Third District Court of Appeal

State of Florida

Opinion filed June 24, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2403
Lower Tribunal No. 12-8748

Wileme Baptiste,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Martin Zilber, Judge.

Carlos J. Martinez, Public Defender, and Robert Kalter, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Brian H. Zack, Assistant Attorney General, for appellee.

Before SALTER, MILLER and LOBREE, JJ.

LOBREE, J.

Wileme Baptiste ("Baptiste") appeals from a final judgment convicting him of lesser included offenses of manslaughter with a deadly weapon, two counts of attempted manslaughter, and unlawful possession of a firearm by a minor, contending that the jury's verdict was coerced by the trial court's issuance of a second, modified Allen[1] charge. Because we conclude that the error at issue was invited, we affirm.

"A trial court commits error when it couches an instruction to a jury or otherwise acts in any way that would appear to coerce any juror to reach a hasty decision or to abandon a conscientious belief in order to achieve a unanimous position." Nottage v. State, 15 So. 3d 46, 48 (Fla. 3d DCA 2009). "Each challenge to a deadlock charge must be decided on a case-by-case basis depending upon the totality of the facts and circumstances in the individual case." Holmes v. State, 710 So. 2d 188, 190 (Fla. 1st DCA 1998).

Here, having already given an Allen charge, and upon being informed that a unanimous verdict had been reached, the court had the clerk read the verdict and poll the jury. One of the jurors, however, denied agreeing with the verdict. After the jury left the courtroom, the court took a recess so that defense counsel could confer with Baptiste. Thereafter, the defense requested that the jury be sent a note instructing them to continue deliberating, along with the jury instructions and a new

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

verdict form. The court stressed to the parties that because it had already given an Allen charge, it did not intend for the jury to continue to deliberate. The court explained that writing a note with such an instruction might give rise to misinterpretation.[2] Rather, the court advised the parties that it would instruct the jury solely to memorialize on a new form what their verdict was, if they had one. Defense counsel replied, "that's fine." The court again asked counsel if the parties were in agreement, and both responded affirmatively. Thereafter, the court instructed the jury in open court that it was giving them a new set of verdict forms and asking them to go back to fill them out. The court advised the jury: "If you have a unanimous verdict, please fill out the verdict accordingly. If you do not have a unanimous verdict, please knock on the door . . . and we'll bring you back out here." The jury then returned a unanimous verdict for the lesser included offenses of the primary charges, and the firearm count as charged.

Baptiste contends that the court's final instruction to "go back" and "fill out" a new verdict form could reasonably have been interpreted as a modified Allen charge. "[I]n assessing whether the trial court's decision to give an Allen charge

[2] See Philip Morris USA Inc. v. Brown, 243 So. 3d 521, 524 (Fla. 1st DCA 2018) (Winsor, J., dissenting) (observing "[w]hen later told to end their deliberations (essentially to memorialize where they left off earlier), reasonable jurors might not have understood their options," since "[t]hey might not have understood that they were not locked into the positions they held immediately before sending their last note," and "that their remaining duty was more than a ministerial duty to record their earlier positions").

was error, 'the other prevailing circumstances, including the length of the deliberations, the lateness of the hour, the condition of the jurors, and the jury's disclosure of their numerical split raise[] additional concerns.'" Lebron v. State, 799 So. 2d 997, 1013 (Fla. 2001). Although this court has refused to adopt a per se rule for repeated Allen charges, see Nottage, 15 So. 3d at 49-50 (disapproving of Washington v. State, 758 So. 2d 1148, 1154 (Fla. 4th DCA 2000)), it is clear that under a totality of the circumstances analysis, two or more consecutive Allen (or modified) charges provide sufficient indicia of coercion, particularly where the jury has repeatedly indicated its division with a sole holdout.

Considering all of the circumstances, the modified Allen charge given here after the prior instruction and the jury's third, if not fourth, showing of deadlock was erroneous. See Thomas v. State, 748 So. 2d 970, 977 (Fla. 1999) (reversing judgment after modified Allen charge partly because of "the jury's announcement in open court of their split vote indicating a lone holdout"); Almeida v. State, 157 So. 3d 412, 417 (Fla. 4th DCA 2015) (reversing in part because, "[h]aving reported that they were deadlocked twice, the jury could have viewed the court's additional instruction as demanding a verdict and imposing 'marathon deliberations' until a verdict was reached"); Cambareri v. State, 746 So. 2d 1215, 1216 (Fla. 5th DCA 1999) (reversing based on modified Allen charge where "the court advised the jury that the judge would wait in the courtroom for its decision" and "[t]his again gave

immediacy to the jury's deliberation"); McKinney v. State, 640 So. 2d 1183, 1187 (Fla. 2d DCA 1994) ("Because the polling of the jury was coupled with the non-standard Allen instruction, we conclude that the error was not harmless.").

Nevertheless, because Baptiste failed to move for mistrial after the non-unanimous jury poll, or object to the subsequent, modified Allen charge, he waived the error in the court's instruction. See Tejeda-Bermudez v. State, 427 So. 2d 1096, 1098 (Fla. 3d DCA 1983) ("[D]efendant's failure to object to the modified 'Allen charge' constitutes a waiver for purposes of appeal."). Even if we were to consider this error to be fundamental, Baptiste waived it by agreeing to the modified charge. See Universal Ins. Co. of N. Am. v. Warfel, 82 So. 3d 47, 65 (Fla. 2012) ("Fundamental error is . . . waived where defense counsel affirmatively agrees to an improper instruction."); Pickett v. State, 109 So. 3d 841, 843-44 (Fla. 3d DCA 2013) ("Even if an erroneous jury instruction constitutes fundamental error, this Court has held that the error is deemed waived if counsel requests, or affirmatively accepts, the erroneous jury instruction."). Because Baptiste cannot invite error and then seek to take advantage of it on appeal, we affirm.

Affirmed.