

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN 19 2013

Appeal from Oconee County

SC Court of Appeals

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS EUGENE LAND,

APPELLANT

Appellate Case No. 2012-213004

ANDERS BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL.....	3
STATEMENT OF THE CASE	4
ARGUMENT	
The trial judge erred in admitting Appellant's statement to police where the statement was obtained in violation of Appellant's right pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution because it was induced by promises of leniency by the interrogating officer.	5
CONCLUSION.....	11
PETITION TO BE RELIEVED AS COUNSEL	12

TABLE OF AUTHORITIES

Cases

<u>Compton</u> , 366 S.C. at 680, 623 S.E.2d at 666	7
<u>Dickerson v. United States</u> , 530 U.S. 428, 434 (2000)(citations omitted).....	7
<u>Illinois v. Perkins</u> , 496 U.S. 292 (1990)	7
<u>Jackson v. Denno</u> , 378 U.S. 368, 376 (1964)	5
<u>Moran v. Burbine</u> , 475 U.S. 412 (1986)	6
<u>State v. Arrowood</u> , 375 S.C. 359, 652 S.E.2d 438 (Ct. App. 2007)	8
<u>State v. Cain</u> , 246 S.C. 536, 144 S.E.2d 905 (1965)	7
<u>State v. Callahan</u> , 263 S.C. 35, 208 S.E.2d 284 (1974).....	7
<u>State v. Compton</u> , 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005).....	6
<u>State v. Crawley</u> , 349 S.C. 459, 562 S.E.2d 683 (Ct. App. 2002)	6
<u>State v. Goodwin</u> , 384 S.C. 588, 683 S.E.2d 500 (Ct. App. 2009).....	6
<u>State v. Middleton</u> , 288 S.C. 21, 339 S.E.2d 692 (1986)	6
<u>State v. Miller</u> , 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007).....	6
<u>State v. Moses</u> , 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010)	6, 7
<u>State v. Peake</u> , 291 S.C. 138, 352 S.E.2d 487 (1987).....	7
<u>State v. Rochester</u> , 301 S.C. 196, 391 S.E.2d 244 (1990).....	7
<u>State v. Von Dohlen</u> , 322 S.C. 234, 471 S.E.2d 689 (1996)	6

Constitutional Provisions

S.C. Const. art. I, §12	3
U.S. Const. amend. V.....	3
U.S. Const. amend. XIV	3

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in admitting Appellant's statement to police where the statement was obtained in violation of Appellant's right pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution because it was induced by promises of leniency by the interrogating officer.

STATEMENT OF THE CASE

On December 5, 2011, an Oconee County grand jury indicted Appellant for three counts of burglary in the first degree. R.* (Indictment). The state, represented by David Wagner, called one count of the indictment to trial on August 15, 2012 before the Honorable Alexander S. Macaulay. Tr. 1; Tr. 8, lines 6 – 14. R. Daniel Day represented Appellant at the trial. Tr. 1. The jury found Appellant guilty as charged. Tr. 258, lines 5 – 17. Pursuant to the recidivist statute, Judge Macaulay sentenced Appellant to life imprisonment without the possibility of parole. Tr. 273, lines 10 – 14.

Appellant timely filed a notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in admitting Appellant's statement to police where the statement was obtained in violation of Appellant's right pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution because it was induced by promises of leniency by the interrogating officer.

Relevant facts

During a pretrial hearing, David Smith, an officer with the Oconee County Sheriff's Office, testified that he and Scott Arnold interrogated Appellant on the day of Appellant's arrest. Tr. 83, lines 23 – 24; Tr. 84, line 22 – Tr. 85, line 2. According to Smith, he advised Appellant of his rights. Tr. 85, line 4 – Tr. 86, line 20. Smith claimed that Appellant admitted entering the residence and did so with the intent to steal items. Tr. 87, lines 5 – 14. On direct examination, Smith testified that he made no promises to Appellant. Tr. 87, lines 1 – 4. However, Smith admitted that he told Appellant he "would speak on his behalf." Tr. 88, lines 10 -13. In fact, Smith testified that he had informed the solicitor that Appellant had cooperated with their investigation of this crime and other crimes. Nevertheless, Smith steadfastly claimed he never promised Appellant anything. Tr. 88, lines 14 – 22.

On cross-examination, Smith admitted that he spoke to Appellant about cooperating with police regarding this crime and others. Smith further admitted that Appellant had cooperated fully. Tr. 91, lines 7 – 24. Smith maintained that he had agreed to speak on Appellant's behalf to the solicitor regarding Appellant's cooperation. Tr. 91, line 25 – Tr. 92, line 14. Smith admitted that Appellant "probably" discussed the

desire that his sentences would run concurrently with his probation. Tr. 92, line 15 – Tr. 93, line 10.

Arnold also testified during the pretrial hearing regarding the admissibility of Appellant's statement. According to Arnold, Smith did not promise Appellant anything. Tr. 97, lines 24 – 25. Arnold claimed no one held out any hope of leniency in order to obtain a statement from Appellant. Tr. 98, lines 3 – 6. Arnold was forced to admit that Smith "advised him that cooperation would mean a lot and he would be getting with him later on some other things." Tr. 98, lines 23 – 25. Nevertheless, Arnold denied that Smith made any specific promises of anything. Tr. 99, lines 1 – 3. On cross-examination, Arnold testified that Smith mentioned to Appellant that cooperation would go a long way and that Smith would be getting with Appellant later about some other cases. Tr. 101, lines 1 – 3.

Appellant admitted to giving a statement to Smith. However, Appellant testified that he asked Smith exactly what Smith could do for him in exchange for Appellant's cooperation in this case and others. Smith responded by asking Appellant about the length of the sentence, which had been suspended to probation, Appellant was serving. When Appellant responded that he had been sentenced to five years' imprisonment, which had been sentenced to probation, Smith informed him that he would not receive much more time than that. Tr. 124, line 19 – Tr. 125, line 6. Appellant further testified that he would not have given the statement except for Smith's promise to help him. Tr. 125, line 7 – 10; Tr. 126, lines 15 – 21. On cross-examination, Appellant maintained that Smith promised that if Appellant helped the police that Appellant would not receive much more than five years' imprisonment. Tr. 135, lines 9 – 21.

The court held the statement was admissible. Specifically, the trial judge found that Appellant was not influenced by a promise or hope of reward. Concerning a promise of leniency, the court found “if there [were] any, it was almost as if he invited it, and that was what he was hoping for rather than what he actually was promised.” The court relied upon the officer’s statement that he did not make a promise and that “promises of cooperation are not sufficient to overcome our amount to the promise of reward or affirmative consideration.” Tr. 141, line 20 – Tr. 142, line 19.

During the trial, Smith testified similarly to his pretrial testimony concerning his advisement of rights to Appellant and the statement given by Appellant. Tr. 198, line 24 – Tr. 199, line 16.¹ On direct examination, Smith testified that he never promises anything. He further stated, “I told him that what I’ll do is with his cooperation, then I would speak on his behalf and I did it. I contacted the solicitor’s office and told him that he had cooperated with us fully and that that’s what we did it, so....” Tr. 199, line 17 – 25. On cross-examination, Smith denied informing Appellant that he would be rewarded for his cooperation. Tr. 202, line 19 – Tr. 203, line 6. Nevertheless, Smith candidly admitted that only **after** he informed Appellant that he would speak on his behalf that Appellant agreed to give a statement in the case. Tr. 200, lines 16 – 19.

Discussion

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, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); 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); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver has two distinct dimensions. It must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and it must be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986).

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.

¹ Trial counsel did not object to the admission of Appellant's statement contemporaneously with Smith's trial testimony.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of “‘totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.’” Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted). Consideration of a person’s mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974)(citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)).

Whether officers exercised coercion is determined from the perspective of the suspect. Illinois v. Perkins, 496 U.S. 292 (1990). “Further, the confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence.” State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (internal quotations omitted). A statement “‘induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise.’” Compton, 366 S.C. at 680, 623 S.E.2d at 666; Rochester, 301 S.C. at 200, 391 S.E.2d at 247.

In State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987), the South Carolina Supreme Court held a defendant’s statements to police were not admissible as they had been induced by a promise of leniency where the officer told the defendant the prosecution would not see the death penalty if the defendant made a statement. On the other hand, the Supreme Court found a polygraph examiner’s statement to a defendant that it would be in the defendant’s best interest to tell the truth was not an inducement by promise of leniency. It was not the kind of hope or reward or benefit condemned by the law. Rochester, 301 S.C. at 201, 391 S.E.2d at 247.

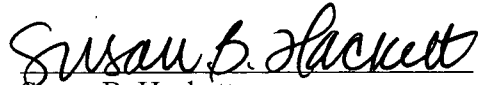
In State v. Arrowood, 375 S.C. 359, 368, 652 S.E.2d 438, 443 (Ct. App. 2007), this Court found a defendant's statement was not the product of the officers' promise of leniency where the officers testified the only help offered to Arrowood was to testify in court that he cooperated with the investigation. "Under precedent emanating from South Carolina jurisprudence, the officers' offer to attest to Arrowood's cooperation did not constitute promises of leniency." Id. This Court found that "Arrowood produced his statements in the mere 'hope' of leniency based on his cooperation, rather than as the consequence of promises." Id. at 369, 652 S.E.2d at 443.

The trial judge erred in admitting Appellant's statement into evidence where the undisputed testimony was that Appellant provided the statement only after the police officer promised to speak on Appellant's behalf to the solicitor regarding Appellant's cooperation. In stark contrast to Arrowood, supra, Appellant's statement and cooperation with police was not the product of the hope of leniency; rather, Appellant's statement was the direct result of Smith agreeing, at a minimum, to speak on Appellant's behalf to the solicitor regarding Appellant's cooperation. Smith admitted that he and Appellant discussed Appellant's probation and the impact of a conviction for the instant matter up on his probation. Therefore, Appellant's statement was extracted by a direct or implied promise, and the law does not concern itself with however slight the promise may be. Without question, Smith promised to secure leniency in exchange for Appellant's cooperation. Smith further admitted that it was only after Smith agreed to speak on Appellant's behalf regarding his cooperation that Appellant provided a statement. Clearly, Appellant's statement to Smith was "so connected with the inducement as to be a consequence of the promise."

CONCLUSION

Appellant respectfully requests this Court reverse his conviction for burglary in the first degree and remand the matter for a new trial in light of the trial court's erroneous admission into evidence of Appellant's statement.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of June, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

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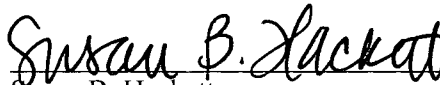
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Curtis Eugene Land states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before Judge Alexander S. Macaulay, which was held on August 16, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Curtis Eugene Land.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of June, 2013.

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Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Sentence sheet;
- (3) Entire trial transcript dated August 15 and 16, 2012;
- (4) Court's Exhibit #1;
- (5) Court's Exhibit #2;
- (6) Court's Exhibit #3;
- (7) Court's Exhibit #4; and
- (8) Court's Exhibit #5.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 19th, 2013



Susan B. Hackett
Appellate Defender

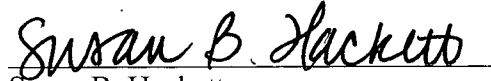
South Carolina Commission on Indigent Defense
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PO Box 11589
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(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 19, 2013



Susan B. Hackett

Appellate Defender

S.C. Commission on Indigent Defense

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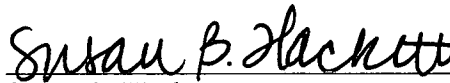
V.

CURTIS EUGENE LAND,

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CERTIFICATE OF SERVICE

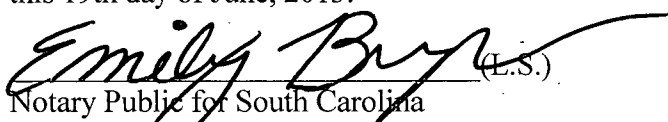
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Curtis Eugene Land, #193273 at Perry Correctional Institution, this 19th day of June, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of June, 2013.


(L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.