarborough, III
522 N. Church Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served this 3rd day of June, 2020.



Shana Montgomery
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

Shana Montgomery

From: Shana Montgomery
Sent: Thursday, September 3, 2020 11:10 AM
To: wgyarborough@gmail.com
Cc: Shana Montgomery; Bill Schumacher
Subject: State V. Charles Rampey ; Appellate Case No. 2016-001905
Attachments: 02371010.PDF

Good Morning,

Enclosed you will find a copy of the State's Petition for Rehearing in the above referenced case. Please confirm receipt. This document will also be upload to the Court of Appeals today using our AIS system. A hard copy will also be placed in today's mail. Please don't hesitate to contact me should you have any questions or concerns.

Thank You.

Shana Montgomery
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

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