

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 5903

THE STATE,

APPELLANT,

V.

PHILLIP WAYNE LOWERY,

RESPONDENT.

APPELLATE CASE NO. 2022-000806

RESPONDENT'S PETITION FOR REHEARING

Comes now Respondent Phillip Wayne Lowery, by and through his undersigned counsel, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court to rehear this matter. Respondent requests that this Court grant rehearing because the basis relied upon by the Court, the admissibility of spontaneous and voluntary statements made during a custodial interrogation without the benefit of Miranda¹ warnings, was not briefed or argued during Respondent's original trial, before the Court of Appeals. This issue was not briefed by either party before this Court. During oral argument on March 26, 2024, this Court questioned counsel

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

for both parties on the potential impact of Respondent's statements being seen as spontaneous rather than from interrogation. At that time, Respondent's counsel indicated that the short and continual nature of the interaction would not have removed the taint of the Miranda violation and referenced Missouri v. Seibert, 542 U.S. 600 (2004) for guidance on the issue.

On July 17, 2024, this Court issued an opinion reversing in part the decision of the Court of Appeals in State v. Lowery, 436 S.C. 349, 872 S.E.2d 197 (Ct. App. 2022). In reversing, this Court found that “[i]f Lowery was in custody, these initial incriminating statements to Trooper Vallin were inadmissible; however, we need not to decide whether Lowery was in custody, as Lowery later volunteered other equally incriminating statements that he was driving. Lowery made these later statements spontaneously and not in response to anything Trooper Vallin said or did.” State v. Lowery, No. 2022-000806 at 5 (S.C. July 17, 2024).

The statements being spontaneous utterances outside the impact of the custodial interrogation was not an issue before this Court. The lower court admitted all of respondent's statements on the basis that he was not in custody at the time since the matter involved a routine traffic stop. On this issue, the Court of Appeals reversed, finding this Court's decision in State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) removed the present case from the context of a routine traffic stop and placed it into a custodial setting. On this point, this Court has affirmed the Court of Appeals, noting “[t]he investigation was no longer a routine traffic stop and was instead a targeted investigation following a search for the driver of a missing vehicle.” State v. Lowery, No. 2022-000806, at 6.

The Court of Appeals ruled, narrowly, that Respondent was subject to custodial interrogation requiring Miranda warnings. See State v. Lowery, 436 S.C. 349, 358–59, 872 S.E.2d 197, 202 (Ct. App. 2022). This Court agreed that initial interactions between Respondent

and Trooper Vallin was an interrogation to illicit incriminating responses: “During the first thirty-three seconds of the video, Trooper Vallin, without Mirandizing Lowery, questioned Lowery as to where he had been before arriving at the Spinx parking lot and how Lowery was able to drive with a flat tire. These questions were ‘interrogation,’ as they were reasonably likely to elicit incriminating responses.” State v. Lowery, No. 2022-000806, at 6.

Rather than address the impact of whether the encounter was custodial in nature, as found by the Court of Appeals, this Court’s opinion focused on statements that Respondent made during the recorded interaction that were not in response to direct questioning by Trooper Vallin. Respondent acknowledges that truly spontaneous statements that are “not the product of interrogation or its functional equivalent” do not violate Miranda “even if the defendant is in custody when the statements are made.” United States v. Ivey, 60 F.4th 99, 112 (4th Cir.), cert. denied, 144 S. Ct. 160, 217 L. Ed. 2d 59 (2023). As this point has become part of the basis for the Court’s ruling, Respondent would respectfully assert that the Court did not fully consider the factors required in evaluating such statements before the taint of the immediate Miranda violation has worn off to allow the incriminatory statements to be considered truly spontaneous.

Respondent would argue that the admissibility of any potentially spontaneous statements, made during interrogation in violation of Miranda, need to be evaluated under the Seibert factors to determine if they were in fact spontaneous in nature or the result of the improper interrogation itself. As this Court noted in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), that requires an evaluation of:

- 1) the completeness and detail of the question and answers in the first round of interrogation;
- 2) the timing and setting of the first questioning and the second;
- 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.

Id. at 302, 688 S.E.2d 841-42. “The concern of the Court in *Miranda* was that the ‘interrogation environment’ created by the interplay of interrogation and custody would ‘subjugate the individual to the will of his examiner’ and thereby undermine the privilege against compulsory self-incrimination.” Rhode Island v. Innis, 446 U.S. 291, 299 (1980). The failure to evaluate the impact of the prior interrogation by Trooper Vallin on the alleged spontaneous statements undermines the privilege against self-incrimination.

In the present case, there is no temporal break between the questioning and the allegedly spontaneous utterances.² As this Court has held, Trooper Vallin interrogated Respondent with questions regarding his driving, damaged vehicle tire, the accident, and his drinking over the course of his very first interaction with Respondent (“What happened?”) and during the first minute and twenty seconds of the recorded video interaction.³ For the Respondent’s statements that were made just after this period of interrogation, this Court erred in determining they were not the result of the immediately preceding custodial interrogation in violation of Miranda. The inculpatory statements uttered by Respondent from the 1:20 time stamp, when Trooper Vallin’s interrogation ends, and 1:58 time stamp, are all simply Respondent repeating the answers he has already provided Trooper Vallin.

This thirty-eight second lapse between active interrogation and Respondent continuing to talk to Trooper Vallin taints the “voluntary” nature of the “spontaneous” utterances. The subject matter of the custodial questions and answers and these statements are the same. There is a

² In this regard, the conduct of the Greenville County deputies before the camera records Trooper Vallin’s interaction with Respondent could also be a factor. To the extent that the record inadequately addresses this very issue, the spontaneous nature of the utterances was not argued during trial or put before the Court of Appeals or this Court by the parties.

³ State’s Exhibit 1.

limited break in time (seconds) and no change in setting between the custodial questioning and the alleged spontaneous utterances. The police personnel are the same. Trooper Vallin treats the earlier, custodial interrogation, as continuous with the later interactions with Respondent.⁴

As the state bears the burden to establish the statements were spontaneous and not the result of custodial interrogation, the Seibert factors, as outlined by this Court in State v. Navy, provide the lower courts with some guidance in future cases in evaluating similar situations. Absent such guidance from this Court, a broad reading of the Court's decision in this case will effectively encourage Miranda violations. Law enforcement will be able to actively question those under arrest to elicit incriminating information in intentional violation of Miranda and simply allow the video technology to record any "spontaneous" statements suspects may make while under the pressure and compulsion of the earlier, inadmissible statements. Even more chilling, law enforcement without the watchful eye of such recording equipment will simply be able to violate the requirements of Miranda and wait for a suspect to spontaneously provide potentially useful statements.

There is a line when the impact of custodial interrogation will give way to spontaneous statements. During oral argument, the scenario of an interrogation room video recording a suspect talking to himself after officers leave the room following an interrogation that violated Miranda was posed. In such a setting, the question will be whether the spontaneous statements are "sufficiently an act of free will to purge the primary taint" of the Miranda violation. Wong

⁴ Respondent would concede, as the video progresses beyond the immediate custodial interrogation, statements made later in time would be a closer call as to being truly spontaneous. However, the burden of proof that the statements are free and voluntary is always on the state. Statements made three minutes and forty seconds into the interaction with Trooper Vallin ("I guess I screwed up, I can't lie about it.") would be evaluated in the context of the delay between the original, custodial interrogation and that utterance. The longer the temporal delay, the more likely such statements are truly spontaneous in nature.

Sun v. United States, 371 U.S. 471, 486 (1963). The Seibert factors will provide trial courts with the tools required to solve that very problem. In the present case, those tools require suppression of the allegedly “spontaneous” statements as they are the product of the Miranda violation.

Other courts addressing this issue have also looked to portions of the Seibert factors for guidance. In State v. Martin, 816 N.W.2d 270, 283 (Wis. 2012), the Wisconsin Supreme Court addressed the claim that spontaneous responses obtained during a custodial interrogation in absence of Miranda warnings may be admissible but “there must be a break between the two exchanges, evidenced by factors like a lapse in time, change in personnel, change in location, or change in the content of the questions and answers.” In Millhausen v. United States, 253 A.3d 565, 573 (D.C. 2021), the District of Columbia Court of Appeals held there was “no basis for concluding that brief periods of silence and brief discussion of more benign topics eliminated the coercive effects of the ongoing Miranda violation. Relatedly, we see no basis for artificially dividing the single ongoing interrogation in this case into a series of discrete incidents and treating some of the statements during that interrogation as ‘volunteered’ simply because they did not immediately follow a specific question.” The Fourth Circuit’s decision in Ivey was careful to differentiate the statements from custodial interrogation, noting they were “unprompted by questioning from the officers” as opposed to the present case in which the statements were in continuation of the conversation prompted by the officers and during a very short time period. Ivey, 60 F.4th at 112.

The Court’s opinion on the admissibility of allegedly spontaneous and voluntary statements made during an active and ongoing custodial interrogation without the benefit of Miranda warnings fails to provide the lower courts with guidance on balancing the impact of the improper custodial interrogation on the contemporaneous utterances of a suspect while under the

compulsion of such interrogation. Respondent respectfully requests that this Court reconsider its opinion on this issue and either affirm the Court of Appeals on the narrow issue raised by the parties or allow rehearing.



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This 1st day of August, 2024.