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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Robert E. Hood, Circuit Court Judge

RECEIVED

MAR 03 2016

SC Court of Appeals

Appellate Case No. 2013-001680

Marcus Bailey,.....Appellant,

v.

The State of South Carolina,.....Respondent.

PETITION FOR REHEARING

S. Jahue Moore
Stanley L. Myers
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, South Carolina 29171
Tel.: (803) 796-9160
Fax: (803) 791-8410

Attorneys for Appellant.

The Appellant, by and through his undersigned attorneys, does hereby respectfully present to this Court this Petition for Rehearing. The Appellant is informed and believes that this Court overlooked and/or misapprehended several important points of law and fact in its analysis and decision in this case. Accordingly, pursuant to Rule 221(a), SCACR, the Appellant respectfully requests that this Court hold another hearing on these matters and reconsider its opinion accordingly.

I. THE COURT OVERLOOKED AND MISAPPREHENDED SEVERAL IMPORTANT POINTS IN ITS ANALYSIS AND DECISION CONCERNING THE IMPROPER ADMISSION OF THE TESTIMONY OF THE CADAVER DOG HANDLER.

In its analysis of this issue, this Court primarily emphasized two points: 1) The alleged reactions of the dog to certain odors was cumulative with the alleged detection of odors by police officers; and 2) The prosecution's case was, otherwise, so strong that the improper admission of this testimony did not contribute to the verdict.

In so ruling, this Court underestimated and overlooked the impression and strength which testimony and evidence concerning police K-9 units has upon the general public and jury members. While the testimony of police officers could be perceived as biased by jurors, the impact and trust assigned to K-9 units by jurors is heightened due to television, movies, and other media depictions and coverage. These units are always depicted as “faithful,” “lovable,” highly trained, infallible, and unbiased in their reactions. As such, a jury is likely to assign an inordinately high level of weight and trust to such testimony and evidence. As such, the K-9 testimony in this case was neither simply cumulative nor inconsequential amongst other prosecution evidence.

In addition, as argued by the Appellant in the trial court and on appeal, the testimony of Deputy Pearrow concerning the police dog was improper due to several factors: The testimony should not have been admitted because cadaver dog's "alerts" were never corroborated by forensic evidence; The testimony was unreliable non-expert testimony pursuant to *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009); The probative value of a number of false positives is significantly outweighed by the danger of undue prejudice pursuant to Rule 403, SCRE. In ruling otherwise, this Court overlooked, misapprehended, and incorrectly evaluated the analysis and argument of the Appellant, as more fully presented in his Brief and oral arguments.

Further, this Court's reasoning that the prosecution's case was, otherwise, so strong that the improper admission of this testimony did not contribute to the verdict is misapplied and misapprehended in this instance. Despite other evidence presented at trial, it is likely that this testimony concerning the police dog resonated strongly with the jury, as discussed above, and is likely to have made a considerable and meaningful difference to the jury.

II. THE COURT OVERLOOKED AND MISAPPREHENDED SEVERAL IMPORTANT POINTS IN ITS ANALYSIS AND DECISION CONCERNING THE FAILURE OF THE TRIAL COURT TO DIRECT A VERDICT IN FAVOR OF THE APPELLANT WHEN THERE WAS NO EVIDENCE OF HOMICIDE TO SUPPORT THE MEDICAL EXAMINER'S SUSPICIONS.

In its analysis of this issue, this Court essentially conceded that there was no direct or forensic proof of death by homicide in this case. This Court simply stated that circumstantial evidence was sufficient to establish that the decedent died by means of homicide.

In its opinion, this Court indicated that circumstantial evidence is only sufficient to establish *corpus delicti* when it is “the best evidence obtainable.” *citing, Brown v. State*, 307 S.C. 465, 415 S.E.2d 811 (1992). In this case, however, the “best evidence” was that there really was no physical or forensic evidence of murder at all. This was fully set forth in the Appellant's brief and argued before this Court in the analysis of the testimony of the forensic pathologists. These individuals admitted that there were no physical findings proving strangulation, no physical findings proving the crushing of the windpipe or adjacent blood vessels, and that their original opinion of “probable homicidal asphyxiation” was simply a suspicion of foul play based upon the lack of any real evidence. This was “the best evidence obtainable” and, therefore, circumstantial evidence alone was insufficient to defeat a directed verdict motion on this important and foundational issue in the charges against the Appellant. This Court overlooked, misapprehended, and incorrectly evaluated this analysis and argument of the Appellant, as more fully presented in his Brief and oral arguments.

III. THE COURT OVERLOOKED AND MISAPPREHENDED SEVERAL IMPORTANT POINTS IN ITS ANALYSIS AND DECISION CONCERNING THE TRIAL COURT'S IMPROPER ALLOWANCE OF THE TESTIMONY OF EDWARD WALKER WITHOUT THE ALLOWANCE OF A FULL CROSS EXAMINATION OF HIM.

In its analysis of this issue, this Court essentially upheld the trial court's ruling based upon the fact that the cross examination would only be useful to the Appellant to question the witness's general credibility. The Court, however, overlooked the fact that the cross examination could also have brought to light the witness's motive to lie in order to receive more favorable terms on the other charges he was facing. As more fully presented in the Appellant's Brief and oral arguments, this is a much more specific

motive to lie than the broad question about the witness's general credibility. When weighed in the balance against the Appellant's Sixth Amendment right to fully and adequately confront witnesses against him, in a murder trial, and the resulting prejudicial effect upon the Appellant if unable to do so, the witness's desire to protect himself is insufficient. If the rights of both individuals could not be adequately protected, the witness's testimony should not have been allowed at all. The trial court erred in this matter and this Court overlooked, misapprehended, and incorrectly evaluated this analysis and argument of the Appellant.

IV. THE COURT OVERLOOKED AND MISAPPREHENDED SEVERAL IMPORTANT POINTS IN ITS ANALYSIS AND DECISION REGARDING THE IMPROPER ADMISSION OF CHARACTER EVIDENCE AGAINST THE APPELLANT.

In its analysis of this issue, this Court relied heavily upon the assumption that the trial court's attempt to give a curative instruction to the jury on this matter was sufficient to prevent undue prejudice to the Appellant. As discussed in the Appellant's Brief and oral arguments, however, this is exactly the type of prejudicial character evidence which Rule 404, SCRE is meant to prevent. It is not, in any way, relevant to the question of whether or not a crime was committed and, as argued by the Appellant, its prejudicial effect is devastating, easily outweighing any alleged or perceived probative value. This is especially true in these days when there seems to be so much honor and respect being given to members of the military. Any assertion or implication which casts dispersions upon the Appellant's military service in this regard is likely to be especially prejudicial and damaging.

The other comments by this Court about this issue not being properly preserved by objections at trial are a misinterpretation and misapprehension of the record. As discussed in the Appellant's Brief and oral arguments, counsel for the Appellant did object to this testimony at trial and did move for a mistrial. Also, as admitted by this Court, counsel for the Appellant clearly stated that he had not waived his objection to the testimony. Any perception by this Court that the objections were not specific enough or exactly contemporaneous, reflects a misapprehension and misreading of the record. With the acknowledgment that motions and objections were, in fact, made, the benefit of the doubt should be given to a defendant in a murder trial and the unduly prejudicial value of the testimony should be recognized and disallowed under the rules of evidence. The trial court erred in this matter and this Court overlooked, misapprehended, and incorrectly evaluated this analysis and argument of the Appellant.

V. THE COURT OVERLOOKED AND MISAPPREHENDED SEVERAL IMPORTANT POINTS IN ITS ANALYSIS AND DECISION REGARDING THE TRIAL COURT'S REFUSAL TO STRIKE OR SUPPRESS EVIDENCE GATHERED PURSUANT TO AN INVALID SEARCH WARRANT WHICH WAS BASED UPON AN AFFIDAVIT OF A POLICE OFFICER WITH NO PERSONAL KNOWLEDGE OF THE FACTS ATTESTED AND WITH NO INDICATION THAT THE ISSUING MAGISTRATE PROPERLY EVALUATED THE INFORMATION FOR RELIABILITY.

In its analysis of this issue, this Court relied upon the hearsay exception to the personal knowledge requirement for a valid search warrant. In doing so, this Court relied upon *State v. Dunbar*, 361 S.C. 240, 603 S.E.2d 615 (2004). However, as discussed in the Appellant's Brief and oral arguments, the hearsay exception from *Dunbar* is not a blanket exception. There must be a showing that the issuing magistrate properly evaluated the information and determined that the affiant had gained his information in a

reliable way. *Dunbar, supra, citing, State v. Sullivan*, 267 S.C.610, 615, 230 S.E.2d 621, 623-24 (1976).

The record is clear that the affiant in this case had no personal knowledge whatsoever to support the warrant. He was not at the Appellant's house. He mistakenly swore that the decedent was killed by a gunshot wound. There was no evidence whatsoever presented at trial that the issuing magistrate was told that the affiant lacked any personal knowledge. There was no evidence whatsoever presented at trial that the issuing magistrate properly evaluated the information and determined that the information was gained or presented in a reliable way. Counsel for the Appellant properly objected to and moved to strike any evidence gained pursuant to the search warrant.

The trial court erred in allowing the admission of such evidence. This search warrant was the primary search warrant in this case. The entire investigation stemmed from this defective warrant. This error allowed the admission of so much evidence and testimony that it must be deemed to have heavily contributed to the verdict. The undue prejudice to the Appellant is obvious. In ignoring the fatal defect in the search warrant, as discussed above, and as discussed in the Appellant's Brief and oral arguments, this Court overlooked and/or misapprehended the facts and proper legal analysis on this issue.

VI. THE COURT OVERLOOKED AND MISAPPREHENDED SEVERAL IMPORTANT POINTS IN ITS ANALYSIS AND DECISION REGARDING THE TRIAL COURT'S IMPROPER ADMISSION OF THE APPELLANT'S STATEMENT IN LIGHT OF THE FACT THAT THE APPELLANT WAS NOT PROVIDED A COPY OF THE STATEMENT.

In its analysis of this issue, this Court essentially states that as long as the Appellant received a copy of his statement a few months before the trial of the case, the

requirements of the statutes are satisfied. However, this reasoning fails to take into account the importance of a defendant's ability to see his or her statement as soon as possible in order to make corrections if necessary. An early delivery of a copy of the statement is also important to allow a defendant to properly and promptly begin work on preparing his or her case.

In this case, such considerations are especially true. When he gave his statement, the Appellant was in a mentally compromised position. He had a panic attack. He was rushed to the hospital for medical treatment, including medication. Due to his weakened state, the Appellant was especially susceptible to manipulation or the tendency to misspeak. These are all important reasons for the Appellant to have the right to promptly see a copy of his statement.

Also, with regard to this issue, this Court, once again, reasoned that the prosecution's case was, otherwise, so strong that the improper admission of this testimony did not contribute to the verdict. Even with other related testimony, the Appellant's statement was used very heavily in the case against the Appellant. This is especially true regarding the Respondent's constant attacks on the timeline established by the Appellant's statement. This was of prime importance in establishing malice aforethought. To assert that this error of admissibility was harmless or did not contribute to the verdict is a misapplication of the facts and law and overlooks the undue prejudice caused to the Appellant.


For the reasons stated above, pursuant to Rule 221(a), SCACR, the Appellant respectfully requests that this Court hold another hearing on these matters and reconsider

its opinion accordingly.

Respectfully submitted,

Moore Taylor Law Firm, P.A.

March 3, 2016

A handwritten signature in black ink, appearing to read "S. Jahue Moore", written over a horizontal line.

S. Jahue Moore
Stanley L. Myers
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
Tel.: (803) 796-9160
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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on the Respondent by depositing a copy if it in the United States Mail, postage prepaid, on March 3, 2016, addressed to the attorneys of record for the Respondent, as follows:

Alan Wilson
John W. McIntosh
Donald J. Zelenka
Melody J. Brown
Post Office Box 11549
Columbia, SC 29211-1549

Daniel E. Johnson
Post Office Box 192
Columbia, SC 29202



S. Jahue Moore
Stanley L. Myers
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
Tel.: (803) 796-9160
Fax: (803) 791-8410
Attorneys for Appellant.