ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP MONROE,

APPELLANT

APPELLATE CASE NO. 2013-000425

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in denying Appellant's motion for a mistrial where a law enforcement officer testified about a polygraph examination performed on Appellant immediately prior to Appellant giving a confession in this case since it was improper and unduly prejudicial?

STATEMENT OF THE CASE

A Jasper County Grand Jury indicted Appellant at the September 27, 2012 term of General Sessions for trafficking in cocaine, ten grams or more but less than twenty-eight grams, and possession with intent to distribute Clonazepam, a schedule IV drug. R. 191 – R. 194. His case was called to trial on February 11, 2013 before the Honorable Perry M. Buckner, and a jury. Assistant Solicitors J. Carra Henderson and Erin Vaux appeared on behalf of the prosecution and Robert Hughes represented Appellant. R. 55.

At the conclusion of the trial on February 13, 2013, the jury found Appellant guilty of trafficking in cocaine, ten grams or more but less than twenty-eight grams, and the lesser charge of possession of Clonazepam. R. 185, ll. 8-25. Judge Buckner sentenced Appellant to twenty-seven years imprisonment for the trafficking offense and six months concurrent for possession of Clonazepam. R. 189, l. 21 – 190, l. 14.

This appeal follows.

ARGUMENT

The court erred in denying Appellant's motion for a mistrial where a law enforcement officer testified about a polygraph examination performed on Appellant immediately prior to Appellant giving a confession in this case since it was improper and unduly prejudicial.

Background Facts

On April 10, 2012, Officer Richard Long and Sergeant Kevin Smith of the Ridgeland Police Department initiated a traffic stop on a "tan Honda" vehicle after the car made a right hand turn into the wrong lane of traffic. Immediately upon coming to a stop, the passenger got out of the car with his hands up. When Sergeant Smith made contact with the passenger, later identified as Courtney Baniel, he "saw a purple Crown Royal bag that was bulging lying on the ground." The officers recovered the Crown Royal bag and emptied its contents. It contained numerous pills, a white powdery substance that field tested positive for cocaine, and a small amount of marijuana. The driver was identified as Appellant. Both Appellant and Baniel were arrested and taken into custody. R. 60, l. 20 – 66, l. 10; R. 75, l. 7 - 79, l. 24.

Baniel testified that upon noticing the blue lights behind their car, Appellant threw the Crown Royal bag onto his lap and said, "Take these charges from me." Baniel said, "Hell no" and Appellant responded, "Boy, don't play with me. I'll kill Sally and your kids." R. 93, ll. 8-23. Sally was Baniel's girlfriend and the mother of his two children. R. 87, l. 2 – 88, l. 9. Baniel explained that when he got out of the car with his hands up the Crown Royal bag fell to the ground. Baniel claimed that he never touched the bag and did not know what it contained until law enforcement emptied its contents onto the hood of the car. R. 93, l. 24

– 95, l. 16. Baniel denied the drugs belonged to him. R. 96, ll. 16-21. Baniel testified that he immediately got out of the car with his hands up after being stopped because he had "seen it on T.V. like that" and "just thought that's what you supposed to do." R. 94,l. 24 – 95, l. 7.

Appellant was interviewed by law enforcement a total of four times in regards to this case. According to the testimony of the officers who interrogated him, Appellant was read his Miranda rights and subsequently waived them on each occasion. On April 10, 2012, the night of his arrest, Appellant stated that the drugs did not belong to him. R. 66, ll. 5-22. On April 12, 2012, Appellant again stated the drugs were not his, but instead belonged to Baniel. On April 16, 2012, Appellant stated that the drugs belonged to both him and Baniel and that the two had purchased them together. R. 107, l. 14 – 109, l. 18; R. 130, l. 15 – 131, l. 7. And then finally, on April 30, 2012, Appellant allegedly told law enforcement that the drugs belonged to him, that he threw them in Baniel's lap during the traffic stop, and that Baniel had nothing to do with it. R. 114, l. 12 – 115, l. 13; R. 123, l. 17 – 125, l. 24; R. 131, ll. 8-18.

The first three statements were audio and video recorded by the Ridgeland Police Department. R. 18, l. 18 – 19, l. 10[1]; R. 107, l. 14 – 113, l. 25. The fourth statement, which was made at the Beaufort County Sheriff's Office after Appellant took a polygraph test regarding an unrelated murder investigation, was not recorded in any fashion. R. 118, ll. 15-19; R. 40, l. 3 – R. 41, l. 5. Despite defense counsel's pretrial challenge to the admissibility of Appellant's statements, specifically the April 30, 2012 statement, counsel made no contemporaneous objection in front of the jury with respect to any of the statements. See R. 48, l. 12 – 49, l. 19; R. 115, ll. 4-13; R. 125, ll. 6-24.

Jennifer Mills, who was qualified as an expert in drug analysis without objection, testified that the white powdery substance found in the Crown Royal bag that was seized during the traffic stop was 27.97 grams of cocaine. The fifty-six round, white tablets also found in the Crown Royal bag were identified as Clonazepam, a Schedule IV drug. R. 135, l. 19 – 141, l. 16.

At the conclusion of the state's case, the court granted defense counsel's motion for a directed verdict with respect to the charge of possession with intent to distribute Clonazepam finding that the state failed to establish any intent to distribute the Schedule IV drug. The court, however, denied defense counsel's motion for a directed verdict with respect to the trafficking cocaine charge. Consequently, only the lesser included charge of possession of controlled substance and trafficking in cocaine, ten grams or more but less than twenty-eight grams, went to the jury. R. 148, l. 4 – 149, l. 24; R. 150, l. 19 – 151, l. 24.

Motion for a Mistrial

Lieutenant Daniel Litchfield of the Ridgeland Police Department, testified that he personally interviewed Appellant on two occasions: April 12, 2012 and April 16, 2012. R. 107, l. 14 – 109, l. 18. When asked by the prosecution during direct examination whether he observed any other interviews of Appellant, Litchfield answered, "I believe on April 30th, following a polygraph." Defense counsel immediately told the judge that a matter of law needed to be taken up and an off the record bench conference was held. Following the bench conference, the court noted, "Motion by defense is respectfully denied. I'll make a record at the appropriate time." Direct examination continued and Lieutenant Litchfield explained that he was present when Master Sergeant Brian Baird interviewed Appellant and

[1] The supplemental transcript refers to the pretrial hearing held on February 11, 2013

that Appellant told Baird that the drugs were his, that he threw them in Baniel's lap, and that Baniel had nothing to do with it. R. 114, l. 12 – 115, l. 13.

During a discussion on cross-examination about why the April 30, 2012 interview was not recorded, Lieutenant Litchfield again mentioned a polygraph. Litchfield stated, "Typically, when we use another agency's equipment or facilities, we try to use their, also, their rules as far as that goes. It was on a closed circuit T.V., if you're referring to the polygraph. And at that time, I - - " Litchfield was interrupted and again a bench conference was held off the record with the court, the solicitor, and defense counsel present. Lieutenant Litchfield was later asked to join the bench conference and was presumably instructed by the court not to mention the polygraph again. R. 118, l. 15 – 119, l. 120, l. 9.

During the next break in testimony, outside the presence of the jury, the court explained for the record what occurred during the two bench conferences. The court said that subsequent to Litchfield referring to a polygraph, the court offered to give a curative instruction where it would tell the jury that there was no evidence of a polygraph in the case being tried and that Mr. Litchfield never stated that Appellant took a polygraph However, according to the court, defense counsel refused the curative instruction presumably as an insufficient remedy and moved for a mistrial which the court denied. After the testimony continued, Litchfield ***again*** commented on a polygraph during cross-examination. The court once more offered to give a curative instruction, but defense counsel refused and moved for a mistrial for a second time, which was subsequently denied. R. 144, l. 9 – 145, l. 10. The court then stated:

> It is clear to me that the testimony of this witness, both on direct and cross, that being Mr. Litchfield, that there

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immediately prior to the start of trial.

> was not an elicitation by counsel to bring out the fact that there was a polygraph. What I have been told during the break is that the defendant was taken to Beaufort Sheriff's Department for the purposes of a polygraph examination in a completely unrelated case, for which the defendant has never been charged, that being an investigation into a murder. And for which he is not going to be charged or has not been charged. I was aware of this.
>
> I was also aware of the fact that my attorney both for the State **instructed this witness, prior to their testimony, they were not to mention the word *polygraph***; they were not to mention the word *murder investigation*; they were not to mention anything about other alleged offenses that the defendant may have been arrested for or charged with. . .

R. 145, l. 11 – 146, l. 3.

At the conclusion of all the testimony, the defense renewed its motion for a mistrial. The court stated that defense counsel was not required to renew the motion, that it was "for the appellate court to determine," and that the motion was denied. R. 152, l. 15 – 153, l. 2.

Discussion

Despite being instructed before he testified not to mention the unrelated murder investigation or polygraph, Lieutenant Litchfield ignored the instruction and referenced a polygraph ***twice***. This signaled to the jury that Appellant subsequently confessed that the drugs were his, that he threw them in Baniel's lap, and that Baniel had nothing to do with it because he failed a polygraph test. The trial court should have granted Appellant's motion for a mistrial because any reference to a polygraph was improper, inadmissible, and unduly prejudicial.

In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471,

472 (1983). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. See State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

"The general rule is that no mention of a polygraph test should be placed before the jury." State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) (holding the trial court did not abuse its discretion in granting a new trial based on a reference by a state's witness to a polygraph test that she had taken). "Mention of a polygraph test might arise in any one of many ways. The safer course would normally be to avoid ***any*** mention of a polygraph examination." State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979) (emphasis added). Additionally, "[e]vidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." State v. Pressley, 290 S.C. 251, 252 349 S.E.2d 403, 404 (1986) (holding the trial judge improperly allowed repeated references to the defendant's submission to a polygraph examination where the evidence showed the defendant confessed immediately after taking the polygraph, thus reversing and remanding for a new trial).

The evidence presented at trial indicated that Appellant made a full confession "following a polygraph." This led the jury to infer that Appellant failed a polygraph test which is why he provided a full confession indicating the drugs belonged to him and that Baniel was not involved. See R. 114, l. 12 – 115, l. 13. Litchfield, a veteran officer who had

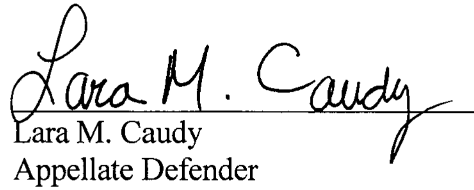
been in law enforcement for approximately sixteen years prior to his testimony, knew such reference was improper, especially after being instructed by the solicitor before his testimony not to mention a polygraph. R. 106, ll. 2-17; See R. 145, ll. 22-24. His testimony violated the general rule that no mention of a polygraph should be made in front of the jury and denied Appellant a fair trial.

Defense counsel was correct to refuse a curative instruction as such instruction would have only drawn attention to the fact that Appellant took a polygraph test and would not have cured the prejudice suffered by Appellant, specifically the likely inference made by the jury that Appellant failed the polygraph which is why he subsequently confessed. See Pressley, 290 S.C. at 252, 349 S.E.2d at 404. A curative instruction would have only further prejudiced Appellant. Thus, the trial court erred in denying Appellant's motion for a mistrial. This Court should reverse and remand for a new trial.

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed and this case remanded to the Jasper County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

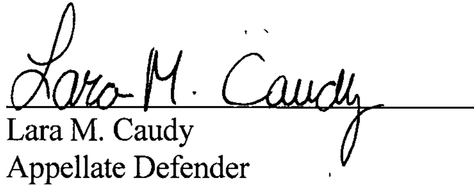
ATTORNEY FOR APPELLANT

This 24th day of January, 2014

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 24, 2014



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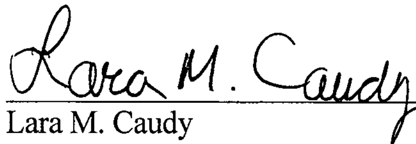
APPELLATE CASE NO. 2013-000425

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of January, 2014.



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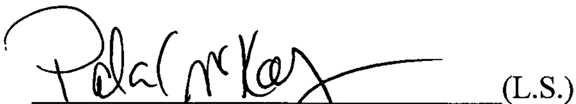
this 24th day of January, 2014.


(L.S.)
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