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S.C. Supreme Court

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)

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar Number 15608

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

I. The trial court incorrectly suppressed a knowingly and voluntarily made statement based on Petitioner's intent to bring into evidence the existence of a polygraph and the results of Petitioner's polygraph. Further, the admission of the statement is a separate and distinct issue from Petitioner's ability to admit the polygraph information. The Court of Appeals properly concluded the trial court erred in its suppression of the statement by Petitioner. Finally, the State asserts the trial court improperly concluded the polygraph information was *per se* excludable, and instead, the Court of Appeals properly found it could be admissible in certain circumstances.

STATEMENT OF THE CASE

Procedural History

The Richland County Grand Jury indicted Petitioner 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 specifically finding the statement knowingly and voluntarily given, the trial court suppressed a statement by Samuel. The circuit court's ruling substantially impaired 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 Court granted the Petition for Writ of Certiorari and this Brief 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 trial court incorrectly suppressed a knowingly and voluntarily made statement based on Petitioner's intent to bring into evidence the existence of a polygraph and the results of Petitioner's polygraph. Further, the admission of the statement is a separate and distinct issue from Petitioner's ability to admit the polygraph information. The Court of Appeals properly concluded the trial court erred in its suppression of the statement by Petitioner. Finally, the State asserts the trial court improperly concluded the polygraph information was *per se* excludable, and instead, the Court of Appeals properly found it could be admissible in certain circumstances.

The trial court erred in suppressing a statement it found knowingly and voluntarily made by Petitioner based on its erroneous conclusion Petitioner's ability to address a polygraph in front of the jury was *per se* excluded. The issue of the admission of polygraph evidence is separate and distinct from the court's finding on the admissibility of the statement. Further, even if related, the trial court clearly erred in finding the evidence of the polygraph was *per se* excluded under the facts of this case, and any possible prejudice does not substantially outweigh the probative value of the statement.

First, and most significant, the trial court found the statement given by Petitioner to be knowing and voluntary. He made the finding after hearing all the evidence related to the polygraph, including the fact Petitioner was given a polygraph, The trial court specifically addressed this Court's opinion in State v. Rochester, 301 S.C. 196, 201, 391 S.E.2d 244, 247 (1990), in which this Court found a statement given after a polygraph test is administered is not *per se* inadmissible. (App.185-186). Further, the trial court concluded: "So there is support in our jurisdiction for statements given post a polygraph

exam, and I don't feel that the subsequent interrogation or questioning by the Columbia Police Department was excessive or overbearing." (App.186). The court continued: "Certainly once someone has it put in their mind that the police did not believe them, I feel it's perfectly reasonable for that person to try to explain their behavior in some other context than admitting guilt, and that frequently is the case." (App.186-187).

The trial court ultimately concluded:

> The defendant **knowingly** and **intelligently** waived her rights under the fifth and sixth amendments to the Constitution of the United States and that constitutional safeguards required by Miranda v. Arizona and that the alleged statement was obtained from the defendant, was **freely** and **voluntarily** given **without duress, without coercion, without undue influence**, without reward, without promise or hope of reward, without promise of leniency, without threat of injury and without compulsion or inducement of any kind, and that such alleged statement was the **voluntary** product of the free and unconstrained will of the defendant.
>
> This Court finds all of the forgoing conclusions by the preponderance of the evidence. I, therefore, find the statements are **admissible** into evidence.

(App.188-189) (emphasis added).

The trial court specifically found the polygraph exam and the questioning of Petitioner after the exam did not render the second statement involuntary. With all three statements, he found no coercion, no undue influence, and no duress. He found the statements freely, voluntarily, intelligently, and knowingly given. After making such finding, the court found all three statements by Petitioner admissible into evidence.

As the Court of Appeals found, the court then erred in finding the statement should be suppressed based on Petitioner's desire to admit information regarding the polygraph exam prior to the second statement being given. The determination of whether

Petitioner may admit the polygraph information is entirely separate and distinct from the admissibility of her knowing and voluntary statements. Further, defense counsel never provided the trial court with any basis for suppressing the statement based on the polygraph examination. The admission of the second 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.

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 (1997).

In this case, there is no prejudice other than the usual prejudice from admitting evidence against a defendant. Even if Petitioner can create his own prejudice by attempting to admit the polygraph at trial, as will be discussed below, there is no *per se* exclusion of the polygraph information. Further, 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.[3]

As a result, the trial court improperly found the admissibility of the second statement was reliant on the admissibility of the polygraph information. Counsel's attempt to admit other evidence during trial should not impact the admissibility of a statement which is found to be knowing and voluntary and is specifically found to be

[3] Again, the State submits the question of the admission of the second statement and the admission of the polygraph information by Petitioner are two separate and distinct issues and the only one before the Court today is the admission of the statement.

admissible. The trial court abused its discretion in finding the second statement should be excluded because Petitioner sought to admit evidence of her polygraph examination.

Further, as the Court of Appeals properly found, and this Court has stated several times, the exclusion of polygraph evidence is not a *per se* rule. Therefore, even if its admissibility could impact the admissibility of the statement, the trial court erred in relying on a *per se* exclusion to reach its conclusion. 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[4] 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.

The trial court clearly abused its discretion, and the Court of Appeals properly held it abused its discretion, in relying on a *per se* rule. The failure to exercise discretion is itself an abuse of discretion. State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000).

[4] State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

Finally, Petitioner maintains this Court can find the statement admissible and should issue an opinion allowing the admission of the polygraph evidence. First, this issue is not before the Court because the admissibility of the second statement by Petitioner is separate and distinct from the issue of the admissibility of the polygraph and the use of its results. However, to the extent the two are related, the State submits there is no *per se* rule barring the admission of the polygraph information and the Court of Appeals properly remanded for a determination of the polygraph's admissibility.

Petitioner contends that the circumstances of the polygraph are relevant and necessary to a consideration of the voluntariness of the statement.[5] Even if true, nothing in the case law of this State prevents him from attempting to admit the evidence. Conversely, 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

[5] Petitioner cites to several articles and studies related to false confessions and false confession testimony. The science of false confessions has not been established as reliable in South Carolina, and in other jurisdictions has been specifically excluded as invading the province of the jury. See State v. Free, 798 A.2d 83, 95–96 (N.J. App. Div. 2002) (holding that the trial court abused its discretion in admitting expert testimony as to false confessions and interrogation techniques because, inter alia, it was not scientifically reliable, it was of no assistance to the jury, and the jury would recognize that coercive methods have the potential for causing a false confession). The science appears at best analogous to the evidence presented by a forensic interviewer which this court described as an attempt to admit a "human truth-detector." State v. Kromah, 401 S.C. 340, 356, 737 S.E.2d 490, 498 (2013).

> 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.[6]

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

[6] To the extent Petitioner intends to admit any expert testimony regarding the polygraph or its results, or seeks to use the results to prove his innocence, the evidence would need to meet the requirements of State v. Council, 335 S.C. 1, 23–24, 515 S.E.2d 508, 519–20 (1999).

> 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 trial court did not conduct a proper Rule 403 balancing test. The trial court abused his discretion in excluding Petitioner's second statement because any prejudice from the admission of the statement, or the inability of Petitioner to admit evidence of the polygraph, did not substantially outweigh the statement's probative value. This is especially true in light of the fact Petitioner's counsel could raise the issue of the voluntariness of the confession without the testimony regarding the polygraph being admitted, or in the alternative the

trial court could consider the admission of the polygraph information in light of Wright and issue a proper limiting instruction to prevent any prejudice from the consideration by the jury. Accordingly, the State submits the trial court's suppression of the second statement should be reversed, and the Court of Appeals opinion allowing the admission of the statement and remanding for a separate determination of the admissibility of the polygraph evidence should be affirmed.

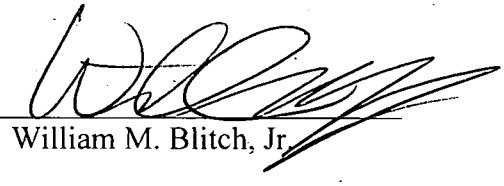
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed to the extent it allows the statement to be admitted at trial and remands for the trial court to separately determine the admissibility of the polygraph testimony and information.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 29, 2014

STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I, SALLY ELLISON, certify that I have served the within Brief of Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Richard A. Harpootlian, Esquire
Richard A. Harpootlian, P.A.
Post Office Box 1090
Columbia, South Carolina 29202

Graham L. Newman, Esquire
Chappell, Smith & Arden, P.A.
1510 Calhoun Street
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served. This 29th day of August, 2014.

Sally Ellison

SALLY ELLISON
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727