

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Williamsburg County
The Honorable William Jeffrey Young, Circuit Court Judge
Appeal Case No. 2013-00700
Opinion No. 5382 (Filed February 24, 2016)

APR 04 2016

SC Court of Appeals

THE STATE

RESPONDENT,

V.

MARC ANTHONY PALMER,

APPELLANT

RETURN TO PETITION FOR REHEARING

Comes now Respondent, above named, by and through the South Carolina Attorney General, hereby makes Return to the Petition for Rehearing filed by Appellant on March 8, 2016. Respondent submits that Appellant has not presented any points that were overlooked or misapprehended by this Court. As a result, the Petition for Rehearing should be denied and dismissed.

1. Appellant first contends the trial court applied the wrong burden in deciding the State's Batson motion. He specifically contends the trial court improperly placed the burden on Appellant to convince the court that his reasons for his use of peremptory strikes were race neutral. Respondent submits this argument was not overlooked or misapprehended by this Court. This Court

correctly found the trial court utilized proper procedure in analyzing the Batson motion.

The trial court utilized the proper procedure for the Batson hearing. The State identified the jurors against whom it asserted the defense improperly struck based on race. (R. p. 33). The trial court then moved to step two of the process and allowed the proponent of the strikes, the defense, to provide race-neutral explanations for the peremptory strikes. (R. pp. 34-7). After the race neutral explanations were provided, the trial court moved on to step three of the process and allowed the State to present argument as to why the racially neutral reasons given by the defense were mere pretext. (R. pp. 37-9). The trial court's ruling reflects that, after hearing argument from the State, it felt the State met its burden of showing that the explanations for the use of the peremptory strikes were pretextual.

Contrary to Appellant's assertions, this case is clearly distinguishable from State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014). In Inman, the Supreme Court found that the trial court did not properly shift the burden of persuasion to the State, which had made the Batson motion. Inman, 409 S.C. at 28, 760 S.E.2d at 109 (2014). As evidence of the trial court's failure, the Supreme Court pointed to the argument presented by the State at step three of the process. At that point, the prosecutor only generally contended the strikes were pretextual without any specific argument. Id. at 24, 28-9, 760 S.E.2d at 107, 109. The argument at the Batson hearing was much different. The solicitor provided very

specific and strong arguments in support of the State's claim that the strikes were pretextual.

Judge I would take the position that some of the reasons advanced to the court for the strike at pretextual in nature. For example one of the reasons advanced for striking a white jurors is because of the employment being in government related employment. The defense thought that they would be sympathetic to the state, however the defense seated juror number 27 who was retired from the County Transit Authority and she would be no different from the white male juror who's retired from the United States Post Office in terms of government employee. That particular juror was a white male who was struck by the defense, however juror number 27 is a black female and she had the same type retirement from government employment and she was seated. Judge I was actually trying to go through the list to see whether or not any of the jurors who were seated whether they were from Hemmingway because that was another reason advanced. Also Judge another reason was advanced by the defense was that they did want anybody who was in the medical field. They used that a reason to strike a paramedic and they used that a reason to strike a juror who is not employed with the medical field but his wife is a nurse as I understand, but Judge at the same time they seated juror number 12 who is a black female. She worked at Georgetown Hospital as a CNA and actually her brother is a witness on this case, but she's a black female and they seated her and Judge in all candor I hadn't had quite an opportunity to go down the through everybody. Also Judge it was advanced that they didn't want jurors from Hemmingway however juror number 27 is from Hemmingway. Your Honor if you look at juror number 61 he's a black male he's from Hemmingway. Judge if you also look at juror number 87 although she's a white female she' s through Hemmingway as well and the defense seat her and Judge we would take the position obviously some of the reasons that were advanced by the defense are in fact pretextual that they applied those to white to strike the jurors but at the same time similarly situated black jurors were seated and so we obviously would take position that that is in direct violation of Batson vs Kentucky we ask that our motion be granted.

(R. p. 38, l 1 – R. p. 39, l 15). Here, the trial court did not place the burden on Appellant to show his answers were race neutral. The trial court's findings that the defense's use of some of its peremptory strikes was improperly racially

motivated are supported by the record. As noted by the solicitor, the Appellant's strikes of two jurors based upon their connection to the medical field were pretextual. Appellant did not strike another witness who was similarly situated, a certified nursing assistant who was seated. (R. pp. 38-9). Further, the explanation given for the strike of Juror 5 was especially tenuous because the juror was not an operating room nurse; his wife was one. (R. pp. 37, 38). As to the remainder of the strikes challenged, Respondent would note "[t]he trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility, and the reviewing court should give the findings great deference on appeal." State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 503 (1999) (citing Sumpter v. State, 312 S.C. 221, 439 S.E.2d 842 (1994); State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991)). Altogether, this Court did not overlook or misapprehend this issue. The petition for rehearing should therefore be denied.

2. Appellant request that this Court reconsider the denial of Appellant's motion for a mistrial and his motion for a new trial should be denied. This Court correctly found that both of these motions were properly denied. First, contrary to Appellant's assertions, Montgomery's testimony does not reflect that he was cleared because of a passed polygraph examination. The testimony merely reflects that Montgomery cooperated with law enforcement in their investigation. Montgomery had also indicated within that line of questioning in cross-examination that he cooperated during the interview with law enforcement and he voluntarily submitted a DNA sample.

Second, the testimony was not prejudicial. This Court properly found that the one mention was isolated, and was not referred to again by either party. While Mr. Montgomery was asked if he had voluntarily submitted to a polygraph, the results of the polygraph were not discussed at trial. See Bruno v. State, 347 S.C. 446, 452, 556 S.E.2d 393, 396 (2001) (finding that a defendant could not establish he was prejudiced by counsel's failure to object to mention of a polygraph examination when the results of the exam were not presented in any form). Further, the one question during Montgomery's cross-examination was the only reference to a polygraph throughout Appellant's trial. The solicitor did not attempt to use the testimony about the polygraph in any way throughout the rest of the trial. Further, Montgomery's testimony was neither inculpatory nor exculpatory. Montgomery was not a witness to the shooting, and nothing in his testimony reflected on the credibility of any other witness involved in the case. Contrary to Appellant's assertions, Montgomery was not a key witness to either party in this case. He was not referenced by Appellant at any other part of the trial. Altogether, the single mention of a polygraph examination for a witness who provided no information that implicated Appellant in the crime did not render Appellant's case unfair. Since Appellant was not prejudiced by the single mention of a polygraph examination in Montgomery's cross-examination, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial and motion for a new trial.

3. Appellant requests this Court reconsider its holding that the trial court did not err in denying his motion for a speedy trial. Specifically, Appellant appears to contend that this Court and the trial court improperly weighed the number of attorneys Appellant had prior to trial in their consideration of whether the motion was properly denied.

This Court should not reconsider this issue. This Court properly weighed the fact that Appellant had four different attorneys during the course of the pendency of his criminal action against Appellant. As reflected in the Record, two of the attorneys were relieved as a result of the deteriorating relationships the attorneys had with Appellant. One of the attorneys noted that Appellant had filed a grievance against him, and another requested to be relieved because he and Appellant disagreed on how to handle several matters. (See R. pp. 549-62, 566). While none of Appellant's attorneys filed a motion for a continuance, it was reasonable for the trial court and this Court to take into consideration that counsel would need some time to prepare for Appellant's murder trial.

Furthermore, this Court properly found Appellant failed to show that he was prejudiced. The trial transcript reflects that Appellant was able to challenge some witnesses' credibility with the use of their prior statements. (See R. pp. 134-36, 137-38, 209-11, 248-50). Appellant's assertion on appeal that he was prejudiced by the unavailability of Elijah Kennedy was not an argument raised at trial. Thus, to the extent he relies upon that contention as a source of prejudice, his argument is not preserved for appellate review. Adams, 354 S.C. at 380, 580 S.E.2d at 795; see Perez, 334 S.C. at 565-66, 514 S.E.2d at 755; see also

Tucker, 319 S.C. at 428, 462 S.E.2d at 265. Furthermore, the transcript reflects that Kennedy's testimony was likely more favorable to the State. (See R. pp. 301-04).

In reviewing all of the factors together, it was not unreasonable for the trial court to deny Appellant's motion to dismiss the charges because of the speedy trial claim. While Appellant did assert his right to a speedy trial early and consistently, a substantial portion of the delay was due to Appellant's actions and continual attempts to have counsel replaced. Each new attorney had to be afforded adequate time to properly prepare a defense. Further, there was no evidence the delay was the result of any attempt from the State to hinder Appellant's ability to present a defense. In light of the very limited, if any, prejudice Appellant may have suffered, in balance with the other factors, dismissal of Appellant's case was not warranted. Thus, the petition for rehearing of this issue should be denied.

4. This Court should not reconsider its holding regarding the admission of Appellant's statement into evidence. This Court correctly found Appellant did not unambiguously invoke his right to counsel. The opinion accurately reflects the exchange between Appellant and law enforcement just prior to the statement. The transcript of the interview reflects that when Appellant indicated he was willing to talk with law enforcement, he also requested they call Charles Barr, a local defense attorney. (R. p. 576). Not being sure of whether Appellant was invoking his right to have counsel present for the interview, the SLED agent asked a few questions for clarification. The record supports the trial court's

finding that Appellant's alleged invocation of his right to counsel was not clear, and that the SLED agent properly sought clarification regarding whether Appellant was invoking his right to have counsel present for the interview. As noted by the trial court, the audio better and clearly reflects the ambiguity of Appellant's response and the need for the clarification questions. (State's Exhibit 2). Since Appellant's request that law enforcement call Charles Barr was not an unambiguous invocation of his right to counsel, Agent Creech was not required to cease questioning Appellant, and it was not improper for Agent Creech to ask clarifying questions to determine whether Appellant was invoking his right to have counsel present.

The factual situation in this case is distinguishable from that presented in Com. v. Hilliard, 613 S.E.2d 579 (Vir. 2005). In Hilliard, the Virginia Supreme Court found the defendant's third alleged request for counsel to be unequivocal. In that request, the exchange was as follows:

HILLIARD: Can I get a lawyer in here?

DETECTIVE WHITE: Do you want to do that?

HILLIARD: 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. And I'll tell you everything that I know. This is my word.

Hilliard, 613 S.E.2d at 582. At that point during the interview, Hilliard had made two prior equivocal mentions about obtaining counsel. The Virginia Supreme Court held the third request was unequivocal in light of the context in which the statement was made and in light of the context and circumstances and prior statements made by Hilliard during the interview. Id. at 586.

There was not similar context in this case. The exchange at issue occurred at the very beginning of the interview with Appellant. There is no indication in the record that there were circumstances that would have made clear that Appellant's statements in response to the early questions were unequivocal invocation of his right to counsel. Thus, this Court's finding that the trial court's denial of the motion to suppress was correct. The petition for rehearing as to this issue should therefore be denied.

Wherefore, premises considered, for the reasons stated herein,
Respondent respectfully requests this Court deny the Petition for Rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

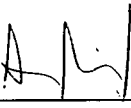
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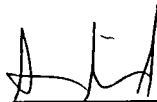
APPELLANT.

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the Return to Petition for Rehearing on Appellant by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201, and to Ryan L. Beasley, Esq., 650 E. Washington Street, Greenville, SC 29601.

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

This 4th day of April, 2016.



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