

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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JUL 31 2014

**S.C. Supreme Court**

THE STATE,

RESPONDENT,

V.

THEODORE DAVID WILLS, JR.,

PETITIONER

APPELLATE CASE NO. 2010-178266

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Appeal from Horry County

Steven H. John, Circuit Court Judge

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Opinion No. 4742

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PETITION FOR REHEARING

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On July 16, 2014, this Court affirmed the conviction of Theodore David Wills for the murder of Julian Lee who was shot twice in the back in October, 2001 in Horry County. This Court affirmed the ruling of the Court of Appeals that Wills' statement, made in connection with a proffer agreement with the state, was admissible as Wills had waived the protections provided by Rule 410, SCRE. Wills' statement was used by the state during its case-in-chief. Wills had agreed in the proffer agreement that if a subsequent polygraph examination showed deception or inconsistencies

on his part, then the terms of the proffer agreement were null and void and any statements made by Wills could be used against him by the state for any legal purpose.

This Court relied on the rules of contract construction and determined that Wills' Proffer Agreement waived the protections of Rule 410, SCRE. As a result of the polygraph, Wills was charged with murder. The prosecution of Wills was based almost exclusively on the taped statement that Wills gave as part of the Proffer Agreement. R. 147, ll. 13-14; R. 185-187. According to his statement, Wills and three other friends and the victim drove to a remote location. Wills saw Mark Willard shoot the victim and Wills ran away. R. 90, ll. 11- R. 93, ll. 4; R. 152, ll. 20-R. 155, ll. 18.

This Court misapprehended the impact and significance that this opinion potentially has on the legal justice system. If this Court allows the present opinion to stand petitioner respectfully submits it will greatly undermine the purpose and policy of Rule 410, SCRE which is to encourage accomplices or co-defendants to cooperate with the government in order that the government can bring the most culpable to justice while ensuring that the cooperating party receives some lesser punishment for his cooperation. See State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986).

Rule 410(4), SCRE, provides that evidence of "any statement in the course of plea discussions with an attorney for the prosecuting authority which did not result in a plea of guilty or which result in a plea of guilty later withdrawn" is not admissible "in any ... criminal proceeding ... against the defendant who made the plea or was a participant in the plea discussions."

Honoring this contractual plea agreement not only is fundamentally fair, it invites great wariness on the part of any criminal defense attorney and defendant if solicitors are allowed to opt out of them based on reasons that can be correctly argued to be arbitrary – as in this case. See Santobello v. New York, 404 U.S. 257 (1971); State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

The United States Supreme Court held in Missouri v. Frye, 132 S.Ct. 1399 (2012), that in order that the benefits of plea bargaining, which include the potential to conserve valuable prosecutorial

resources and for defendants to admit their crimes and receive more favorable terms at sentencing, can be realized, criminal defendants require effective counsel during plea negotiations. The Court found that ninety-four percent of state convictions are the result of guilty pleas. There has been concern in South Carolina generally about the backlog of cases in the criminal courts. This opinion has the potential to lead to even greater backlog if there is reluctance on the part of defense attorneys to enter into plea agreements. The Missouri v. Frye, *id.* court held that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.

As Justice Beatty wrote in his dissent with which Justice Hearn concurred: “The integrity of the judicial process is challenged when the State is allowed to introduce a statement that the State has declared false and deceitful yet, at the same time, insists that the judge and jury accept the statement as truthful.” Justice Beatty used the principles of contract law as a guide to decide that the plain terms of the proffer agreement prevented the state from using Wills’ statement during its case-in-chief.

The majority applied the rules of contract law to decide that the proffer agreement waived the protections of Rule 410, SCRE. However, the proffer agreement provided that if the polygraph indicated deception, then the agreement was null and void. Under contract law, this would return the parties to the same position they were in prior to the contract. See 17A Am. Jur. 2d *Contracts* Section 584 (2004). In that case, Wills’ statement could not have been used pursuant to Rule 410, SCRE. Here again, Wills was denied fundamental fairness.

This Court overlooked the constitutional principles that apply to a person accused of a crime such as due process and fundamental fairness. It is these constitutional principles that should guide the use of contract rules in interpreting proffer agreements between a criminal defendant and the state. Proffer agreements, like plea agreements, are “unique contracts in which special due process

concerns for fairness and the adequacy of procedural safeguards obtain.” United States v. Parra, 302 F.Supp. 2d 226, 236 (S.D.N.Y. 2004).

In Lafler v. Cooper, 132 S.Ct. 1376 (2012), the United States Supreme Court held that when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.

In State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985), this Court emphasized the importance of a fair trial by ruling that a defendant cannot waive the right to a fair trial unless he pleads guilty. This court affirmed Gaskins’ trial court where the trial judge excused two jurors who were biased against Gaskins because they believed he was guilty, but they were opposed to the death penalty. Therefore, they were properly disqualified.

It was a violation of Wills due process rights and a violation of fundamental fairness to allow the state to admit Wills’ statement as substantive evidence when it was based on the state’s opinion about the reliability of their own polygraph machine. Polygraph results are generally not admissible in court due to questionable reliability, but the results of this one were used to admit the statement.

Even the United States Supreme Court in United States v. Mezzanatto, 513 U.S. 196 (1995), although it ruled that an agreement to waive the exclusionary provisions of Federal Rule 410 was valid and enforceable, allowed the waiver to be used for impeachment purposes—not as substantive evidence during the prosecution’s case-in-chief. Cf. People of the State of Michigan v. Stevens, 461 Mich. 655, 610 N.W.2d 881 (2000) (dissent).

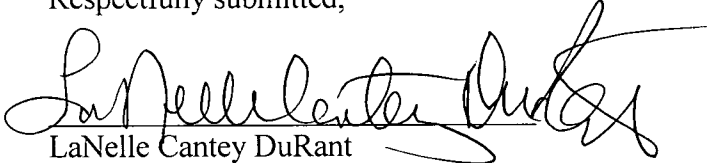
If the state is allowed to use statements made during a proffer agreement pursuant to Rule 410, SCRE, the validity of having Rule 410 is undermined. The Rule becomes useless as it is no longer of any benefit.

In State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 607 (1999), where this Court held that it “has consistently held the results of polygraph examinations are generally not admissible because the reliability of the test is questionable.” Although this Court did not recognize a *per se* rule against the admission of polygraph evidence, it indicated that the admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE, and the Jones factors. The polygraph result was not put before the jury, but triggered the admission of the statement which the polygraph examiner deemed to be deceptive.

Then in Wills’ opinion, this Court allowed the waiver of the proffer agreement, which the Court said was based on contract law, to be waived based on an unreliable polygraph test, and then allowed the state to use this alleged false statement against Wills as the truth. This undermines the integrity of contract law and the judicial system and due process.

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

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender

This 31st day of July, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

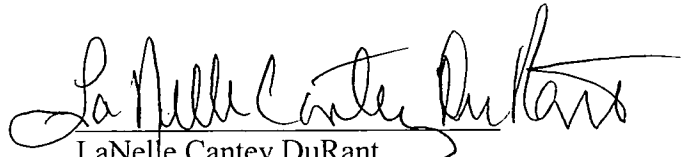
V.

THEODORE DAVID WILLS, JR.,

PETITIONER

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 S. Creighton Waters, Esquire, AT Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Theodore David Wills, #239761, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 31<sup>st</sup> day of July, 2014.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31<sup>st</sup> day  
of July, 2014.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.