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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES ELBERT DANIELS, JR.

APPELLANT

APPELLATE CASE NO. 2018-001630

Appeal from Horry County

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 5986

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's holding that the trial judge did not err in admitting appellant's warned and unwarned statements into evidence where all statements given by appellant were made involuntary under the failed "question first" tactic because this Court might have overlooked and/or misapprehended certain aspects of the guidelines of Miranda v. Arizona, 384 U.S.436 (1966), that were applicable, but not followed in the case. Support for this petition is based on the information presented below.

Two men shot and killed two employees during robberies at three Horry County convenience stores in January 2015. The state alleged that appellant was the look-out during the robberies. A jury found appellant guilty of murder and two counts of armed robbery. Based on surveillance tapes, appellant was developed as a suspect after having been seen at one of the stores that was robbed, and after police identified appellant's girlfriend's vehicle as the get-a-way vehicle used in the robberies. The girlfriend's vehicle was confiscated and searched via a warrant. Appellant gave involuntary statements (unwarned and warned) regarding the three robberies in question that should not have been admitted into evidence at trial.

PRE-MIRANDA STATEMENTS

After developing appellant as a suspect and learning that his girlfriend drove a silver Chevrolet Malibu believed to have been used in the robberies, the police went to appellant's home to interrogate him. R. 436, ll. 9-20; R. 458, ll. 13-22. Upon their arrival, the police saw a Chevy Malibu. R. 436, l. 24 – R. 437, l. 2. A search warrant was obtained, and the Malibu was seized immediately by police. R. 460, ll. 12-19.[1] The police then transported appellant and his pregnant girlfriend to the West Precinct for a formal interrogation. R. 439, ll. 16-21; R. 440, ll. 12-14; R. 460, ll. 3-6. Despite considering appellant a suspect, the police did not advise Appellant of his rights prior to the interrogation. Instead, the officer waited until "it became apparent ... that there was most likely further information that [appellant] was going to provide that, that would cause [the officer] to place him under arrest." R. 441, l. 22 – R. 442, l. 4. Appellant identified McKinley Daniels, his brother, and Jerome Jenkins as individuals who

[1] A subsequent search of the Malibu revealed the presence of "a red, white and black headgear attire," which an officer opined was "similar to" what one of the individuals was wearing in the video of one of the armed robberies. R. 385, ll. 9-20.

entered all three stores and committed the armed robberies. R. 454, l. 8 – R. 456, l. 5. After Appellant was placed in jail, the police interrogated appellant again. R. 443, ll. 2-11.

Upon their arrival, the police saw a car in the yard that "looked to be the same vehicle" observed in the surveillance video. R. 11, ll. 7-16; R. 14, ll. 6-9. Apparently able to establish probable cause to believe the car was involved in criminal activity, the police obtained a search warrant and seized and towed the car immediately. R. 24, ll. 12-22; R. 35, ll. 1-7. The police initially spoke to appellant's pregnant girlfriend because appellant was at work. R. 14, ll. 4-11; R. 25, ll. 18-24. From the girlfriend, the police learned she owned the car of interest and that appellant "had control and would use her car." R. 14, ll. 17-20. When appellant arrived home from work, the police had his girlfriend in a police car. R. 25, ll. 10-17. Lent then invited him to the precinct to speak with them. R. 14, ll. 22-24. Appellant agreed. R. 15, ll. 19-21. Additionally, the police invited appellant's girlfriend to the precinct to speak with them. R. 15, ll. 2-3. Lent claimed appellant was not under arrest, not in custody, and voluntarily agreed to accompany the police to the station. R. 15, ll. 12-21. However, the police refused to allow appellant to drive himself to the precinct and required he go to the precinct in a police car. R. 26, ll. 11-25; R. 27, ll. 3-10.

During the interrogation, Lent "very skillfully," pinned down appellant regarding "some important incriminating information," such as appellant's work schedule, his access and use of his girlfriend's car during the relevant time periods, and his presence at the Red Bluff store on the day of the robbery. R. 46, ll. 1-16. Only after getting this critical incriminating information did Lent advise Appellant of his rights. R. 46, ll. 16-23. Thereafter, Lent "boxe[d] him in from the information at the beginning" of the interrogation. R. 48, ll. 15-18.

Relying upon Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 638 (2010), defense counsel moved to exclude his statements to police. R. 42, ll. 11-18. Defense counsel explained that when Miranda warnings are provided during the interrogation, rather than at the beginning, the "warnings become less effective and really don't mean anything." R. 42, l. 21 – R. 43, l. 7. Further, defense counsel emphasized that in Navy, the Supreme Court focused on the detective's purpose during the interrogation – to obtain incriminating information. R. 43, ll. 8-12. According to defense counsel, appellant was in custody during the interrogation at the precinct based upon the totality of the circumstances – "taken from the house in a police car," the presence of at least four police cars and "lots of detectives," and the identification of appellant and his brother by an officer as "possible suspects." R. 44, ll. 1-17. Further, the police "had already determined to tow the vehicle," and apparently, had enough information to establish probable cause to support a search warrant for seizure of the car. R. 44, ll. 18-23. The police refused to permit appellant to drive himself to the police station; rather, the police insisted appellant and his girlfriend, albeit in separate cars, be escorted to the police station in police cars. R. 45, ll. 1-2. Quite simply, the police "intended at that point to [elicit] incriminating information from him." R. 45, ll. 5-7.

As defense counsel explained, one-third of the interrogation occurred prior to law enforcement advising appellant of his rights. R. 45, ll. 8-11. Defense counsel also challenged Lent's after-the-fact claim that the police would have permitted appellant to leave the precinct had he made such a request as the evidence demonstrated appellant was not permitted to drive himself to the precinct, his pregnant girlfriend was transported and interrogated, and there was a heavy law enforcement presence at appellant's home and at the precinct. R. 45, ll. 15-24.

This Court referred to and summarized to the trial judge's findings as follows:

> Although the continuity of police personnel was the same, the State argued the timing of the subsequent jail interview demonstrates this was not a continuous statement as there was a clear break between the pre- and post-*Miranda* interviews.
>
> After hearing the evidence and arguments of counsel, the circuit court found: when law enforcement arrived at Chestnut's home, the only information they had was that Daniels was at the Sunhouse #1 prior to the armed robbery and Chestnut drove a silver Chevy Malibu: Daniels voluntarily came to Chestnut's house from work, knowing the police were there; Daniels and Chestnut both agreed to accompany officers for questioning; there was no evidence either Daniels or Chestnut was under arrest; and because Daniels did not confess to committing any criminal act during the pre-*Miranda* portion of the interview, his statements were admissible. Ultimately, the circuit court concluded Daniels was "given the appropriate *Miranda* warnings" and based on the additional testimony from Detective Lent, Daniels "agrees and goes along with [the interview] after acknowledgement of his constitutional rights with the decision to continue to talk to law enforcement." Thus the circuit court found no violation of either *Miranda* or *Seibert*. The circuit court held the totality of the circumstances demonstrated Daniels was not in custody for the first thirty-one minutes of the interview, detailing its findings that Daniels was at a police precinct rather than headquarters or the jail, was not handcuffed, was not forced to accompany the officers, and suffered no denial of creature comforts, no threats, and no intimidation. Finally, the circuit court found Daniels made his interview statements freely, voluntarily, knowingly, and intelligently after he was advised of and waived his constitutional rights.

On appeal, this Court held as follows regarding the "in custody" issue and the admissibility of the statements:

> Here, there is no dispute that Daniels participated in the initial thirty-one minutes of questioning without the benefit of *Miranda* warnings. While our inquiry focuses on whether Daniels was in custody when initially questioned, the State persuasively argues the content of Daniels's initial statements, specifically the lack of any confession, is pertinent to the inquiry.

videos, law enforcement already knew this from their earlier discussions with Chestnut.

Next, Detective Lent questioned Daniels about his work schedule, and Daniels told him which days and times he worked during the month of January. Detective Lent testified he questioned Daniels about his work schedule because he "wanted to find out . . . if he had access to the car, if he was even in the area or around, or would've been able to have been free on the dates when these crimes had been committed." Daniels's answers led Detective Lent to believe Daniels "would've been off work at the time these crimes were committed, and that he . . . would've had access to Ms. Chestnut's vehicle at the times those crimes were committed."

Finally, Detective Lent questioned Daniels about his whereabouts and conduct on the day of the armed robbery and murder at the Sunhouse #1. When Daniels told Detective Lent that he and Brother bought a soda at the Sunhouse #1 on January 2, 2015—a fact detectives already knew from the surveillance footage—Detective Lent told Daniels they needed to have a "serious talk" because he did not know if Daniels would tell him there "was a dead midget buried in the backyard" or something similarly incriminating. Detective Lent said he was "afraid of what would come out" and people sometimes say "off-the-wall and crazy stuff," thus, he advised Daniels of his *Miranda* rights to "cover" any incriminating statements Daniels might make.

Regarding Daniels's first statement, as our supreme court found in *Navy*, "it is debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." 368 S.C. at 301, 688 S.E.2d at 841. Accordingly, the circuit court's finding that Daniels was not in custody should be "upheld as it is supported by the record." *Id.* Daniels was asked—not required—to ride to the substation with police officers for questioning; he was questioned in an office and did not ask to leave; he was offered creature comforts; and the initial pre-*Miranda* questioning lasted only about half an hour. *See Evans*, 354 S.C. at 583, 582 S.E.2d at 410 ("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.").

To the contrary, appellant was in custody under the totality of the circumstances and his interrogation was for the purpose of gaining incriminatory responses. 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. 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). 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 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). 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).

"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). "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." Id.

In Evans, the defendant went to the police station accompanied by her family. Id. 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.

In summary, in this case, it was clear that appellant was in custody and gave incriminating statements without the benefit of Miranda warnings, and that the interrogation that occurred pre-Miranda was designed to elicit incriminating responses from appellant. Note the dissenting opinion from this Court in disagreement with the majority "in custody" and "intent to elicit an incriminating responses" rulings:

> I merely point out that the statement given by Daniels prior to receiving Miranda warnings should have been excluded from evidence because it was the product of a custodial interrogation.
>
> Under all of the surrounding circumstances, a reasonable person would not have felt free to leave the office in which Detective Lent questioned Daniels.
>
> Daniels arrived home from work to find his pregnant girlfriend, LaShania Chestnut, speaking with officers while sitting in one of several unmarked police cars at the residence. When Detective Lent asked Daniels if he would be willing to speak with him at the

police substation, Daniels agreed to do so. However, he was not allowed to drive his Grand Prix to the substation, despite the willingness to cooperate he showed by appearing at the residence soon after he was notified that officers were there questioning Chestnut. Rather, officers required Daniels and Chestnut to ride in separate police cars. Once they arrived at the substation, Daniels and Chestnut were taken to separate offices. Detective Lent met with Daniels at approximately 9:45 p.m. and interviewed him for over thirty minutes before advising him of his Miranda rights.

Based on the foregoing, I believe the record contradicts the circuit court's finding that Daniels was not in custody. Further, Detective Lent's questioning during this thirty minute period was not only reasonably likely to elicit an incrimination response, it was specifically designed for this purpose.

Rhode Island v. Innis, 446 U.S. 291, 301 n.5 (1980) (emphases added) (quoting *Miranda v. Arizona*, 384 U.S. 436, 476 (1966)). Detective Lent started his questioning by asking Daniels if he had any idea why officers had asked him to talk with them. When Daniels said he had no idea, Detective Lent expressed incredulity and then explained that he was interested in Chestnut's car and Daniels's own car. From his earlier discussions with Chestnut, Detective Lent already knew that Daniels had access to Chestnut's car in January 2015. Detective Lent was also aware prior to his interview with Daniels that Chestnut's car matched the car in the surveillance videos. Therefore, at the very least, Detective Lent should have known that questioning Daniels about Chestnut's car and Daniels's own car was reasonably likely to elicit an incriminating response, i.e., that around the time of the robberies in question, Daniels had access to a car matching the car in the surveillance video.

Next, to nail down the precise days that Daniels was available to participate in the robberies, Detective Lent questioned Daniels about his work schedule during January 2015 and asked him to mark a desk calendar to indicate which days he had worked. Not only should Detective Lent have known that these questions were likely to elicit an incriminating response—i.e., Daniels had no workplace alibi and was available to participate in the robberies—he was counting on it. Detective Lent testified,

[O]ne of the first things I wanted to find out was if he had access to the car, if he was even in the area or around, or [would have] been able to have been free on the dates when these crimes had been

> committed. So, we start speaking about some things, some of which were his work schedule and times that he would work.
>
> Detective Lent then questioned Daniels concerning his whereabouts and conduct on the day of the armed robbery and murder at the Sunhouse #1. Detective Lent already knew from the surveillance video that Daniels bought a soda in the store prior to the robbery. Therefore, Detective Lent would have known that the questions about Daniels's whereabouts on the day in question were likely to elicit an incriminating response, i.e., that, consistent with the activity of a scout, Daniels bought a soda at the Sunhouse #1 just prior to the robbery. Yet, it was not until after Daniels made this admission that Detective Lent advised Daniels of his *Miranda* rights.

Appellant's pre-Miranda statements were unconstitutionally obtained.

POST-MIRANDA STATEMENTS

Also, the late Miranda warnings given to appellant were ineffective and thus the statements given post-Miranda were unconstitutionally obtained and inadmissible at trial as well. Appellant argued at trial and on appeal that the second and third statements were given involuntarily despite the fact that the Miranda warnings were given before those statements (second and third) were made because the warnings were ineffective as they were obtained after it became apparent that appellant would be arrested, and after the incriminating statements were already given regarding work schedule, presence at one crime scene store, and the use of the girlfriend's car in the case. Therefore, the post-Miranda statements were involuntarily given and inadmissible as evidence.

This Court held that the second and third statements were constitutionally protected and admissible based on the following ruling:

> It was only after he was given *Miranda* warnings that Daniels admitted his involvement in the string of convenience store armed robberies. Significantly, there is no indication that once the

> interrogation became custodial, Daniels's statements were involuntary or that the conditions under which he made the statements were unconstitutionally coercive.
>
> Although Daniels correctly notes Detective Lent failed to execute the standard written advisement of *Miranda* rights, the warnings are clear on the interview audio, and nothing suggests Daniels either misunderstood or did not hear the advisement. We acknowledge Daniels gave no audible assent during Detective Lent's recounting of the *Miranda* rights; however, immediately following the advisement when Lent asked Daniels if he had any questions about those rights and whether Daniels had been at work and had not been drinking, Daniels responded verbally. The tone of the remainder of the interview is conversational, the whole interview lasted approximately an hour and a half, and Daniels was neither threatened nor deprived of food, drink, or sleep. Notably, Daniels told the officers he wanted to come forward earlier, but he was scared of Brother and could not let anything happen to his family.
>
> The following day at the jail, Detective Lent re-advised Daniels of his *Miranda* rights, and Daniels again agreed to speak with him. This nineteen-minute interview was also audio-recorded, and—as with the evening interview at the precinct—evidence supports the circuit court's finding that Daniels's statements were knowingly and voluntarily made.

During the interrogation, Lent "very skillfully," pinned down appellant regarding "some important incriminating information," such as appellant's work schedule, his access and use of his girlfriend's car during the relevant time periods, and his presence at the Red Bluff store on the day of the robbery. R. 46, ll. 1-16. Only after getting this critical incriminating information did Lent advise Appellant of his rights. R. 46, ll. 16-23. Thereafter, Lent "boxe[d] him in from the information at the beginning" of the interrogation. R. 48, ll. 15-18.

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 post warning 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 v. Burbine, 475 U.S. 421, 424 (1986)).

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.

At first blush, Lent's questioning of appellant during the first half hour of the interrogation appears innocuous. State's Exhibit #167. However, Lent skillfully elicited incriminating information from Appellant. State's Exhibit #167. Initially, Lent obtained admissions from Appellant that his car was broken during January 2015, and he used his girlfriend's car during that time. State's Exhibit #167. This was important because his girlfriend's car "matched" the car at the scene of the robberies according to the surveillance videos. State's Exhibit #167. In short, appellant had access to a car like the one at the crime scenes during the relevant time periods. State's Exhibit #167. Next, Lent got Appellant's work schedule. State's Exhibit #167. This was important as well because it showed appellant did not have a workplace alibi for the dates and times that the crimes were committed. State's Exhibit #167. Then, Lent zeroed in on January 2, 2015, the day of the Red Bluff robbery. State's Exhibit #167. He got appellant to explain his whereabouts and conduct on that day. State's Exhibit #167. Only after appellant told Lent that his brother was McKinley James and that appellant went to the store to buy a soda on Red Bluff Road on January 2 did Lent advise appellant of his rights. State's Exhibit #167.

When Lent advised appellant of his rights, he did so orally, without the benefit of a written advisement. State's Exhibit #167. He told appellant the two were going to have a "serious talk,"

that he did not know if appellant would tell him there was a "dead midget buried in the backyard," and, as a result, he was "afraid of what would come out." State's Exhibit #167. He noted that people sometimes say, "off-the-wall and crazy stuff." State's Exhibit #167. He advised appellant of his rights to "cover" all of them. State's Exhibit #167. When he told appellant that what he said could be used against him in a court of law, he said "like you got a dead midget." State's Exhibit #167. Although he asked if appellant understood his rights and if he had questions, the audio tape shows no response from appellant. State's Exhibit #167. Of course, Lent claimed that appellant gave non-verbal assent during the pre-trial hearing. Importantly, however, Lent never requested or obtained a waiver of those rights from appellant. State's Exhibit #167. He simply continued questioning appellant, picking up where he left off during the initial questioning. State's Exhibit #167.

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. 421, 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.").

Recently, 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.

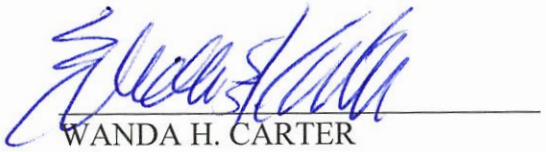
Turning to the admissibility of Hill's statement that occurred after he was advised of his rights, this Court initially noted the first and second interrogations of Hill were similar as they involved the same police officers and occurred in a room just across the hall from where the first interrogation 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, the post-Miranda warnings given to appellant had no effect as incriminating statements had already been elicited from him, which in turn rendered the post-Miranda statements given by appellant involuntary in nature and inadmissible into evidence. Both pre-Miranda statements and post-Miranda statements were involuntarily given by appellant and inadmissible at trial.

CONCLUSION

Based on the foregoing arguments, counsel for appellant would request that this Court grant this petition for rehearing in the case.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 8th day of June, 2023.

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Jun 08 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES ELBERT DANIELS, JR.

APPELLANT

APPELLATE CASE NO. 2018-001630

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on James Elbert Daniels, #311245, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of June, 2023.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

From: Leverett, Scott
To: SC - FARTHING MARK
Cc: Leigh Ann Stone; Carter, Wanda
Subject: James E. Daniels - Petition for Rehearing - Appellate Case No. 2018-001630
Date: Thursday, June 8, 2023 2:31:00 PM
Attachments: James E. Daniels - Petition for Rehearing - Appellate Case No. 2018-001630.pdf

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Dear Mr. Farthing,

Attached please find a copy of the petition for rehearing in the above referenced case that is being filed today, June 8, 2023, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Wanda Carter
Appellate Defense