

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County
Stephanie P. McDonald, Circuit Court Judge

S.C. Supreme Court

LORD BYRON SLATER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2012-212846

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance in derogation of petitioner's Fifth and Sixth Amendment rights by failing to move to suppress (1) petitioner's statements, and (2) evidence flowing from petitioner's statements because petitioner's statements were given after inadequate warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966)?

STATEMENT

On May 1, 2001, a Charleston County grand jury indicted Lord Byron Slater (“Slater”) for murder and a related weapons charge. App. 856 - 59. On November 13 – 15, 2001, Slater was tried before the Honorable Edward B. Cottingham and a jury. App. 1. Dale DuTremble and Elizabeth Sumner represented the State. App. 1. Ashley Pennington and Boyd Young represented Slater. App. 1. The jury convicted Slater on both counts. App. 557, l. 24 – 558, l. 10. Judge Cottingham sentenced Slater to life imprisonment. App. 579, l. 2 – 581, l. 4. The Court of Appeals reversed Slater’s conviction. State v. Slater, 360 S.C. 487, 682 S.E.2d 90 (Ct. App. 2004); App. 681 - 86. The Court of Appeals held that the trial judge erred in refusing to give a self-defense charge. Id. This Court reversed the Court of Appeals. State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007); App. 741-43. This Court held a self-defense charge was not warranted. Id.

On May 23, 2007, Slater filed a PCR application. App. 744. On November 16, 2009, a hearing was held on Slater’s PCR application before the Honorable Deadra L. Jefferson. App. 764. Matthew Friedman represented the State. App. 764. William Runion represented Slater. App. 764. On December 21, 2009, Judge Jefferson denied Slater’s PCR application. App. 814 No appeal was filed. App. 853. On May 10, 2011, Slater filed another PCR application. App. 823. On July 24, 2012, a hearing was held on this PCR application before the Honorable Stephanie P. McDonald. App. 839. Ashleigh Wilson represented the State and Charles T. Brooks represented Slater. App. 839. Slater and the State entered into a consent order granting Slater a belated appeal of his first

PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).¹ App. 851. This appeal follows.

¹ At the PCR hearing, Slater himself – not his attorney – argued that he should be allowed the opportunity to file a motion pursuant to Rule 59(b) of the South Carolina Rules of Civil Procedure in order to have issues that were raised in his application ruled upon that were not addressed by Judge Jefferson in her order. App. 847, ll. 12 – 20. Petitioner's counsel did not advance this argument on his behalf and instead signed a consent order which only granted a belated appeal and waived and dismissed with prejudice any other allegations. App. 855.

ARGUMENT

Trial counsel provided ineffective assistance in derogation of petitioner's Fifth and Sixth Amendment rights by failing to move to suppress (1) petitioner's statements, and (2) evidence flowing from petitioner's statements because petitioner's statements were given after inadequate warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

Relevant Facts

Slater testified in his own defense. This incident occurred in February 2001, when Slater was only nineteen years old. App. 434, ll. 2 – 6. On the night of February 3, 2001, Slater drove to North Charleston High School. App. 434, ll. 15 – 22. There was a dance at the high school. App. 435, ll. 8 – 16. Slater was talking to some girls outside when a commotion began. App. 435, l. 20 – 436, l. 8. Slater took his gun out of his car. App. 436, ll. 15 – 17. Slater's intent when he got the gun was only to shoot the gun in the air. App. 482, ll. 21 – 25. Slater changed his mind and did not shoot the gun into the air. App. 438, l. 15 – 439, l. 1. When Slater walked back to his car, he noticed a separate commotion – a fight. App. 439, ll. 16 – 440, l. 30.

Slater walked over to the fight. App. 440, ll. 1 – 3. He “just wanted to see what was going on.” App. 440, ll. for – 5. He still had the gun. App. 440, ll. 6 – 8. A man was on the ground. App. 440, l. 25 – 441, l. 3. Several other people were fighting. App. 440, l. 9 – 442, l. 5. Slater's approach surprised one of the men. App. 442, ll. 8 – 18. The man turned to Slater. App. 442, ll. 8 – 18. The man had a gun in his hand. App. 442, ll. 8 – 18. When Slater saw the gun, he ran. App. 442, ll. 8 – 18. Slater heard a gunshot. App. 442, ll. 8 – 18. He returned fire. App. 442, ll. 8 – 18. On cross-examination, Slater was forced to admit that the evidence at trial showed that bullets fired from his gun killed the decedent. App. 473, ll. 9 – 16.

In its opinion finding that a self-defense charge was not warranted, this Court placed great emphasis on the fact that Slater was unlawfully in possession of a pistol. App. 742-43. The reason for this was Slater was nineteen years old, and the law at the time required a person to be twenty-one years old in order to possess a pistol. See S.C. Code Ann. § 16-23-30(A)(3) (2001). This statute was amended in 2008 to allow persons eighteen years and older to possess a handgun. See 2008 Act No. 192, § 1, eff. Apr. 2, 2008, *and current version of* S.C. Code Ann. § 16-23-30(A)(3) (2001). This Court held that “Slater’s unlawful possession of the weapon was the proximate cause of the homicide.” App. 743.

The Defective Miranda Warning and Slater’s Statements

On February 4, 2001, at approximately 5:00 AM, Slater was arrested at his house by Officer Chris Widmer (“Widmer”). App. 318, l. 19 – 321, l. 19. Widmer read Slater his Miranda rights. App. 321, ll. 20 – 22. Widmer testified that he used a card to read Slater his Miranda warnings. App. 321, l. 23 – 301, l. 22. Widmer’s card did not contain the warning that Slater could stop speaking with the police at any time. App. 322, ll. 9 – 22; App. 334, ll. 3 – 9. Widmer did not obtain a written waiver from Slater.

According to Widmer’s testimony before the jury, Widmer made several statements. First, Slater supposedly said that the police “were mistaken” in apprehending him. App. 323, ll. 4 – 7. Widmer asked Slater if he owned any guns. App. 324, ll. 4 – 10. Slater admitted that he owned a nine millimeter pistol and a .25 caliber pistol. App. 324, ll. 8 – 12. Widmer then testified that based, in part, on the information Slater provided about these handguns, the police obtained a search warrant for Slater’s residence. App. 324, l. 13 – 325, l. 5. A nine millimeter handgun was found in the closet of Slater’s bedroom. App. 325, l. 23 – 326, l. 9. This handgun was later determined to be the weapon that fired the bullets that killed the decedent. App. 372, ll. 18 – 23. Officer Widmer

further testified that Slater admitted being at the high school, had heard shooting, but that he did not shoot anyone. App. 327, ll. 2 – 10.

Discussion

Trial counsel provided constitutionally ineffective assistance that prejudiced Slater. Trial counsel failed to move to suppress Slater's statements as well as the evidence obtained pursuant to the search warrant because the Miranda warnings given to Slater omitted that he had a right to stop answering questions at any time. In a post-conviction relief proceeding, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997).

At the PCR hearing, trial counsel admitted that he failed to object to Slater's statements based on Widmer's defective Miranda warnings both at the Jackson v. Denno, 378 U.S. 368 (1964), hearing and during the trial. App. 768, ll. 7 – 773, l. 21. Trial counsel admitted he had an obligation to object to this testimony and to the trial judge's instructions regarding it. App. 773, ll. 13 – 21.

The PCR court held that trial counsel was not ineffective because Slater received complete Miranda warnings. App. 819. Judge Jefferson also held that Slater was not prejudiced because he continued to answer questions from the police in a similar way after a different policeman gave him

complete Miranda warnings. App. 819-20. Both of these holdings are erroneous and should be reversed.

At the time of Slater's arrest, the binding appellate precedent concerning Miranda warnings was State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1997) *aff'd as modified* 333 S.C. 426, 510 S.E.2d 714 (1998). In Kennedy, the Court of Appeals held that:

A suspect in custody may not be subjected to interrogation unless he is informed that: [1] he has the right to remain silent; [2] anything he says can be used against him in a court of law; [3] he has a right to the presence of an attorney; [4] if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires; **and [5] he has the right to terminate the interrogation at any time and not to answer any further questions.**

Id. at 303, 479 S.E.2d at 842 (emphasis added). The emphasized language in Kennedy—the right to stop answering questions—is known as the “Fifth Warning.” See Commonwealth v. Lewis, 371 N.E.2d 775, 776-77 (Mass. 1978). Giving the Fifth Warning—as opposed to omitting it—is recognized as the better practice for police. Id. The Fifth Warning comes directly from Miranda, which states, “Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” Miranda, 384 U.S. at 473 – 74.

While appellate counsel acknowledges that the Fifth Warning had not been mandated by the United States Supreme Court at the time of Slater's arrest, it had been recognized as one of the warnings required in South Carolina by the Court of Appeals in Kennedy. The PCR court cited State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973) for the proposition that the Fifth Warning was not required by South Carolina. App. 819. While this is a correct statement of the holding of Cannon, the Court of Appeals' decision in Kennedy came after twenty-four years of additional jurisprudence on Miranda warnings. The Kennedy court's recitation of the required Miranda

warnings was binding on the trial court and was not an unreasonable interpretation of Miranda. But see State v. Hoyle, 397 S.C. 622, 626-29, 725 S.E.2d 720, 722-24 (Ct. App. 2012) (stating that recitation of the Fifth Warning in Kennedy was dicta and Cannon controlled result). In fact, the second officer to question Slater gave him the Fifth Warning. App. 345, ll. 12 – 17.

In Davis v. United States, 131 S.Ct. 2419 (2011), the court held that police may rely in good faith on “binding appellate precedent” even when such precedent is in error. Davis, 131 S.Ct. at 2434. This Court adopted the good faith rule of Davis in State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012). If this Court determines that Kennedy was an erroneous decision, the logic of Davis should be equally applicable to errors in favor of criminal defendants. Kennedy was in force at the time of Slater’s arrest and it is undisputed that the warnings given by Officer Widmer did not comply with Kennedy. By the Davis and Brown Courts’ reasoning, the error should inure to Slater’s benefit and this Court should find that as of the time of Slater’s arrest, binding appellate precedent required the giving of the Fifth Warning.² The PCR court also found that trial counsel was credible and trial counsel admitted he should have objected on this ground. App. 819. Therefore, the PCR court erred in finding that the Fifth Warning was not required and trial counsel was not ineffective.

The PCR court also erred in finding that Slater was not prejudiced. Slater’s statements after the defective warning had two effects. First, they directly led police to the weapon that killed the decedent. Had the statement been suppressed, the search of Slater’s residence also would have been suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). Had the handgun been suppressed, it is extremely likely that Slater would have been acquitted.

² Slater also urges this Court to require police to give the Fifth Warning. It clearly affords defendants greater protection of their right against self-incrimination under both the federal and South Carolina Constitutions. S.C. Const. art. I, § 12.

Second, Slater's statements that he had nothing to do with the shooting were later used to impeach his credibility when he testified at trial. On cross-examination, the following occurred:

Q. Asked a lot of questions. One of the questions was, did you have a gun in your car. You told him no; didn't you?

A. Yes, sir.

Q. That was a lie; wasn't it?

A. Yes, sir.

Q. He asked you, did you ever shoot a gun that night, and you told him no; didn't you?

A. Yes, sir.

Q. That was a lie; wasn't it?

A. Yes, sir.

Q. You've had nine months to make up the lies we've heard today; haven't you?

A. No, sir.

App. 472, ll. 12 – 25. This cross-examination undoubtedly damaged Slater's credibility and made it less likely that the jury would believe his testimony. Had Slater's credibility not been impeached, there was a reasonable possibility the outcome of the trial would have been different.

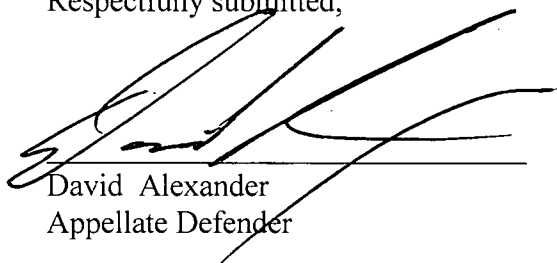
Finally, the PCR court erred in holding that Slater was not prejudiced because he continued to speak with police after being given a correct Miranda warnings. The police cannot cure defective Miranda warnings with correct Miranda warnings after incriminating information is elicited. State v. Navy, 386 S.C. 294, 301–04, 688 S.E.2d 838, 841–43 (2010); Missouri v. Seibert, 542 U.S. 600 (2004). By the time Slater was given correct Miranda warnings, he had already told police the location of his gun and admitted that, as a nineteen-year-old, he had violated the law by possessing a

handgun. He was also “locked in” to his story. Whether the police intend to subvert Miranda is not determinative. Navy at 304, 688 S.E.2d at 842. Therefore, the PCR court erred as a matter of law in finding that Slater suffered no prejudice because of his later statements to the police.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and order further briefing with the ultimate relief of the reversal of Slater’s conviction, the suppression of his statements to police, and the suppression of any evidence obtained as a result of statements he made to police.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and somewhat cursive.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Stephanie P. McDonald, Circuit Court Judge

LORD BYRON SLATER,

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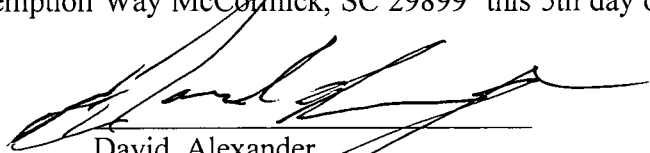
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212846

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. Lord Byron Slater 279992 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899 this 5th day of August, 2013.

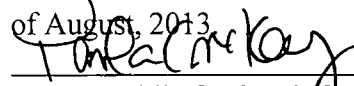


David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day

of August, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.