RECEIVED
Oct 30 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH MAR KEITH CHISOLM,

APPELLANT

APPELLATE CASE NO. 2022-001206

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

STATEMENT OF FACTS 4

ARGUMENT

The trial court reversibly erred by admitting evidence of Appellant's statement to law enforcement where it was taken while Appellant was in custody, and where it was involuntarily made under circumstances of intimidation due to officers forcing Appellant to strip to his underwear and into a prison jumpsuit in the interrogation room at the police station 7

CONCLUSION 12

PETITION TO BE RELIEVED AS COUNSEL 13

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) 13

Arizona v. Fulminante, 499 U.S. 279, 295, 111 S.Ct. 1246, 1257 (1991) 10

Berghuis v. Thompkins, 560 U.S. 370, 382-83, 130 S.Ct. 2250, 2260 (2010) 8

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326 (2000) 8

Jackson v. Denno, 378 U.S. 368, 378, 84 S.Ct. 1774, 1781 (1964) 7

Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972) 7

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978) 8

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). 7

State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007) 8

State v. Miller, Op. No. 28171 (S.C. Sup. Ct., filed Sept. 13, 2023)
(Howard Adv.Sh. No. 36, at 18) 3, 8, 9

State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010) 7

Withrow v. Williams, 507 U.S. 680, 113 S.Ct. 1745 (1993) 8

Other Authorities

U.S. Const. amend. VI 5

STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by admitting evidence of Appellant's statement to law enforcement where it was taken while Appellant was in custody, and where it was involuntarily made under circumstances of intimidation due to officers forcing Appellant to strip to his underwear and into a prison jumpsuit in the interrogation room at the police station?

STATEMENT OF THE CASE

Appellant Kenneth Mar'keith Chisolm was indicted by the Colleton County grand jury on September 21, 2017, for attempted murder, possession of a weapon during a violent crime, and three counts of murder. R. 917-926. The charges stemmed from Appellant's alleged conduct during an incident in Ruffin, South Carolina, on May 16, 2017. R. 917-926.

Appellant's case proceeded to jury trial from August 15th through 19th, 2023, before the Honorable Perry Buckner. David Matthews represented Appellant, while the State was represented by Tameaka Legette. R. 1-2; R. 329; R. 515; R. 809. The jury found Appellant guilty on all charges, and the trial court imposed the following concurrent sentences: life without parole for each murder conviction; thirty (30) years for attempted murder; and five (5) years for possession of a weapon during a violent crime. R. 899, l. 22–R. 901, l. 15; R. 914, l. 17–R. 915, l. 18.

This appeal follows.

STANDARD OF REVIEW

"[T]he question of voluntariness presents a mixed question of law and fact. Accordingly, we take this opportunity to refine our standard of review." State v. Miller, Op. No. 28171 (S.C. Sup. Ct., filed Sept. 13, 2023) (Howard Adv.Sh. No. 36, at 18). Accordingly, South Carolina appellate courts "review the trial court's factual findings regarding voluntariness for any evidentiary support. However, the ultimate legal conclusion—whether, based on those facts, a statement was voluntarily made—is a question of law subject to *de novo* review." Id. Op. No. 28171 (S.C. Sup. Ct., filed Sept. 13, 2023) (Howard Adv.Sh. No. 36, at 18-19).

STATEMENT OF THE FACTS

On the afternoon of May 16, 2017, La'Shay Aiken (Aiken) drove Appellant and his girlfriend Moose-Goose "Moosie" Napatino[1] (Moosie) in her car to meet with Phillip Miller (Miller). Appellant was purportedly going to buy marijuana from Miller. R. 557, l. 5—R. 559, l. 15; R. 626, ll. 22-23. They met in the Walmart parking lot, and then later went to Miller's house on Low Country Highway in Ruffin, South Carolina, shortly after. R. 179, ll. 7-21; R. 575, l. 2—R. 578, l. 19; R. 593, l. 11-16.

Moosie and Appellant allegedly walked from Aiken's car to the front porch of Miller's home where they talked at first, and then argued. R. 593, l. 25—R. 594, l. 10; R. 596, ll. 13-23. Appellant purportedly shot Miller on the porch during the argument, and went inside the home. R. 247, l. 15—R. 248, l. 24; R. 598, l. 2—R. 599, l. 13. Inside, Miller's spouse Lori Miller, 13-year-old son (Minor 1), and nine year old granddaughter (Minor 2) were likewise shot. R. 249, l. 1-2; R. 250, ll. 3-21; R. 599, ll. 17-24; R. 600, l. 7—R. 601, l. 23. Appellant then allegedly came back out to Aiken's car, which sped off. R. 142, ll. 10-15; R. 602, ll. 11-16; R. 605, ll. 20-23. Miller died on the porch, while Spouse died inside, both from gunshot wounds. Minor 1 ran outside where he too succumbed to his wounds. R. 197, l. 17—R. 198, l. 17; R. 683, ll. 16-25; R. 685, ll. 1-10; R. 686, ll. 4-11; R. 600, l. 7—R. 601, l. 23. Minor 2 survived with a gunshot wound through her leg. R. 174, l. 16—R. 175, l. 1; R. 228, l. 20—R. 229, l. 24; R. 234, ll. 6-17; R. 235, ll. 16-22.

Appellant was arrested on May 18, 2017, and removed from his car. R. 475, l. 19—R. 476, l. 2; R. 508, l. 10—R. 509, l. 8. Rather than take Appellant to the jail for booking, he was taken to an interrogation room at the Colleton County Sheriff's Office investigative division annex. R. 475, l.

---

[1] Although Aiken indicated Moosie's name was Napatino, Counsel for both Appellant and the State later indicated her actual name was "Niffatina Coppadge." R. 827, l. 19; R. 829, l. 16; R. 840, l. 23; R. 844, l. 21; R. 845, ll. 10-12.

19—R. 476, l. 2. Once in the interrogation room, Investigators James King (Inv. King) and Jason Chapman (Inv. Chapman) demanded Appellant take off his clothes. R. 509, l. 18—R. 510, l. 5; State's Exhibit 66 (Interrogation Video, 07:24:46 pm to 07:25:17 pm). Police indicated Appellant's personal possessions were going to be entered into evidence. Appellant commented on how he was treated when initially arrested, and both Inv. King and Inv. Chapman argued with him about what they said happened. State's Exhibit 66 (Interrogation Video, 07:25:37 pm to 07:26:13 pm). Appellant complied with the orders to take off his clothes, and was provided a brown prison jumpsuit to wear for the remainder of his interrogation after he was Mirandized.[2] During the interrogation, Appellant made several incriminating admissions regarding his whereabouts and conduct on May 16, 2017. State's Exhibit No. 66 (Interrogation Video).

At trial, Appellant moved to suppress his statement outside the presence of the jury. R. 8, l. 2—R. 9, l. 2. At the hearing, Inv. King acknowledged Appellant was arrested by being pulled from his car "to a hard asphalt pavement," and that "[w]hen flesh hits the pavement, injuries may occur." R. 16, l. 18–R. 17, l. 20. As to the interrogation itself, Inv. King also acknowledged they made Appellant disrobe in the interrogation room and put on jail clothes. R. 18, l. 20—R. 19, ll. 4. Appellant was questioned for approximately three-and-a-half hours total. R. 479, ll. 7-10; R. 493, ll. 12-22.

The trial court ruled that Appellant's Sixth Amendment and Miranda rights were not violated, and that the statement was admissible. R. 64, ll. 14—R. 67, l. 3. Before the jury, the State entered a redacted version of Appellant's video statement into evidence over objection. R. 492, l. 12–R. 497, l. 4. Furthermore, the State repeatedly referred to Appellant's video statement to police

---

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

in its closing argument to the jury. Appellant was convicted on all counts, and ultimately sentenced to life without parole. R. 899, l. 22–R. 901, l. 15; R. 914, l. 17–R. 915, l. 18.

ARGUMENT

The trial court reversibly erred by admitting evidence of Appellant's statement to law enforcement where it was taken while Appellant was in custody, and where it was involuntarily made under circumstances of intimidation due to officers forcing Appellant to strip to his underwear and into a prison jumpsuit in the interrogation room at the police station.

Given the totality of the circumstances surrounding Appellant's statement, his confession was obtained in custody of police, and under circumstances of intimidation and coercion. Therefore, Appellant's waiver of his Miranda rights was not knowing or voluntary, and the confession should have been suppressed. Additionally, Appellant was prejudiced by the trial court's erroneous admission of his confession due to the State's repeated use of it throughout the trial.

"[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." Jackson v. Denno, 378 U.S. 368, 378, 84 S.Ct. 1774, 1781 (1964). This fundamental principle applies "even though there is ample evidence aside from the confession to support the conviction." Id. Additionally, "[e]ven absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [Miranda] rights when making the statement." State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 400 (Ct. App. 2010). Therefore, "[i]n order to introduce a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona." Id. 390 S.C. at 512, 702 S.E.2d at 400; see also Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 627 (1972) ("[T]he prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.").

The United States Supreme Court specified two distinct dimensions of inquiry regarding the waiver of Miranda rights: (1) that the waiver was "voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception; and (2) that the waiver was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Id. 390 S.C. at 513, 702 S.E.2d at 401 (quoting Berghuis v. Thompkins, 560 U.S. 370, 382-83, 130 S.Ct. 2250, 2260 (2010)). Whether these points of inquiry are satisfied is distilled to the test of whether the defendant's will was overborne by the totality of the circumstances surrounding the confession. Id.

"The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the given [statement]. The due process test takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." State v. Miller, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007) (quoting Dickerson v. United States, 530 U.S. 428, 434, 120 S.Ct. 2326 (2000) (internal quotation marks omitted)). The potential circumstances to consider include, "the crucial element of police coercion," location and length of interrogation, its continuity, as well as the defendant's maturity, education, physical condition, and mental health. Id. 375 S.C. at 385, 652 S.E.2d at 452 (quoting Withrow v. Williams, 507 U.S. 680, 693-94, 113 S.Ct. 1745 (1993)).

Although "[c]oercive police activity is a necessary predicate to finding a statement is not voluntary," it is "*determined from the perspective of the suspect.*" Miller, 375 S.C. at 386, 652 S.E.2d at 452 (emphasis added). Moreover, "the blood of the accused is not the only hallmark of an unconstitutional inquisition." Mincey v. Arizona, 437 U.S. 385, 401, 98 S.Ct. 2408, 2418 (1978) (internal quotations and citations omitted). Rather, "[d]etermination of whether a statement is involuntary requires more than a mere color-matching of cases. It requires a careful evaluation of

all the circumstances of the interrogation." Id. (internal quotations and citations omitted). For example, "[a] statement may not be extracted by any sort of threats or violence, or obtained by any direct or indirect promises, however slight, *or obtained by the exertion of improper influence*." Miller, 375 S.C. at 386, 652 S.E.2d at 452 (internal quotations omitted) (emphasis added).

Given the totality of the circumstances in the case at bar, Appellant's confession was obtained under circumstances of intimidation and coercion. First, Appellant was forcibly removed from his vehicle by armed police officers and thrown to the ground. R. 16, l. 18–Tr 17, l. 20. In fact, Investigators continued to argue with Appellant in the interrogation room at the police station in order to assert the justification of their view regarding their use of force towards him. State's Exhibit No. 66 (Interrogation Video, 07:25:37 pm to 07:26:13 pm).

Furthermore, while in the custody of law enforcement at the police station, investigators continued coercive tactics by strip searching Appellant in the interrogation room prior him ever being booked at the jail. As indicated above, after Appellant was arrested by being violently taken from his car and thrown to the ground, he was taken in handcuffs to the interrogation room two days after the underlying incident occurred. R. 477, ll. 2-24. Once inside, Inv. King began by demanding Appellant strip out of his clothes and don prison garb brought in by Inv. Chapman. State's Exhibit No. 66 (Interrogation Video, 07:24:46 pm to 07:25:17 pm). Regardless of whether Appellant was under arrest, conducting a strip search of him at that time was wholly unnecessary: as Inv. King even acknowledged, all of Appellant's the clothing and jewelry would have been collected by jailers during the booking process and put in a locker because "they are not entitled to wear their own clothes at the jail." R. 509, l. 18—R. 510, l. 5.

Additionally, there was no exigent circumstance indicating a delay might result in the destruction of evidence: the incident occurred on May 16, 2023; any potential evidence that could

have been lost from Appellant's clothes, such as gunshot residue, blood, or DNA, would already have been lost over the two intervening days of activity. Moreover, any potential evidence on his clothes when interrogated on May 18, 2023, would have still remained on his clothes when they took Appellant—in police custody--from the interrogation room to booking at the jail. In other words, contrary to Inv. King's purported desire to preserve evidence, there were no exigent circumstance to justify his demand that Appellant strip out of his clothes and into prison apparel in the interrogation room. R. 510, ll. 2—R. 511, ll. 3.

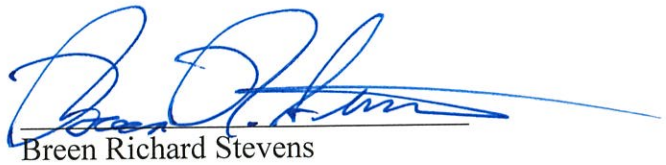
As such, the only remaining rationale is that of mental intimidation and coercion. That is precisely what occurred: while in police custody in the interrogation room after being subjected to these intimidating and coercive circumstances, Appellant—in the act of disrobing down to his underwear—asks to talk with police. After being assured they will talk with him, Inv. King continued with the process of having Appellant strip out of his clothes and put on jail clothes. State's Exhibit No. 66 (Interrogation Video, 07:26:36 pm to 07:28:30 pm). Once this demeaning, intimidating, and coercive treatment was completed, Inv. King informed Appellant what his rights were, yet the coercive and intimidating conduct had had its desired effect: Appellant's defendant's will was overborne by the circumstances surrounding his interrogation, and he provided a statement against his interest regarding the incident. State's Exhibit No. 66 (Interrogation Video). Therefore, Appellant's statement was not voluntary in the sense that it was the product of a free and deliberate choice; rather, it was the result of police conduct intended to intimidate and coerce him into complying with what law enforcement wanted over the course of approximately three-and-a-half hours. R. 479, ll. 7-10; R. 493, ll. 12-22.

Moreover, Appellant was prejudiced by the improper admission of his statement. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 295, 111 S.Ct. 1246, 1257 (1991) (holding admission of

involuntary confessions is a trial error, and a federal constitutional error is reversible if the error was harmless beyond a reasonable doubt). Here, the State repeatedly exploited this constitutional error and compounded its prejudicial effect to Appellant by repeatedly reminding the jury of Appellant's admissions in opening statement, trial testimony, and closing argument. R. 126, ll. 6-8; R. 497, ll. 1-7; R. 838, l. 2–R. 853, l. 22. Literally, from beginning to end, the jury was inundated with the knowledge of Appellant's admissions. As a result, the error cannot be deemed harmless beyond a reasonable doubt. Therefore, Appellant respectfully requests reversal of his conviction, and remand for new trial.

CONCLUSION

For the foregoing reasons, Appellant Kenneth Mar'keith Chisolm respectfully requests reversal of his convictions, and remand for a new trial.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH MAR KEITH CHISOLM,

APPELLANT

APPELLATE CASE NO. 2022-001206

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth Mar Keith Chisolm states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Perry M. Buckner, which was held on August 15 - 19, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for Kenneth Mar Keith Chisolm.

Respectfully Submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2023.

RECEIVED
Oct 30 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH MAR KEITH CHISOLM,

APPELLANT

APPELLATE CASE NO. 2022-001206

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Indictments (2017-GS-15-00572 through 00574; 2017-GS-15-00704; and 2017-GS-15-00710);
(2) Sentence sheets;
(3) Entire Trial transcript, Volumes I through V (August 15th, 16th, 17th, 18th, and 19th, 2022)
(4) State's Exhibit #66 (Interrogation Video) (Disc 2, same as Court's Exhibit #3).

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

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 30th day of October, 2023.

RECEIVED
Oct 30 2023
SC Court of Appeals

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 April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 30th day of October, 2023.

RECEIVED
Oct 30 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH MAR KEITH CHISOLM,

APPELLANT

APPELLATE CASE NO. 2022-001206

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Kenneth Mar Keith Chisolm, #388732, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of October, 2023.

Breen R. Stevens
Appellate Defender

ATTORNEY FOR APPELLANT