ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi L. Harrington, Circuit Court Judge

RECEIVED
MAY 12 2014
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RON SANTA McCRAY

APPELLANT,

Appellate Case No. 2012-2133393

INITIAL REPLY BRIEF OF APPELLANT

James K. Falk
Bush Law Group
3 Broad Street, Suite 450
Charleston, SC 29401
(843) 300 -1047

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1159
(803) 724-1343

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

ARGUMENT IN REPLY

1.

The Respondent's reliance upon Williams v. Illinois, __ U.S. __, 132 S. Ct. 2221 (2012) to support its argument that Stephanie Stanley's testimony did not violate Appellant's rights under the Confrontation Clause is misplaced because the facts in Williams are clearly distinguishable from the those in the case at bar.

The factual similarity between the recent United States Supreme Court decision in Williams v. Illinois, __ U.S. __, 132 S. Ct. 2221 (2012) and the case at bar is that the Court ruled on the admissibility of testimony from a DNA expert that included statements from a non-testifying DNA analyst's report. The Court held that the expert witness's testimony did not violate the Confrontation clause because the particular statements from the non-testifying analyst were not offered for the truth of the matter asserted and, on a separate and independent ground, because the DNA report at issue was non-testimonial. Three significant factual dissimilarities exist between the two cases are: 1) Williams was a bench trial not a jury trial; 2) the DNA report at issue in Williams was prepared by a separate and independent outside laboratory, Cellmark Diagnostics Laboratory, and not a lab operated by state law enforcement; and, 3) the DNA report in Williams was used to identify and apprehend a suspect and not to further incriminate an existing suspect.

The particular testimony at issue in Williams concerned the following question from the state: *Whether there was "a computer match" between "the male DNA profile found in semen from the vaginal swabs of [L.J.]" and "[the] male DNA profile that had been identified" from petitioner's blood sample.* Williams *Id.* at 2230 (internal quotations and brackets included). The testifying expert in Williams had no first-hand information regarding the source of the sample

that she entered into the Illinois State Police Crime Laboratory computerized database. *Id.* at 2229 and 2245. The Williams Court held the testifying expert was not tasked to testify as to the origin of the sample and her testimony was therefore not offered to prove the sample was recovered from the victim. *Id.* at 2236. Rather that portion of the state's question regarding the source of the sample was a mere premise of the prosecutor's question, and [the testifying expert] simply assumed it to be true in giving her answer. *Id.* Since the statement was not offered for the truth of the matter asserted, it was not hearsay and therefore not a violation of the Confrontation Clause.

The testimony of the testifying expert in Williams is unlike the testimony of the testifying expert in the case at bar, Stephanie Stanley, because the testifying expert in Williams was asked about her own analysis based on DNA information that was received from the outside lab. *See id.* at 2230. Stanley did not perform her own testing rather her testimony consisted of her audit of the testing performed by Katie Urka, the non-testifying expert. T. 368 l. 16-17 and T. 382 l. 1. Therefore Urka's report was more than a mere premise upon which Stanley relied in giving her opinion and the references to Urka's report were therefore offered for the truth of the matters asserted therein.

The Williams Court noted since this was a bench trial there is no reason to assume that the finder of fact would have mistaken the expert's answer to the prosecutor's question as substantive evidence establishing the origin of the DNA sample. *Id. at 2236.* The Williams Court held that when a judge sits as trier of fact *it is presumed that the judge will understand the reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose. Id.* at 2235. The case at bar was a jury trial therefore there

was no similar safeguard that would prevent the jury from considering whether the contents of Urka's report constituted substantive evidence regarding the DNA results.

As separate grounds for the admissibility of the disputed testimony, The Williams Court held that when analyzing hearsay under the Confrontation Clause the court would look to the primary purpose for which the statement was made. *Id.* at 2242. Consistent with its earlier opinion in Hammon v. Indiana, 547 U.S. 813 (2006), the Court noted that when the primary purpose of an out-of court statement was to enable police to respond to an ongoing emergency rather than to build a case against an accused individual, the hearsay statement does not violate the Confrontation Clause. *Id.* at 2243. Additionally and citing its decision in Michigan v. Bryant, 562 U.S. __, 131 S. Ct. 1143, at 1155, the Williams Court held that when statements are made for the purpose of assisting police in an ongoing emergency the prospect of fabrication is presumably significantly diminished. The Court held further that reliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause. *Id* at 2243. The Williams Court went on to hold that the Cellmark report was not generated for *the primary purpose of creating an out-of-court substitute for trial testimony* or to target an existing suspect. Rather the primary purpose of the Cellmark report was to help law enforcement *catch a dangerous rapist who was still at large. Id.*

Moreover there is an additional presumption of reliability or lack of motivation for fabrication when the non-testifying witness is an employee at an independent third party lab with and not a state employee with an interest in the outcome of their testing. In both Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) and Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011), the reports at issue were prepared by employees of state-owned labs. In Melendez-Diaz, the non-testifying technician worked for the State Laboratory Institute of the Massachusetts Department

of Public Health. *Id* at 308. In Bullcomming the non-testifying technician was employed at the New Mexico Department of Health. Scientific Laboratory Division. *Id* at 2707. In both cases the court held that the admission of the document prepared by a non-testifying witness was a violation of the defendant's rights under the Confrontation Clause. Melendez-Diaz, 557 U.S. at 311, Bullcomming, 131 S. Ct. at 2717.

The justifications supporting the Court's decision in Williams are inapplicable to the case at bar. At the time that Katie Urka performed her DNA analysis, Mr. McCray was already in custody. Urka knew the identity of the individuals from whom the blood samples were taken. It is reasonable to assume that Urka knew that primary purpose of her work was to corroborate the State's case against Mr. McCray and that her report would be used at trial. Whereas prior to preforming their work the DNA analysts at Cellmark had no way of knowing who was the target of the investigation or whether their report will be incriminating or exonerating or both. *Id.* at 2244.

Because of the significant factual differences between the case at bar and the Williams case, the legal analysis supporting the Court's decision Court's decision in *Williams* would be inapplicable to the case at bar. Therefore the Respondent's reliance on the Court's decision in Williams is misplaced. Appellant respectfully suggests this court follow the Court's analysis supporting its decisions in Bullcoming v. New Mexico, 131 S. Ct. 2705 and Melendez-Diaz v. Massachusetts, 557 U.S. 305 when reaching a decision in this case.

CONCLUSION

By reason of the arguments is the brief of appellant, and this reply brief, appellant should be granted a new trial.

Respectfully submitted,

By: RJMcC

James K. Falk, Esq.
Bush Law Group
3 Broad Street, Suite 450
Charleston, SC 29401
(843) 300-1047
jkfalk@bushlaw.com
Robert Dudek, Esq
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

The 12th day of May, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Kristi L. Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RON SANTA McCRAY

APPELLANT,

CERTIFICATE OF SERVICE

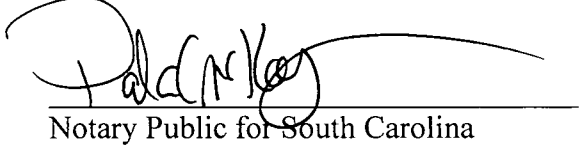
The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of May, 2014.

By: 

James K. Falk
Robert Dudek

Attorney for Appellant

SUBSCRIBED AND SWORN TO
Before me this 12th day of May, 2014



Notary Public for South Carolina
My Commission Expires: July 24, 2022