

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

v.

WILLIAM DONALD BOLT,

RECEIVED
OCT 22 2015
RESPONDENT,
SC Court of Appeals

APPELLANT

APPELLATE CASE NO. 2013-002164

Appeal from Greenwood County

Donald B. Hocker, Circuit Court Judge

Opinion No. 2015-UP-477

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case and grant rehearing on both issues. Respectfully, the Court's opinion overlooks key points that necessitate reversal of appellant's conviction.

Issue 1

The Court's opinion erroneously holds that the initial Miranda waiver remained valid and foreclosed appellant's arguments pursuant to Missouri v. Seibert, 542 U.S. 600 (2004) and Miranda v. Arizona, 384 U.S. 436 (1966). In Seibert, 542 U.S. 600 (2004), the United States Supreme Court condemned a deliberate practice used in police departments throughout the

country meant to circumvent Miranda. Siebert at 610-12 and n.2. The Court cited the Police Law Institute's manual which instructed officers to use a "two-stage interrogation" and not to give Miranda warnings until after arrestees have confessed. Id. at 610. The Court listed multiple sources advising officers on how to obtain confessions and then curing the failure to give Miranda warnings. Id. at 610 n.2.

The Court called this practice "question-first" and rejected the notion that the subsequent giving of Miranda warnings could transmute these confessions into admissible evidence. Id. at 610-13. "By any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Id. at 613. "After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset." Id. "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." Id.

South Carolina recognized the impact of Siebert in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). Kenneth Navy was convicted of suffocating his two year old son. Id. at 296, 688 S.E.2d at 838. EMS responded to Navy's house and found him giving the child CPR. Id. at 297, 688 S.E.2d at 838. Navy gave an unsatisfactory statement to the police at the hospital that night. Id. The police subsequently met with the pathologist who told them that the child died from suffocation. Id.

With this knowledge in hand, the police took Navy from his house to the police station. Id. He was not formally under arrest. He gave a statement that was not incriminating. Id. at 298, 688 S.E.2d at 839. Questioning continued and police confronted Navy with information from the autopsy. Id. at 298, 688 S.E.2d at 839-40. The Court found that “[a]t this juncture, the nature of the interrogation and respondent’s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation.” Id. Without giving Miranda warnings, the police ultimately obtained a confession from Navy which they memorialized after having him sign a Miranda waiver. The Court ruled these statements violated Siebert and were inadmissible. Id. at 301-04, 688 S.E.2d at 841-43.

While the police strategy in this case is the same as in Siebert and Navy, the mechanics were slightly changed in an effort to avoid their application. Investigator Strickland gave Bolt Miranda warnings when he first arrived at the station, but then after Bolt denied the allegations, let Bolt spend the rest of the day and night in jail. Bolt was then confronted with a different questioner—the private contractor, Owen—who did not give Bolt Miranda warnings. The police not only switched questioners, they switched the **kind** of interrogation used: from straightforward police questioning to a lie detector test. Switching investigators is relevant to the Miranda inquiry. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). In Evans, the original interrogators left the room and sent in a female SLED agent, who used a sympathy tactic. Id. The Evans Court found that the police’s purpose was important and used the fact that they challenged the defendant’s story and switched officers to divine the officers’ intent. Id.

The failure to give Miranda warnings before the polygraph examination also departs from established police practice. As early as 1972, courts recognized that “prudent police practice requires that when polygraph examinations are to be given persons in custody under

investigation for suspected criminal conduct, they should be given Miranda warnings before the commencement of such examinations.” People v. Algien, 501 P.2d 468, 472 (Colo. 1972). Multiple South Carolina decisions state that the polygrapher gave Miranda warnings before the exam. State v. Saltz, 346 S.C. 114, 135, 551 S.E.2d 240, 252 (2001) (noting that defendant was given Miranda warnings before polygraph exam); State v. Harvin, 345 S.C. 190, 192, 547 S.E.2d 497, 498-99 (2001) (recounting that suspect was administered Miranda warnings immediately before polygraph even though warnings had previously been given); State v. McCray, 332 S.C. 536, 543, 506 S.E.2d 301, 304 (1998) (noting that defendant was given Miranda warnings by a SLED polygrapher—Hartley, Bolt’s expert in this case); State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 694 (1996) (noting that defendant was given Miranda warnings at SLED before the test was administered); State v. Rochester, 301 S.C. 196, 198, 391 S.E.2d 244, 246 (1990) (noting that in a SLED-administered exam, “Prior to being tested, the polygraph examiner administered the Miranda warnings); State v. Grizzle, 293 S.C. 19, 20, 358 S.E.2d 388, 389 (1987) (noting that SLED polygrapher gave Miranda warnings); State v. Smith, 268 S.C. 349, 353, 234 S.E.2d 19, 20 (1977) (noting that in a SLED-administered exam, the defendant was advised of his rights before the examination and given a written waiver which contained Miranda warnings); State v. Samuel, 400 S.C. 593, 596, 735 S.E.2d 541, 543 (Ct. App. 2012) (stating that polygraph examiner issued Miranda warnings before the exam); State v. Cope, 385 S.C. 274, 291, 684 S.E.2d 177, 186 (Ct. App. 2009) (stating that polygrapher issued Miranda warnings before the exam).

The giving of Miranda warnings during Bolt’s first, brief encounter with Investigator Strickland was insufficient under the totality of the circumstances. Rochester at 200, 391 S.E.2d at 246-47 (stating totality of the circumstances test). See also State v. DeWeese, 582 S.E.2d 786,

797-99 (W.Va. 2003) (holding that failure to give Miranda warnings prior to a polygraph examination rendered statements inadmissible despite prior Miranda warning given by police officers). Taking into account the fact that Bolt was functionally illiterate and of limited intelligence, Miranda warnings were required before the polygraph examination. Since these statements were taken in violation of Bolt's Fifth Amendment rights, the later statement was tainted and inadmissible pursuant to Siebert and Navy. This Court should grant rehearing and reverse.

Issue 2

Respectfully, the Court mistakenly construes Minor's statements as contradictory. Minor's statements were not contradictory—her latter specific response on cross-examination unequivocally clarified her earlier vague statement on direct-examination. During her direct-examination, Minor testified that during the "summer of 2006" Bolt began to touch her in a way that made her feel uncomfortable. R. 131, ll. 1 – 5. On cross-examination, Minor was much more specific concerning the dates of the abuse. R. 159, ll. 2 – 15. She testified as follows:

Q. And going back to your testimony again about when this was. You say that the night he came in the room you were sleeping and that was somewhere around June 1 of 2006?

A. Yes, ma'am.

Q. And you mentioned these other incidents where he would have you on his lap and be touching you?

A. Yes, ma'am.

Q. All of those incidents happened before that date, right?

A. Yes, ma'am.

Q. All of them prior to June 1st of 2006?

A. Yes, ma'am.

Q. Nothing after?

A. No, ma'am.

Q. And you said you went – you might have gone there occasionally after that June 1st incident but there – there was never another time that you say he inappropriately touched you; is that correct?

A. Yes, ma'am.

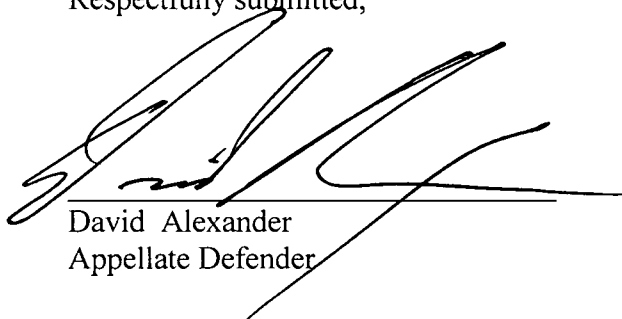
R. 159, ll. 2 – 20 (emphasis added). This was no offhand remark, or, as suggested at oral argument by the State, the result of clever cross-examination by trial counsel. Minor responded to **three** clear, succinct questions concerning the dates she alleged the lewd act took place. Nothing in her answers indicates any equivocation. Nor do her answers conflict with her earlier testimony concerning the “summer.” Had Minor instead testified that the lewd acts occurred around the July 4th holiday, around Labor Day, or in August, there would be conflicting evidence. Minor clarified her earlier general statement about the “summer” and nothing in her responses on cross-examination indicate that she was confused.

Without any conflict in the evidence about when the lewd acts occurred, appellant was entitled to a directed verdict under the *corpus delicti* rule because the only evidence against him were his statements to Owen. “It is well-settled law that a conviction cannot be had on the extra-judicial confessions of a defendant unless they are corroborated by proof *aliunde* of the *corpus delicti*.” State v. Abraham, 408 S.C. 589, 759 S.E.2d 440 (Ct. App. 2014). The corroboration rule applies to statements and confessions. State v. Osborne, 335 S.C. 172, 178, 516 S.E.2d 201, 204 (1999). To satisfy the corroboration rule, the State must provide “sufficient independent evidence which serves to corroborate the defendant’s extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred.” Id. at 180, 516 S.E.2d at 205.

In Abraham, this Court conducted an in-depth analysis of the corroboration rule as described by our Supreme Court in Osborne and held that the State must introduce “substantial independent evidence which would tend to establish the trustworthiness of the statement.” Abraham at n.2, citing Opper v. United States, 348 U.S. 84 (1954) (stating that the government must introduce “substantial independent evidence”). No substantial independent evidence exists in this case.

The Court also mistakenly adopted the State’s argument that time is not an element of the offense. In the case cited by the Court, the appellant argued that the indictment should have been quashed because the two-year time frame was overly broad. State v. Wade, 306 S.C. 79, 409 S.E.2d 780 (1991). The Court rejected this argument. Id. However, nothing in Wade supports the notion that a defendant can be tried for allegations that occur **outside of the time frame alleged in the indictment**. If this were the rule, then the entire concept of notice that is the primary purpose of an indictment would be meaningless. This Court should grant rehearing and reverse appellant’s conviction.

Respectfully submitted,



David Alexander
Appellate Defender

This 22nd day of October, 2015.

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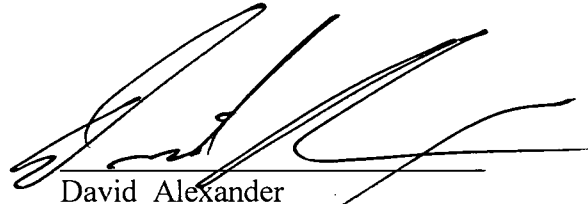
WILLIAM DONALD BOLT,

APPELLANT

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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 Deborah R.J. Shupe, Esquire, this 22nd day of October, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 22nd day
of October, 2015.

Kevin Mendel (L.S.)
Notary Public for South Carolina

My Commission Expires: July 3, 2023.