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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001542

THE STATE,.....RESPONDENT,

V.

LARRY E. ADGER, III.....APPELLANT.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant, Larry E. Adger, III, hereby files this petition for rehearing. The Court issued its decision, unpublished opinion No. 2021-UP-415 on November 17, 2021. Accordingly, this petition is timely under Rule 221(a) SCACR.

Mr. Adger resubmits the arguments from his briefs on the merits of the issues raised in this appeal as if stated verbatim herein, which arguments were not addressed in the Court's opinion and additionally submits the following issues that the Court may have overlooked or misapprehended in reaching the decision:

I. The Court Overlooked paragraph (3) of Appellant's brief that the trial judge interjected himself into the decision of the jury.

Neither the brief of the Respondent nor the Court of Appeals addressed this core issue.

The only reference in Respondent's brief on this issue is contained at lines 4-5 of page 10 of Respondent's brief:

"also informed the jurors that if they failed to reach a verdict, the case would simply be retried with a new jury."

The trial judge went further, instructing the jury:

"If you do not agree on the verdict in this case, I must declare a mistrial. In that case, it does not mean anyone wins It just means that at some point in the future, I will try this case with some other jury setting where you now sit. The same participants will come in, and the same players are asked the same questions and give basically the same answers and we'll go through whole process again.

You were selected in the same manner and from the same source as any future jury will be. And there's no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious, and competent jurors than you or that more clearer evidence will be produced on one side or the other."
Therefore, Mr. Foreman, I'm going to ask that you go back and continue your deliberations if you will, please sir. Thank you." (R. p. 21, lines 7-25)

Because the trial judge is the authority figure in the courtroom, jurors look to the trial judge for guidance not only on the law, but for matters such as courtroom conduct and protocol, even permission for breaks, meals and telephone calls. Recognizing the enormous power such influence can wield and its capacity to compromise impartiality, our constitution forbids the trial judge from commenting on the facts.

Article V. Section 21. Judges shall not charge juries in respect to matters of fact, but shall declare the law. (1972 (57) 3176; 1973 (58) 161; 1985 Act No. 9.)

It is precisely because jurors scrutinize the trial judge's statements and instructions - - a scrutinizing that becomes more acute amidst heated deliberations - - that the trial judge should couch them in as neutral and dispassionate terms as language and context permit.

Even an otherwise benign remark, such as "you should come to a decision" could be interpreted by a rational juror that this trial judge believes the result is obvious, or at least capable of unanimous agreement.

"The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling." *Quercia v. United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933)

The *Taylor*, supra Court found the trial courts' *Allen* Charge as unconstitutionally coercive. *State v. Taylor* [829 S.E.2nd 730]

The trial judge's instructions to the jury here were patently untrue and gave the jury the illusion that this trial judge must be placated. The instruction that *"It just means that at some point in the future, I will try this case with some other jury and there's no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious, and competent jurors"* is not found in any cases from any jurisdiction in South Carolina, the Federal Courts, or any other State Courts and is particularly and unconstitutionally coercive.

It is impermissible for a Court to pit one Court against "some future" Court with a potential decision of another future jury and is a deviation of the requirement to assess all circumstances surrounding the jury's progress, an impossibility with a potential future jury.

After the jury announced for the second time that they were at an impasse the contested *Allen* Charge was given and the jury returned their verdict in 53 minutes.

The charge was unconstitutionally coercive under the entire context and circumstances under which it was given.

II. The Court misapprehended the full decision in *Tucker v Catoe*, 346 S.C. 483, 552 S.E.2nd 712 (S.C. 2001) in declining coercion as it applies to this case.

The Court only considered the four factors in deciding whether or not to find coercion.

The Court cited *State v. Taylor*, 427 S.C. 208, 829 S.E.2d 723 (S.C. App. 2019) and *Tucker,* supra, as support for their decision affirming Defendant's conviction.

In the *Taylor*, supra, case the *Allen* charge was found to be unconstitutionally coercive and the lower court's decision was reversed and the case remanded for a new trial. (829 S.E.2nd 730)..

In the *Tucker*, supra case, the Supreme Court of South Carolina found the giving of the *Allen* charge in combination with other factors to have been unconstitutionally coercive, shocking to the universal sense of justice and granted the petitioner a writ of habeas corpus and ordered a new sentencing proceeding.

The *Tucker*, supra test does not tell us the relative weight each factor carries, nor is the list of factors exclusive. Id at 491, 552 S.E.2nd at 716 (emphasizing the coercion decision is very fact intensive).

The Trial Court in *Tucker*, supra charged the jurors *"[W]hen 12 men and women must agree as to a particular decision, it becomes correspondingly more difficult, but it's important that jurors reach a unanimous verdict....*

It was never intended that the verdict of the jury should be the view of any one person. On the other hand, the verdict of the jury is the collective reasoning of all of the men and women serving on the panel. That's why we have a jury, so that we may have the benefit of collective thought and of collective reasoning.

Now, it becomes each of your duties as jurors to tell the other jurors how you feel about the case and why you think as you do. It becomes each of your duties to exchange views with the other jurors, and you should listen to each other and give to the other's thought such meaning as you think it should have."

The Supreme Court of South Carolina found that the language of the trial judge set forth above was "an unconstitutionally coercive *Allen* charge with its emphasis on a collective result. *Tucker* supra.

The trial courts instruction in this case before the court stated:

The Court: *"If you do not agree on the verdict in this case, I must declare a mistrial. In that case, it does not mean anyone wins. It just means that at some point in the future, I will try this case with some other jury setting where you now sit. The same participants will come in, and the same players are asked the same questions and give basically the same answers and we'll go through whole process again.*

You were selected in the same manner and from the same source as any future jury will be. And there's no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious, and competent jurors than you or that more clearer evidence will be produced on one side or the other."

Therefore, Mr. Foreman, I'm going to ask that you go back and continue your deliberations if you will, please sir. Thank you." (R. p. 21, lines 7-25).

The language of this charge with it's emphasis on a collective result is unconstitutionally coercive *Allen* charge as found in *Tucker*, supra.

Workman, 412 S.C. at 130, 771 S.E.2nd at 638 (stating coerciveness must be gauged by context and circumstances.

The judge's charge that "*As I instructed you earlier, in order for your verdict to stand. it will have to be unanimous*" is an erroneous charge.

[The verdict] does not have to be unanimous "to stand" The verdict stands on its own merit whether the jurors are split as to their opinion or not.

The Court continued with its instruction "*However, you have a duty to make a reasonable effort to reach a unanimous verdict*". This mandatory instruction is erroneous also.

Jurors only have a duty to consider the law and the evidence in rendering their decision, Tucker, supra.

Also, the charge to reevaluate your position for reasonableness, correctness and impartiality" conveys the impression to the individual juror that his thinking is eskew.

The Court of Appeals decision overlooked language in the trial court's *Allen* charge not found in *Allen*, *Taylor*, *Workman* and *Tucker* in finding that the charge was even handed fair and did not exert improper pressure on the jury.

The charge in *Tucker*, supra provided:

"It is your decision as to the appropriate sentence that should be imposed in this particular case based upon your view of the evidence as well as the application of the law.

"To tell the other jurors how you feel about the case and why you think as you do. It becomes each of your duties to exchange views with the other jurors, and you should listen to each other and give to the other's thought such meaning as you think it should have.

The judge in *Tucker*, supra, then directed the jury to "*Go back into the jury room and continue your deliberations and see if you can come to a unanimous verdict.*"

At no time did the judge in *Tucker*, supra charge "You have a duty to make a reasonable effort to reach a unanimous verdict as the trial judge did in this case.

CONCLUSION

For the reasons stated above, this Court overlooked and misapprehended several points in its decision. The Court therefore should grant a rehearing and issue an opinion remanding the case for a new trial due to the unconstitutionally coercive charge to the jury.

Respectfully submitted,

/s/ Charles W. Whiten, Jr.
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PROOF OF SERVICE

This is to certify that I, Carla R. Whiten, with the Law Offices of Charles W. Whiten, Jr. P.A. have caused to be served this day one (1) copy of Appellant's Petition for Rehearing by electronic mail delivery of same to the recipients listed and at their Attorney Information System provided email addresses below and via the attached emails:

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November 30, 2021

VIA ELECTRONIC FILING
The Honorable Jenny Abbott Kitchings
1220 Senate Street
Columbia, South Carolina 29201

Re: State vs Larry E. Adger, III
Appellate Case No.: 2019-001542

Dear Ms. Kitchings:

Attached for electronic filing in accordance with Supreme Court Order 2020-05-29-02, parts (c)(6) and (f), please find **Appellant's Petition for Rehearing** in the above-referenced matter. As permitted by Order 2020-05-29-02, part (d) no other copies, whether paper or electronic, are being provided.

By copy of this letter, we are serving counsel of record via electronic mail only and enclose a Proof of Service to that effect, with transmittal email, as provided for under Order 2020-05-29-02, part (g)(3). If you have any questions or if you need any additional information, please do not hesitate to contact me.

Thank you for your usual courtesies in these matters.

Sincerely,

Charles W. Whiten, Jr.
Attorney at Law

CWW/crw

cc: William Blitch < wblitch@scag.gov
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