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Mar 11 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RICKY ANTHONY SHORT,

APPELLANT

APPELLATE CASE NO. 2018-000782

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2021-UP-057

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner seeks rehearing because this Court may have overlooked the fact that police officer opinions that they believe or do not believe a witness, and that they "cleared" another person as being the culprit should not be allowed. To allow such testimony as permissible "lay witness opinion testimony" will do great damage to the rightful expectation that law enforcement officers or detectives are government officials in search of the truth, and not prosecution hacks doing everything possible to convict the accused. As Justice Pleicones stated in his dissent in State v. Douglas, 380 S.C. 499, 505, 671 S.E.2d 606, 610

(2009): "Juries do not require the assistance of human 'truth detectors' in assessing the credibility of testimony."

As this Court will recall, Detective Bailey testified and opined, over objection, that appellant's "story" did not match up with what other witnesses were telling him. R. 382, l. 3 – 383, l. 24.

Bailey was also asked if appellant's explanation that he had cut his hand picking thorny flowers for the decedent seemed like a reasonable explanation to him. Defense counsel objected that this was outside the ability of Detective Bailey to answer, that it was an opinion, and that it called for speculation. The judge agreed that it was speculation. However, the judge ruled that Detective Bailey could give his opinion because it was a rational explanation or "perception based on his years of experience." R. 453, l. 14 – 454, l. 24. Detective Bailey then said he did not believe appellant's "story" about the flowers having cut his hand. R. 454, ll. 21-24.

Detective Sam Riedel also testified in the presence of the jury. Riedel was asked whether he believed appellant's statement that he followed the decedent that evening because he wanted to calm her down. Defense counsel also objected that this opinion would not be relevant. That objection was also overruled, with the judge adding, "goes to the course of the investigation." R. 477, ll. 4-24. Detective Riedel then said that appellant's explanation "wasn't completely believable, no." R. 477, l. 14 – 478, l. 10.

When defense counsel asked Detective Riedel on cross-examination if he had ever lied to anyone during the investigation, the solicitor objected that this was irrelevant. The judge ruled this was an improper question, but that defense counsel could argue to the jury that Riedel had lied. However, counsel could not ask Riedel if he lied. R. 487, l. 18 – 490, l. 10.

Detective Ruben Serrudo testified that he was given the names of some prior boyfriends of the decedent, and he was asked to contact them during his investigation. When the solicitor asked the detective whether he was able to "clear" them as suspects in this crime, defense counsel again objected to the relevance of this question. The trial judge responded that the state could anticipate that appellant was denying having committed the crime and that it was therefore permissible for the solicitor to have law enforcement testify they cleared other suspects. R. 550, l. 3 – 551, l. 21. Serrudo then testified that he was able to clear another person as a suspect, and that it was "a misunderstanding as far as him [the suspect] having contact at all." R. 551, l. 21 – 552, l. 7.

In its summary opinion, this Court found all of this was admissible as "lay witness opinion testimony" pursuant to Rule 701, SCRE, and State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009). See State v. Ricky Anthony Short, 2021-UP-057 (filed February 24, 2021) at p. 2. Respectfully, State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) would not be decided the same way today as explained below, it is an outdated precedent, and the dissent of Justice Pleicones would prevail. In Douglas, however, the majority did hold that Officer Herod should not have been qualified as an expert. The part of the opinion would not change. The majority also found that Herod's testimony did not prejudice Douglas.

In his dissent, Justice Pleicones correctly noted that Officer Herod's testimony went to the ultimate issue in the case, which was the victim's credibility. Herod testified about the RATAC method, and the child promising to tell her the truth. Herod testified after the interview that she recommended the child go to the Durant Center for a physical examination. Justice Pleicones agreed with this Court's holding in Douglas that the only reasonable conclusion that could be drawn from this testimony was that Officer Herod believed the alleged victim was

being truthful. "Juries do not require the assistance of human 'truth detectors' in assessing the credibility of testimony." State v. Douglas, 380 S.C. 499, 505, 671 S.E.2d 606, 610 (2009).

In the later case of State v. Kromah, 401 S.C. 340, 359-360, 737 S.E.2d 490, 500 (2013) the Supreme Court noted that in State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), it found error where "[t]here is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." Id. "Similarly, we find Smith's testimony about a "compelling finding" to be inappropriate here. Smith should not have been allowed to testify about a compelling finding of child abuse as that was the equivalent of Smith stating the Child was telling the truth." State v. Kromah, 401 S.C. 340, 359-360, 737 S.E.2d 490, 500 (2013).

Appellant understands that Kromah involved "expert testimony," but the salient point is that testimony signaling to the jury that the witness believes another witness is telling the truth is impermissible. The same should hold true, where, as here, the lay police officer witnesses testified they did not believe what the defendant told them was true. Judging the credibility of the defendant and other witnesses is the function of the jury, and not law enforcement officers.

In this case, there was police officer testimony about not believing what appellant told them, and the police having cleared another suspect because they seemingly believed that suspect. This Court should respectfully reconsider its holding finding no error in the police witnesses being allowed to testify they did not believe appellant. This Court's reliance, most respectfully, on the outdated opinion in State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) was misplaced.

Missouri v. Seibert

Appellant also submits that this Court should reconsider its holding that Missouri v. Seibert, 542 U.S. 600 (2004), and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) are distinguishable because "although Short had been in custody for three hours prior to being read his Miranda rights, he did not make the statements he sought to exclude until after being read and waiving his rights. Furthermore, we do not believe the questioning prior to Miranda warnings was intended to elicit an incriminating response from Short." See State v. Ricky Anthony Short, 2021-UP-057 (filed February 24, 2021) at p. 3.

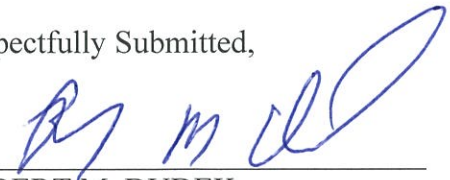
Here, appellant was detained at the crime scene. He was handcuffed, and he was taken to the police station to be interrogated. He was interrogated *for three and a half to four hours* before he was finally given his Miranda warnings. It was respectfully almost laughable for law enforcement to claim appellant was not a suspect in this murder. He should have been read his Miranda warnings, since he was in custody -- he was not free to leave -- and he was being interrogated. See State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), *citing* State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003).

Again, as appellant argued in his brief, "[u]nlike Navy, a reasonable person would have believed he was in custody at the time he began being questioned by the police." Brief of Appellant at 21. Appellant was lied to by the detectives when he asked if he was a suspect. Appellant did not have a shirt on, *and he was bloody and dirty.* The explanation that he cut his hand on thorns while picking flowers for the decedent a few days prior to being interrogated was not believed by the police. It was thought that appellant had been cut by a knife when the decedent was stabbed to death. Appellant's statement that he followed the decedent that evening to "calm her down" was also not believed by the police.

Respectfully, the defense properly urged that appellant's statements were the product of the "question first-give Miranda warnings later" police tactic condemned in Missouri v. Seibert, 542 U.S. 600 (2004). It was also the technique employed in this case, and although this Court can find distinguishing factual differences in this case, they are not material distinctions making Seibert and Navy inapplicable for purposes of suppressing appellant statements. The police got appellant locked into his narrative, then gave him Miranda warnings and allowed him to continue with his "story." Appellant's statements must be examined given the "totality of the circumstances." This Court should reconsider its holding since the interrogation without Miranda warnings in this case violated Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) from its inception through subsequent hours of discussion where the police thought the bloody appellant was guilty. Appellant telling the police that he had been involved in an argument with his decedent girlfriend, and his attempt to explain away the cuts on his hands as having come from him pulling roses or flowers cannot be considered in isolation given the tactical use of the now condemned Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) interrogation method. R. 38, l. 8 – 43, l. 15.

Rehearing should be granted on the law enforcement credibility determination testimony, and the Seibert and Navy suppression issue.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 11th day of March, 2021.

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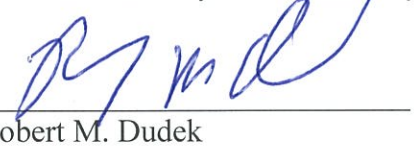
CERTIFICATE OF SERVICE

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 J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 11th day of March, 2021.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT