DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2012

MARCO L. MCBURROWS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D10-5279

[July 18, 2012]

PER CURIAM.

The defendant, Marco McBurrows, appeals his convictions for possession of cocaine, possession of drug paraphernalia, resisting an officer without violence, and driving with a suspended license. He raises two issues on appeal. First, he argues that the trial court committed fundamental error by not declaring a mistrial after the jury twice informed the court that it was unable to reach a unanimous verdict on two of the four counts. Second, he argues that section 893.101, Florida Statutes (2002), is facially unconstitutional. We affirm on both issues.

The defendant's criminal charges arose from a traffic stop for running a stop sign. When an officer approached him, the defendant fled on foot to a nearby field. The officer observed him throw a cigarette box on the ground as he pursued him. The defendant struggled with the officer when he tried to handcuff him. After the defendant was placed in custody, officers recovered the cigarette box. Inside the cigarette box were rock cocaine and a pipe, which tested positive for cocaine.

At the close of trial, the jury began its deliberations. Two hours into its deliberations, the jury informed the trial court that it was deadlocked on two of the four charges. The trial court gave the jury a modified *Allen*[1] charge and instructed the jurors to continue with their deliberations. Shortly thereafter, the jury informed the court it was still having trouble reaching a verdict. The trial court asked the parties whether it should

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

give the jury the *Allen* charge or bring the jury back the next day and give the charge. Defense counsel said that the defense would prefer to have the jurors come back the next day. Rather than give another *Allen* charge, the trial court sent the jury home for the evening.

The next morning, the jury immediately informed the court that it wished to have testimony read back to them. The jury returned a verdict of guilty on all counts after hearing the read-back of the requested testimony.

We reject the defendant's argument that the trial court fundamentally erred by ordering the jury to deliberate after the jury informed the trial court twice that they were unable to reach unanimous verdicts on two of the four courts. We have previously held that it is fundamental error to give a second *Allen* charge after a jury informs the trial court that it is irreversibly deadlocked on an issue. *Tomlinson v. State*, 584 So. 2d 43, 45 (Fla. 4th DCA 1991). However, in this case, only one *Allen* charge was given. A trial court is not required to immediately give an *Allen* charge in response to a jury's declaration of deadlock. *Washington v. State*, 758 So. 2d 1148, 1154 (Fla. 4th DCA 2000). Instead, a court may exercise its discretion by choosing to "delay the giving of the *Allen* charge for a short time to allow the jurors an opportunity for further discussion without intervention or direction from the court." *Id.* Similarly, a trial court may exercise its discretion by choosing not to immediately declare a mistrial after a jury, having already received an *Allen* charge, informs the court that it is still deadlocked on an issue. As noted in *Tomlinson*, the trial court may not demand that the jury continue deliberating, but it may sit in silence and wait a reasonable amount of time for the *Allen* charge to take effect before declaring a mistrial.[2] *See Nottage v. State*, 15 So. 3d 46, 50 (Fla. 3d DCA 2009) ("[W]e are urged again to declare that an overnight recess alone, after an *Allen* charge, constitutes reversible error, a rule we decline to adopt.").

We also reject the defendant's argument that statutory provisions in sections 893.101(2) and (3), Florida Statutes (2002) are facially unconstitutional because they eliminate the element of *mens rea*. *State v. Adkins*, No. SC11-1878 (Fla. July 12, 2012) ("Here, the Legislature's decision to make the absence of knowledge of the illicit nature of the controlled substance an affirmative defense is constitutional.").

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[2] The defendant argues that language in *Rubi v. State*, 952 So. 2d 630, 633-34 (Fla. 4th DCA 2007), mandates a reversal in this situation. However, *Rubi* involved a court's issuance of two *Allen* charges after two declarations of deadlock, a situation that did not occur in the instant case.

Affirmed.

TAYLOR, HAZOURI and LEVINE, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Andrew L. Siegel, Judge; L.T. Case No. 09-22294 CF10A.

Carey Haughwout, Public Defender, and Peggy Natale, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.