

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

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Opinion No.:5157(S.C. Ct. App. Filed 7/10/13)

Appellate Case No.: 2013-001970

S.C. Supreme Court

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

v.

Lexi Dial,.....Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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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

No matter how tortuously or eloquently the State attempts to stretch the definition of the term “fugitive” to embrace Dial’s status at the time of his arrest there is no way it can rationally be expanded to include Dial. Dial was transported to Richland County by Lexington County Officers and he remained there under their control until his arrest (R.p. 125 lines 9-25, R.p. 695, l. 19 to p. 696, l 24)

The State’s argument that the MOU gave Dukes authority to arrest Dial in Richland County is simply without substance.

First of all, as set forth above, Dial was not a “fugitive”. Secondly the purpose of the agreement as stated in the first paragraph is to locate and apprehend fugitives. Dial was already located and apprehended and the MOU requires the LCSD to refer cases for investigation to the District Fugitive Task Force, which was not done. For all those reasons Dial’s arrest pursuant to the MOU was not lawful.

The State’s argument that Dial’s arrest was valid as a “citizen’s” arrest under §17-13-10 is likewise an attempt to stretch the law to achieve an irrational result. The State’s argument is that any law enforcement officer could arrest anyone anywhere in the State if they had certain information that a felony has been committed. This would certainly streamline the process, an Officer wouldn’t need to go before a magistrate to get a warrant, wouldn’t have to abide by any multijurisdictional agreements, he could simply go arrest the suspect wherever he was and bring him back to his county. Fortunately, our Federal and State Constitution prohibit such vigilante justice.

The State argues that the admission of the confession would be harmless error because of overwhelming evidence of guilt independent of the confession. The State contends that the evidence showed that the victim's injuries could not have been caused by a household fall and that the victim did not have a bruise on his head showing no fall. This argument however overlooks medical testimony in the record supportive of Petitioner's claim that the injury to his son was caused by a fall.

Dr. Shuler, the first doctor to examine the child, testified there was bruising on the back of the head (R.p. 305, lines 7-8) and that the injury was consistent with his head striking an object (Second p. 305, line 1-4).

Dr. Webb-Wood testified that CPR could cause retinal hemorrhaging (R.p. 339, lines 1-2) and that a fall itself could cause retinal hemorrhaging (R.p. 339, lines 4-8). She also admitted that a fall can cause a subdural hematoma and that bleeding could have continued through medical treatment creating artificial blood pressure, particularly because of the victim's coagulation problem. R.p. 344, l.9 to p. 345, l.16)

Dr. Harper admitted there are many causes of retinal hemorrhaging (R.p. 468 l. 25 to p. 469, l.2) and that children shaken severely enough to cause serious injury often have other injuries such as cracked or fractured ribs and internal organ damage. (R.p. 477, l. 16 to p. 478, l. 15)

However Dr. Ross, the pathologist admitted there were no fractures, no internal injuries to organs and no evidence of old injuries (R.p. 595, lines 2-7). Also Dr. Ross opined the cause of death as "head hit object" or "object hit head", not shaken baby syndrome. (R.p. 591, l. 22 to p. 592, l.4). She also testified that one could have trauma to head causing brain injury without evidence of trauma to the exterior of the skull. (R.p. 596, lines 20-24)

Even Dr. Luberoff admitted that in many causes of severe shaking injury there are injuries to other parts of the body, such as ribs, neck, arms and legs. (R.p. 775, l. 21 to p. 776, l. 10), but in this case a complete skeletal survey was performed and there was no evidence of injury to any bones. (R.p. 776, lines 11-17)

It is likely that the alleged confession blinded the jury to the importance of the inconsistencies in the State's medical evidence on the question of guilt.

As set forth above, the arrest was unlawful and the alleged confession should have been excluded. *See State v. Boswell* 391 S.C. 592, 707 SE 2d 265 (2001).

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

The romantic relationship between Russell and the Assistant Solicitor assigned the case was admitted (R.p. 132, lines 5-14). In fact the relationship caused the Solicitor to be dismissed from the case and the prosecution was turned over to the Attorney General. (R.p. 100 – 101; p. 729 lines 6-9) This action was an admission by the State that the relationship created inherent bias prohibiting the Solicitor's Office from participation in the prosecution. In like manner the inherent bias created by the relationship applies to Detective Russell and should have been admitted pursuant to Rule 608 (C), SCRE.

Further, the trial Court's reasoning that the relationship began ten months after Russell became involved with the case made it irrelevant is erroneous. (R.p. 180, lines 3-12) The relationship admittedly existed at the time of Russell's testimony and there were important differences between Russell's testimony and the testimony of Dial and the existence of the

relationship may well have impacted on the jury's determination of credibility on those differences. (See Argument 2, Petition for Writ of Certiorari)

Furthermore it would place an almost impossible burden on a Defendant to prove when a relationship between a Solicitor and a Detective turned romantic, particularly when both parties were married thereby insuring that the relationship remain clandestine. It was error for the trial Judge to simply accept the testimony of the Detective as to the onset of the romantic involvement. (R.p. 180, lines 3-7)

The question of the timing of the romantic involvement and it's impact on Russell's testimony were both questions for the jury to determine and it was error for the trial Judge to remove those decisions from the jury.

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 VICTIM'S ASHES

The State's argument that a reasonable juror would perceive the carrying of the victim's urn to be a normal sign of the grief occasioned by the loss of a loved one over one year after the death of the love one is not reasonable. The only reason witness Richard would have to carry the urn to court would be to inflame and sway the jury.

The jury was closer to the witness than the Judge and the witness had to parade in front of the jurors to reach the witness stand. The trial court's effort to downplay the potential impact by saying he didn't believe any jurors could see the urn or know what it was (R.p. 499, lines 1-5) does nothing to remove the distinct possibility that some of the jurors did see the urn and did know what it was.

The trial Judge must protect the integrity of the judicial process and when outside factors calculated to inflame emotion, sympathy or passion are introduced into the process the

declaration of a mistrial is the appropriate remedy. *State v. Northcutt* 372 S.C. 207, 641 SE 2d 873 (2007)

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

The State's argument that the exclusion of the conflicting reports of Dr. Ross was harmless error ignores the dramatic visual impact the two reports would have had on the jury. The presence of the conflicting reports in the jury room would have made it impossible for the jury to overlook the serious doubt the pathologist had on the cause of death.

The jury was bombarded by testimony of many expert witnesses who opined on the cause of death. However, the witness most qualified to testify on the cause of death was Dr. Ross and the presence of the conflicting reports would have given the jurors powerful documentary evidence that Dr. Ross was not certain on the cause of death. The exclusion of these conflicting reports mandates reversal on the same principle as this Court's earlier ruling in *McKnight v. State* 378 SC 33, 661 SE 2d 354 (2008).

5. THE COURT OF APPEALS ERRED WHEN IT REFUSED TO OVERTURN PETITIONER'S LIFE SENTENCE

The State's argument that *Miller v. Alabama* 132 S ct 2455 (2012) affords Petitioner no relief as he was 18 years of age at the time of the incident ignores the impact of proven scientific studies cited with approval in *Miller*.

Dial was nine days past his eighteenth birthday and he still had an adolescent brain. As *Miller* indicates, there are fundamental differences between juvenile and adult minds and adolescent brains are not fully mature in regions and systems related to higher order executive functions such as impulse control. *Miller* at 2469

There was no evidence of prior abuse by Dial who was the primary caregiver. R.p. 595, line 2-7, R.p. 797, lines 13-16)

If in fact he did lose control because of his not yet fully developed adolescent brain should he have to spend the rest of his life in prison for one instance of loss of impulse control Miller says no and this Court should too.

CONCLUSION

This Court has never addressed the applicability of a Memorandum of Understanding entered into pursuant to the Presidential Threat Protection Act of 2000 and for this reason alone certiorari should be granted. It is also clear that the guidelines of the MOV were not followed and the State used the MOV as a ruse in an attempt to validate an illegal arrest. The Lexington County deputies jumped the gun. They may have been able to legally arrest Dial had they waited until he returned to their jurisdiction but they chose not to wait. The result was an illegal arrest and the resulting alleged confession should have been excluded. Although the State argues such a ruling would be drastic, it is proper and consistent with this Court's earlier ruling in Boswell.

The Court's ruling that the romantic relationship between the Assistant Solicitor and Detective Russell should be kept from the jury and that the conflicting death certificates of Dr. Ross should be kept from the jury were evidentiary rulings that singly and combined deprived Dial for a fair trial and very likely impacted on the verdict.

The Court's refusal to grant a mistrial when the victim's ashes were paraded before the jury likewise severely prejudiced Dial in the jury's eye.

Furthermore the life sentence given to Dial is truly draconian in light of our current understanding of the development of the adolescent brain.

For all those reasons Dial should be granted a new trial, or, at least, a new sentencing.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "H. Wayne Floyd", written over a horizontal line.

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January 9, 2014

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Lexie Dial, III, Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the **Reply To Return To Petition for a Writ of Certiorari** in the above referenced case has been mailed to **Christina J. Catoe**, at Post Office Box 11549, Columbia, South Carolina 29211, this **9th day of January, 2014**.



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