ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY
William Jeffrey Young, Circuit Court Judge

Case No. 2013-000700

Opinion No. 5382
Filed February 24, 2016

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

v.

Marc Anthony Palmer . . . . . Appellant

PETITION FOR REHEARING

On February 24, 2016, this Court held that the trial court did not error in (1) granting the State's Batson v. Kentucky, 476 U.S. 79 (1986) motion; (2) denying the appellant's motion for a mistrial and a motion for a new trial; (3) denying his motion for a speedy trial; and (4) admitting his statement to law enforcement after he invoked his right to counsel. The Court found that the trial court erred in sentencing the appellant for possession of a weapon during the commission of a violent crime after sentencing him to life imprisonment without parole for murder. State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, February 24, 2016; 2015 WL 731237. Pursuant to Rule 221(a), SCACR, the appellant respectfully requests this Court rehear the matter based upon the following points overlooked and/or misapprehended in the opinion.

I. Whether the trial court applied wrong burden when deciding the State's Batson motion.

The appellant respectfully requests this Court to rehear the issue of whether the trial court applied the wrong burden when deciding the State's Batson motion. As recognized by this Court, the three-step inquiry for evaluating whether a party executed a peremptory challenge in a matter which violated the Equal Protection clause is as follows:

> First, the party asserting the *Batson* challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the party opposing the *Batson* challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the party asserting the challenge has proved purposeful discrimination. The ultimate burden always rests with the party asserting the *Batson* challenge to prove purposeful discrimination.

State v. Inman, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014) (citations omitted). This Court acknowledges that the appellant met the second step of the inquiry. His stated reasons were race-neutral, including his explanation with respect to Juror 173. State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, at 31; 2015 WL 731237, *5. Because the appellant met the second step, the trial court was required to move to the third step and determine whether the State had proved purposeful discrimination. Inman, 409 S.C. at 26, 760 S.E.2d at 108. At all times, the ultimate burden was to rest on the State. Id.

Rather than placing the burden on the State to prove purposeful discrimination, the trial court incorrectly placed the burden on the appellant to convince the court that his reasons were race neutral. (R. p. 40, trial court stating "I'm not convinced that the answers that were race neutral and therefore I am going to strike this jury"). This is strikingly similar to Inman in which the South Carolina Supreme Court found that the trial court improperly placed the burden on the appellant when it stated "I'm going to grant the State's motion based on those three individuals

jurors numbers 17, 60, and 166 *that the reasons given I don't believe are sufficient.*" Inman, 409 S.C. at 24, 760 S.E.2d at 107 (emphasis that of Supreme Court). Again, it was not the appellant's burden to convince the court that his answers were race neutral. It was the State's burden to convince the court that the defendant practiced purposeful racial discrimination, and the ultimate burden at all times rested with the State. Inman, 409 S.C. at 26, 760 S.E.2d at 108; *see also* State v. Cochran, 369 S.C. 308, 315 (Ct. App. 2006) (citations omitted).

II. Whether the trial court erred in denying the appellant's motion for a mistrial and a new trial.

The appellant also asks this Court to reconsider the issue that the trial court did not error in denying the appellant's motion for a mistrial and a motion for a new trial. Respectfully, this Court incorrectly states that "[b]ecause there was no evidence regarding the results of the witness' polygraph test, Palmer failed to meet his burden of establishing the prejudicial impact of this evidence." State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, p. 33; 2015 WL 731237, *7.

As this Court recognizes, the South Carolina Supreme Court "has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable." State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 529 (1999); State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, p. 33; 2015 WL 731237, *6. Although the State did not ask the witness whether he "passed" or "failed" the polygraph, by its use of the term "cleared," it elicited evidence concerning the result of the test:

Q: You voluntarily submitted yourself to a polygraph right?

Mr. Ballinger: Objection.

The Court: No overruled.

Q: You voluntarily submitted yourself to a polygraph right?

A: Correct.

Q: Anything they asked of you, you gave it to them right?

A: That's correct.

Q: And you were cleared by the police?

A: Correct.

(R. p. 430, ln. 13-24).

The term "cleared" is often used rather than "passed" when discussing polygraph results. *See, e.g.*, People v. Barbara, 255 N.W.2d 171, 178 (Mich. 1977) (The witness "testified to the common policy in many states that individuals who are cleared by the polygraph examiner are not prosecuted"); Kirby v. Williamson Oil Co., 510 So.2d 176, 179 (Ala. 1987) ("Neu had once accused Kirby of being involved in a store inventory shortage, though he later cleared her of involvement when he gave her a polygraph examination"); Davern v. Midwest Communications, Inc., 1993 WL 527905, *8 (Ct. App. Minn. 1993) ("Another example is the polygraph examination of the suspected driver. ... The polygraph cleared, to the limited extent a polygraph examination can, the driver of criminal involvement in the accident"); Leonard v. State, 385 S.W.3d 570, 573 (Ct. App. Tx. 2012) ("The appellant had failed three polygraphs prior to April 2007, at which point the appellant 'made several admissions' and 'cleared' a polygraph. After that 'cleared' polygraph, the appellant then failed five polygraphs ..."); Laney v. South Carolina Dept. of Corrections, 2012 WL 4069680, *1 (D.S.C. 2012) ("Apparently Plaintiff took a polygraph exam which 'cleared Plaintiff' ..."); King v. Oakland County Prosecutor, 842 N.W.2d 403, 406 (Ct. App. Mich. 2013) ("Busch was briefly considered a suspect in the murder of the first OCCK victim, but he was allegedly cleared by law enforcement officials following a polygraph examination"); Martin v. Citibank, N.A., 762 F.2d 212, 215 (2nd Cir. 1985) ("The

second person tested was cleared, but the third failed the polygraph and was discharged"). By the very use of the term "cleared," the unmistakable evidence was that the witness passed the polygraph.

Even if the term "cleared" does not mean "passed" the polygraph, the above-quoted testimony was inadmissible and prejudicial. This Court seems to incorrectly adopt a *per se* rule that so long as the results of a polygraph are not introduced into evidence, there is no prejudice. State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, p. 33, 2015 WL 731237, *7 ("Because there was no evidence regarding the results of the witness' polygraph test, Palmer failed to meet his burden of establishing the prejudicial impact of this evidence"). Respectfully, even if the results of a polygraph are not introduced into evidence, there still may be prejudice. The question becomes whether the reference to a polygraph creates an impermissible inference thereby prejudicing the defendant. Bruno v. State, 347 S.C. 446, 451, 556 S.E.2d 393, 395 (2001); State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007).

In Bruno, the Supreme Court found that there was no prejudice where the jury could have inferred that the witness passed the polygraph, or it could have made an "equally plausible" inference that the witness failed the polygraph. In other words, the is no prejudice where it equally plausible for the jury to infer that the witness passed the polygraph as it is for the jury to infer that the witness failed the polygraph. Bruno, 347 S.C. at 451-52 556 S.E.2d at 396. This reasoning makes sense because if it plausible that the witness passed the polygraph, and it is not equally plausible that the witness failed the polygraph, the results of the polygraph would, in effect, be introduced as evidence.

Respectfully, this Court does not correctly frame the issue. This Court states that there was no prejudice to the appellant because the jury could have inferred that the witness passed the

polygraph or it could have made an "equally plausible inference" that appellant was not asked to take a polygraph. State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, p. 33; 2015 WL 731237, *7. The correct issue is whether it was "equally plausible" that the witness passed the polygraph as it was that he failed the polygraph.

The plausible inference from the above-quoted testimony was that the witness passed the polygraph.[1] There was not an "equally plausible inference" that the witness failed the polygraph. As argued by the appellant, the *only* plausible inference is that the witness passed the polygraph.

In Johnson, the Supreme Court addressed a second impermissible inference created by a reference to a polygraph - - one that bolsters the credibility of the witness. Johnson, 376 S.C. at 11, 654 S.E.2d at 836. Respectfully, this Court overlooked this point and did not address this issue.

Like in Johnson, the case against the appellant here essentially consisted of witness testimony, and the credibility of each witness was crucial to the verdict. Id. In fact, Montgomery (the witness whose testimony is at issue) was a key witness. The appellant's counsel implied that Montgomery could have murdered the victim in retaliation for a robbery the night before. (R. p. 423, ln. 6-8; 425, ln. 12 – 428, ln. 2). On cross examination, the State elicited evidence that at the time of the murder, Montgomery did not have the same physical characteristics as the shooter. (R. p. 429, ln. 2-23). It also elicited testimony that Montgomery was not near the scene of the shooting on the night of the murder. (R. p. 430, ln. 2-4). It thereafter elicited the testimony that Montgomery submitted to the polygraph test and was "cleared by the police." (R. p. 430, ln. 13-24).

[1] The appellant argues, however, that no inference had to be made, as being "cleared" with respect to a polygraph means "passing" a polygraph.

The Texas Court of Appeals found that where the State asked the witness if he took a polygraph, and the witness's answer was affirmative, it improperly bolstered the witness testimony:

> [W]e think that the learned trial judge fell into error in not granting appellant's motion for a mistrial. We think it fair to observe that the only reason that anyone would possibly take a lie detector test would be to determine whether or not they were telling the truth. The state not only inquired about a test, the results of which were not admissible, but when it asked the question and received an affirmative reply it no doubt very effectively bolstered the prosecutrix's testimony before the jury. This, we think was highly prejudicial to the rights of the appellant, and the harm done was so great that no instruction from the court could remove it. This testimony in effect revealed the results of the lie detector test and this was inadmissible.

Nichols v. State, 378 S.W.2d 335, 336 (Ct. App. Tex. 1964); *see also* United States v. Marlinga, 2005 WL 1459138, *4 (E.D. Mich. 2005) (polygraph excluded under Rule 403, FRE, because the purpose was to bolster the defendants' claims of innocence); Commonwealth v. York, 486 A.2d 502, 503 (Pa. 1984) (Commonwealth's question to the witness whether he had the occasion to take a polygraph, to which he replied 'yes,' improperly bolstered the testimony of the witness because the question was asked by the Commonwealth's attorney after the witness gave his version of events); People v. Rocha, 312 N.W.2d 657, 661 (Ct. App. Mich. 1991) (evidence that the witness was willing to take a polygraph improperly bolstered the witness's testimony, warranting a new trial).

The Court mentions that the State's asserted purpose for eliciting the above-quoted evidence - - that Montgomery voluntarily took a polygraph and was "cleared" by police - - was to show that Montgomery cooperated with law enforcement. State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, p. 33; 2016 WL 731237, *6. However, even if this were true, it is still improper bolstering evidence and was inadmissible when analyzed under Rule 403. Marlinga, 2005 WL 1459138, *4 (polygraph excluded under Rule 403, FRE, because the

purpose was to bolster the defendants' claims of innocence); State v. Russell, 2008 WL 201594, *10 (Ct. App. Ohio 2008) (The court acknowledged that it wrongfully upheld the admissibility of evidence of a cooperation agreement that specifically included, over the defendant's objection, a reference to the witness's willingness to take a polygraph examination. "[W]e were wrong in holding that a witness's willingness to take a polygraph examination may properly be admitted in evidence over objection"); United States v. Hayes, 2007 WL 1594455, *7 (W.D. Vir. 2007) ("The Fourth Circuit has held that the introduction by the government of a plea agreement with a reference to possible polygraph testing constitutes improper bolstering of the witness's testimony and the reference should be redacted before the plea agreement is admitted as evidence") (citing United States v. Herrera, 832 F.2d 833, 835-36 (4th Cir. 1987); United States v. Porter, 821 F.2d 968, 974 (4th Cir. 1987); United States v. Suarez-Milian, 1992 WL 252495, *8 (4th Cir. 1992)). The above-quoted testimony was improperly admitted and it prejudiced the defendant.

III. Whether the trial court erred in denying the appellant's motion for a speedy trial.

The appellant also respectfully requests this Court to reconsider its holding that the trial court did not error in denying his motion for a speedy trial. This Court stated that a reason for the delay was due to the appellant having four attorneys prior to trial. State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, p. 37; 2016 WL 731237, *9. However, there is no evidence that any of the appellant's attorneys requested a continuance, or indicated that they needed time to get up-to-speed on the case. Instead, appellant made numerous motions for a speedy trial, and each of them was denied. There is no indication that the changes of the appellant's attorneys caused the delay of the appellant's prosecution, and there is no indication that the appellant himself caused the delay of his prosecution. The responsibility rested with the State. Dickey v. Florida, 398 U.S. 30, 51, 90 S.Ct. 1564, 1575, 26 L.Ed.2d 26, J. Brennan,

concurring ("If the defendant does not cause the delay of his prosecution, the responsibility for it will almost always rest with one or another governmental authority. The police and prosecutor are not the only governmental officials whose conduct is governed by the Speedy Trial Clause; it covers that of court personnel as well . . . And the public officials responsible for delay may not even be associated with law enforcement agencies or the courts. Delay, for example, may spring from a refusal by other branches of government to provide these agencies and the judiciary with the resources necessary for speedy trials"). All factors weigh in favor of the appellant and he was prejudiced.

IV. Whether the trial court erred in admitting the defendant's statement into evidence.

Further, the appellant requests that this Court reconsider its holding that the trial court did not error in admitting into evidence his statement to law enforcement after he invoked his right to counsel. Respectfully, this Court wrongfully holds that the appellant's statements were not an unambiguous invocation of his right to counsel. State v. Palmer, Opinion No. 5382, Shearouse's Advance Sheet No. 8, p. 39; 2016 WL 731237, *11. The transcript of the interview states in pertinent part:

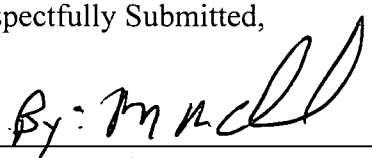
Question by Officer Creech:	"Do you wish to talk to us."
Answer by appellant:	"I wish to talk to you, but I need for you to call Charles Barr too."
Question by Officer Creech:	"You want him here?"
Answer by appellant:	"I want him to come, yes."

(R. p. 11; R. p. 59, ln. 23 – 60 ln. 8; R. p. 578). At this point, the appellant's request for counsel was sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *See* State v. Conner, 821 N.W.2d 267, 273 (Ct. App. Wis. 2012) ("the record makes clear that Conner unequivocally requested an attorney. The first time Conner requested counsel, he said 'I want to talk to ya'll, but I want an attorney present'");

Commonwealth v. Hilliard, 613 S.E.2d 579, 586 (Vir. 2005) (the following exchange was an unequivocal request for counsel: The defendant asked "Can I get a lawyer here? The detective responded "Do you want to do that?" The defendant then stated "I already have a lawyer. I mean, I can talk to you, don't get me wrong. But I just want to make sure I don't, like I said before, just jam myself up").

For these reasons, the appellant respectfully requests this Court rehear the matter based upon the foregoing points overlooked and/or misapprehended in the opinion.

Respectfully Submitted,



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Dated this 8th day of March, 2016

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above captioned case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of March, 2016.

Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

SWORN to and Subscribed
Before me this 8th day of March, 2016.

Notary Public for South Carolina
My Commission expires: October 30, 2022