THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Knox R. McMahon, Circuit Court Judge

Appellate Case No.: 2011-190693

State of South Carolina, ... Respondent,

v.

Lexie Dial, III, ... Appellant.

PETITION FOR REHEARING WITH MEMORANDUM OF LAW

Appellant files this Petition for Rehearing in the captioned cause of the opinion filed July 10, 2013, and, in support thereof, alleges that the Court misapprehended or overlooked the following points:

1. **THE COURT OVERLOOKED THE PURPOSE OF THE MEMORANDUM OF UNDERSTANDING (MOU) WHEN IT RULED THAT THE MOU GAVE OFFICER DUKES AUTHORITY TO ARREST DIAL IN RICHLAND COUNTY**

The reason for the MOU is clearly stated in the first paragraph of the agreement that it is "for the purpose of locating and apprehending fugitives". This purpose is reiterated under the Mission Statement on page one of the MOU that "the intent of the joint effort is to investigate and apprehend local, State and Federal fugitives, thereby improving public safety and reducing violent crime".

The Mission Statement of the MOU further requires the participating agency to refer cases for investigation by the District Fugitive Task Force.

The empowerment clause of the MOU granting Deputy Marshalls the same powers a Sheriff may exercise is not a blanket grant of authority but one that must be tempered by and enforced only when executing the purpose of the MOU, to wit, the apprehension of the fugitive.

Dial was certainly not a fugitive. He was in the control of the Lexington County Sheriff's Department before a warrant was even issued. Detective Russell testified that Dial was not free to leave the hospital after Russell talked to the Doctor's and before the child died and before a warrant was ever issued for any charge. R.p. 125 ll. 9-25

Futhermore, the powers under the MOU must be appropriately invoked. The participating agency must refer the case to the District Fugitive Task Force for approval and acceptance. This was not done. Lexington County Sheriff's Deputy Russell simply called Deputy Dukes and had him come to Richland Memorial Hospital to arrest Appellant. R.p. 695, l. 19 to p. 696, l. 24; R.p. 134, ll. 23-25.

For these reasons the arrest was not proper under the MOU and the arrest was therefore illegal and the alleged confession of the Appellant should have been suppressed. *State v. Boswell* 391 S.C. 592, 707 S.E.2d 265 (2001).

2. **THE COURT ERRED WHEN IT UPHELD THE TRIAL COURTS DECISION PROHIBITING THE CROSS EXAMINATION OF DETECTIVE RUSSELL CONCERNING HIS ROMANTIC RELATIONSHIP WITH THE SOLICITOR ORIGINALLY PROSECUTING THE CASE AGAINST DIAL**

Rule 608 (C), SCRE, specifically provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness...." A romantic relationship with a member of the Prosecution team is certainly evidence of potential bias. The removal of the paramour from the Prosecution team does not remove the potential bias. In fact, it may well enhance the pressure on the witness to color his testimony to ensure conviction so that the romantic relationship cannot be blamed if the Prosecution fails to convict.

The Court misapprehended the impact of the testimony of the

relationship on the lack of proof that the relationship had begun at the time of Russell's initial contact with Dial. It is undisputed that the relationship existed at the time of Russell's testimony and the Court overlooked the fact that that is the most important time to focus on because that is the time the testimony is offered. The interview Russell had with Dial was not recorded, R.p. 726 l. 18-p 727 l.1 and there were crucial aspects of Russell's testimony at trial that were publicized for the first time. These include testimony concerning the conversation with Dial prior to his alleged confession, R.p. 714, 15 – p 717, l. 7 Russell's denial that he ever told Dial that he had to have shaken the baby because of the Doctor's statements, R.p. 730 l. 24 to p731, 15 and Russell's denials that he made any threats, promises, used coercion or raised his voice to obtain the "confession". R.p 724, ll. 9-20. This is important because Dial testified Russell told him these injuries had to come from shaking. Rp 868, ll. 22-23. Dial also said that Russell told him he could help himself by cooperating, R.p. 869, l. 21 to p. 870 l. 3, and he testified he felt coercion as he felt he could only end the interview with Russell by telling them what they wanted to hear. R.p. 871, ll. 2-9.

These differences in Russell's and Dail's testimony were crucial on the question of the weight, if any, the jury should give Dial's alleged confession and the impact of the romantic relationship between Russell and the former Solicitor on his potential bias. It was important for the jury to know about the relationship so they could weigh the impact on Russell's testimony since it was in direct conflict with Dial's testimony on these crucial points.

3. THE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURTS DENIAL OF A MISTRIAL WHEN MISTI RICHARD APPROACHED THE WITNESS STAND CARRING AN URN CONTAINING THE VICTIM'S ASHES IN HER HANDS

The Court overlooked that the jury must certainly have noticed the urn if the trial court immediately recognized it. The jury was closer to the witness than the Judge as the witness had to walk in front of the jury box to approach the witness stand. The court overlooked the fact that jurors can be as smart and as prescient as Judges and if

the urn was so blatantly obvious to the Judge then it most likely was just as blatantly obvious to some of the jurors.

The trial Court's conclusion that none of the jurors saw the urn or believed the object was an urn was tantamount to the trial Courts ruling on a fact question which is the sole province of the jury.

There is no way the trial Courts generic curative instruction could remove the impact of the dead baby's ashes being paraded in front of them in a heart shaped bronze urn.

The deep sympathy this maneuver engendered in the hearts of the jurors certainly had the potential to impact the verdict and a mistrial should have been granted. In *State v. Northcutt* 372 S.C. 207, 641 SE 2d 873 (2007) our Supreme Court reversed a death sentence because the Solicitor paraded a baby carriage shrouded in black before the jury. This maneuver was more likely to inflame emotion, sympathy and passion because the State's witness paraded the dead baby's ashes, not just an empty baby carriage.

Mistrial should have been granted so Dial would have the opportunity to have a trial based upon the facts of his case before a jury not tainted and inflamed by sympathy or passion.

4. **THE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S ADMISION OF STATES EXHIBITS 7, 8 AND 86**

These autopsy photographs showed the baby's scalp pulled away revealing the skull and the brain. They were gory and shocking. The trial court reasoned that the photographs were necessary to corroborate Dr. Ross's testimony. However, Dr. Ross fully testified concerning her examination and her conclusions and findings, R.p. 578, l. 14 – p 579, l. 19; R.p. 580, l. 24 – 581, l. 20 and the display of the inflammatory photographs to the jury was unnecessary. Furthermore the State had already introduced testimony from other medical experts on this point. (R.p. 416, l. 20-p 417, l. 5; R.p. 458, ll. 10-16; R.p. 749 l. 8 – p 750, l. 9).

Since the State's version of the cause of death was adequately put

forth through the testimony of these experts the photographs were unnecessary and improperly inflamed the passions and sympathy of the jurors for no good reason.

The Court overlooked this point and should have reversed the trial court's decision to admit the gory photographs. *See State v. Collins,* 398 S.C. 197 727 S.E. 2d 751 (Ct. App. 2012)

5. THE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S RULING EXCLUDING THE CONFLICTING DEATH CERTIFICATES OF DR. ROSS

The Defense attempted to introduce exhibits 2 and 3 to show that Dr. Ross had changed her opinion on the cause of death. The initial death certificate stated cause of death was "head hit object".

The court overlooked the trial Courts aboutface from its ruling on the admission of the autopsy photographs. (See argument 4). Whereas the State was allowed to admit the gory autopsy photographs because they assisted Dr. Ross in explaining her conclusion the trial court denied the Defense move to admit the conflicting death certificate on the basis they would be cumulative and Dr. Ross had already been examined concerning the certificates. (R.p. 842, l.15 – p. 844, l. 21)

The denial of the admission of this strong visual evidence on the cause of death was extremely prejudicial and warrants reversal. *See eg, McKnight v. State* 378 S.C. 33, 661 S.E 2d 354 (2008).

6. THE COURT ERRED WHEN IT REFUSED TO OVERTURN DIAL'S LIFE SENTENCE

In ruling that Dial's failure to ask the trial court to reconsider his life sentence precluded his raising the issue on appeal, the court overlooked previous court rulings that exceptional circumstances may allow an Appellate Court to consider a sentence even though no objection was made at the trial *See State v. Johnson* 333 S.C. 459, 510 S.E. 2d 423 (1999).

Exceptional circumstances exist in this case. Dial was nine

days past his eighteenth birthday. He was the primary caretaker for his son, R.p. 850, l.7-p 851, l. 25 and there was absolutely no evidence of any prior abuse to the child. R.p. 595, ll. 2-7.

Viewed in a light most favorable to the State Dial momentarily lost control and shook his child too hard. There were no aggravating circumstances. §16-3-85 (D), S.C. Code amended 1976 requires the sentencing Judge to consider any "aggravating circumstances, including, but not limited to a Defendant's past pattern of child abuse or neglect" and any mitigating circumstances when sentencing a Defendant found guilty of homicide by child abuse.

The Court overlooked the clear implication of § 16-3-85 (D) that there must be aggravating circumstances and the absence of mitigating circumstances to justify a life sentence. In this case there were no aggravating circumstance and much evidence of mitigating circumstances, including Dial's age and his prior record of parental nurturing.

The court further overlooked the impact of *Miller v. Alabama* 132 S.Ct. 2455 (2012), a United States Supreme Court case decided subsequent to Dial's trial. *Miller* overturned a statute mandating life imprisonment when applied to a Defendant under the age of eighteen. Although §16-3-85 does not mandate life imprisonment and Dial was nine days past his eighteenth birthday when the incident occurred, the scientific principles approved by the Supreme Court impact on the question of mitigation in this case. *Miller* cites scientific studies showing fundamental differences between juvenile and adult minds in parts of the brain involved in behavior control and that adolescent brains are not fully mature in regions and systems related to higher order executive functions such as impulse control. *Miller* at 2468.

The nine days subsequent to Dial's eighteenth birthday certainly did not miraculously transform his adolescent brain to that of an adult.

The *Miller* decision came after Dial's sentencing and the principles enunciated therein mandate reconsideration of his life sentence.

Such a draconian sentence for an eighteen year old with no prior criminal record raises the issue of whether or not such a punishment violates our Constitutional

guarantees against cruel and unusual punishment and the sentence here should be reversed. S.C. Const. Art. I §15; U.S. Const. 8th Amend.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned, Michelle M. Wash, Paralegal to Wayne Floyd, Esquire, has this 24th day of July 2013, served the **PETITION FOR REHEARING WITH MEMORANDUM OF LAW.**

[X] Hand delivering a copy hereof.

[ ] Depositing a copy hereof in the United States mail postage prepaid

[ ] Certified Mail (Return Receipt Requested).

[ ] Facsimile Transmission.

upon:

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July 24, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
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RE: Name: State v. Lexie Dial, III
Appellate Case No.: 2011-190693

Dear Ms. Kitchings:

Enclosed is the original and six (6) copies of the Petition for Rehearing With Memorandum of Law along with our certificate of service in the referenced matter.

Please contact me if you have any questions concerning this matter.

Sincerely,

Wayne Floyd

WF/mmw
Enclosure
cc: Christina J. Catoe, Assistant Attorney General