

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Oct 15 2020
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

STEWART JEROME MIDDLETON,

APPELLANT.

APPELLATE CASE NO. 2017-002478

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

Opinion No. 2020-UP-271

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner seeks rehearing because this Court may have overlooked the fact that Detective Rebecca Bailey's testimony that appellant failed to show up for two police interviews and delayed giving a statement to the police was admissible to show appellant's consciousness of guilt as to the crime ultimately charged. This Court cited State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976), in support of this proposition of law. In McDowell, the court found that evidence the defendant was affirmatively seeking evidence about how to "beat" the polygraph examination was admissible to show his consciousness of guilt. However, the court was careful to point out that evidence the defendant refused to take an

offered polygraph examination would have been inadmissible. Here, appellant not showing up for two appointments with the police was more in line with a refusal to take a polygraph than it was with the admission of any other evidence of evasion. Detective Bailey clearly wanted to interrogate appellant, and evidence appellant did not want to be interrogated by the police was impermissibly used as evidence of his guilt in the same manner as if appellant had been read his Miranda warnings and then refused to talk with the police. That would clearly have been a Doyle violation.¹ Appellant was under no obligation to talk to Detective Bailey, and evidence appellant initially chose to remain silent by not meeting Detective Bailey to be interrogated was unfairly used against him as evidence of his guilt. This Court should respectfully reconsider its holding that evidence appellant failed to show up to be interrogated by Detective Bailey on two different occasions was properly admitted against him.


In State v. Sloan, 278 S.C. 435, 439, 298 S.E.2d 92, 94 (1976), the Supreme Court held the trial court erred by admitting evidence that Sloan made no attempt to talk to the police prior to being served with the arrest warrant. The Court noted that “the prosecution may not use at trial the fact that a defendant stood mute in the face of accusation, except for impeachment purposes. Jenkins v. Anderson, 447 U.S. 231 (1980); Miranda v. Arizona, 384 U.S. 436 (1966). Here, the defendant did not testify and thus did not cast aside his right to remain silent.” Appellant Middleton likewise did not testify, and the trial court here erred by admitting evidence appellant did not show up to be interrogated by Detective Bailey when he had every right to avoid interrogation and answering the questions of the police. The state impermissibly persuaded the trial court to allow the jury to use these refusals to initially meet with Detective Bailey on two occasions as evidence of his guilt.

¹ Miranda v. Arizona, 384 U.S. 436 (1966); Doyle v. Ohio, 426 U.S. 610 (1976).

Directed Verdict

This Court should also reconsider its holding that there was substantial circumstantial evidence that appellant was guilty of criminal sexual conduct in the third degree. There was not substantial circumstantial evidence that appellant knew or had reason to know that the victim was mentally incapacitated or physically helpless. There was evidence that the alleged victim was moving throughout the hotel that night. There was no substantial circumstantial evidence that the alleged victim was “temporarily incapable of appraising or controlling his or her conduct” or, even if she was, that appellant knew or had reason to know of that fact. While the alleged victim may have had “too much” to drink, she was not “physically helpless,” meaning “unconscious, asleep, or for any reason physically unable to communicate unwillingness to an act [sex].” See S.C. Code § 16-3-651 and S.C. Code § 16-3-654. Since there was no substantial circumstantial evidence appellant knew or had reason to know the alleged victim was “mentally incapacitated” or “physically helpless,” as those terms are defined, this Court should reconsider its ruling that a directed verdict was properly denied on the charge of third-degree criminal sexual conduct and rehearing should be granted.

Respectfully Submitted,

Robert M. Dudek by
 *w/permission*
ROBERT M. DUDEK
Chief Appellate Defender

This 15th day of October, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 15th day of October, 2020; and Stewart J. Middleton at 203 Market Hall Street, Moncks Corner, SC 29461, this 15th day of October, 2020.

Robert M. Dudek
by  *of permission*
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT