STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2013-000115

The State, Respondent,

v.

Kendra Samuel, Petitioner.

Opinion No. 5046 (S.C. Ct. App. filed November 14, 2012)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals correctly ruled the trial court erred in finding statement given by Petitioner following a polygraph examination was inadmissible due to the polygraph being per se excluded from admission into evidence.

STATEMENT OF THE CASE

Procedural History

The Richland County Grand Jury indicted Respondent/Appellant Kendra Samuel (Samuel) on one count of homicide by child abuse. She proceeded to trial before the Honorable G. Thomas Cooper, Jr. on November 29 and 30, 2010. During pretrial motions and after finding the statement voluntarily given, the trial court suppressed a statement by Samuel. The circuit court's ruling substantially impairs the State's ability to prosecute the homicide by child abuse charge, and the State timely served the Notice of Appeal from the oral order on December 1, 2010.[1]

On November 14, 2012, the Court of Appeals reversed the trial court's suppression and remanded the case to the trial court. See State v. Samuel, 400 S.C. 593, 735 S.E.2d 541 (Ct. App. 2012). Petitioner filed a Petition for Rehearing, which the Court of Appeals denied on December 18, 2012. Petitioner filed her Petition for Writ of Certiorari on January 24, 2013. This Return follows.

Factual Background

On July 31, 2008, Jessica Davis entrusted the care of her two-year-old son to Samuel. Davis and her grandmother left at around 5:30p.m., leaving Samuel alone with her son. Samuel placed the child in his crib as if he were asleep when she returned with

[1] See State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) ("A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976)."); State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993) (same).

him from the park at around 7p.m. Davis checked on her son sometime after 11p.m. and found he was not breathing.

Samuel and Davis each gave witness statements on August 1, 2008 at the Columbia Police Department (CPD). At the time, neither was considered a suspect of a crime. After further investigation, Investigators Reese and Thomas asked Samuel to come back to CPD to give additional statements. She returned on August 6. (R.33; App.35).

Samuel was met by Investigator Gray, who read Samuel her Miranda[2] rights and had her sign an Advice of Rights form prior to conducting a polygraph examination. (State's Exhibit 1; R.24-26; 213; App. 26-28; 215). Investigator Gray indicated Samuel was free to leave at any time before, during or after his examination of her. (R. 65-67; App.67-69). After informing Samuel the exam indicated deception, Gray asked her some follow-up questions.(R. 47-49; 51; App. 49-51; 53). He began talking with her and she gave him a statement of the events that transpired with the child. (R. 51-53; App.53-55). Investigator Gray notified Investigators Reese and Thomas that Samuel gave an additional statement. (R. 53; App.55).

Investigator Thomas stated there were indications from the statement given to Investigator Gray that Samuel had changed her story regarding the events that resulted in the child's death. She indicated injuries occurring to the child. As a result, he and Agent Shockley with SLED's Child Fatality Task Force conducted an interview with Samuel. (R. 72-73; App.74-75). He indicated she was free to leave and not in custody. Further, he knew she had been advised of her Miranda rights. (R. 73-74; App.75-76). They began an interview with Samuel and concluded the interview after having to delete some

[2] Miranda v. Arizona, 384 U.S. 436 (1966)

files off the digital recorder in order to have more memory to store her entire statement. (Court's Exhibit 2-3; R. 75; 222-236; App.77; 224-238). Samuel provided a statement similar to the one given Investigator Gray. She was allowed to provide a written statement, and then answered some questions in her handwriting. (State's Exhibit 2 pages 1-6; R. 77-79; 214; App.79-81; 216).

Investigator Thomas and Investigator Reese then conferred and after discussing the autopsy results and information received from Davis determined Samuel's story was not corroborated by the evidence. (R. 81-82; App. 83-84). Samuel was not handcuffed or in custody at this time and was free to leave if she chose. (R. 81; 87-89; App.83; 89-91).

Investigator Reese then conducted an interview on Samuel. (Court's Exhibit 4; R. 106-107; 259; App.108-109; 261). Investigator Reese reminded Samuel she had been advised of her rights and asked if she still wished to talk with them. She agreed. (Court's Exhibit 4; R.107; 259; App.109; 261). Samuel gave another statement to the Investigators and again answered several follow-up questions in her own handwriting after giving the statement. (R.107-108; 259; 220-221; App.109-110; 261; 222-223). Investigator Reese testified she was free to leave and they could not stop her until the time she was placed under arrest. (R.111-113; 116; App.113-115; 118).

In her last statement to the Investigators, Samuel admitted shaking the baby. She stated the baby began crying hysterically while in her care, and she could not get him to stop fussing. Samuel picked the child up, and shook him for one to two minutes until he stopped crying. After shaking him, the child was unresponsive so instead of calling for help, Samuel left the house and went to the park carrying the child. Her boyfriend

picked her up from the park and brought her home. Davis was home and instead of letting anyone know the child needed help, Samuel placed the child in the crib as if it were asleep. (Court Exhibit 4; R. 259; App.261).

Prior to trial, the court conducted a Jackson v. Denno hearing to determine whether the multiple statements given by Samuel were knowing, voluntary, and admissible. After hearing from all the officers involved, the trial court concluded all statements made by Samuel were knowing and voluntary. (R.183-189; App.185-191). The court concluded all the statements were admissible into evidence at trial. (R.189; App.191).

Counsel for Samuel then indicated he intended to bring in the polygraph examination at trial as it relates to the statement given to Investigator Gray. Samuel moved to exclude the statement because she could not reference the fact she failed the polygraph. The trial court agreed to exclude without providing any reasoning. The State served and filed this appeal from the trial court's oral suppression ruling. (R.189-190; 195; App.191-192; 197).

ARGUMENT

I. The Court of Appeals correctly ruled the trial court erred in finding statement given by Petitioner following a polygraph examination was inadmissible due to the polygraph being *per se* excluded from admission into evidence.

The Court of Appeals correctly found the trial court erred in refusing to admit the first statement given by Petitioner which followed a polygraph examination. The Court correctly found the trial court erred in finding the polygraph evidence was *per se* inadmissible and because it was *per se* inadmissible the statement could not come in because its probative value became substantially outweighed by its prejudicial nature.

Petitioner's main arguments relate to the admissibility of the polygraph to determine the admissibility of the statement. As below, Petitioner seems to argue any testimony related to the polygraph is *per se* inadmissible. However, as the Court of Appeals correctly found, while the testimony is generally inadmissible, it is not *per se* inadmissible.

The admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. Id.

This Court has held "the results of polygraph examinations are generally inadmissible because the reliability of the test is questionable." State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001). The Court, however, refused to set a *per se* rule that no mention of a polygraph examination or its results may be made before the jury. See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Instead, the Court found the

"admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors." Id. at 24, 515 S.E.2d at 520.

Petitioner refers to State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986) and Rutledge v. St. Paul Fire & Marine Ins. Co., 286 S.C. 360, 334 S.E.2d 131 (Ct. App. 1985), to argue a *per se* exclusion of polygraph testimony and evidence. Both of these cases arose prior to Council and the adoption of the South Carolina Rule of Evidence in 1995. As such, neither is controlling in this case.

In the instant case, if the trial court determined the statement was inadmissible solely based on defense counsel's desire to mention the polygraph examination, it was an abuse of discretion. The trial court failed to consider the relevant factors as required by Council, and instead determined the admissibility under a bright-line, *per se* rule that was specifically rejected by Council. The failure to exercise discretion, however, is itself an abuse of discretion. State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000).

Further, defense counsel never provided the trial court with any basis for suppressing the statement based on the polygraph examination. The court found the statement knowing and voluntary, and thus, admissible. The admission of the statement did not require admission of any information regarding the polygraph examination and counsel's bootstrapping of a claimed desire to raise the issue of the polygraph is simply a means to force the exclusion of the statement. See e.g., State v. Rochester, 301 S.C. 196, 201, 391 S.E.2d 244, 247 (1990) (finding a statement made after being given a polygraph examination is still admissible).

Further, Samuel's counsel could have waived the error associated with addressing the polygraph by raising it as part of his defense. See State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); State v. Gillis, 73 S.C. 318, 53 S.E. 487, 488 (1906) (all rights, including constitutional rights may be waived). Furthermore, the mention of a polygraph is not *per se* prejudicial as counsel may have a valid trial strategy to allow its admission. See Ellenburg v. State, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006). As discussed below, the admissibility of the polygraph evidence in order to demonstrate coercion or the lack of a voluntary statement certainly would be considered a valid trial strategy for waiving any objection to its admission.

Samuel's counsel could have raised the polygraph examination during his examination of Investigator Gray or of his client. There is no *per se* exclusion of the testimony, and the trial court erred in making a *per se* ruling. Samuel's counsel made it clear he intended to use the polygraph and Investigator Gray's finding of deception to show Samuel was coerced into changing her story and giving a new statement. (R.189; App.191). This appears to be a valid trial strategy for the use of the polygraph evidence and testimony, and as discussed below, the evidence could have been admitted for this limited purpose. Accordingly, the trial court abused its discretion in suppressing the statement if it did so based on the bootstrapped ground that Samuel's counsel sought to admit information about the polygraph if the statement were admitted.

Additionally, the trial court abused his discretion in excluding the statement under Rule 403, SCRE. Rule 403, SCRE, states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "Unfair prejudice does not mean the damage to a defendant's case that

results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)); see also, State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

In this case, the trial court did not conduct any balancing test. There was never a discussion of what prejudicial impact the statement may have had and certainly no finding any prejudice substantially outweighed the statement's significant probative value. The probative value of the statement is significant because it sets the stage for the two following statements including the one in which she admits shaking the child. Further, it establishes what takes place during the time she is at CPD from when she is given her Miranda rights until the recorded statements are made. The trial court's ruling would leave a significant gap of time between her arrival at the station and Miranda warnings being given and the subsequent admissible statements made by Petitioner. The State is entitled to fill in these gaps and this statement, already found knowing and voluntary by the trial court, was necessary for this purpose. See e.g., Old Chief v. U.S., 519 U.S. 172, 187-188, 117 S.Ct. 644, 653 - 654 (1997).

In this case, there is no prejudice other than the usual prejudice from admitting evidence against a defendant. Even if the possible prejudice was the inability to cross-examine about the polygraph, counsel could have elicited testimony that Investigator Gray only received the second statement from Samuel after accusing her of lying. The result has the same impeachment value without mentioning the polygraph and allows the

admission of a clearly probative statement. As a result, there is no prejudice whatsoever from the admission of the statement and the exclusion of any mention of the polygraph in the event it is to be excluded. The lack of prejudice is especially true if the trial court admitted the mention of the polygraph because there is no *per se* rule barring its admission and the evidence could be admitted with a limiting instruction as discussed below.

The cases of State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996), and Johnson v. State, 355 A.2d 504 (Md. 1976) cited by Petitioner are highly instructive and belie the trial court's application of a *per se* rule. In Wright, this Court found:

> Appellant sought to disclose the polygraph examiner's misinformation to show the jury that the confession was not given voluntarily. However, appellant did not suggest at trial nor on appeal what limitation could have been placed on the disclosure to limit prejudice to appellant. Without some limitation, the only inference the jury could reasonably have drawn from learning appellant's confession followed closely after a deceptive polygraph was that the confession was truthful and the answers given to the polygraph exam were untruthful. This would serve to bolster the confession rather than persuade the jury to believe the alleged coercion. Under these circumstances, we find no abuse of discretion.

Wright, 322 S.C. at 256, 471 S.E.2d at 702 (emphasis added). This Court articulates that if a proper limitation on the use of the polygraph evidence was given to the jury, it could be used for the purpose Petitioner seeks to use it in this case—for the limited purpose of establishing a statement was involuntary.

Similarly, the Johnson Court explained that in some circumstances the evidence of a polygraph may be admitted. The Court faced the argument that *per se* exclusion of evidence of a polygraph was necessary. The Johnson Court, however, found where the

evidence is being admitted to show the involuntariness of a confession, as opposed to the guilt of the defendant, the evidence may properly be admitted for that limited purpose and with proper limiting instruction. In Johnson, the Court explained:

> While the issue to our knowledge has never been decided in Maryland, other jurisdictions have held that the taking of a lie detector test may be considered by the jury in determining whether a confession was freely and voluntarily given. Leeks v. State, 95 Okl.Cr. 326, 245 P.2d 764. A jury should also consider if the method of examination was such as to constitute, in itself, coercion sufficient to find a resulting confession involuntary, Johnson v. State, 166 So.2d 798 (Fla.App.). The very fact that the accused was preparing to take a lie detector test was found to be a proper factor for consideration by the jury when deciding the voluntariness of a confession given before such test was administered. People v. McHenry, 204 Cal.App.2d 764, 22 Cal.Rptr. 621. See also annotation Evidence-Deception Tests, 23 A.L.R.2d 1306.
>
> The reason for excluding the results of a polygraph examination is the questionable reliability of such evidence. Similarly, the admission into evidence of whether an accused agreed or refused to take such a test may give rise to jury speculation as to his reasons for submitting or refusing to submit to the test. In both cases, a determination of guilt or innocence may be affected by an accused's state of mind after the crime, rather than upon evidence produced related to the crime itself. But evidence of the use of a polygraph as a device to obtain a statement is substantially less prejudicial than either the impact of the questionable results of the device or the effect of the defendant's refusal to take the test. The importance of permitting the jury to weigh the coercive effect of every motivating circumstance surrounding the eliciting of a confession, far outweighs the importance of avoiding the possible prejudice from a reference to its use. Furthermore, as indicated by Lusby v. State, 217 Md. 191, 141 A.2d 893, any prejudice may be diminished by instructing the jury as to the limited purpose of the admission of the evidence relating to the device.

Johnson, 355 A.2d at 507-508 (emphasis added). These two cases provide great examples of the error by the trial court in finding the evidence of the polygraph *per se* inadmissible, and therefore, barring admissibility of the statement. This is especially true after the court made an unappealed finding that the statement was knowing and voluntary.

Accordingly, the Court of Appeals correctly found the trial court erred in suppressing the statement given to Investigator Gray because there is not and should not be a *per se* ban on the admissibility of polygraph evidence. Further, the court did not conduct a proper Rule 403 balancing test, but even if he had he abused his discretion in excluding the statement because any prejudice from the admission of the statement certainly did not substantially outweigh the statement's probative value, especially in light of the fact the admission of the polygraph could be for the limited purpose of attacking the voluntariness of the statement and a limiting instruction could be issued to prevent any prejudice from the consideration by the jury. As a result, this Court should deny the Petition for Writ of Certiorari because the Court of Appeals correctly found the trial court erred in finding polygraph evidence is *per se* inadmissible and in suppressing the statement made after the polygraph.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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April 26, 2013

STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I, ELLEN R. DuBOIS, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 26th day of April, 2013.

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