

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	
-vs-)	Supreme Court Case Nos. 20080285
)	
Antonio Phillip Stridiron,)	District Court Case No. 51-07-K-1457
)	
Defendant-Appellant.)	

PETITON FOR REHEARING

Petition from the Opinion of the Court and Judgment of January 26, 2010

Supreme Court of North Dakota Opinion 2010 ND 19

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STATEMENT OF THE CASE ON PETITION

[¶1] This matter comes before the Court on a Petition for Rehearing pursuant to the provisions of Rule 40 of the North Dakota Rules of Appellate Procedure. The Opinion of the Court and the Judgment in this matter were dated and filed January 26, 2010. Rule 40 (a) (1) of the above and foregoing Rule provides for the filing of a Petition for Rehearing “...within 14 days after entry of judgment unless the time is shortened or enlarged by order.”

[¶2] A Motion for Enlargement of Time was made on February 8, 2010, within the prescribed 14 day period of the above Rule and in accordance with the provisions of Rule 26 (b) of the North Dakota Rules of Appellate Procedure. The Clerk of the Supreme Court graciously granted counsel the requested 10 additional days to prepare and file the instant Petition.

[¶3] The instant Petition is dated February 18, 2010 and filed electronically with the Clerk of the Supreme Court and opposing counsel. The Petition is therefore timely made.

ARGUMENT AND AUTHORITIES

[¶4] Rule 40 (a) (2) of the North Dakota Rules of Appellate Procedure provides that “The petition must state with particularity each point **of law or fact** that the petitioner believes the court has **overlooked or misapprehended** and must argue in support of the petition. Oral argument is not permitted.” (Emphasis added). In this Court’s Opinion in State v. Stridiron, 2010 ND 19, dated January 26, 2010, it was stated that:

[¶5] [¶25] In Rasmussen, 790 F.2d at 56, the Eighth Circuit Court of Appeals listed the following nonexclusive factors to be considered in analyzing the veracity of the in-court witness and the reliability of the out-of-court declarant:

[¶6] (1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, (2) the general character of the speaker, (3) whether other people heard the out-of-court statement, (4) whether the statement was made spontaneously, (5) the timing of the declaration and the relationship between the speaker and the witness.

[¶7] [¶26] The district court found Boyce had a motive to fabricate because she was Stridiron's girlfriend's best friend. Other circumstances cast doubt on Boyce's veracity. On August 2, 2007, Boyce submitted to investigators a statement written in her own hand that did not mention Davis had told her he killed Velasquez. Boyce did not report to the police her claim that Davis told her he had killed Velasquez until March 11, 2008, approximately eight months after Davis's "confession" purportedly occurred. Boyce's husband, who Boyce claimed was also a party to the conversation, never indicated Davis made the statement. **Although Stridiron claims the presence of gunshot residue on Davis's hands supports the veracity of his statement, the evidence reflected that Stridiron had much more gunshot residue on his hands than was found on Davis, and the court determined this "evidence alone is not sufficient to clearly indicate the trustworthiness of [Boyce's] statement."** (Emphasis added).

[¶8] This Court has misapprehended the situation in a manner similar to the trial court, in that the focus of Its ruling rests solely on the credibility of the messenger, rather than the facts supporting the veracity of the message. Gunshot residue was not the only factual evidence supporting the veracity of Bradley Davis’s proffered confession.

Moreover, the gunshot residue on Bradley Davis's hands was lesser in amount due to a number of facts **that were testified to by the State's expert witness.**

[¶9] Consider first the testimony of Dr. Elzbieta Barkowska, the forensic scientist who testified with respect to the varying amounts of gunshot residue on both the hands of Antonio Stridiron and Bradley Davis. With respect to Bradley Davis' hands, and the lesser amount of residue found by the analysis of his swabs, Dr. Barkowska testified that blood on the skin of the subject would not simply act as a diluent but as a sort of insulator preventing the full deposit of the gunshot residue from reaching the surface of a test subjects hands. (Transcript, Volume X, p. 2424, l. 1-25; p. 2425, l. 1-10). While the State had offered an objection to muddy the water at this point, which objection was overruled by the trial court, Dr. Barkowska confirmed her answers to defense counsel's original line of questioning, to a reasonable degree of scientific certainty. (Transcript, Volume X, p. 2426, l. 1-21).

[¶10] Consider further that Dr. Barkowska also testified to the scientific processes of emulsification, the terminology used to describe the more ordinary process of washing ones hands. Not surprisingly, Dr. Barkowska's conclusion was that if someone has washed their hands after discharging a firearm that the particulate matter—the gunshot residue—on the surface of the skin is reduced dramatically. Once again, this answer was given to a reasonable degree of scientific certainty. (Transcript, Volume X, p. 2428, l. 1-20).

[¶11] Taking the second fact first—Detective David Goodman testified that Bradley Davis was found to be remarkably clean during his interview at the Minot Police Department, as reflected in the numerous photographs of his hands and body that were

submitted by the State into evidence. (Transcript Volume IX, P. 2261, l. 9-25; p. 2262, l. 1-4). (State’s Exhibits 8-27 through 8-35, inclusive). This is unsurprising, when it is considered in light of the testimony proffered by the defense through Jane Doe, a pseudonym, which established that after the shooting of Joshua Velasquez, and the attendant butchery before with the garden scythe, Bradley Davis took a shower in the duplex next door, a shower heard by Jane Doe which was reported in her statement to the Minot Police Department and testified to at trial. Transcript, Volume XII, p. 2769, l. 14-25; p. 2270, l. 1-19). **The conclusion resting upon lesser amount of gunshot residue, relied upon by both the trial court and this Court to support the denial of the admission of Bradley Davis’s confession to the murder of Joshua Velasquez, ignores the impact of blood as an insulator and the cleansing effects of the shower.**

[¶12] This is not a matter of the defense weaving a theory of corroborating circumstances out of the whole cloth—but simply of the trial court and this Court misapprehending or overlooking this facts that support the reliability and the veracity of the confession and the underlying claim that Bradley Davis was the shooter. This conclusion is supported by expert testimony, lay witness testimony, and police observation as well as the physical evidence of the photographs and test swabs referred to in both the Appellant’s Brief and the above sections of the transcript of the proceedings below.

[¶13] The blood of Joshua Velasquez played not only the role of insulator of the gunshot residue in the instant case—it also acts as a corroborating circumstance in identifying Bradley Davis as not only the wielder of the garden scythe, but as the shooter of the fatal shots that ended Joshua Velasquez’s life before the grievous wounds he

inflicted moments before did so. Mr. LaMonte Jacobson a forensic supervisor and scientist with the North Dakota State Crime Laboratory testified that a biological examination of the murder weapon was conducted, with swabs taken of reddish-brown stains from three specific areas—the bottom of the magazine, the muzzle of the pistol, and the trigger guard. Only the muzzle stains tested negative for human blood—human blood was found on both the bottom of the magazine and upon the trigger guard.

(Transcript, Volume XI, p. 2616, l. 4-25). Ms. Hope Olson, the Director of the North Dakota State Crime Laboratory and our resident DNA expert, who followed LaMonte Jacobson, testified that biological swabs were taken from the scythe or sickle blade and its handle, the three swabs referred to above from the murder weapon, and additional swabs from the crime scene on the house and near where Joshua Velasquez’s body was found. (Transcript, Volume XI, p. 2626, l. 1-25 and p 2627, l. 1-11).

[¶14] These swabs were compared with known DNA samples of Joshua Velasquez, Antonio Stridiron, and Bradley Davis. **The human blood found on both the garden scythe and the handgun identified as the murder weapon was conclusively identified as that of Joshua Velasquez.** (Transcript, Volume XI, p. 2630, l. 1-19 and p. 2631, l. 1-9). The significant question that the Court is urged to consider on this point on Petition for Rehearing is both simple and extremely significant—**how did the same blood found on the garden scythe appear on the handgun?** There was not one scintilla of evidence offered with respect to the injuries sustained by Joshua Velasquez that made any reference in link to the handgun being used to strike the decedent. In fact, the testimony of the State Medical Examiner, Dr. William Massello, specifically precluded the handgun from being used as a bludgeon from behind Joshua Velasquez (Transcript, Volume

XI, p. 2548, l. 13-25) and also specifically precluded the possibility of Joshua Velasquez's blood from being found on the murder weapon by "blowback" in being fired at close range or a so-called contact shot. (Transcript, Volume XI, p. 2563, l. 16-25 and p. 2564, l. 1-25). Again, this expert testimony was offered to a reasonable degree of scientific or medical certainty.

[¶15] Chief Justice and Justices of the Court—**the only way that the blood of Joshua Velasquez can be found on both the garden scythe admittedly wielded by Bradley Davis and on the handgun used to murder Joshua Velasquez is that it came from the red and dripping hands of the man who was both the assailant and the shooter—Bradley Davis.** The same Bradley Davis who confessed his crime to Alicia Boyce, who relayed it—however eventually and regardless of her friendship with Sonia Delzer, to the trial court which found insufficient corroborating circumstances, focusing only on Ms. Boyce's perceived credibility problems and the lesser amount of gunshot residue on the hands of Bradley Davis.

[¶16] This Court brought in to the concept that a lesser amount of residue automatically precluded Bradley Davis from being the shooter—yet when the above overlooked or misapprehended facts are considered coupled with the other corroborating circumstances set forth below, the perceived credibility problem does not weigh against the admission of the confession to the finder of fact.

[¶17] Again, while a transcript of the June 17, 2008 status conference was not ordered by counsel, the trial court did draft extensive findings regarding the substance of the defense proffer, even while arbitrarily parsing the proffer into "corroborating circumstances" and mischaracterizing the vast majority of the proffer as "corroborating

evidence” and disregarding the same. (Concluding Order on Stridiron’s Omnibus Motion in Limine, ROA #148, App. p. 60

[¶18] Consider the corroboration by motive and eyewitness statements/identification—Amy Davis, when she was Amy Hancock, had a sexual relationship with Joshua Velasquez as late as December of 2006/January of 2007. When their relationship was terminated by her involvement with Bradley Davis, a confrontation ensued at a local bar then known as the "101", at which time Bradley Davis engaged in a fight with Joshua Velasquez and was humiliated and physically beaten badly by him—to the point of having his head pounded into the ground—all in front of the eyes of Amy Davis. Further, while the statement of Charles Price reflects the bad blood that this quite literally caused between Joshua Velasquez and Bradley Davis, this narrative itself comes from Alicia Marie Boyce, who observed all of this with her own eyes—an eyewitness statement/identification of these events—which were preserved for review by this Court in the formal proffer of Alicia Marie Boyce’s testimony taken outside of the presence of the jury impaneled herein, (Transcript, Volume XII, pp. 2824 to 2864), as well as in her continuing testimony before the jury (Transcript Volume XII, pp. 2882 to 2902). The State argued and the trial court accepted that there may be some bias or credibility issue, based upon a friendship—but this does not change the fact of the presence of eyewitness corroboration, and is an argument targeted toward the weight of the evidence, as well as its credibility, and is therefore within the sole province of the jury—not the "gate keeping” function of the trial court.

[¶19] Again, this circumstance was deemed “corroborating evidence” of counsel for the Appellant’s case, and specifically found by the trial court not to be a “corroborating circumstances that clearly indicate the trustworthiness of Ms. Boyce’s statement.”

(Concluding Order on Stridiron's Omnibus Motion in Limine, ROA #148, App. p. 66).
Once again, the trial court was not only arbitrarily mischaracterizing the proffer; it was placing the focus on the messenger, rather than the message. **See also** United States v. Atkins, 558 F.2d 133, 135 (3d Cir. 1977), where the appellate court reversed the conviction where trial court concentrated **more on reliability of witness instead of corroborating evidence.**

CONCLUSION

[¶20] Antonio Stridiron stands convicted and condemned to life without possibility of parole by a process that did not allow a confession to the crime by another to be submitted to the finder of fact. That confession was uttered by another with the motive, method and opportunity to end the life of Joshua Velasquez and the proffer was supported by a plethora of physical, testimonial, expert and scientific evidence that clearly corroborates the confession. Respectfully, counsel for the Appellant contends that this Court has overlooked or misapprehend the facts set forth above, and has also overlooked or misapprehended the law in buying into the word-game indulged in by the trial court, in characterizing these facts as corroborating evidence, rather than corroborating circumstances supporting the admission of the proffered confession.

[¶21] It should shock the conscience of this Court to allow the reasoning of the trial court to stand, and further to allow Antonio Stridiron to stand condemned without the jury having heard Bradley Davis's confession to the murder of Joshua Velasquez.

[¶22] Respectfully submitted this 18th day of February, 2010.

[¶23]

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ATTORNEY'S CERTIFICATE OF SERVICE

[¶24] The undersigned hereby certifies that a true and correct copy of the foregoing document was on the 18th day of February 2010, electronically filed with and served upon:

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