IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 24 2014
S.C. Supreme Court

Appeal from Orangeburg County
Court of General Sessions

Edgar W. Dickson, Circuit Court Judge

S. C. Court of Appeals Appellate Case No. 2012-213006

THE STATE,

RESPONDENT,

v.

JULIAN YOUNG,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803) 738-8622
(803) 738-1600 (FAX)

ATTORNEY FOR PETITIONER.

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies, pursuant to Rule 242(d) (1), SCACR, that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 6, 2014.

INDEX

QUESTION PRESENTED

I.

Did the trial court err, and thereby violate the Petitioner's right to confront his accusers, by admitting into evidence hearsay testimony concerning statements made by the victim-deceased to a law enforcement officer after he was shot where the statements at issue were testimonial in nature and where, even if not testimonial, they did not qualify under Rule 803(2), SCRE, as excited utterances which would be admissible as an exception to Rule 802, SCRE; the hearsay rule?

STATEMENT OF THE CASE

The Petitioner was indicted by the Orangeburg County Grand Jury for the offense of murder. See, Indictment no. 2011-GS-38-1833. He was represented in the trial court by Virgin Johnson and Corey L. Williams, of the Orangeburg County Bar. The Petitioner proceeded to trial by jury on August 14 – 16, 2102. The State was represented at trial by Assistant Solicitors Donald Sorenson and Harrison Bell. At the conclusion of this trial, the Petitioner was found guilty as indicted and was sentenced by the Honorable Edgar W. Dickson, presiding circuit court judge, to a term of thirty-five (35) years incarceration.

The Petitioner served and filed a timely Notice of Appeal from his judgment and sentence. This appeal was heard by the South Carolina Court of Appeals on June 4, 2014. Petitioner's conviction was affirmed by the Court of Appeals on June 18, 2014. ***State v. Julian Young**, Op. No. 2014-UP-234 (S.C.Ct.App. filed June 18, 2014).* Petitioner filed his Petition for Rehearing in the Court of Appeals on July 2, 2014. Said petition was denied by the Court of Appeals by Order filed August 25, 2014. Petitioner now asks that the Writ be issued and that he be afforded the opportunity to fully brief the issue addressed herein.

STATEMENT OF FACTS

ARGUMENT

I.

Did the trial court err, and thereby violate the Petitioner's right to confront his accusers, by admitting into evidence hearsay testimony concerning statements made by the victim-deceased to a law enforcement officer after he was shot where the statements at issue were testimonial in nature and where, even if not testimonial, they did not qualify under Rule 803(2), SCRE, as excited utterances which would be admissible as an exception to Rule 802, SCRE; the hearsay rule?

C. How the Issue Arose Below

At trial, the Petitioner made a motion pursuant to ***Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)*** that any testimony concerning statements attributed to the victim-deceased be excluded. The Petitioner argued that admission of testimony concerning these statements, where the victim was not available for cross-examination, would violate his rights pursuant to the confrontation clause of the United States Constitution. The Petitioner cited ***State v. Gardner*** [1] and ***Rule 803, SCRE***, in support of his position that the testimony in question would be prejudicial hearsay. The Petitioner further argued that the statements in question should not be admitted as dying declarations where there was no reliable evidence from which it could be determined that the victim-deceased actually believed he was dying. Defense Counsel argued that the fact that the victim-deceased, who was known to be a drug dealer, did not want to give his name to the police, was evidence that he was capable of reflective thought at the time. This fact, the Petitioner argued, directly evidenced that the victim-deceased was capable of reflective thought at the time the statements were made. Likewise, it was argued that the statements in

[1] The record reflects that Counsel cited to State v. Gardner, however, based upon the content of his argument, Petitioner asserts that this is a probable reference to *State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2012)*.

questions were not spontaneous utterances but rather, were made in response to questioning by a sergeant with the South Carolina State University Police Department; Kendra Williams. ROA p. 4, line 11 – p. 7, line 15. In response to the Petitioner's motion, the State argued that ***Crawford***, supra, should not apply because the statements were not testimonial in nature. ROA p. 9 lines 12-22.

B. Argument on direct appeal to the South Carolina Court of Appeals.

Testimony from Sergeant Williams was presented *in camera*. She testified that when she arrived at the scene the victim-deceased was in the back of an ambulance. ROA p. 14, lines 10 – 23. He had a gunshot wound to his right chest and another wound on his left side. ROA p. 15, lines 5 – 11. According to Sgt. Williams, he appeared to be in a lot of pain. She said, ***"[h]e was frantic, he was rolling back and forth, he was scared, he kept saying, get me to the hospital, I'm going to die. He was, he was scared."*** ROA p. 15, lines 14 – 19.

According to this witness, she asked the victim if he had been robbed and he shook his head, yes. She asked him if he had been in the parking lot of Queen's Village and he once again nodded, yes. She asked him if he saw who robbed him and he indicated that he did by shaking his head. She then asked him how many people robbed him and he held up four fingers. When she asked, "four?" he shook his head, yes. Although he supposedly shook his head yes in response to the question about whether he saw the gun that shot him, he shook his head "no" when asked if the gun was black or silver. ROA p. 16, lines 2- 13. She testified that the victim was having a really hard time speaking and that he mostly just shook his head to answer questions. She did claim that he said he was in pain and that he was going to die. ROA p. 16, lines 11 – 21. On cross-examination, Sgt. Williams acknowledged that she had given a statement to Investigator John Johnson with SLED. She said that she had told him everything that

happened, "if I recall." ROA p. 18, lines 6 – 14. She admitted that in her statement to SLED

- She did not say the victim was frantic;
- She did not say that he had said "get me to the hospital";
- She did not say that the victim was scared;

ROA p. 18, line 3 – p. 18, line 12.

Sgt. Williams also acknowledged that when she first spoke to the victim he would not tell her his name. ROA p. 22, line 24 – p. 23, line 4. In response to the testimony of Sgt. Williams, Trial Counsel noted that in the statement she gave to SLED, Sgt. Williams reported that the victim said, "get me to the hospital because I'm shot, I'm hurt.", as opposed to, "I'm going to die" as she claimed in court. ROA p. 24, lines 10 – 14. The Petitioner renewed his objections to the admission of this testimony on the ground that it clearly wasn't an excited utterance nor was it a dying declaration. Trial Counsel argued that the statements in question were more prejudicial than probative under ***Rule 403, SCRE***. ROA p. 23, line 21 – p. 25, line 8. The State argued that the fact that the victim was in pain, and wanting to get to the hospital, coupled with the fact that he thought he was about to die, made these statements non-testimonial. The State additionally argued that since the victim did not name the Petitioner in any of these statements to Sgt. Williams, the statements were no prejudicial to the Petitioner. ROA p. 25, line 12 – p. 26, line 22.

Ultimately, the trial judge acknowledged that he had questions about whether, or not, it would be a dying declaration because the statement this witness gave to SLED after interviewing the victim, did not contain the statement about "***needing to get to the hospital, I'm going to die.***" The judge noted that he had "***an issue with whether or not it's a dying declaration***" and he declined to decide the admissibility of this testimony on that issue. ROA p. 27, line 24 – p. 28,

line 5. The trial court found however, that the statements in questions were excited utterances and ruled that, as such, they were admissible. ROA p. 28, lines 5 – 24. Trial Counsel challenged the notion that a nodding of the head could qualify as an excited utterance however, the trial court found non-verbal communication could constitute an excited utterance. ROA p. 28, lines 4 – 14. In addition, Trial Counsel noted that Sgt. Williams was not able to say how close in time these statements were made to the shooting. Also, Trial Counsel objected to the position that someone being in pain would qualify as a foundation for a finding that a statement was an excited utterance. ROA p. 29, line 15 – p. 30, line 12.

The State subsequently asked the trial court to rule on whether the statements in questions were testimonial in nature. ROA p. 30, lines 13 – 17. The trial court then stated for the record,

> Okay. I'm going to let it in, I say it will be non-testimonial and let it in. It's just part of the excited utterance at the time, whether or not—you know, the purpose of letting an excited utterance in is that he doesn't have time for any kind of reflective thought. And so, right now, this is a gentleman that's just been robbed and shot, he's in an ambulance, and I don't think based on the testimony I heard that he had time to have much reflection about what was going on so he could make up a story. Okay? He was just answering questions that were put to him by a police officer trying to get to the bottom of the situation.

ROA p. 30, line 18 – p. 31, line 3.

In response to this ruling, the Petitioner asked the Court to note, once again, that the fact that this witness refused to give his name to the officer interviewing him was evidence of reflective thought. ROA p. 31, lines 9 – 12. The Court responded, "But, I do believe it's an excited utterance." ROA p. 31, line 20.

The testimony of Sgt. Williams in the presence of the jury was largely consistent with her testimony *in camera.* In her testimony in camera she indicated that the victim shook his head and indicated yes when she asked him if he had seen the weapon. She said that when she asked

him if the weapon was black or silver, he *"kept shaking his head, no."* ROA p. 16, lines 7 – 13. In her testimony in the presence of the jury, she added that she had asked him if the gun was a revolver and he answered yes. ROA p. 58, lines 10 – 11. With this exception, her trial testimony was consistent with her *in camera* testimony on the operative points concerning the circumstances surrounding this shooting. ROA p. 57, lines 17 – 21 and ROA p. 58, lines 1 – 14. The Supreme Court of the United States has found that testimonial hearsay against a defendant violates the Confrontation Clause of the United States Constitution if 1) the declarant is unavailable to testify at trial and 2) the accused has had no prior opportunity to cross-examine the witness. ***Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct. 1354 (2004).*** As recognized by the Court in Crawford, "not all hearsay implicates the Sixth Amendment." ***Id, 541 U.S. at 51.*** On the other hand, otherwise admissible hearsay testimony may be rendered inadmissible if it is testimonial in nature. ***Id, 541 U.S. at 68.*** Thus, if a statement is testimonial in nature, it is not admissible simply because it would otherwise fall under a recognized exception to the hearsay rule. On the other hand, the fact that a statement is not testimonial, does not render it admissible simply because it does not infringe upon the Sixth Amendment right of confrontation. ***State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2012).*** Where non-testimonial hearsay is at issue, the Sixth Amendment is not implicated. ***State v. Ladner, 373 S.C. 103, 113, 644 S.E.2d 684, 689 (2007).*** In discussing what the standard for determining whether a statement is testimonial should be, the high court stated, "we leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." ***Crawford, 541 U.S. at 68.*** The Court went on to find that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy

constitutional demands is the one the Constitution actually prescribes: confrontation." *Id, at 68-69.* South Carolina has clearly recognized that a statement that would otherwise be admissible under an exception to the hearsay rule is inadmissible if it is testimonial nature. In ***State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App.2009)***, a prior statement to police which would have been admissible as a statement against penal interest under Rules 804(a)(2) and (b)(3), SCRE, where the declarant refused to testify, was found by the Court of Appeals to violate the confrontation clauses of both the United Sates Constitution and the South Carolina Constitution. ***U.S.C.A. Cont. Amend.6 and 14 and S.C. Cont. Art. I, §14.*** Our Supreme Court has held that a violation of the Sixth Amendment right to confront witnesses is not *per se* reversible error. ***State v. Davis, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006)***

On the facts of this case, the statements attributed to the victim-deceased should have been excluded from evidence inasmuch as they were testimonial in nature and the declarant would not be available for cross-examination. The testimony presented during the Petitioner's trial established that drugs were found in the victim's car. ROA p. 70, lines 4-5. Multiple state witnesses would ultimately testify that the victim was a drug dealer. Despite the fact that he was seriously injured, the fact remains that he made the statements in question while being questioned by a law enforcement officer concerning the circumstances surrounding his shooting. He made those statements under circumstances where an objective witness would reasonably believe that the statement would be available for later use at a trial. ***Crawford, 541 U.S. at 51-52.*** On these facts, the statements attributed to the victim by Sgt. Williams were testimonial and their introduction violated the confrontation clauses of both Untied States Constitution and the South Carolina State Constitution. ***U.S.C.A. Cont. Amend.6 and 14 and S.C. Cont. Art. I, §14. See also, State v, Green, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977).***

The trial court appears to have concluded that the statements in questions were admissible because the circumstances surrounding these statements met the criterion for the excited utterance exception to the hearsay rule. Assuming *arguendo* that they would, this fact would not render the statements admissible in light of the fact that they were testimonial. As previously noted, otherwise admissible hearsay may be rendered inadmissible if it is testimonial.

Even if this Honorable Court were to conclude that the statements in questions were not testimonial in nature, the Petitioner would submit that the circumstances under which they were made did not meet the standard for admission as an excited utterance. Rule 803(2) defines an excited utterance as a,

> **[s]tatement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.**

A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance hearsay exception and the determination in such matters is generally left to the sound discretion of the trial judge. ***State v. Burdette, 335 S.C. 34, 43-44, 515 S.E. 525, 530(1999)***. The rationale behind the excited utterance exception is that "the startling event suspends the process of reflective thought, reducing the likelihood of fabrication." ***State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006)***. As argued by the Petitioner at trial, the victim-deceased in this case, knowing he had drugs in his car, refused to give his name to Sgt. Williams. Such a ploy clearly evidences reflective thought and therefore, establishes that the statements in questions were no made while the victim's state of mind was such that he was incapable of reflective thought and therefore, less likely to fabricate. Hiding your identity in fear of the police is not an action one would expect to see in a person who wasn't expecting to be around to suffer the consequences of their unlawful behavior.

The Petitioner would respectfully assert that the admission of the statements attributed to the victim irreparably tainted his ability to review a fair trial. Absent these statements, there was no other evidence that the victim in this case was robbed prior to his shooting. Given the totality of the evidence presented in this case, while the circumstances may have given rise to suspicion, they did not establish how the victim died. If anything, the testimony of all the states other witnesses left as a mystery what happened in the moments preceding the victim's shooting. Based on the testimony of the State's own witnesses, it was equally possible that the deceased pulled a gun on the Petitioner and was shot in an ensuing tussle for the weapon. The testimony of Sgt. Williams is all the more dangerous inasmuch as she questioned the injured man in a manner which suggested an answer. After all, her question to the deceased was not, what happened? Her question was, were you robbed? ROA p. 16, lines 2-5. It is not unreasonable to suggest that a young man cool enough to refuse to give the police his name after he had been shot, and caught with drugs in his car, might also have been cool enough to seize on the opportunity to shift attention away from himself by answering that question affirmatively. It is also important to note that the statements in question were not blurted out by someone experiencing the immediate effects of a stressful event. He was questioned by the police and his refusal to answer the questions about his identity demonstrates that he was thinking reflectively about his answers.

D. <u>Argument for Reversal.</u>

Petitioner recognizes that this Honorable Court has found that the fact that a statement was made in response to a question does not necessarily prevent the answer from being an excited utterance. ***State v. Smith***, 348 S.C. 16, 23 n. 1, 558 S.E.2d 518, 522 n. 1 (2002). Petitioner respectfully submits, however, that the opinion of the Court of Appeals appears to

overlook the fact that, on the facts of this case, the answers to the questions posed by the officer who interviewed the victim indicate that the declarant was thinking forward to potential criminal prosecution. As argued in the Court of Appeals and noted above, the testimony presented during the Petitioner's trial established that drugs were found in the victim's car. ROA p. 70, lines 4-5. The testimony of multiple state witnesses established that the deceased was a drug dealer. Despite the fact that he was seriously injured, the fact remains that the deceased made the statements in question while being questioned by a law enforcement officer concerning the circumstances surrounding his shooting. Petitioner submits that he made those statements under circumstances where an objective witness would reasonably believe that the statement would be available for later use at a trial. ***Crawford, 541 U.S. at 51-52***. The fact that the declarant would not disclose his identity evidences the fact that he was thinking ahead to possible criminal charges for the drugs he knew were in his car. This factor strongly supports Petitioner's position that the statements at issue were testimonial in nature. Under these circumstances it is not at all surprising that a drug deal dealer would jump at the opportunity to agree with the officer that he was shot during a robbery. After all, this version of the facts, supplied to the deceased by the questions posed by the officer, offered up an opportunity for this drug dealer to deflect attention away from the drugs in his car. The fact that he was able to think ahead and try to avoid being properly identified, demonstrates that he was, despite his injuries, capable of reflective thought and therefore, that his statements were not excited utterances. ***See, State v. Davis****, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006).*

In addition, Petitioner respectfully submits that the opinion of the Court of Appeals fails to take into account that the nature of the questions asked by the officer, particularly the inquiry concerning whether the declarant had been robbed, did not go to issues addressing public safety.

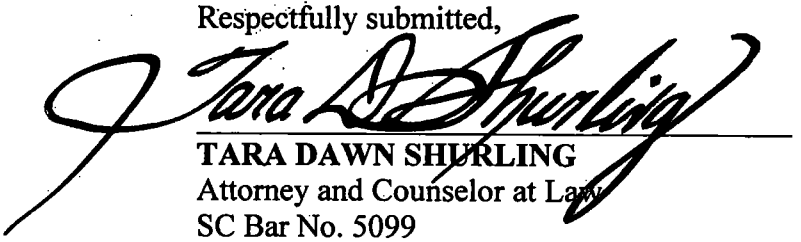
Petitioner argues that a close examination of the questions put to the deceased, concerning the circumstances that lead to him being shot, clearly reveals that the questions were not designed to reveal information which would aid law enforcement in curtailing any immediate threat to the community.

Petitioner maintains his position that the testimony in question was testimonial in nature and therefore, that its admission violated his rights pursuant to the Confrontation Clause of the United States Constitution where 1) the declarant was unavailable to testify at trial and 2) the accused has had no prior opportunity to cross-examine this witness. *Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct. 1354 (2004)*. On the other hand, Petitioner submits that the testimony in question would not be admissible simply because it did not implicate the Sixth Amendment. *State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2012)*. Petitioner submits that the evidence before this Court does not support a finding that the statements in question were admissible as excited utterances pursuant to *Rule 803(2), SCRE*, where the record demonstrates that the declarant engaged in reflective thought at the time the statements were made. Where the testimony in dispute constituted the only evidence that the declarant was shot in the course of a robbery, the Petitioner was clearly prejudiced by its admission inasmuch as the jury would likely have factored that information into its deliberations on the question of whether the victim was shot with malice.

CONCLUSION

Based upon all the arguments presented to the Court of Appeals, and in this Petition, the Petitioner now respectfully prays that the writ might be issued and that he be granted the opportunity to be further heard on these issues.

Respectfully submitted,



TARA DAWN SHURLING
Attorney and Counselor at Law
SC Bar No. 5099

Law Office of Tara Dawn Shurling, PA
3614 Landmark Drive, Suite A
Columbia, SC 29204
803-738-8622
803-738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

ATTORNEY FOR THE PETITIONER

This 24th day of September, 2014.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Orangeburg County
Court of General Sessions

Edgar W. Dickson, Circuit Court Judge

Appellate Case No.

The State,

Respondent,

v.

Julian Young,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari and the Appendix in the above matter has been served on opposing counsel, Kaycie Smith Timmons, Assistant Attorney General, by mailing in an envelope properly addressed to the Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211, with postage prepaid on this the 24th day of September, 2014.

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803) 738-8622

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 24th day of September, 2014.

Sharon H McAllister
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires Jan 16, 2017.