

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 21-1278

In re: **TERRON GERHARD DIZZLEY,**

Petitioner.

On Petition for Writ of Mandamus. (8:20-cv-00126-JD)

Submitted: June 24, 2021

Decided: June 28, 2021

Before KING and THACKER, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Petition denied by unpublished per curiam opinion.

Terron Gerhard Dizzley, Petitioner Pro Se.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

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O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Thacker, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix B

PER CURIAM:

Terron Gerhard Dizzley, a state prisoner, petitions for a writ of mandamus. He asserts that his convictions violated the Double Jeopardy Clause and requests an order compelling his immediate release from incarceration. We conclude that Dizzley is not entitled to mandamus relief.

Mandamus relief is a drastic remedy and should be used only in extraordinary circumstances. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004); *In re Murphy-Brown, LLC*, 907 F.3d 788, 795 (4th Cir. 2018). Further, mandamus relief is available only when the petitioner has a clear right to the relief sought and “has no other adequate means to attain the relief [he] desires,” *Murphy-Brown*, 907 F.3d at 795 (alteration and internal quotation marks omitted), and mandamus may not be used as a substitute for appeal, *In re Lockheed Martin Corp.*, 503 F.3d 351, 353 (4th Cir. 2007).

The relief sought by Dizzley is not available by way of mandamus. Accordingly, we deny the petition for writ of mandamus, deny Dizzley’s motion requesting “an answer on the merits” of his petition, and deny his motion for “an expedited hearing.” We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

PETITION DENIED

THE HONORABLE JUDGE MICHAEL BAXLEY'S RULING IN TRIAL OF 2012

Appendix C

1 MR. DIZZLEY: No, sir.

2 THE COURT: And is what I've told you about your
3 right to testify the same thing that Mr. Barr told you about
4 your right to testify?

5 MR. DIZZLEY: Yes, sir.

6 THE COURT: All right, now, Mr. Barr tells me you've
7 not yet made your decision as to whether you intend to
8 testify, is that correct, sir?

9 MR. DIZZLEY: Yes, sir.

10 THE COURT: All right, then we will - I will ask you
11 finally, do you have any questions about our discussion we've
12 just had or your right to remain silent or your right to
13 testify?

14 MR. DIZZLEY: No, sir.

15 THE COURT: All right, very good, anything further,
16 Mr. Barr, you would have me discuss with Mr. Dizzley about
17 those rights?

18 MR. BARR: No, sir, Judge.

19 THE COURT: And Mr. Hixson?

20 MR. HIXSON: No, Your Honor.

21 THE COURT: All right, then, sir, I'm going to let
22 you be seated and it would be my intention we would bring this
23 jury back, tell them that we have - we will end the
24 proceedings, take up with whether or not the Defendant will
25 call a witness or put up a case first thing in the morning and

1 be prepared to go at 9:30. What I would ask counsel to do is
2 be here at 9:15 ready to go. We have prepared copies of what
3 we believe the charge to be that you can have now and take
4 with you over the evening hour. If you would please come and
5 be here at nine o'clock then we can have our charge
6 conference, 9:15 to 9:20, we can resolve any other issues and
7 be ready to go forward in whichever way the Defense wishes to
8 proceed. Any objections to that from the State?

9 MR. HIXSON: No, Your Honor.

10 THE COURT: And from Defense?

11 MR. BARR: No, sir, Judge.

12 THE COURT: All right, then, let's bring in the jury,
13 please.

14 (Whereupon, the following takes place in the presence of
15 the jury.)

16 THE COURT: All right, ladies and gentlemen, welcome
17 back. We really are pretty close to the end of the business
18 day. As you know the State rested a few moments ago. Rather
19 than calling additional witnesses today we will wait until
20 tomorrow morning for the Defense to make a determination as to
21 whether they intend to put up a case because, again, they have
22 no burden of proof and also after that's concluded we'll begin
23 the arguments and charge. There's no reason or benefit to
24 going forward at this late hour when we change sides of the
25 case. So we're going to stop for the day and what I'd ask you

1 to do is be - and by the way, there's no windows, so I don't
2 know if I'm sending you out to a monsoon again or not, but if
3 it is if you need one of our officers to help you get to your
4 car with an umbrella we'll do our best to provide that for you
5 and what I would ask that you do is be back in your jury room,
6 again at 9:30 tomorrow morning. We will start at 9:30, and
7 again this evening please don't discuss this case with anyone
8 including your loved ones at home. Don't undertake any
9 investigations. Just get a good night's rest and be back at
10 9:30 tomorrow morning. Don't call the juror number. There's
11 no need to do that. Just be back at 9:30. Any questions now
12 from our jury panel about scheduling?

13 (No response.)

14 THE COURT: All right, well, then we will see you at
15 9:30 and as we do every day out of respect we will remain
16 where we are while you depart the courtroom first. Have a
17 good afternoon, ladies and gentlemen.

18 (Whereupon, the following takes place outside the
19 presence of the jury.)

20 THE COURT: All right, anything further for our
21 record today?

22 MR. HIXSON: No, Your Honor.

23 THE COURT: Very good, gentlemen, if you would step
24 up we'll give you, again, this charge is not set in stone, but
25 if you would meet me in chambers tomorrow morning at nine

1 o'clock we'll be prepared to have a charge conference and if
2 you'd step forward and get the charge we are in recess now,
3 ladies and gentlemen, until 9:30 here in the courtroom
4 tomorrow morning.

5 OFF THE RECORD

6 (On the record, August 30, 2012. Jury deliberations continue
7 at 9:42 a.m.)

8 (Note from jury [Court's Exhibit Number Five] received at
9 10:03 a.m. Reply from Court sent back to jury at 10:21 a.m.)
10 (Note from jury at 11:12 a.m. The following takes place
11 outside the presence of the jury.)

12 THE COURT: Let's go back now on the record in the
13 case of the State versus Dizzley. We have a message from the
14 jury, ladies and gentlemen, or counsel, you want to step up
15 and look at it? Have you already seen it?

16 MR. BARR: I've seen it, Judge.

17 THE COURT: All right, very good. It would be the
18 State's intention at this time to bring the jury back,
19 including our alternates, and give an Allen charge and I'll be
20 glad to hear from either side as to whether you object or
21 concur with that procedure. What says the State?

22 MR. HIXSON: I concur, Your Honor.

23 THE COURT: All right, and Mr. Barr, you want to be
24 heard?

25 MR. BARR: Your Honor, I just need to consult with my

1 client for just a second.

2 THE COURT: Very good. We'll wait a moment.

3 MR. BARR: Nothing from the Defendant, Judge.

4 THE COURT: Very good. Madam court reporter, let's
5 mark this as a Court's Exhibit, please, this note, and would
6 you please bring our two alternate jurors from the back and
7 then would you please bring our jury panel from the jury room.

8 MR. BARR: And Judge, I think we've just got one now.

9 THE COURT: Are we down to one now, all right.

10 (Whereupon, the following takes place in the presence of
11 the jury at 11:25 a.m.)

12 THE COURT: Welcome. I don't think you're going to
13 need your pad. That's what some of the jurors are asking. I
14 can hear them in the back. So I think you're fine where you
15 are. That's fine. We'll wait a moment. We're fine. We're also
16 waiting on our alternate to join us. So we'll just be at ease
17 for a moment. Ladies and gentlemen, just while we are waiting
18 for our others to join us I want to thank you for coming back
19 today. I know that probably some of you, if you were like me,
20 were confronted by a flood on the way home yesterday and I
21 couldn't help but go notice as I drove by your business, Mr.
22 Thompson, I believe it flooded yesterday; did it not?

23 MR. THOMPSON: No, no.

24 THE COURT: It did not? All right, well, it had some
25 heavy standing water near it.

1 MR. THOMPSON: It was close.

2 THE COURT: Very good. Well, I, I appreciate your
3 willingness to be back today and when we had such adverse
4 weather conditions yesterday. We're going to wait just one
5 moment for our alternate and we have at least one of our
6 alternates is still remaining with us.

7 While we have our 12 though assembled in the courtroom
8 let me ask, ladies and gentlemen, when we were apart from one
9 another last night is there any member of the jury panel who
10 had a discussion with any third person concerning or any other
11 jury panel member for that matter during the evening break
12 concerning the facts of this case? If you did please raise
13 your hand.

14 (No response.)

15 THE COURT: And again, let's let the record reflect no
16 one has raised their hands. Thank you for complying with the
17 Court's request. Welcome back, and we still, we still have
18 Ms. Morrison with us this morning as well, is that correct?
19 All right, good. Here she comes. Good morning.

20 All right, and ladies and gentlemen, I'm going to ask you
21 if you would just secure the back door so that we won't have
22 people coming and going as we talk with the jury here.

23 Ladies and gentlemen, first of all, welcome back to the
24 courtroom and I have received your message that you've been
25 unable to reach a verdict in the case, and as I instructed you

1 earlier and as we're all aware the verdict in this case must
2 be unanimous. Now just thinking about this though at any time
3 there is a matter in dispute it isn't always easy for even two
4 people to agree who may be discussing it, much less 12, and so
5 when 12 are required to agree on something well it's even more
6 difficult and in most cases I think we would all agree that
7 absolute certainty can never be reached and that's not what is
8 expected. However, you have a duty to make every reasonable
9 effort to reach a unanimous verdict if you can. In doing this
10 you should consult with one another just as you have been
11 doing, express your own views, but listen openly to the
12 opinions of your fellow jurors, tell each other how you feel
13 and why you feel that way and discuss your differences with
14 open minds as opposed to closed minds, and although the
15 verdict of the jury must be unanimous every one of you has the
16 right to your own opinion and the verdict that you agree to
17 must be your own verdict, the result of your own convictions
18 and you should not give up a firmly held belief merely to be
19 in agreement with fellow jurors. The majority should consider
20 the minority's opinion and the minority should consider the
21 majority's opinion and each of you should consider the others
22 opinion. You should carefully consider and respect the
23 opinions of each other and reevaluate your position for its
24 reasonableness, correctness and impartiality. You must lay
25 aside all outside matters and reexamine the questions before

1 you based on the law as I gave you and the evidence as you
2 found it in the case.

3 Now, let's talk about what happens if you do not agree or
4 cannot agree on a verdict. If that happens and the Court
5 declares a mistrial and what that means is that nobody wins,
6 neither the State nor the Defendant. It just means that at
7 some future time this case will be tried again with some other
8 jury sitting where, where you sit today. The same
9 participants will come in, same witnesses, most likely give
10 the same testimony, the same lawyers will basically ask the
11 same questions and we'll go through the entire process of the
12 trial again.

13 Now, you were selected in the same manner and from the
14 same jury pool really, the community, as any future jury will
15 be and there's no reason for me to suppose or expect that the
16 case would ever be submitted to 12 more intelligent and
17 capable, that is capable, impartial and conscientious and
18 competent jurors than you are and that some greater evidence
19 or more or clear evidence will be adduced on one side or the
20 other.

21 So, ladies and gentlemen, I'm going to ask you to return
22 to your deliberations one more time. If you're unable to
23 reach a verdict please advise me of that, but I ask you in
24 compliance with the instructions that I've given you to go
25 back and try again and out of respect for you and your efforts

1 we're going to remain where we are while you return to the
2 jury room. Thank you, ladies and gentlemen.

3 (Whereupon, the following takes place outside the
4 presence of the jury.)

5 THE COURT: That's fine. If they wish to take a smoke
6 break please give them that opportunity. Now, any objection
7 to the charge that's just been given by the Court from the
8 State?

9 MR. HIXSON: No, Your Honor.

10 MR. BARR: No, Judge.

11 THE COURT: And from Defense. Then hearing none then
12 we're ready to move into other business now, Mr. Hixson, and
13 please call your next case.

14 OFF THE RECORD

15 (On the record. Note from jury at 12:20 p.m. The following
16 takes place outside the presence of the jury.)

17 THE COURT: Let's go back in the record, on the record
18 in the case of the State versus Dizzley and while everyone is
19 coming back in let's go ahead and bring the jury in and let's
20 bring our alternate jurors. Ms. Owens, if you'd bring the
21 alternate jurors as well into the courtroom.

22 (Whereupon, the following takes place in the presence of
23 the jury.)

24 THE COURT: All right, ladies and gentlemen, welcome
25 back and Mr. Grate, Mr. Foreman, ladies and gentlemen of the

1 jury, I've received a message that tells me that the jury is
2 still deadlocked and unable to reach a decision in this case
3 and I wanted to, first of all, tell you one or two things that
4 I have on my mind and heart about this matter. First of all,
5 I don't want you to think in any way that your exercise as
6 jurors has been a failure on your part because you could not
7 reach a verdict. That's not a failure on your part. That's
8 really the strength of our system because we bring diverse
9 citizens from different backgrounds all from the same
10 community to hear a set of facts and make a decision as to
11 whether or not in criminal court a person is guilty or
12 innocent.

13 Now, what you've told us is that you can't reach a
14 unanimous decision, and I would say to you to that that's not
15 a failure on your part. That's actually a strong message to
16 the Prosecution that they are unable to meet the burden of
17 proof to the extent that they can bring back a unanimous
18 verdict.

19 Now, the way this process actually works is it is up to
20 the Solicitor as to whether they will dismiss the charge or
21 whether they will retry this case or perhaps redevelop the
22 charge in some way and bring a separate charge of some kind
23 and try that. It's a - the decision rests with the Solicitor.
24 It's not within the control of the Defendant, but what's going
25 to happen here is the Court is going to declare a mistrial,

1 but I don't want you to believe in any way, zero way that that
2 somehow you are responsible for that because you are not.
3 You're given a set of facts that were the best that the State
4 could adduce from what happened and what they were able to
5 determine, they put that up to you and you brought back a wise
6 and common sense decision that you simply could not agree upon
7 it. There's a message in that and so you've accomplished your
8 purpose.

9 (Instructions for juror payment given and jury
10 dismissed.)

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C E R T I F I C A T E

4 I, the undersigned, Grace L. Hurley, Official Court
5 Reporter for the State of South Carolina, do hereby certify
6 that the foregoing is a true, accurate and complete Transcript
7 of Record of the trial held in the case of The State versus
8 Terron Gerhard Dizzley, held in the Court of General Sessions
9 for Georgetown County, Georgetown County Courthouse,
10 Georgetown, South Carolina, on August 27, 28 and 30th, 2012.

11 I do hereby certify that I am neither of kin, counsel,
12 nor interest to any party hereto.

Grace L. Hurley

Grace L. Hurley, CVR-CM-M

Official Reporter

22 September 14, 2013.

23