THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No.: 2013-001970

Lower Court Case No.: 2010-GS-32-01876

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S.C. Supreme Court

State of South Carolina, Respondent,

vs.

Lexi Dial, III, Petitioner.

PETITIONER'S BRIEF

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STATEMENT OF CASE

Petitioner was indicted by the Lexington County Grand Jury in July 2010 for homicide by child abuse. This matter was tried before the Honorable R. Knox McMahon and a jury from April 11th to April 15, 2011. Petitioner was found guilty as indicted. Post-Trial motions were denied on April 19, 2011 and Petitioner was sentenced to life without parole.

Timely notice of appeal was filed. The Court of appeals affirmed all rulings of the Trial Court July 10, 2013.

Petitioner filed a Petition for Rehearing with Memorandum of Law on July 24, 2013. Petition for Rehearing was denied on August 22, 2013 and a Petition for Writ of Certiorari was filed September 18, 2013.

An Order granting Certiorari on questions I, III and IV was entered on August 6, 2014.

STATEMENT OF THE FACTS

On January 19, 2010 Petitioner was taking care of his five month old son when he suffered a serious head injury. When CPR failed to revive the child 911 was called and emergency medical services and Law Enforcement Officers of the Lexington County Sheriff's Department responded to the scene.

EMS transported the child to Lexington Medical Center and Petitioner was taken to the hospital by Lexington County Sheriff's Department personnel. The child was then transported to Richland Memorial Hospital and likewise the Lexington County Sheriff's Department transported Petitioner there.

The child died the following day and Petitioner was arrested very shortly thereafter by Henry Dukes a Lexington County Officer at the hospital in Richland County. He was

immediately transported to the Lexington County Sheriff's Department where he was interrogated until an inculpatory statement was obtained.

Petitioner contended at the scene and at the beginning of the interrogation that he was carrying his child when he tripped and the child's head hit the coffee table. Several experts opined that the child's injury was the result of "shaken baby syndrome".

I. THE COURT ERRED WHEN IT RULED THAT OFFICER DUKES HAD AUTHORITY TO ARREST PETITIONER IN RICHLAND COUNTY

It is undisputed that the powers vested in a Lexington County Sherriff's officer do not include the authority to arrest in Richland County. Lexington County Sherriff's Deputy Russell admitted that he was at Richland Memorial Hospital with Petitioner when the child died. He called Deputy Henry Dukes to come to the hospital to arrest Petitioner as Russell knew he did not have authority to arrest in Richland County. (R. p. 105, l. 3 to R. p. 106, l. 5; R. p. 122, l. 10 to p. 125, l. 6)

Since Dukes would have the same restriction in his arrest authority outside Lexington County, the question, which is novel, is whether a Memorandum of Understanding (MOU) between the Lexington County Sherriff's Department and the United States Marshall Service (App. pp 18-21) somehow conferred upon Dukes the authority to arrest Petitioner in Richland County.

Dukes admitted he did not have a copy of any authorization giving him the power to arrest in Richland County (R. p. 678, ll 5-8). The question is whether his appointment as the Lexington County Sherriff's Department representative to the Fugitive Task Force pursuant to the MOU gives him the authority to arrest Petitioner.

This Court has recently addressed the issue of multi-jurisdictional agreements in *State vs. Burgess* 408 S.C. 421, 759 SE 2d 407 (2014), *Burgess* held that statutes governing multi-jurisdictional agreements must be strictly complied with to be valid. *Burgess* at 11. The Court in *Burgess* discussed the various statutes authorizing multi-jurisdictional agreements §23-1-210, §23-1-215 and §23-20-50. §23-1-215 doesn't apply as this was not a crime involving multiple jurisdictions. §23-1-210 and §23-1-215 both require approval of the governing bodies for the agreement to be valid.

Petitioner asserts that the MOU is invalid for two reasons. First, it was not approved by the governing body of Lexington County and the statutes authorizing Multi-Jurisdictional agreements do not authorize agreements with the Federal Government.

However, even if the MOU is valid, it does not authorize Dukes to arrest Petitioner in Richland County.

The MOU states its primary purpose is to "investigate and arrest", as part of joint law enforcement operations people, who have active state and federal warrants for their arrest. The intent of the joint effort is to investigate and apprehend local, state, and federal fugitives ... (App. p. 18). It requires the participating agency to refer cases for investigation to the District Fugitives Task Force (DFTF) at which time cases will be adopted at the discretion of the District Chief Deputy. Petitioner's case was never referred to anyone and no one outside the Lexington County Sheriff's Department had any involvement in Petitioner's case before his arrest.

Petitioner was certainly not a "fugitive". LCSD Deputy Russell testified that Petitioner was not free to leave the hospital before the child died and Russell was right there with him. (R. p. 125 ll. 9-25; R. p. 695, l. 19 to R. p. 696, l. 24). In fact, Petitioner was de facto under arrest by Deputy Russell because he was not free to leave Richland Hospital. To call him a "fugitive" and

attempt to invoke the authority of the MOU to "legally" arrest him in Richland County was ludicrous. Even if he were a fugitive his case was never referred to the DFTF nor adopted by the District Chief Deputy.

Russell arrived at Richland Memorial Hospital at around noon or 1:00 p.m., the child died at approximately 2:06 p.m. and Petitioner was arrested at approximately 2:10 p.m. (R. p. 122, ll. 11-23). He was handcuffed and carried to an interview room at the Lexington County Sheriff's Department (R. p. 125, ll. 2-8). Russell was present for the arrest but admitted he did not have jurisdiction to make the arrest so he had LCSD Deputy Dukes make the arrest (R. p. 105, l. 19 to R. p. 106, l. 5).

Petitioner, who had just turned eighteen years of age was interrogated by Detective Russell, from 3:00 p.m. to 4:10 p.m. (R. p. 121 ll. 2-6)

At the beginning of the interrogation Petitioner asserted that the injury was accidental. R. p. 127, l. 20 –l. 24) He eventually signed an inculpatory statement. (R. p. 1022 – 1023). At trial Petitioner repudiated the statement saying he wrote what they wanted to hear as he was in shock from the loss of his child (R.p. 870, ll. 10-24).

Since the arrest was invalid Petitioner moved to suppress this involuntary statement, but the motion was denied (R. p. 678, l. 22 to R. p. 693, l. 18).

Since the arrest was invalid any evidence seized as a result of the arrest should have been suppressed.

This is the same situation this Court addressed in <u>*State v. Boswell*</u> 391 S.C. 592, 707 S.E. 2d 265 (2011). Bowell was arrested in Calhoun County by Lexington County Sheriff's Department Officers. There was an invalid Multi-Jurisdictional agreement between Calhoun County and Lexington County. Boswell allegedly confessed after his arrest. This Court ruled

that the confession should have been suppressed as it was the fruit of the poisonous tree of the invalid arrest.

The trial Court should likewise have suppressed the statement in this case.

II. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURTS DENIAL OF A MISTRIAL WHEN THE VICTIM'S MOTHER APPROACHED THE WITNESS STAND CARRYING AN URN CONTAINING THE VICTIM'S ASHES

Misti Richard, the victim's mother, cried so hysterically at the beginning of the trial that Defense Counsel moved for a mistrial, which was denied. (R. p. 229, ll. 2-20). About halfway through the trial Richard was called as a witness by the State. When she approached the jury stand she placed an object upon the table to take the oath. The object was in clear view of both the Judge and the jury. The object was so obviously inappropriate the jury was sent out of the court room immediately. The object was a heart shaped urn containing the ashes of the dead child. It is approximately 3 inches in width, 2 ½ inches in length and one inch deep, bronze in color. (R. p. 501, ll 4-9). Defense Counsel moved for dismissal for prosecutorial misconduct (R. p. 499, ll 16-19) which was denied (R. p. 502, ll 2-8) and then for mistrial (R. p. 503, ll 1-3) which was denied (R. p. 504, l. 21).

This was a blatant attempt to inflame the passion of the jury and to curry sympathy for the dead child. Witness Richard literally brought the remains of the dead child into the courtroom in clear view of the jury.

The jury could not help but be moved by the sight of the child's remains being carried around by his mother.

Petitioner had a right to be tried on the facts of the case by an impartial jury not swayed by emotion or passion. Though brief, this encounter with the child's remains by the jury irreparably prejudiced and tainted the judicial process.

Our Court has looked at such displays before with extreme disfavor. In _State v. Northcutt_ 372 S.C. 207, 641 SE 2d 873 (2007) our Supreme Court reversed a death sentence when the Solicitor paraded a baby carriage shrouded in black cloth before the jury during closing argument. The Court reasoned that the baby carriage display injected into the jury's consideration concerns that were not based on the record evidence and it's reasonable inferences.

This tactic by the State's witness Richard was even more inflammatory than the empty baby carriage because the dead child's ashes were paraded before the jury.

Witness Richard made it to the witness stand holding the heart shaped urn (R.p. 498, ll. 7-12) (R. p. 499, ll 16-25; R. p. 504, l. 22 to R. p. 505, l. 5).

The witness passed right in front of the jury with the urn to get to the witness stand. It is impossible to remove the prejudicial impact of this display by the witness from the jury's mind and the Court should have granted a mistrial.

III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S EXCLUSION FROM EVIDENCE OF THE CONFLICTING DEATH CERTIFICATES OF DR. ROSS

When the Petitioner was questioned at the scene he informed the police that he was carrying his child when he tripped and fell and the child's head struck the coffee table. (R. p. 643 ll. 11-17)

The State's theory of the case was that the petitioner violently shook the child and that the fatal injury suffered by the child was more consistent with "shaken baby syndrome".

There was some conflict between the opinions of the medical experts called as witnesses by the State.

Dr. Shuler was the emergency room physician who initially treated the child at Lexington Medical Center. He testified that the bilateral bleeding and subdural hematoma he observed

could have been caused by the child being dropped on a coffee table (R.pp 298 -299) and that a small 2-3 inch bruise on the back of the head could have been caused by the child's head striking an object. (R. pp 305 A, l. 4 to p. 305 B, l. 5)

Dr. Webb Wood, pediatric resident at Richland Memorial Hospital had a final diagnosis of traumatic brain injury secondary to accidental trauma (R. p. 332, ll. 12-13).

Dr. Cheesman, ophthalmologist, had a diagnostis of shaken baby syndrome. (R. p. 416 line 20 to p. 417, l. 5).

Dr. Harper, pediatric critical care specialist likewise diagnosed shaken-baby syndrome. (R.p. 466, ll. 10-12)

Dr. Luberoff opined that the child suffered non accidental blunt force trauma with extensive retinal hemorrhaging. (R. p. 749, l. 8 to R.p. 750, l. 11). She did concede that the pathologist was the expert best suited to determine the cause of death. (R. p. 786, ll. 10-15)

Dr. Janice Ross was the forensic pathologist who conducted the autopsy. The original certificate she prepared described how the injury occurred as "Head hit object". (R. p. 1005) She later prepared a subsequent certificate that removed this phrase and was blank as to how the injury occurred. (R. p. 1006).

Defense counsel moved to admit the two certificates into evidence so tht the jury would have visual evidence of the initial certificate which was consistent with Petitioner's version of the events of the injury and to show how the subsequent certificate was changed so it would not conflict with the State's theory of the cases. The State objected to the introduction of the exhibits and the Court granted the States motion and excluded the certificates from evidence. (R.p. 841, l 5 to p. 844, l 21)

This ruling prevented Petitioner's trial counsel from showing the initial certificate of the pathologist to the jury during closing argument thereby depriving the Petitioner of a powerful piece of documentary evidence prepared by the State's expert that was consistent with the innocence of the Petitioner and prevented the jury from studying the documents in the jury room as they deliberated.

This ruling of the trial Court was in direct conflict with this Court' ruling in *McKnight v. State* 378 S.C. 33, 661 SE 2d 354 (2008). *McKnight* involved a Post Conviction Relief matter. Although his trial counsel had extensively cross examined the State's expert on inconsistencies in the autopsy report, trial Counsel failed to place the report in evidence. Rejecting the State's argument that the report would simply be cumulative to the expert's testimony, the Court held that the report would be "hard evidence" that would remind jurors of inconsistencies in the State's expert testimony. *McKnight*, at 54-55.

This is exactly why Petitioner attempted to introduce these exhibits, to highlight the inconsistency of the State forensic pathologist testimony on the most crucial point in the case, the cause of the death of Petitioner's child.

The ruling deprived Petitioner of the opportunity to give the jury "hard evidence" of the State's expert testimony, the same point that caused this Court to reverse the conviction in *McKnight*.

This was of paramount importance in this case because there was much evidence in the case to support Petitioner's contention that the injury was accidental. Petitioner had made sure that his child received proper post-natal care and the treating pediatrician testified that the child had never exhibited any signs of abuse (R. p. 797, ll. 13-16) and Dr. Ross, the pathologist confirmed there were no signs of other injury to the child. (R. p. 595, ll. 2-7)

Furthermore, Petitioner testified that the injury was accidental (R. p. 856, l. 22 – R. p. 859, l.5). The Pathologist's initial report supported Petitioner's version of the injury and he had a right for the jury to see it and study it.

CONCLUSION

The inculpatory statement of the Petitioner was by far the most damaging piece of evidence in the case. There was conflicting evidence of the experts on the cause of death and there was no evidence that this child had ever suffered any injury prior to this incident. Also, the evidence showed he was a loving, caring parent.

This Court should reverse the conviction and remand the case with instructions that the inculpatory statement must be suppressed because the arrest was invalid.

The Court should also reverse and remand for retrial because the display of the urn to the jury unduly inflamed the passion of the jury.

Also, the Court should reverse and remand for retrial with instructions that the two conflicting reports of the forensic pathologist should be admitted into evidence.

Respectfully submitted,

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9/16, 2014.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Petitioner's Brief complies with Rule 211 (b), SCACR.

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September 16, 2014

THE STATE OF SOUTH CAROLINA
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vs.

Lexi Dial, III, Petitioner.

PROOF OF SERVICE

I, Michelle M. Wash, certify that I have served the within Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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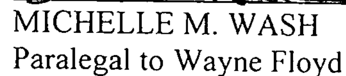
I further certify that all parties required by Rule to be served have been served.

This 17 day of September, 2014.



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