EFiled: May 20 2024 12:54PM EDT
Filing ID 73106545
Case Number 444,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIE L. BURTON, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	)	No. 444, 2023 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 2211007240

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

REPLY BRIEF

COLLINS PRICE & WARNER

Kimberly A. Price, ID No. 6617
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Dated: May 20, 2024

TABLE OF CONTENTS

TABLE OF CITATIONS ii

ARGUMENT 1

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY *SUA SPONTE* GIVING AN *ALLEN* CHARGE OVER THE DEFENSE OBJECTION AS THE GIVING OF THAT INSTRUCTION WAS COERCIVE 1

II. THE SUPERIOR COURT ERRED IN DECLARING MR. BURTON AN HABITUAL OFFENDER WHEN THE STATE FAILED TO FILE A MOTION AS REQUIRED UNDER 11 *Del. C.* § 4215(b) AND SUPERIOR COURT CRIMINAL RULE 32(a)(3) 6

CONCLUSION 9

TABLE OF CITATIONS

Cases

Abdul-Akbar v. State, 1997 WL 776208 (Del. Dec. 4, 1997).....8

Arbolay v. State, 2021 WL 5232345 (Del. Sept. 14, 2021).....7

Boatson v. State, 457 A.2d 738 (Del. 1983).....2

Collins v. State, 56 A.3d 1012 (Del. 2012).....1, 3

Davis v. State, 1999 WL 86055 (Del. Jan. 20, 1999).....3

Fields v. State, 2005 WL 3200359 (Del. Nov. 28, 2005).....8

Johnson v. State, 1991 WL 235359 (Del. Sept. 18, 1991).....7

Maxion v. State, 1992 WL 183093 (Del. July 22, 1992).....1, 2

Mobley v. State, 1998 WL 515243 (Del. June 5, 1998).....7

Papantinas v. State, 2003 WL 1857548 (Del. Apr. 8, 2003).....3

United States v. Bonam, 772 F.2d 1449 (9th Cir. 1985).....3

United States v. Vanvliet, 542 F.3d 259 (1st Cir. 2008).....3

Whiteman v. State, 2001 WL 1329693 (Del. Oct. 23, 2001).....7

Rules

Super. Ct. Crim. R. 32(a)(3).....6

Statutes

11 *Del. C.* § 4215(b).....6

Willie Burton, through the undersigned counsel, replies to the State's Answering Brief as follows:

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY *SUA SPONTE* GIVING AN *ALLEN* CHARGE OVER THE DEFENSE OBJECTION AS THE GIVING OF THAT INSTRUCTION WAS COERCIVE.

The State argues that the *Allen* charge provided in this case was not coercive and the Superior Court did not abuse its discretion in providing the charge to the jury.[1] The State correctly points out that there is no *per se* rule establishing a cutoff time for when the instruction may be provided.[2] The inquiry rests on the specific facts of each case and requires this Court to explore the following four factors: "(1) the timing of the instruction, (2) the words used in the instruction, (3) the length of the deliberations both before and after the instruction, and (4) the complexity of the case."[3]

While this Court upheld a trial judge giving an *Allen* charge at 2:30 p.m., the instruction here was around 3:15 p.m.[4] In *Maxion v. State*,[5] the trial court gave the instruction at approximately 4:15 p.m.[6] By 5:00 p.m., the jury in *Maxion* was still

---

[1] Ans. Br. at 11-23.
[2] *Id.* at 20.
[3] *Collins v. State,* 56 A.3d 1012, 1019 (Del. 2012).
[4] *Boatson v. State,* 457 A.2d 738, 743 (Del. 1983).
[5] 1992 WL 183093 (Del. July 22, 1992).
[6] *Id.* at *1.

deadlocked and dismissed for the weekend.[7] The jury returned on Monday, continued deliberating, and ultimately reached a verdict.[8] This Court held that "the timing of the charge late in the day clearly had no coercive effect on the jury."[9] This is in contrast to Mr. Burton's case where the jury returned a verdict in the same afternoon after the *Allen* charge was given, rather than returning the next day to continue deliberations.

Here, the *Allen* charge was given at approximately 3:15 p.m. This time is inferred from the transcript based on comments from counsel and the Court. Delaware courts typically close at 4:30 p.m. under normal operating hours. The jury returned a verdict shortly after the Court provided the *Allen* charge. The lateness in the day demonstrates its coercive nature.

Additionally, the length of deliberations before and after the instruction supports that it was coercive. Although it is unclear exactly what time the jury returned with its verdict, it is apparent that it was within one hour and 15 minutes since that was the amount of time left in the day for the jury to deliberate after the instruction was given.

[7] *Id.*
[8] *Id.*
[9] *Id.*

While it is problematic that the record does not reflect the exact amount of time the jury deliberated *after* the *Allen* charge, this Court can infer that the jury deliberated for less than one hour and 15 minutes after the instruction. This is a shorter period of post-instruction deliberation than those found in the cases cited by the State.[10]

Prior to retiring the jurors for deliberations, the Court addressed issues with the jury instructions. The criminal activity and exhibit list reflects that the Superior Court denied the defense request for a *Lolly/Deberry* instruction at 9:27 a.m.[11] The parties then moved to closing arguments before the trial judge read the jury instructions. Jury deliberations immediately followed.

Based on the record, it appears the jury deliberated for some unknown period of time before sending its first note. Trial counsel indicated that the second jury note was sent about two hours after the first note.[12] In opposition to the *Allen* charge, defense counsel noted that the jury had been deliberating for about as long

---

[10] *See United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985) (indicating that jury deliberated for an hour and one-half after instruction was given); *Papantinas v. State*, 2003 WL 1857548, at *2 (Del. Apr. 8, 2003) (explaining jury deliberated for approximately one and a half hours after *Allen* charge was given); *Davis v. State*, 1999 WL 86055, at *3 (Del. Jan. 20, 1999) (finding that jury deliberated for an additional two hours after the charge); *United States v. Vanvliet*, 542 F.3d 259, 270 (1st Cir. 2008) (describing that jury's verdict came after over two hours of deliberation after the instruction); *Collins*, 56 A.3d at 1022 (discussing that jury deliberated for approximately two hours after charge was given).

[11] A520.

[12] A472.

as it took for the evidence to come in.[13] Thus, it is clear that the jury deliberated for a longer period of time prior to the *Allen* charge as compared to after the instruction was given. This factor weighs in favor of coercion.

This Court must also look at the complexity of the case. The case here was not complex and rested largely on witness credibility. The parties introduced the evidence in less than one full day of trial. The record reflects that the evidence concluded the day prior to deliberations at approximately 3:00 p.m. On the morning of deliberations, the parties addressed a few issues regarding jury instructions before closing arguments. Then the judge read the jury instructions and released the jurors for deliberations.

Given the short length of the trial, it did not exhaust a significant amount of resources. As such, it would not have been difficult or costly to re-try the case if the jury was unable to reach a unanimous verdict. This weighs against giving the *Allen* charge.

Of significance, the Superior Court *sua sponte* decided to give the *Allen* charge. The trial judge provided his reasoning, which was flawed. The Court's concerns focused on the amount of time that Mr. Burton was held in custody before trial and how much longer he may be held if there was a mistrial.[14] That is

[13] *Id.*
[14] A472-475; A481.

not a valid reason to give an *Allen* charge and does not contemplate the four factors that the Court must consider when deciding to give the instruction.

In weighing the factors, the *Allen* charge was coercive and should not have been given. The Superior Court abused its discretion by *sua sponte* giving the *Allen* charge. Mr. Burton's convictions should be reversed and remanded for a new trial.

II. THE SUPERIOR COURT ERRED IN DECLARING MR. BURTON AN HABITUAL OFFENDER WHEN THE STATE FAILED TO FILE A MOTION AS REQUIRED UNDER 11 *DEL. C.* § 4215(b) AND SUPERIOR COURT CRIMINAL RULE 32(a)(3).

The State correctly points out that trial counsel did not object to the State's oral application to declare Mr. Burton an habitual offender and that this Court should review for plain error. Under 11 *Del. C.* § 4215(b) and Superior Court Criminal Rule 32(a)(3), the State was required to file an habitual offender motion.[15] The trial judge's decision to grant the State's oral request to declare Mr. Burton an habitual offender deprived him of a substantial right and constituted manifest injustice.

In its Answering Brief, the State points out that it agreed that the trial court could sentence Mr. Burton from zero up to life imprisonment *under §4214(a)*.[16] To be clear, the State did not explicitly state that it sought habitual offender sentencing under §4214(a); the Superior Court noted it would be subsection (a).[17] The Court ultimately declared Mr. Burton an habitual offender pursuant to §4214(a).[18]

[15] *See* 11 *Del. C.* § 4215(b) and Super. Ct. Crim. R. 32(a)(3).
[16] Ans. Br. at 27 (emphasis added).
[17] A525.
[18] Exhibit A.

The issue is that the State failed to identify the specific subsection under which it sought to declare Mr. Burton an habitual offender when it made its oral application. This failure to identify the applicable subsection of § 4214 led to Mr. Burton not being put on notice of the particular method under which the State sought to declare him an habitual offender.

First, the State looks to *Johnson v. State*[19] for guidance. In *Johnson*, this Court found that the defendant waived his right to a hearing on his habitual offender status by stipulating to the State's record of his convictions.[20] This Court also held that the record in *Johnson* reflected that the Superior Court did conduct a hearing and then determined the defendant to be an habitual offender.[21] It is unclear from the *Johnson* case whether the State filed an habitual offender motion, as that was not the issue raised on appeal.[22]

[19] 1991 WL 235359 (Del. Sept. 18, 1991).
[20] *Id.* at *2.
[21] *Id.*
[22] *See generally id.* The State also cited to *Mobley v. State*, 1998 WL 515243 (Del. June 5, 1998) and *Whiteman v. State*, 2001 WL 1329693 (Del. Oct. 23, 2001). Again in *Mobley* it is unclear whether the State filed a written motion to declare the defendant an habitual offender, which is the issue presented here. The *Whiteman* case dealt with a motion for reduction/modification of sentence, rather than a direct appeal of the defendant's conviction and sentence. Lastly, the State refers to *Arbolay v. State*, 2021 WL 5232345 (Del. Sept. 14, 2021). Since the State in *Arbolay* filed a written motion to declare the defendant an habitual offender, it is not relevant to the issue presented here.

The State cited to *Abdul-Akbar v. State*[23] to support its contention that the procedural requirements related to an habitual offender application can be waived.[24] There is an important distinction between Mr. Burton's case and *Abdul-Akbar* – Mr. Abdul-Akbar entered a plea agreement and signed a stipulation that listed his prior convictions that qualified him for habitual offender sentencing.[25] Mr. Burton did no such thing; he did not sign any plea paperwork nor sign a stipulation regarding his prior felony convictions.

The State also refers to *Fields v. State*[26] in its Answering Brief, which has little bearing to the issue here. In *Fields*, the State did in fact file an habitual offender motion to which the defense responded.[27] In contrast, the prosecutor in Mr. Burton's case failed to file a motion as required under Rule 32(a)(3).

Therefore, the Superior Court erred in granting the oral application and committed plain error by declaring Mr. Burton an habitual offender.

[23] 1997 WL 776208 (Del. Dec. 4, 1997).
[24] Ans. Br. at 28-29.
[25] *Abdul-Akbar*, 1997 WL 776208, at *1.
[26] 2005 WL 3200359 (Del. Nov. 28, 2005).
[27] *Id.* at *2.

CONCLUSION

For the foregoing reasons, and those stated in the Opening Brief, Appellant Willie Burton respectfully requests that this Court reverse the judgments of the Superior Court and remand for a new trial and/or resentencing.

COLLINS PRICE & WARNER

/s/ Kimberly A. Price
Kimberly A. Price, ID No. 6617
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Dated: May 20, 2024