STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW S. YOUNG,

APPELLANT

APPELLATE CASE NO. 2022-000218

INITIAL BRIEF OF APPELLANT

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II. Did the trial court err by allowing the state to introduce multiple statements made by Appellant during custodial interrogation where Appellant's statements were tainted by the police obtaining incriminating statements from Appellant prior to advising him of his rights pursuant to Miranda in contravention of federal and state law?

III. In light of Appellant's sentence of life imprisonment without the possibility of parole for murder, was the trial judge's imposition of a five-year sentence for possession of a weapon during the commission of a violent crime in violation of the plain language of section 16-23-490(A) of the South Carolina Code, which forbids such a sentence when the defendant is sentenced to life imprisonment?

STATEMENT OF THE CASE

On April 16, 2019, a Richland County grand jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime. R. *(indictments). The state, represented by April W. Sampson, Carter R. Potts, and Andrew T. Smith, called the case to trial before the Honorable Robert E. Hood on February 14-17, 2022. Tr. 1. Foster M. Mathews represented Appellant. Tr. 1. The jury acquitted Appellant of murder, but the jury found him guilty of the lesser-included offense of voluntary manslaughter. Tr. 658, ll. 7-13. The jury also found him guilty of possession of a weapon during the commission of a violent crime. Tr. 658, ll. 11-15. Judge Hood sentenced Appellant to five years imprisonment for the weapon. Tr. 671, ll. 19-22; R. *(sentence sheet). He also sentenced Appellant to life in prison without the possibility of parole for voluntary manslaughter. Tr. 671, ll. 22-25; R. *(sentence sheet).

On February 22, 2022, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred when he determined Appellant was not in custody where the totality of the circumstances showed a reasonable person would have not felt free to leave when (1) two armed police officers told Appellant not to leave, (2) multiple armed police officers were around Appellant, (3) the armed police officers expressed their subjective intent that Appellant was not free to leave and would have been prohibited from doing so, (4) a police car was parked perpendicular to Appellant's work truck, and (5) Appellant expressed his subjective believe that he was not free to leave.

Standard of review

Previously, the South Carolina Supreme Court held "[a]ppellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003); see also State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (1996). Appellant respectfully requests this Court review the issue as a mixed question of fact and law. Although the Supreme Court was addressing the voluntariness of a statement, and the present issue concerns the related issue of whether Appellant was in custody, Appellant submits that the Court's opinion in State v. Brewer, 438 S.C. 37, 882 S.E.2d 156 (2022) supports his request. In Brewer, the Court "left for another day" the standard of review to be employed by an appellate court when reviewing the voluntariness of a statement. State v. Brewer, 438 S.C. 37, 44 n.1, 882 S.E.2d 156, 160 n.1 (2022). Acknowledging its prior precedent that reviewing courts would use an abuse of discretion standard, the Court expressed a desire to change the standard of review. Id. The Court suggested that reviewing courts examine "the question of whether a statement was voluntarily given as a mixed question of fact and law." Id.

In light of the Court's recent jurisprudence, Appellant respectfully requests this Court analyze whether he was in custody at the time he was interrogated by law enforcement as a mixed question of fact and law. Appellant respectfully requests this Court review the trial court's factual findings for any evidentiary support and review de novo the legal conclusions reached by the trial court. Just as in State v. Frasier, 437 S.C. 625, 632, 879 S.E.2d 762, 766 (2022), resolution of this matter does not require this Court to review "cold records and depend[] on trial courts to review credibility and weigh conflicting evidence in reaching its decision." "[W]ith the dawn of the technological age, appellate courts are no longer dependent on the trial court in [its] review of evidence." State v. Frasier, 437 S.C. 625, 632, 879 S.E.2d 762, 766 (2022). The Court explained that "[t]he most obvious example is the advent of the body and dash cam footage, whereby [the appellate court] reviews the same video as the trial court." Id. Thus, the Court announced that "while the need for deference remains, particularly in determining issues of credibility, it is no longer necessary for [the appellate court] to defer to the trial court's overall ruling in every case." Id. As such, the Court held that "appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means [the appellate court] review[s] the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion ... is a question of law subject to de novo review." Id. at 633-634, 878 S.E.2d at 766. Here, Appellant's interactions with law enforcement were captured on body worn cameras and video in an interrogation room; therefore, there is no need for the appellate court to review the cold record in order to determine the issue presented – whether Appellant was in custody at the time of the interrogations.

Relevant facts

Prior to trial, defense counsel moved to suppress Appellant's statements to law enforcement. During the hearing on the motion, Steven K. Sulser with the Columbia Police Department testified regarding his interactions with Appellant. Tr. 82, ll. 5-7. Sulser arrived at the scene to find an individual lying on the ground next to a car. Tr. 83, ll. 16-119. Sulser saw Appellant approaching him from a lawn maintenance truck. Tr. 83, ll. 20-22. Sulser asked Appellant "Where's the suspect? Did you see who did it?" Tr. 83, ll. 22-23. Appellant responded that he did not. Tr. 83, l. 24. Sulser then directed Appellant to step back so he could establish a crime scene. Tr. 83, ll. 24-25.

Sulser directed another police officer, Vereen, to go find Appellant and his coworkers. Tr. 98, ll. 16-23. Vereen parked the police car perpendicular to the work truck. Tr. 100, ll. 7-12. Vereen asked Appellant and his coworkers for their identification. Tr. 118, ll. 17-18. Vereen said he needed the men to "**stay right [t]here for a few minutes**" because someone wanted to talk to them. Tr. 118, ll. 19-22 (emphasis added); Tr. 122, ll. 8-14. Appellant explained that he did not feel like he was free to leave at this point because he had been asked – by law enforcement – to stay. Tr. 118, ll. 23-25.

Shortly thereafter, Sulser and Officer Osagie walked down to a spot a little farther down in the neighborhood where he found Vereen standing guard over Appellant and his two coworkers. Tr. 84, ll. 12-25; Tr. 101, ll. 8-11. Sulser asked the trio if they knew or saw who stabbed the individual on the ground, and Appellant responded that he had no idea. Tr. 85, ll. 7-11. Specifically, Sulser asked Appellant if he had called 911 and stated that he stabbed a man who had approached him in an aggressive manner. Tr. 86, ll. 1-3; Tr. 101, ll. 12-22; Tr. 119, ll. 15-17. Sulser was clear – he was speaking directly to Appellant "in an attempt to establish if he's the one

who did the stabbing." Tr. 101, ll. 20-22. Sulser had received information that Appellant was the one who stabbed the deceased. Tr. 103, ll. 16-20. Appellant was a suspect. Tr. 103, ll. 21-23; Tr. 104, ll. 2-3. Appellant did not feel free to leave. Tr. 119, ll. 22-24.

Appellant responded to Sulser that it was not him. Tr. 86, ll. 4-6. Importantly, Sulser told Appellant "**just stand by real quick**" so he could gather more information from dispatch. Tr. 86, ll. 6-8 (emphasis added); State's Exhibit #50 (showing Sulser tell Appellant to "hold on one second."). Although Sulser denied telling Appellant that he could not leave, despite telling him to "stand by," Sulser repeatedly admitted that Appellant was not free to leave at this point. Tr. 90, ll. 4-9. Sulser stated that if Appellant had tried to leave, he would not have allowed him to do so. Tr. 104, ll. 4-10.

After getting additional information that showed Appellant had not called 911 – his coworker had – Sulser approached Appellant again. Tr. 86, ll. 9-18. Sulser then advised Appellant that if he were lying, "this could be a serious incident," but that "if he stabbed him due to an altercation ... come forward with that information." Tr. 86, ll. 18-22; State's Exhibit #50. Then, Appellant said he stabbed the deceased. Tr. 86, ll. 22-23; State's Exhibit #50. Sulser immediately placed Appellant in handcuffs and began walking Appellant toward his patrol car. Tr. 87, ll. 1-4; Tr. 120, ll. 2-9; State's Exhibit #50.

While walking Appellant to his car, Sulser commented, "[I]f you stabbed him and it was self-defense, it is what it is." Tr. 87, ll. 5-10; State's Exhibit #50. According to Sulser, Appellant responded, "I did it. It wasn't self-defense and ... I did it." Tr. 87, ll. 12-15; State's Exhibit #50. Only then did Sulser advise Appellant of his rights. Tr. 87, l. 21 – Tr. 88, l. 2; Tr. 120, ll. 10-13; State's Exhibit #50. After the advisement, Sulser continued to engage Appellant in conversation by asking about the location of the knife. Tr. 88, l. 15 – Tr. 89, l. 1; State's Exhibit #50. Appellant

explained that he continued speaking with Sulser even after being advised of his rights because he had "already told him any - - what was going on anyway." Tr. 120, ll. 20-25.

Sulser's body worn camera was activated during his entire interaction with Appellant. Tr. 84, ll. 1-7; State's Exhibit #2; State's Exhibit #50.[1] Sulser also remained present while Christian Ross, the investigator on the case, interrogated Appellant at the scene so that his camera caught the interactions between Appellant and Ross as well. Tr. 91, ll. 5-17; Tr. 108, ll. 4-8. Ross first spoke to Appellant when Appellant was handcuffed and seated in Sulser's patrol car. Tr. 108, ll. 4-6. Appellant was "already detained and in custody" prior to Ross's arrival. Tr. 108, ll. 9-10

Thereafter, Sulser took Appellant to police headquarters where Appellant was interrogated by Ross again. Tr. 95, ll. 17-22.

The state argued that Appellant was "investigatively detained" by Vereen when he told Appellant and his coworkers "they cannot leave." Tr. 129, ll. 15-19. According to the state, Appellant was "in detention" and "not under arrest." Tr. 130, ll. 1-3. He argued it was "completely noncustodial." Tr. 130, ll. 4-5. Defense counsel argued Appellant was in custody because he had been told by Vereen and Sulser not to leave. Tr. 130, ll. 15-22. Further, Sulser considered Appellant a suspect at the time based upon the information he had from dispatch. Tr. 130, ll. 20-25.

Regarding when Sulser reapproached Appellant after obtaining more information from his police car, the state argued that Appellant was not in custody and that Sulser's question was directed to all three of the men who were standing by the truck, including Appellant. Tr. 133, ll. 4-8. Defense counsel maintained his position that Appellant was in custody. Tr. 133, ll. 15-16.

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[1] State's Exhibit #2 contains the body worn camera footage for all officers on the scene. While this exhibit was not admitted during the trial, it was used during the pre-trial hearing to determine what was admissible. The judge allowed State's Exhibits #50, #51, and #63 to be admitted.

Turning finally to Sulser continuing to interrogate Appellant after placing him in handcuffs and escorting him to the police, the state argued Appellant was under arrest and in custody, but disputed any interrogation by Sulser. Tr. 135, ll. 2-9. The state argued Sulser's "statements" were "not questions" and were "not the kind of statements made to extract inculpatory information from the defendant." Tr. 135, ll. 17-20. According to the state "another officer" asked Appellant where the weapon was while Sulser was walking him to the car. Tr. 136, ll. 6-17. The state argued that Appellant "started talking" and "Sulser just responds to him" with "a statement not designed to elicit incriminating information." Tr. 137, ll. 15-19.

After hearing the arguments of counsel, the judge first noted what he considered to be "very important," which was that Sulser was "a beat cop" when he arrived at this scene. Tr. 148, ll. 2-6. He was "not a trained criminal investigator there for the purposes of taking interrogation down." Tr. 148, ll. 2-4. The judge noted that Sulser was "trying to figure out what happened and who needs to be done what with in really quick fashion." Tr. 148, ll. 10-13. Further, the judge noted that "all of this [occurred] outside." Tr. 148, l. 14. He noted that they were "on a public street in a neighborhood in a cul-de-sac." Tr. 148, ll. 14-15. The judge observed that "[u]p until the point where [Appellant] says I did it, no one was in handcuffs." Tr. 148, ll. 15-17. According to the judge "this whole interaction from the time Sulser walks up to the landscaping truck is a matter of minutes." Tr. 148, ll. 19-21.

Next the judge erroneously stated that no one was under formal detention despite evidence to the contrary. Tr. 149, ll. 23-24. He also erroneously determined that "[i]n custody is the totality of the circumstances that not only includes the person's freedom to leave the scene, but the purpose and the place and the length of the questioning must also be considered." Tr. 149, l. 24 – Tr. 150, l. 2. However, he rightly noted that "the fact that Sulser may have thought [Appellant] did it is not

dispositive," "the fact that [Appellant] thought he may have not been free to leave is not dispositive" and that it was "an objective standard based upon a reasonable person standard." Tr. 150, ll. 2-7. Thereafter, the judge ruled that "the point of questioning up to where [Appellant] says I did it is in." Tr. 150, ll. 21-22. He excluded "[o]nce Sulser put handcuffs on him on video, from the point he puts handcuffs on him until he gets him around to the side of the car and reads him Miranda." Tr. 150, ll. 22-25.[2]

Discussion

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the United States Supreme Court held "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court explained that "custodial interrogation" meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. Thereafter, the Court required that

> [p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Id. This is because "in-custody interrogation[s]" place "inherently compelling pressures" on the persons interrogated. Id. at 467. The Supreme Court described the purposes of the Miranda safeguards: "to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the 'inherently compelling pressures' generated by the custodial setting itself, 'which work to undermine the individual's will to resist, and as much as possible to free courts from the

[2] Defense counsel renewed his objections contemporaneously with the introduction of Appellant's statements during the trial. Tr. 201, ll. 13-23; Tr. 234, ll. 4-13; Tr. 365, ll. 7-22.

task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." Berkemer v. McCarty, 468 U.S. 420, 434 (1984)

The Supreme Court concluded "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). According to the Court, "[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Id. at 301. "[T]he definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." Id. at 302 (emphasis in original). Whether a suspect was in "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.'" State v. Ledford, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002). A person is "in custody" when a person's freedom has been restricted. State v. Caulder, 287 S.C. 507, 515, 339 S.E.2d 876, 881 (Ct. App. 1986); see also State v. Neely, 271 S.C. 33, 40, 244 S.E.2d 522, 526 (1978).

The determination of whether a person is "in custody" for Miranda purposes requires "[t]wo discrete inquiries": "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995). "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994) (internal quotations omitted); see also Maryland v. Shatzer, 559 U.S. 98, 112 (2010).

"To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003); see also State v. Williams, 405 S.C. 263, 273, 747 S.E.2d 194, 199 (Ct. App. 2013). "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." Evans, 354 S.C. at 583, 582 S.E.2d at 410.

Although the case concerned a traffic stop, it provides some guidance here, particularly in light of the state's concession that the police were detaining Appellant at a minimum. Berkemer v. McCarty, 468 U.S. 420 (1984). Berkemer began with a traffic stop. Berkemer, 468 U.S. at 422-23. A police officer saw the defendant's car weaving, followed him for two miles, stopped him, and directed the defendant to get out of his car. Id. at 423. The defendant was obviously intoxicated. Id. In response to the officer's questioning, the defendant said he drank two beers and smoked marijuana. Id. The officer arrested the defendant and he made further incriminating statements at the jail. Id. at 423-24. At no point did the police give him Miranda warnings. Id. at 424.

The Court first rejected the argument that Miranda should not apply to misdemeanor arrests. Id. at 429-34. After rejecting this argument, the Court concluded that the defendant's post-arrest statements at the jail were inadmissible. Id. at 434-35.

The Court then turned to the more difficult question of the admissibility of the defendant's statements during the traffic stop. Id. at 435-42. Distinguishing traffic stops from "stationhouse interrogation," the Court found that roadside detentions are brief, public, and motorists do not feel "completely at the mercy of the police." Id. The Court then analogized

"the usual traffic stop" to a Terry stop. Id. at 439-40. With the notion of a brief, limited Terry stop in mind, the Court wrote, "The comparatively nonthreatening character of detentions of this sort explains the absences of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda." Id. at 440. The holding found that motorists detained in "ordinary" traffic stops were not in custody pursuant to Miranda. Id.

However, the Court recognized that some traffic stops could be so similar to an arrest that Miranda could be required and declined to create a categorical rule. Id. at 440-41. "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Id. at 440. The Court recognized that, "Either a rule that Miranda applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would produce a clearer, more easily administered line," but expressly declined to adopt such a rule and entrusted the lower courts with making custody determinations on a case-by-case basis. Id. at 441.

Our Supreme Court recognized Berkemer's important distinction between routine traffic stops and accidents in State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). After noting that routine traffic stops do not constitute custodial interrogation, the Court wrote that the situation in Easler was different because "the officers, having been advised there had been an accident and that someone had left the scene, went looking for that individual based upon a description given by two eyewitnesses." Id. at 127, 489 S.E.2d at 620-21. The Court found that the officers interrogated Easler, but ultimately upheld the trial judge's ruling that Easler was not in custody. Id. See also State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016) (holding that the circuit judge erred in finding a defendant was not in custody and that officers should have known

that questions about drinking were likely to elicit an incriminating response); State v. Coyle, 567 A.2d 870, 874-75 (Del. 1989) (describing custodial encounter at an accident scene as in "that twilight zone" left by Berkemer's decision not to adopt a bright-line rule).

In another case from our Supreme Couart, Evans, the defendant went to the police station accompanied by her family. Evans, 354 S.C. at 581, 582 S.E.2d at 408. Two police officers took the defendant "into a back office to take her statement." The officers never advised the defendant of her Miranda rights. Id. at 581, 582 S.E.2d at 409. The police knew that the deadly fire they were investigating started with an accelerant. Id. at 581 n.2, 582 S.E.2d at 408 n. 2. The police told the defendant they did not believe her explanations for the fire. Id. at 581, 582 S.E.2d at 409. The two policemen left the room and sent in a female SLED agent, who used a sympathy tactic. Id. The two women were in the room for at least forty-five minutes. Id. at 582, 582 S.E.2d at 409. The SLED agent followed the defendant to the bathroom and waited outside the door. Id.

The Evans Court found that the defendant was in custody even though she was not formally arrested until shortly after making the statement. Id. at 584, 582 S.E.2d at 410. When analyzing whether the defendant was free to leave, the Court emphasized that the SLED agent accompanied her to the restroom and waited outside the door. Id. The Court was also persuaded that the defendant was "in custody" because she was interviewed in a back office in the police station, her cousin was not allowed to go into the interview room, and the interview lasted three hours. Finally, the officers' purpose of the interview changed from a routine inquiry to questioning of a suspect when the female officer entered the interrogation room. Id.

Here, Appellant was in custody when the first officer, Vereen, told him to "stay right [t]there for a few minutes" because someone wanted to talk to them. Although the interaction occurred outside, an officer, Vereen, stood guard over Appellant while the second officer, Sulser, was en

route. Further, the patrol car was parked perpendicular to the lawn maintenance truck effectively blocking Appellant from leaving by way of the truck. When Sulser arrived, he also told Appellant to stay put while he obtained more information. While the officers' subjective intent is not controlling, Vereen and Sulser testified that Appellant was not free to leave and was being detained. They also indicated that if Appellant had attempted to leave, they would not have permitted him to do so. Similarly, Appellant testified that he did not feel free to leave. Furthermore, the nature of the questioning showed Appellant was in custody. Sulser was asking Appellant directly whether he had stabbed the deceased. As the videos showed, the officers were in police uniforms and heavily armed at all times during their interactions with Appellant. These circumstances point to custodial interrogation.

II. The trial court erred by allowing the state to introduce multiple statements made by Appellant during custodial interrogation where Appellant's statements were tainted by the police obtaining incriminating statements from Appellant prior to advising him of his rights pursuant to *Miranda* in contravention of federal and state law.

Standard of review

Appellant respectfully requests this Court review the issue as a mixed question of fact and law. In State v. Brewer, 438 S.C. 37, 882 S.E.2d 156 (2022), the Court "left for another day" the standard of review to be employed by an appellate court when reviewing the voluntariness of a statement. State v. Brewer, 438 S.C. 37, 44 n.1, 882 S.E.2d 156, 160 n.1 (2022). Acknowledging its prior precedent that reviewing courts would use an abuse of discretion standard, the Court expressed a desire to change the standard of review. Id. The Court suggested that reviewing courts examine "the question of whether a statement was voluntarily given as a mixed question of fact and law." Id.

In light of the Court's recent jurisprudence, Appellant respectfully requests this Court analyze whether his statements to law enforcement were voluntarily given as a mixed question of fact and law. Appellant respectfully requests this Court review the trial court's factual findings for any evidentiary support and review de novo the legal conclusions reached by the trial court. Just as in State v. Frasier, 437 S.C. 625, 632, 879 S.E.2d 762, 766 (2022), resolution of this matter does not require this Court to review "cold records and depend[] on trial courts to review credibility and weigh conflicting evidence in reaching its decision." "[W]ith the dawn of the technological age, appellate courts are no longer dependent on the trial court in [its] review of evidence." State v. Frasier, 437 S.C. 625, 632, 879 S.E.2d 762, 766 (2022). The Court explained that "[t]he most obvious example is the advent of the body and dash cam footage,

whereby [the appellate court] reviews the same video as the trial court." Id. Thus, the Court announced that "while the need for deference remains, particularly in determining issues of credibility, it is no longer necessary for [the appellate court] to defer to the trial court's overall ruling in every case." Id. As such, the Court held that "appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means [the appellate court] review[s] the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion ... is a question of law subject to de novo review." Id. at 633-634, 878 S.E.2d at 766. Here, Appellant's interactions with law enforcement were captured on body worn cameras and video in an interrogation room; therefore, there is no need for the appellate court to review the cold record in order to determine the issue presented – whether Appellant's statement to law enforcement were voluntarily made.

Relevant facts

Appellant incorporates by reference the relevant facts discussed in Issue I.

When Ross confronted Appellant, who was handcuffed and seated in Sulser's patrol car, at the scene, Ross recited Miranda rights to Appellant. Tr. 108, ll. 11-22. Thereafter, Ross had several conversations with Appellant. Tr. 109, ll. 13-14. When Appellant and Ross were in an interrogation room at headquarters, Ross used a written advisement of rights form. Tr. 111, ll. 3-14; R. *(State's Exhibit #48). Appellant, having already provided incriminating information to Sulser and Ross, signed and waived his rights. Tr. 111, ll. 15-16; R. *(State's Exhibit #48). Appellant wrote a statement as well as provided oral statements to Ross. Tr. 112, ll. 7-18; State's Exhibit #49.

After the testimony, defense counsel argued that to suppress Appellant's statements to law enforcement that occurred after Sulser first advised him of his rights because the statements were tainted by law enforcement's prior custodial interrogation of Appellant without the benefit of the

advisement. Tr. 138, ll. 14-25. The state conceded that Appellant was interrogated after Sulser advised him of his rights, but the state argued "the nature of the questioning [was] totally different than what was there before," which removed any taint. Tr. 139, ll. 2-8.

The judge allowed the state to introduce "from the point where Sulser first reads him Miranda forward" "based upon the totality of the circumstances. Tr. 151, ll. 17-19. The judge determined Appellant was in custody, but determined that Appellant "freely, voluntarily, knowingly, and intelligently waived all of those rights and made a decision to continue to speak with the police." Tr. 151, ll. 19-24. Thus, he allowed the state to introduce "from the first Miranda forward." Tr. 151, ll. 24-25. Turning to the argument that the officers' questioning prior to advising of Miranda tainted subsequent waivers made by Appellant, the judge found that Sulser's questioning of Appellant was "not some interrogation tactic ... that the Columbia Police Department is doing to try to get him to give a confession." Tr. 152, l. 23 – Tr. 153, l. 1. Thus, the judge ruled the prior questioning without Miranda warnings did not taint the subsequent statements. Tr. 153, ll. 8-14.[3]

Discussion

Appellant incorporates by reference the relevant legal principles discussed in Issue I regarding voluntariness of statements made during custodial interrogation.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily,

[3] Defense counsel renewed his objections contemporaneously with the introduction of Appellant's statements during the trial. Tr. 201, ll. 13-23; Tr. 234, ll. 4-13; Tr. 365, ll. 7-22.

and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)). Thus, "[t]he waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Id. at 382-383 (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938)("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court confronted a case very similar to the one presented in the instant matter. Officers awakened Seibert at 3 a.m. and transported her to the police station. There, an officer questioned Seibert for thirty to forty minutes without giving her Miranda warnings. During this discussion, the officer obtained an admission from Seibert that she knew a mentally-ill teenager living with her family was meant to die in a house fire, which was set to cover up the death of Seibert's disabled child. After obtaining this admission, the officer permitted Seibert a twenty-minute break. Id. at 604-605.

The officer then turned on a tape recorder and gave Seibert the Miranda warnings. He also obtained a written waiver of those rights from her. The officer resumed questioning of Seibert by confronting her with her prewarning statements. Again, the officer obtained the answer he wanted – that Seibert knew the teenager was supposed to die in the fire. Id. at 605.

At trial, the officer testified that he used an interrogation technique in which he questioned the witness first, then gave the warnings, and then repeated the questioning until he got the answer that the witness had already provided once. Id. at 605-606. The trial judge suppressed Seibert's prewarning statements, but admitted the postwarning statements. Id. at 606. The United States Supreme Court held this was in error.

The Court explained "[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Id. at 611. Thus, the "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612. The Court held "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and

'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" Id. at 613-614 (quoting Moran, 475 U.S. at 424).

The facts presented in Seibert were that the unwarned interrogation was conducted in the police station, and "the questioning was systematic, exhaustive, and managed with psychological skill." Officers paused only for twenty minutes before resuming questioning and providing the required warnings. Officers "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited." Through the style of questioning employed which included repeated references to prior responses, the officers fostered the impression that further questioning was a mere continuation of the earlier questions. Id. at 616. Thus, "these circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 617.

Our Supreme Court confronted this issue in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of Navy's son, he gave a statement at the hospital to police, but was very upset and officers thought the statement was incomplete. Officers learned from the pathologist that the cause of death was smothering or suffocation. Id. at 297, 688 S.E.2d at 839. The following day, officers went to Navy's home with the intent of transporting him to the sheriff's office for further questioning. Thereafter, Navy gave a statement in which he described noticing the child having breathing problems and his ensuing panic. Id. at 297-298, 688 S.E.2d at 839.

Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy inquired if he was under arrest and was told he was not. The officers then engaged in follow-up questioning. "At this juncture, the nature of the interrogation and

[Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this first statement, Navy admitted to popping the child on the back and possibly patting the child on the mouth. After this statement, Navy received another smoke break. Id. at 298-299, 688 S.E.2d at 840.

Officers then advised Navy of his Miranda warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first except Navy admitted to placing his hand over the child's mouth to stop the crying multiple times, including possibly covering the nose area as well, popping the child on the back causing the child to cry out real loud, and feeling frustrated because the child was crying. Id. at 299-300, 688 S.E.2d at 840.

Officers contacted the pathologist who stated the description provided by Navy in his second statement could not have caused the child's death. In response to this information, Officers obtained a third written statement from Navy. Navy then admitted that he could have held his hand over the child's nose and mouth for longer than he first said, perhaps a minute or two. Id. at 300, 688 S.E.2d at 840-841.

The Court held the first statement was admissible because the record contained evidence to support the trial judge's finding that Navy was not in custody. According to the court, it was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." Id. at 301, 688 S.E.2d 841.

However, the second and third statements were inadmissible as they were obtained in violation of the rule announced in Seibert. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (3) the continuity of police personnel; and (4) the degree to which the interrogator's

questions treated the second round as continuous with the first. Navy, 386 S.C. at 302, 688 S.E.2d at 841-842.

The Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. After obtaining Navy's first statement, officers introduced the suffocation and healing rib information to Navy. Then, officers "began an unwarned custodial interrogation designed to elicit incriminating information." After receiving those incriminating statements, officers permitted Navy a break, and then gave him his Miranda warnings. The interrogation resumed with the same officers immediately. The officers made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four Seibert factors met. Navy, 386 S.C. at 303, 688 S.E.2d at 842.

This Court reversed a conviction where the trial court erroneously admitted the defendant's statement based upon the officers engaging in "question-first" tactics to obtain a confession. State v. Hill, 425 S.C. 374, 822 S.E.2d 344 (Ct. App. 2018). When officers arrived at the scene where an individual had died, the officers determined that Hill, who was present at the scene, was too intoxicated to question. Id. at 377, 822 S.E.2d at 346. The following day, the police learned the deceased died as a result of blunt force trauma caused by an object such as a broom handle or cane. Id. The officers remembered that Hill used a cane to walk. Id. Thus, the officers decided to question Hill about the death. Id. When the police asked Hill to accompany them to the law enforcement center for questioning with a promise to drive him home later, Hill agreed. Id. at 378, 822 S.E.2d at 346.

Hill and the officers were in "a common work area," which was "furnished with six desks and numerous chairs." Id. "Hill had not been handcuffed or advised he was in (or not in) custody."

Id. The police then questioned Hill regarding Patterson's death. Id. Hill did not provide any incriminating information. Id. at 378, 822 S.E.2d at 346-347. After the officers conferred, one asked Hill a direct question about his television set. Id. at 378, 822 S.E.2d at 347. Hill then told police that the deceased tried to steal his television and that Hill "tapped him twice" as a result. Id.

Thereafter, the officers took Hill across the hall to an interview room. Id. at 379, 822 S.E.2d at 847. Hill "initialed but did not sign a set of warnings printed on a Waiver of Rights form." Id. Although Hill indicated the officers told him he could not go home, an officer stated he was told the police could not make that decision until they found out what he had to say. Id. Hill was advised the police "could not talk any further with him about what happened unless he signed the form, but the statement they wanted from him was 'no more than what [he] already said.'" Id. Further, the officers indicated Hill would not be "signing his rights away"; rather, he would be "'waiving' them by 'setting them aside." Id. Eventually, the police agreed to speak to Hill without him signing the form. Id. "At the Investigators' prodding, Hill confessed he hit [the deceased] numerous times with his cane when he caught [the deceased] trying to steal his television." Id.

On appeal, Hill challenged the admissibility of his first statement that he "tapped" the deceased twice and of his second statement that he hit the deceased numerous times. Id. at 380, 822 S.E.2d at 347. This Court explain that the admissibility of the first statement turned on whether Hill was "in custody," which would require advisement of his rights. Id. at 380, 822 S.E.2d at 348. The question presented required this Court to determine "if a reasonable person – faced with the same circumstances confronting Hill – would have felt free to leave." Id. at 380-381, 822 S.E.2d at 348. This Court determined Hill's subjective belief that he was not free to leave was "as weightless as the Investigator's conclusory testimony that Hill was not in custody." Id. at 381, 822 S.E.2d at 348. This Court examined "the time, place, purpose, and length of the questioning," as well as "the use or

absence of physical restraints, the statements made by police, and whether the defendant was released at the end of the encounter." Id.

After explaining that "if the 'invitation' is conditioned on the police escorting the defendant to the station, a finding of custody is much more likely," and that "if the police convey to the defendant that he is a suspect – by doubting his version of events or presenting alternate versions based on other evidence they have collected – the atmosphere of the interrogation can objectively change to the point a reasonable person would think his freedom is restricted," this Court noted Hill was isolated with the investigators, not physically restrained, and was not told he could end the questioning and leave at any time. Id. at 381-382, 822 S.E.2d at 348 (internal quotations omitted). Specifically, this Court noted that one officer told Hill the decision of whether he could go home could only be made when the police found out what he had to say and that such a statement "alone" could lead a reasonable person to conclude he was not free to leave. Id. at 382, 822 S.E.2d at 348-349.

Further, this Court examined the "distinct change in the purpose of the questioning," which was "striking." Id. at 382, 822 S.E.2d at 349. According to this Court, "[t]his shift in investigatory purpose and technique echoe[d] what occurred in Navy, where it marked the point the court found the defendant was in custody." Id. This Court concluded that when the investigators realized Hill's statements conflicted with other evidence known to the police, the interaction turned into custodial interrogation. Id. at 383, 822 S.E.2d at 349. Additionally, the two-hour length of the first unwarned questioning militated in favor of a finding of custody. Id. Viewing all of the circumstances together, this Court concluded Hill was in custody when he told the police he "tapped" the deceased twice. Id.

Turning to the admissibility of Hill's statement that occurred after he was advised of his rights, this Court initially noted the first and second interrogations of Hill were similar as they involved the same police officers and occurred in a room just across the hall from where the first interrogation occurred. Id. at 383-384, 822 S.E.2d at 349-350. In fact, the police treated the interrogations as continuous. Id. at 384, 822 S.E.2d at 350. This Court concluded it could not "suspend reality and find the Miranda warnings effective at the late stage they were given." Id. While this Court did not find the investigators "set out to skirt Miranda," this Court explained the interrogations were "a calculated investigatory interview structured by veteran homicide investigators who at times pitched Hill doubletalk." Id. at 384-385, 822 S.E.2d at 350. Thus, this Court concluded Hill's second statement to police, which occurred after the advisement of rights, was inadmissible. Id. at 385, 822 S.E.2d at 350.

Here, despite Sulser's lack of sophistication in interrogation tactics, the police engaged in the forbidden technique of question-first. Sulser asked Appellant the ultimate question – did Appellant stab the deceased? There was really no need for greater detail in the questions and answers as he had a full confession at that point. Ross then questioned Appellant while he remained in the patrol car near the scene, but then the setting changed to the interrogation room at headquarters. The second interrogation, which occurred with Ross in the patrol car, and the third interrogation, which occurred with Ross at headquarters were treated as a continuous interrogation from the first.

III. In light of Appellant's sentence of life imprisonment without the possibility of parole for murder, the trial judge's imposition of a five-year sentence for possession of a weapon during the commission of a violent crime violated the plain language of section 16-23-490(A) of the South Carolina Code, which forbids such a sentence when the defendant is sentenced to life imprisonment.

Standard of review

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

Relevant facts

Prior to sentencing Appellant, the trial judge asked for "help ... with the sentencing on the weapons charge." Tr. 670, ll. 21-22. He noted there was "a paragraph at the end of that statute," but he could not "remember exactly what it says." Tr. 670, ll. 22-23. The solicitor responded, "[I]t's supposed to be consecutive unless they are convicted of – receive a sentence of life without parole, and so then it's just concurrent." Tr. 670, l. 24 – Tr. 671, l. 2. After receiving this "help" from the solicitor, the judge sentenced Appellant to five years for

possession of a weapon during a violent crime. Tr. 671, ll. 19-22; R. *(sentence sheet). According to the sentence sheet, he ordered the sentence to be served concurrently. R. *(sentence sheet).

Discussion

Appellant's five-year sentence for possession of a weapon during the commission of a violent crime was unlawful based on a plain reading of the statute. According to the relevant statute,

> [i]f a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. **This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.**

S.C. Code Ann. § 16-23-490(A) (emphasis added). Under the plain language of the statute, Appellant should not have been sentenced to five years for possession of weapon during the commission of a violent crime.[4] See State v. Owens, 346 S.C. 637, 666-67, 552 S.E.2d 745, 760 (2001) (holding a defendant sentenced to death could not also be sentenced to five years for possession of a firearm during the commission of a violent offense). Therefore, the trial court erred as a matter of law in sentencing Appellant to five years for the weapons offense.

Appellant concedes trial counsel failed to object to the illegal sentence. However, Appellant respectfully requests this Court excuse the lack of error preservation and vacate the sentence based upon the plain language of the statute. See State v. Hewins, 409 S.C. 93, 113, 760 S.E.2d 814, 824 (2014) (addressing the merits of an issue in the interest of judicial

[4] Notably, the indictment for possession of a weapon during the commission of a violent crime stated, "if not also sentenced to life without parole or death." R. *(indictment).

economy); Treece v. State, 365 S.C. 134, 136 n.1, 616 S.E.2d 424, 425 n.1 (2005) (reaching a sentencing issue in the interests of judicial economy); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 599, 553 S.E.2d 110, 119 (2001) (deciding an issue "[f]or the sake of judicial economy and to prevent further litigation between the parties"); Southern Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (explaining that "since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now").

In State v. Sledge, 428 S.C. 40, 59, 832 S.E.2d 633, 644 (Ct. App. 2019), this Court vacated Sledge's five-year sentence for possession of a weapon during the commission of a violent crime because he had been sentenced to life without parole for murder. This Court recognized that Sledge had not objected to the sentence at the trial court. Sledge, 428 S.C. at 59, 832 S.E.2d at 644. Citing precedent to support reaching an unpreserved sentencing error, this Court held the issue could be addressed in the interest of judicial economy. Id. There, the state acknowledged that Sledge's sentence "should be vacated because it was issued in violation of the statute and further concede[d] Sledge [was] entitled to the proper sentence regardless of issue preservation." Id.

Johnston was sentenced to ten years imprisonment and a fine for conspiracy. State v. Johnston, 333 S.C. 459, 460, 510 S.E.2d 423, 424 (1999). On appeal, Johnston challenged the trial court's authority to impose a prison sentence of ten years for conspiracy. Id. at 461, 510 S.E.2d at 424. Pursuant to the relevant statute, the maximum sentence for the conspiracy conviction was one-half the penalty for the substantive offense. Id. at 461, 510 S.E.2d at 424. Accordingly, the maximum sentence the court could impose was five years. Id. at 462, 510 S.E.2d at 424. The Supreme Court vacated Johnston's sentence and remanded for re-sentencing

despite Johnston's failure to object to the sentence at the trial level. Id. at 463-464, 510 S.E.2d at 425-426. The Court explained the state conceded the trial court committed error by imposing an excessive sentence, but contended the "appropriate remedy [was] through the Post Conviction Relief Act." Id. at 463-464, 510 S.E.2d at 425. The Court rejected the state's contention and vacated Johnston's sentence. Id. at 463-464, 510 S.E.2d at 425-426. See also State v. Vick, 384 S.C. 189, 201-202, 682 S.E.2d 275, 281-282 (Ct. App. 2009) (vacating an unpreserved sentence for kidnapping where the sentence violated the plain language of the statute because the defendant was also convicted of murder, the state conceded error, and all involved that if the issue were not reviewed on direct appeal, it would "in all likelihood be addressed in a post-conviction relief proceeding"); State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) (addressing an erroneous sentencing issue despite the lack of error preservation on the basis of judicial economy).

Similarly, this Court should address the merits of the issue in the interest of judicial economy. Without question, Appellant could raise this issue in an application for post-conviction relief as a claim of ineffective assistance of trial counsel for failing to object to an improper sentence. Based upon the clear statutory language and the abundance of case law on the matter presented, Appellant's sentence for possession of a weapon during the commission of a violent crime is improper. Thus, judicial economy weighs heavily in favor of this Court addressing the merits of the claim at this time. Appellant respectfully requests this Court address the merits of the issue and vacate his sentence for possession of a weapon during the commission of a violent crime.

CONCLUSION

As to Issues I and II, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. As to Issue III, Appellant respectfully requests this Court vacate his illegal sentence.

Lara M Caudy for:
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of February, 2023.