THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

JAKE ANTONIO WILSON,

PETITIONER

APPELLATE CASE NO. 2012-212043

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2012-UP-099

PETITION FOR REHEARING

On July 9, 2014, this Court affirmed per curiam the conviction of Petitioner Jake Wilson for the murder of his girlfriend for which he received concurrent sentences of life for the murder and five years for the possession of firearm during a crime of violence. This Court ruled that the Court of Appeals erred in affirming the trial court's admission during the state's case-in-chief of Wilson's mid-interrogation assertion of his right to counsel as substantive evidence of his guilt. However, this court ruled that this error was harmless under the circumstances and did not warrant reversal. This petition for rehearing is submitted in opposition to the harmless error ruling.

This Court overlooked or misapprehended the previous standard it set for a harmless error analysis as it pertained to a Doyle violation, and the standard set by the United States Supreme Court for a harmless error analysis related to a Doyle violation.

In Chapman v. California, 386 U.S. 18 (1967), the United States Supreme Court ruled that before a federal Constitutional error could be held harmless, the reviewing court must be able to declare that it was harmless beyond a reasonable doubt.

This Court held in State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984), and again in State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), that a harmless error analysis could be applied when a Doyle violation occurred. In applying this harmless error analysis, this Court applied the factors as enumerated in Chapman. These factors should be considered conjunctive because the word "or" was not included. Therefore, it was clear that the United States Supreme Court and this Court required that all of the factors had to be met in order for the Doyle error to be considered harmless beyond a reasonable doubt.

These factors provided that in order to be harmless, the record must establish that the reference to the defendant's right to silence was a single reference which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming.

In applying these factors to Wilson's case, the solicitor made two references during the testimony of the officer, Detective Goldstein, who interrogated Wilson, back to back, which had even more impact because it was repeated very soon. From the trial transcript:

> Q.: [H]ow did the defendant respond when asked whether he wanted an attorney before speaking with you at that time?
>
> A.: He advised me that he would speak to me orally but would not give a written statement.

Q.: So he agreed to speak with you without an attorney at that time?

A.: Yes.

Q.: And did he in fact waive his rights?

A.: Yes.

Q.: Did he later change his mind and ask to speak to an attorney?

A.: Yes, he did.

[Objection overruled.]

Q.: Did he ever change his mind and ask to speak to an attorney?

A.: Yes, he did.

Q.: And did the questioning stop at that time?

A.: I stopped it at that time.

ROA. p. 444 line 5- ROA. p. 445 line 4. The reference was repeated.

Wilson's exculpatory story was not implausible. Wilson testified at trial that he did not murder Pendergrass as the shooting was an accident. He was holding the gun waving it around when Pendergrass hit his hand, and the gun went off shooting her accidentally. ROA.P. 542, lines 1-25.

In State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), the Supreme Court reversed and remanded for the entry of a directed verdict when the state's case was circumstantial. Schrock offered an alibi which the state argued was without merit. However, the Supreme Court ruled that "it was not incumbent upon an accused person to prove that he was somewhere else at the time and place of the crime, but the state had the burden of proving that the accused was at the scene of the crime. The fact that Wilson admitted that his first statement to police was not true was not indicative

of his guilt of murder. Involuntary manslaughter was at issue also. It was the state's burden to prove he committed the crime.

The evidence of guilt was not overwhelming. Wilson presented two experts whose testimony supported Wilson's story testimony at trial. ROA. P. 608-655. Thus, the exculpatory story was not totally implausible.

This Court did not use these factors as provided in the Court's own rulings in Truesdale and Pickens nor the standard as cited in Chapman of beyond a reasonable doubt in its harmless error analysis. Instead, this Court relied on the case of State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956) which was decided before Doyle or Miranda.

In State v. Smith, Id. the defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquors. The court held that the admission in evidence of testimony of the defendant's refusal, after arrest, to submit to the chemical test designed to measure the alcoholic content of his blood, was proper and not violative of the accused's constitutional privilege against self-incrimination. The main point was that the defendant did not present a complete record to support his defense that the hearsay statements of the restaurant proprietors were prejudicial. The Court wrote:

> The transcript of record in this case does not show what evidence was offered by the hearsay statements of the proprietors referred to in such statements. An accused must be prejudiced by the admission of hearsay testimony in order to be entitled to a reversal on the ground of its admission. The record in this case does not show what the testimony was nor can we determine form the record whether it was prejudicial to the appellant or not. The burden is upon the appellant to satisfy this court that there has been prejudicial error.

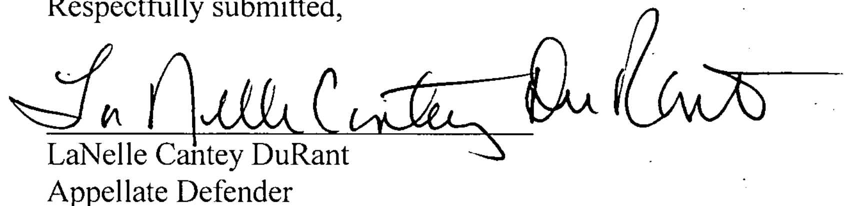
State v. Smith, did not concern a harmless error analysis as related to a constitutional question. The case concerned an incomplete record.

In Williams v. Zahradnick, 632 F.2d 353 (4th Cir 1980), the Fourth Circuit Court of Appeals held that the prosecutor's references at trial to the defendant's post arrest silence were unconstitutional and such error was not harmless. The court wrote that an error is harmless only when the court, after assessing the record as a whole to determine the probable impact of the improper evidence on the jury can conclude beyond a reasonable doubt that the error did not influence the jury's verdict.

Petitioner Wilson was entitled to a harmless error analysis based on the standard of beyond a reasonable doubt. The harmless error analysis had to be particular to a Doyle violation. There was not overwhelming evidence as Wilson's story of the events was not implausible.

WHEREFORE, we respectfully request this Court to reconsider its ruling and grant Wilson a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 21st day of July, 2014.

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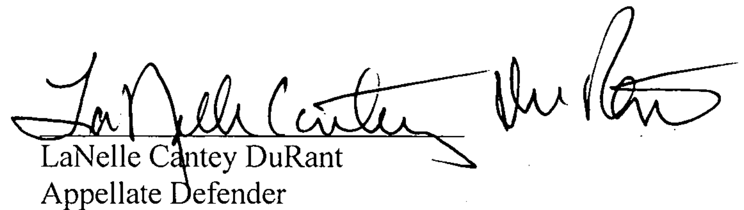
CERTIFICATE OF SERVICE

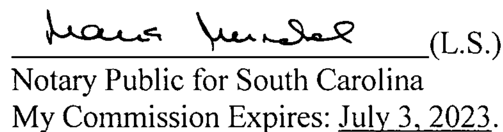
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Mr. Jake Antonio Wilson, # 303739, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of July, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 21st day of July, 2014.



______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.