

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Opinion No.:5157

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SEP 18 2013

S.C. Supreme Court

State of South Carolina,.....Respondent,

v.

Lexi Dial,.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 22, 2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals err when it upheld the trial court's ruling that the Memorandum of Understanding (MOU) gave Lexington County Sheriff's Deputy Dukes the authority to arrest Dial in Richland County?
2. Did the Court of Appeals err when it upheld the trial court's decision prohibiting the cross examination of Detective Russell concerning his romantic relationship with the Solicitor originally prosecuting the case against Dial?
3. Did the Court of Appeals err when it affirmed the trial court's denial of a mistrial when the victim's mother approached the witness stand carrying a urn containing the victim's ashes?
4. Did the Court of Appeals err when it affirmed the trial court's exclusion from evidence of the conflicting death certificates of Dr. Ross?
5. Did the Court of Appeals err when it refused to overturn Dial's life sentence?

STATEMENT OF THE CASE

On January 19, 2010, Joshua Dial, five month old son of Defendant Lexie Dial, III received a head injury while in Defendant's care. (R.p. 856, l. 22 to p. 858, l. 25) Dial attempted CPR without success and called his father who also tried to revive the child and who then called 911. (R.p. 859, l. 1 to p. 862, l. 17) EMS and the Lexington County Sheriff's Department

responded to the scene. Joshua was transported to Lexington Medical Center then to Palmetto Richland Hospital where he died the next day.

Dial was also transported by the Lexington County Sheriff's Department to Lexington Medical Center and then to Palmetto Richland. He was arrested by Lexington County Sheriff's Deputy Dukes at Palmetto Richland Hospital shortly after Joshua's death. (R.p. 105, 1-3 to R.p. 106 l. 5)

Dial was transported to the Lexington County Sheriff's Department where he was interrogated by Deputy Russell. Dial initially maintained that Joshua's injuries were accidental in that he tripped over a table while holding the child whose head struck the table. During the interrogation Dial eventually gave an inculpatory written statement that was admitted at trial over objection. (R.p. 705 ll 14-15) (R.p. 1022, Rp. 1023)

Dial was convicted of homicide by child abuse on April 15, 2011 and sentenced to life imprisonment. Post Trial Motions were denied and Notice of Appeal was timely filed and served. Dial's conviction and sentence was affirmed by the Court of Appeals on July 10, 2013. Petition for Rehearing was filed and was denied on August 22, 2013.

ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE RULED THAT THE MEMORANDUM OF UNDERSTANDING DID NOT GIVE LEXINGTON COUNTY DEPUTY DUKES THE AUTHORITY TO ARREST DIAL IN RICHLAND COUNTY.

This issue presents a novel question of law in South Carolina. Pursuant to the Presidential Threat Protection Act of 2000 a Memorandum of Understanding (MOU) was

entered into between the Lexington County Sheriff's Department (LCSD) and the United States Marshall Service (USMS). (Court's exhibit 3).

The MOU purports to give authority to a Lexington County Deputy to arrest fugitives outside of his normal county wide jurisdiction. The application of a MOU has never been addressed by the South Carolina Supreme Court.

Pursuant to the MOU Lexington County Sheriff's Deputy Henry Dukes was assigned to the U.S. Marshall's Fugitive Task Force. (R.p. 670, l. 23 to R.p. 671, l. 6) Lexington County Sheriff's Deputy Russell was at Palmetto Richland Hospital with Dial and once Joshua died he called Dukes to come to Richland County to arrest Dial as Russell knew he didn't have arrest authority in Richland County. (R.p. 105, l. 3 to R.p. 106, l.5; R.p. 122, l. 10 to p. 125, l.6)

The Court of Appeals erred when it held that the MOU gave Deputy Dukes the authority to arrest Dial in Richland County. The MOU is not a blanket grant of out of county arrest authority. It's purpose as stated in the first paragraph is "for the purpose of locating and apprehending fugitives".

Furthermore, the Mission Statement of the MOU requires the LCSD to refer cases for investigation to the District Fugitive Task Force.

Dial was definitely not a "fugitive". LCSD Deputy Russell testified that Dial was not free to leave the hospital before Joshua died and before a warrant was issued for any charges. (R.p. 125, lines 9-25, R.p. 695, l. 19 to p. 696, l. 24)

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

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

This issue presents a novel question of law – the impact of a romantic relationship between a Solicitor prosecuting a case and a Law Enforcement Officer investigating a case.

At the time of Dial's trial, Detective Russell admitted that he was romantically involved with the Lexington County Solicitor who had been handling the case (App to R.p. 1-5). When the relationship came to light prosecution was turned over to the Attorney General's Office.

Perhaps the most important witness against Dial was Detective Russell because he testified to the circumstances leading up to Dial's inculpatory written statement. It is important that this conversation was not recorded. (R.p. 726 l. 18 to p. 727 l. 1) There were crucial differences between the testimony of the two that impacted on the jury's decision as to the weight given to the alleged "confession". Russell denied he ever told Dial he had to have shaken the baby because of the Doctor's statements (R.p. 730 l. 24 to p. 731, l. 5) and Russell denied he made threats, used coercion or raised his voice to obtain the "confession". (R.p. 724, lines 9-20) This is in direct conflict with Dial's testimony that Russell told him the baby's injuries had to come from shaking. (R.p. 868 l. 22-23) Dial also testified that Russell told him he could help himself by cooperating, (R.p. 869, l. 21 to p. 870, l. 3) and that Dial felt coercion as he felt he could only end the interview by telling Russell what he wanted to hear. (R.p. 871, lines 2-9)

Rule 608 (c) SCRE provides “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 and the removal of the paramour from the trial team does not remove the potential bias of the witness. The jury had the right to know about the relationship and the roles the two lovers played in the investigation and prosecution of Dial’s case. This was crucial information the jury needed to knowingly assess the credibility of Russell’s testimony.

3. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT’S DENIAL OF A MISTRIAL WHEN THE VICTIM’S MOTHER APPROACHED THE WITNESS STAND CARRYING AN URN CONTAINING THE VICTIMS ASHES.

This issue concerns the important Constitutional Right of a Defendant to a fair trial. The Court of Appeals decision is also in conflict with the Court’s decision in State v. Northcutt 372 S.C. 207, 641 S.E. 2d 873 (2007).

In Northcutt the Court reversed a death sentence because the Solicitor paraded a baby carriage shrouded in black before the jury.

This maneuver with the urn was an attempt to inflame emotion, sympathy and passion, the same tactic rejected by this Court in Northcutt.

In fact this tactic was more inflammatory as the witness paraded the dead child’s ashes before the jury – not an empty baby carriage.

The Court of Appeals erred when it held that the Trial Court’s action in sending the jury out of the courtroom averted the disaster. (R.p.498, l. 13)

The witness made it to the witness stand holding the heart shape urn. (R.p.498, ll 7-12; R.p. 499 ll 16-25; R.p. 504 l.22 to R.p. 505, l.5)

The Judge saw it so the jury had to see it also and the Judge's generic curative instruction could not remove the image of the dead child's ashes from the jury's mind. (R.p. 499, l. 16 to R.p. 510, l. 25)

There was no way to remove the taint of the presence of the child's ashes from the minds of the jury and the court should have granted Dial's Motion for a mistrial.

4. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S EXCLUSION FROM EVIDENCE OF THE CONFLICTING DEATH CERTIFICATE OF DR. ROSS.

The forensic pathologist Dr. Janice Ross issued two different certificates of death. The first one stated for the cause of death that "head hit object". (R.p. 1005). The second certificate eliminated the "head hit object" finding and left the cause of death slot blank. (R.p. 1006)

Dial attempted to introduce the two exhibits into evidence so that the jury would be able to visualize this dramatic change in Dr. Ross' opinion but the Court granted the State's motion to exclude the certificate from evidence. (R.p. 841, l.5 to p. 844, l. 21)

This ruling of the trial court, affirmed by the Court of Appeals, is in direct conflict with this Court's ruling in McKnight v. State 378 S.C. 33, 661 SE 2d 354 (2008). In McKnight the issue was raised in a Post-Conviction Relief matter. Trial counsel had cross examined the State's expert on inconsistencies contained in an autopsy report but failed to move the report into evidence. The Court rejected the State's argument that the report would be cumulative because the expert had testified to it's contents, finding the report was "hard evidence" that would "remind jurors of inconsistencies in the State's expert's testimony". McKnight at 54-55.

The Court's reasoning was explained in more depth in Dial's post-trial motions when the Court stated the exhibits would be "unduly highlighting" on the point. (R.p. 983, l. 20 to p. 984, l. 4)

That's exactly why Petitioner moved to introduce these two certificates, to "highlight" the inconsistency in the forensic pathologists testimony on the most crucial point in the case – the cause of death of Joshua Dial.

This ruling of exclusion deprived the Petitioner of the opportunity to give the jury "hard evidence" that would "remind the jurors of inconsistencies in the State's expert's testimony", the same point that caused this Court to reverse the conviction in McKnight.

5. THE COURT OF APPEALS ERRED WHEN IT REFUSED TO OVERTURN PETITIONERS LIFE SENTENCE.

This is a novel question for this Court. After the Petitioner's trial the United States Supreme Court decided the case of Miller v. Alabama 132 S.ct 2455 (2012). Miller overturned a statute mandating a life sentence when applied to a Defendant under the age of eighteen. Although §16-3-85 does not mandate a life sentence the scientific principles the Supreme Court cited with approval should apply to Petitioner's case to mandate reversal of his life sentence.

At the time of the incident Petitioner was convicted of he was nine days past his eighteenth birthday. 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. Certainly the nine days Petitioner lived past his eighteenth birthday did not transform his adolescent brain to that of an adult.

Furthermore, Dial was the primary caretaker for his son, (R.p. 850, l. 17 to p. 851, l. 25) and there was absolutely no evidence of any prior abuse to the child, as confirmed by Dr. Ross the forensic pathologist. R.p. 595, ll 2-7 and Dr. Cope, the Pediatrician. (R.p. 797, ll 13-16)

Even Misti Richard, Joshua's mother, who testified for the State and carried his ashes in a heart shaped urn to the witness stand admitted Dial would never intentionally hurt Joshua and that when she found out about it she couldn't believe he did it. (R.p. 545 l. 4 to R.p. 547, l. 6)

Even if the State is correct in it's version of the events that Dial caused his child's death by shaking him too hard that act would at most be a momentary loss of control. If Petitioner's adolescent brain had not developed to the level of an adult in the area of impulse control as scientific studies show, then is it just and fair to punish him as if he had an adult brain with fully developed regions governing impulse control ?

§16-3-85 (D), S.C. Code of Laws, 1976 as amended, 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.

In this case there were no aggravating circumstances and much evidence of mitigation, including Petitioner's age, his history of parental nurturing and the absence of prior abuse.

The Court of Appeals ruling that this issue was not preserved for review fails to consider that exceptional circumstances may allow an Appellate Court to consider a sentence even though not objections was made at trial. See State v. Johnson 333 S.C. 459, 510 SE 2d 423 (1999)

The subsequent to trial ruling of the United States Supreme Court in Miller v. Alabama, is an exceptional circumstance requiring this matter to be remanded for resentencing. The sentencing Judge's refusal to give Dial any credit for mitigating factors and the lack of aggravating factors is an exceptional circumstances requiring review of Petitioner's sentence.

Dial, at eighteen years of age was not equipped to be a perfect parent but he tried. He was the primary caregiver (R.p. 549, l. 11 to R.p. 851 l. 25) and he even carried him to his doctor's appointments. (R.p. 854, ll 3-8) He had never abused his child in any fashion. (R.p. 595, ll 2-7) (R.p. 797, ll 13-16)

A life sentence for an eighteen year old is simply too harsh in light of Dial's parental history and the state of science concerning the stage of development of the adolescent brain.

CONCLUSION

For the reason's stated Petitioner asks the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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September 17, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Knox R. McMahon, Circuit Court Judge

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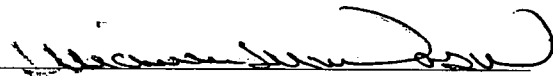
PROOF OF SERVICE

I, Michelle M. Wash, certify that I have served two (2) copies of the Appendix and one (1) copy of the Petition For A Writ of Certiorari on the Respondent by depositing the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 18th day of September, 2013.


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