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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2010-UP-427 (S.C. Ct. App. filed 10/11/2010)
07-GS-19-011.

THE STATE,

RESPONDENT,

V.

STEVEN LOUIS BARNES,

APPELLANT

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the judge err in refusing to declare a mistrial, in violation of S.C. Code §14-7-1330, when the jury returned deadlocked twice and did not ask for further instruction from the judge?

STATEMENT

In March of 2008, the Edgefield County Grand Jury indicted Barnes for throwing bodily fluids, indictment #2008-GS-19-011. On March 12, 2008, Barnes proceeded to jury trial before the Honorable R. Knox McMahon. Attorney W. Greg Seigler represented Barnes at trial. The jury returned a verdict of guilty and Judge McMahon sentenced Barnes to 15 years consecutive to any active sentence being served. A timely notice of intent to appeal was filed on March 19, 2008, and the direct appeal was perfected. On October 11, 2010, the Court of Appeals affirmed the conviction and sentence. State v. Barnes, 2010-UP-427 (S.C. Ct. App. filed October 11, 2010). The petition for rehearing was timely filed on October 26, 2010. The petition for rehearing was denied on January 28, 2011. On April 29, 2011, a petition for wit of certiorari was filed with this Court. On March 9, 2012, this Court granted the petition for writ of certiorari and ordered briefing. This brief of petitioner follows.

ARGUMENT

The judge erred in refusing to declare a mistrial, in violation of S.C. Code §14-7-1330, when the jury returned deadlocked twice and did not ask for further instruction from the judge.

The jury began deliberating at 4:45 PM. (R. p. 56, lines 5-6). At 5:38 PM the jury returned to the courtroom. The judge stated, "It appears our jury is back present in the courtroom, along with our alternate at this time. I received your note Mr. Foreman, 'We are unable to reach a verdict in this case.'" (R. p. 57, lines 7-10). The judge then gave an Allen[1] charge. (R. p. 57, lines 11 – p. 58, 59, lines 1-18). The judge advised that the note sent by the jury included the break down, nine for guilty and three for not guilty. (R. p. 60, lines 1-2). The note was made a part of the record and marked as Court's exhibit # 2. (R. p. 59, lines 21-23; R. p. 81). Barnes did not object to the charge.

At 6:14 PM the judge received another note from the jury asking for further instruction. (R. p. 60, lines 15-19). This note was also made a part of the record and marked as Court's exhibit #3. (R. p. 60, lines 20-21; R. p. 82). The jury returned to the courtroom and the judge re-charged the law on direct and circumstantial evidence. (R. pp. 61, line 1 – p. 62, lines 1 – p. 63, lines 1 – 16). Barnes did not object to the re-charge.

At 6:44 PM the judge received another note indicating that the jury was unable to reach a verdict. (R. p. 63, line 25 – p. 64, lines 1-10). The note was made a part of the record and marked as Court's Exhibit #4. (R. p. 68, lines 3-4; Supp. R. p. 1). The judge commented that the note said, "'One not guilty, lock, will not change their vote.'" (R. p. 64, lines 8-10). Barnes objected to sending the jury back for further deliberations. (R. p. 64, lines 16-25). Barnes noted that the jury

[1] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

was not requesting further instruction. (R. p. 64, lines 21-22). When the jury returned deadlocked for the second time, the trial judge asked the jury:

> About quarter to five my court reporter tells me. Of course, it's now perhaps past some of y'all's suppertime, I'm not sure. But you have been out for some three hours, and it's obvious that you have worked very diligently and very focused on the task at hand in fulfilling your duties and responsibilities under the oath y'all have taken.
>
> Obviously court is going to be operating tomorrow. I would have no problem whatsoever to releasing y'all from your service tonight and asking you to return in the morning after having slept on it and having kept your counsel.
>
> You certainly could not discuss it with any person during this break, just like a lunch break or regular evening break or anything of that nature and just come back fresh in the morning and go from there.
>
> That is the absolute option that I would choose to take. Sometimes I forget I'm a judge, so I know I can order it, but at the same time y'all are the judge's of the facts in the case. I don't want to necessarily dictate that.
>
> But would y'all be amenable to that? I know I have one juror who is protected for Friday. Of course, I see no way we would go into Friday, but that would give y'all the opportunity to sleep on it tonight and come back and start fresh in the morning. Would you discuss that with your fellow jurors? Do you think that would be an option, Mr. Foreman?

(R. p. 66, lines 4 – p. 67, lines 1-6).

In response to the judge's question, the foreman stated, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." (R. p. 67, lines 7-9). Rather than accepting the foreman's comment as a clear indication of the jury's desire to discontinue deliberations as they would be futile, the judge stated, "All right. Well, I appreciate that very much; however, I am going to decline to declare a mistrial at this time. I am going to ask you – I will release y'all from your jury service for the remainder of the

evening." (R. p. 67, lines 10 – 14). Barnes objected. (R. p. 68, lines 12-16). The judge did not question whether the jury's deliberations of almost two hours for a one day trial with only two witnesses constituted due and thorough deliberation.

The next morning the jury returned and reached a verdict of guilty. (R. p. 70, lines 11-16). Barnes renewed his objections and motions. The judge again denied the motions noting that he had reviewed S.C. Code §14-7-1330 and the case of State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). (R. p. 72, lines 16-21). The judge stated that after receiving the second note indicating that the jury was unable to reach a verdict, "I did not Allen charge them at that time. I did have a brief colloquy with the foreperson. He indicated uncertainty of whether or not the particular juror would or would not change 'their,' as he indicated on his note, his vote. As I say, I did not Allen charge them at that time. I did not feel that they were withholding consent to continue deliberations. However, I felt in my discretion it was best to send them home for the evening and allow them to return in the morning." (R. p. 73, lines 23 – p. 74, lines 1-7). The judge went on to state, "I did not get an indication they were unwilling to continue deliberations. Obviously they were not. I think there has been compliance with both 14-7-1330 and State versus Pauling." (R. p. 74, lines 12-15). The judge erred in refusing to grant a mistrial when the jury returned with a second note indicating that they were unable to reach a verdict.

S.C. Code §14-7-1330 provides:

> When a jury, after due and thorough deliberation upon any cause, returns 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 the law.

The jury in Barnes' case returned a second time without having agreed upon a verdict. The jury did not request further instruction on the law. Contrary to the judge's recollection of the foreperson's "uncertainty," the record reflects that the foreperson did not believe the jury would be able to agree on a verdict. When asked if they wished to continue deliberations in the morning, the foreman stated, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." (R. p. 67, lines 7-9). The note reflects that one juror will not change their vote. (Supp. R. p. 1). The foreman's statement indicates a lack of consent to continue to deliberate. The record fails to reflect that the jury consented to further deliberations.

In State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996), the Court found that the trial judge did not abuse his discretion in determining that the jury consented to further deliberations after returning twice without reaching a verdict. In Pauling, unlike in the present case, jurors stated that a verdict could be reached and, importantly, one juror asked to be able to submit questions to the trial judge before renewing deliberations on the next day. In Barnes' case, the foreman indicated that he did not believe the jury could agree to a verdict and none of the jurors asked to submit questions or receive further instruction.

The State's reliance on State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916) and State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1922) is misplaced because in each of those cases the second "return" of the jury was not at the request of the jury but rather the judge. Additionally, in both cases the Court found no indication of unwillingness on the part of the jury not to return for further deliberations. In the present case the foreman's comment that the he believed the jury was unable to reach a verdict is an indication of unwillingness to return for further deliberations.

Once the jury returned a second time without reaching a verdict and not requesting further instruction, the judge was without authority to allow the jury to adjourn for the evening and continue deliberations in the morning. Prior to the foreman telling the judge that he did not believe the jury could reach a verdict, the judge said to the jury,"That is the absolute option that I would choose to take [adjourning for the evening and returning for continued deliberation in the morning]. Sometimes I forget I'm a judge, so I know I can order it, but at the same time ya'll are the judges of the facts in the case. I don't want to necessarily dictate that." (R. p. 66, lines 20-24). The judge, however, "dictated" that the jury would return in the morning for further deliberations. The judge erred. The judge was statutorily prohibited from ordering further deliberation. There is nothing in the record to support that the jury consented, expressly or impliedly, to further deliberations.

The judge's erroneous instruction that he could order further deliberations and that was the absolute option he would choose prevents a finding that the jury impliedly consented to further deliberations as the Court found in Buff v. South Carolina Dept. of Transp., 342 S.C. 416, 537 S.E.2d 279 (2000). As Justice Pleicones notes in his dissent in Buff, "Jurors are told from the beginning of a trial that the trial judge's pronouncements on the law are binding upon them and that their role is to be the sole and exclusive judges of the facts." Id. 342 S.C. at 426, 537 S.E.2d at 284. In Barnes' case the judge erroneously told the jury he could order further deliberations and then did just that, ordered further deliberations. The jury's response was not impliedly consenting to further deliberations but rather was simply obeying the order of the judge. Juries are presumed and bound to follow the instructions of the trial judge. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999).

At the conclusion of the majority opinion in Buff the Court wrote, "In the future, we suggest the trial judge carefully ensure the existence of a sufficient record from which the appellate

court can determine the jury's consent to further deliberation." Buff, 342 S.C. at 423, 537 S.E.2d at 283. The record in the present case fails to establish that the jury consented to further deliberation. The foreperson's response when asked if the jury wished to continue deliberations in the morning indicates a lack of consent. The purported exercise of discretion by the judge in refusing to grant a mistrial and requiring further deliberation constitutes an abuse. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. State v. Arrowood, 375 S.C. 359, 652 S.E.2d 438 (Ct.App. 2007). The judge's ruling in Barnes' case is based on both an error of law, the judge did not have the discretion to order further deliberation as he instructed the jury, and a factual conclusion that is without evidentiary support, the judge concluding that the jury was not withholding consent to continue deliberations when the foreperson's response indicates a lack of consent to continue.

The Court of Appeals affirmed pursuant to the following authorities: S.C. Code Ann. § 14-7-1330 (1976) (defining the procedure for when a jury fails to agree); Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments."); Id. ("Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial."); State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) ("It is well-settled that the decision to grant or deny a mistrial is within the sound discretion of the trial judge."). State v. Barnes, 2010-UP-427 (S.C. Ct. App. filed October 11, 2010) (App. p. 2). The Court of Appeals erred.

First, under the facts and law of this case, the decision to grant or deny a mistrial was **not** within the discretion of the trial judge. S.C. Code §14-7-1330 requires a mistrial when the jury

returns deadlocked twice without asking for further instruction, as the jury did in this case. The judge was statutorily prohibited from ordering further deliberation, without consent from the jury.

Second, there was no express or implied consent by the jury to continue deliberations. In Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000), the South Carolina Supreme Court wrote, "The jury's consent to resume or discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments." In Buff the Court found that the jury impliedly consented to resume deliberations when none of the jurors expressed unwillingness to comply with the judge's request to continue deliberating. In the present case, however, in response to the judge's comments, the foreman expressed unwillingness to continue. The foreman stated, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." (R. p. 67, lines 7-9). Unlike the Buff case, there is nothing in the record to support that the jury consented, expressly or impliedly, to further deliberations.

In Edwards v. Edwards, 239 S.C. 85, 121 S.E.2d 432 (1961), this Court found that the jury, by not responding to the judge's questioning, consented to return for a third time for further deliberations. The Court wrote:

> I'm going to ask you in all seriousness, Gentlemen, to make one more attempt at this case. When you tell me you can't do it, that's going to be the end of it, because I'm not going to send you back again. So, I'm putting it right straight up to you, see what you can do with it, Gentlemen. Was there any question any of you Gentlemen wanted to ask?'
>
> There was no response or indication of unwillingness on the part of any member of the jury, but on the contrary they returned immediately to the jury room for further deliberation. No verbal acceptance of the request of the trial Judge was made, but consent was implied. Had there been a statement to the effect that further consideration of the case was without their consent, it would have

> become the duty of the trial Judge to discharge them. However, under the circumstances, if the Judge was satisfied in the exercise of his discretion that the jury consented to return for further deliberation, he should not have dismissed them but permitted further deliberation as was done in instant case; State v. Rowell, 75 S.C. 494, 56 S.E. 23; State v. Freely, 105 S.C. 243, 89 S.E. 643; State v. Drakeford, 120 S.C. 400, 113 S.E. 307. In reaching this conclusion, we are not unmindful of State v. Kelley, 45 S.C. 659, 24 S.E. 45; State v. Simon, 126 S.C. 437, 120 S.E. 230; and Rowland v. Harris et al., 218 S.C. 42, 61 S.E.2d 397, which facts are not apropos here.

Edwards, 239 S.C. at 93-94, 121 S.E.2d at 436.

In the present case the jury responded to the judge's questioning. After being told by the judge that he would order further deliberations, the foreman told the judge, for a second time, he did not believe the jury could reach a verdict. This does not constitute consent by the jury to continue deliberations.

Similarly, in Buff v. S.C. Dep't of Transp., 342 S.C. 416, 537 S.E.2d 279, (2000), this Court found that the jury impliedly consented to further deliberations when, after the judge diplomatically discussed with the jury whether further deliberations would be beneficial, the jury returned to the jury room without response. In contrast, the discussion by the judge in the present case was coercive and the foreman responded telling the judge that he did not believe the jury could reach a verdict.

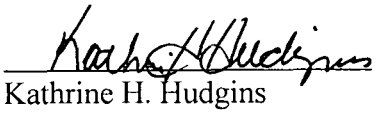
"Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial." Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000). The trial judge's discussion with the jury in the present case was coercive rather than diplomatic. The trial judge told the jury that he would order further deliberations. "That is the absolute option that I would choose to take. Sometimes I forget I'm a judge, so I know I can order it . . . " (R. p.66, lines 20 – 22). It is

inconceivable that any of the other jury members would express an unwillingness to continue to deliberate after the judge told the jury that he would order further deliberations, and in fact ordered further deliberations despite the foreman's comment that further deliberations would not be beneficial. Despite the judge's coercive discussion, the foreman maintained that he did not believe the jury could reach a verdict. The judge's failure to declare a mistrial constitutes an abuse of discretion requiring reversal.

CONCLUSION

Based on the above argument, the opinion of the Court of Appeals should be reversed and the case remanded for a new trial.

Respectfully submitted,



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This 6th day of July, 2012

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on David Spencer, Esquire, this 6th day of July, 2012.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of July, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.