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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marion County

Thomas A. Russo, Circuit Court Judge

WAYNE MCLAUGHLIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

SUPPLEMENTAL APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Wayne McLaughlin, Appellant.

Appeal From Marion County
Howard P. King, Circuit Court Judge

Unpublished Opinion No. 2010-UP-503
Submitted October 1, 2010 – Filed November 12, 2010

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Christina J. Catoe, all of Columbia; and Solicitor Edgar L. Clements, III, of Florence, for Respondent.

PER CURIAM: Wayne McLaughlin was convicted of possession with intent to distribute cocaine base and possession with intent to distribute cocaine and was sentenced to two concurrent terms of twenty-five years. McLaughlin appeals, asserting the trial judge erred in (1) admitting incriminating evidence at trial based on the arresting officer's failure to advise him of his Miranda**[1]** rights, and (2) refusing to remove and replace a sleeping juror. We affirm**[2]** pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether the trial judge erred by admitting incriminating evidence at trial when the arresting officer failed to advise McLaughlin of his Miranda rights while he was in police custody: State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (noting that, generally, a motion in limine is not a final determination and a contemporaneous objection

must be made when the evidence is introduced at trial, unless the ruling on the motion in limine is made immediately prior to the introduction of the evidence in question); Doe v. U.S., 487 U.S. 201, 211 (1988) (providing, "[i]t is the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind, that implicates the Self-Incrimination Clause") (internal quotation marks and citations omitted); Id. at 210 n. 9 (implying that being forced to surrender a key to a strongbox containing incriminating documents would not amount to testimonial communication).

2. As to whether the trial judge erred in refusing to remove and replace a sleeping juror: State v. Smith, 338 S.C. 66, 74, 525 S.E.2d 263, 267 (Ct. App. 1999) (noting a showing of prejudice must be made to warrant relief in juror misconduct cases); Id. at 73, 525 S.E.2d at 266-67 (finding where the trial judge concluded the juror was awake and listening with her eyes closed, the trial judge made the requisite factual finding regarding whether the juror was asleep and need take no further action); Id. at 75, 525 S.E.2d at 268 (holding, because defendant bore the burden to show the juror was actually asleep, failure to request direct examination of the juror waived any complaint on appeal).

AFFIRMED.

FEW, C.J., and HUFF and GEATHERS, JJ., confirm.

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

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WAYNE MCLAUGHLIN,

APPELLANT

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The trial judge erred by admitting incriminating evidence in at trial because the arresting officer failed to advise appellant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), while he was in police custody.

2. The trial judge erred in refusing to remove and replace the sleeping juror in the case.

STATEMENT OF THE CASE

Appellant Wayne McLaughlin was convicted per a jury trial of possession with intent to distribute crack cocaine and possession with intent to distribute cocaine during the May 2008 term of the Marion County General Sessions Court before the Honorable Howard P. King, Judge. Appellant received two concurrent sentences of twenty-five years imprisonment on the convictions. Appellant appealed. This brief follows.

QUESTION I

The lower court erred by admitting incriminating evidence in at trial because the arresting officer failed to advice appellant of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), while he was in police custody.

Marion County police detective Neil Rouse testified that he and Officers Brian Wallace and Simon Brown executed a search warrant at W.T.'s Lounge located in Marion County on January 19, 2007. Officer Rouse stated that appellant, who was believed to have been the club proprietor, was arrested and detained on that date and transported to the club in order to give him an opportunity to open up the club rather than have the fire department destroy the club in order to gain entry inside the club. Rouse stated that appellant made a way for the production of a key to open up the club, and added that once they were inside the club appellant made the comment "it is on the shelf in the kitchen." Thereafter, the drugs were seized from the kitchen. Tr. p. 43, line 22 – p. 54, line 10; Tr. p. 69, line 6 – p. 73, line 16. Appellant did not testify at trial.

Immediately prior to trial and during a separate pre-trial hearing, the defense moved to exclude testimony regarding appellant's production of the keys to the club as non-testimonial evidence and to suppress appellant's statement regarding the whereabouts of the drugs because appellant was in custody (actually arrested and handcuffed) at that time, but never received his warnings per Miranda v. Arizona, supra, subsequent to his arrest. Tr. p. 5, line 9 – p. 11, line 9; Tr. p. 12, line 17 – p. 14, line 21. Clearly, the submission of this evidence which the defense requested be excluded/suppressed prejudiced appellant's case because the fact that appellant was able to produce a key to the club suggested and implied his possessory interest in the club (actual or constructive) and in the drugs inside the club.

The judge ruled that the production of the key did not require Miranda protection and that appellant's statement was given voluntarily. Tr. p. 14, line 22 – p. 17, line 8.

A statement obtained as a result of a custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966). One is in custody when one is deprived of the freedom of action in any significant way. State v. Ledford, 351 S.C. 83, 567 S.E.2d 904 (2002) *citing to* State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) quoting Miranda, 384 U.S. 436, 444. Also, an interrogation is either the express questioning or its functional equivalent. State v. Ledford, State v. Kennedy, 333 S.C. 426, 510 S.E.2d 714 (1998). Here, it was clear that appellant was in custody as he had been arrested and was handcuffed and driven three miles from the place of arrest to the club location. Tr. p. 56, line 25 – p. 57, line 1; Tr. p. 90, lines 21 – 25. Appellant was not free to leave while being driven to the club and he was not free to leave when he arrived at the club. Thus, appellant was clearly in custody. Then, the functional equivalent of an interrogation followed when officers told appellant that they "were going to cut the lock or he could get [them] the keys" after which time appellant made a way for the production of the keys. Tr. p. 58, lines 18 – 24; Tr. p. 75, lines 9 – 17. The inference drawn was related to his ownership. Afterward, the drugs were found inside the club.

Clearly, appellant should have been advised per Miranda upon his arrest and before he gave the police the incriminating non-testimonial evidence via the production of the keys and the statement that followed. Compare the non-testimonial evidence in State v. Clute, 324 S.C. 584, 480 S.E.2d 85, where the court held that the admission of the videotaped sobriety tests administered after the defendant's DUI arrest constituted improper evidence because he did not receive the Miranda warnings after he was stopped by police. Compare

Pennsylvania v. Muniz, 496 U.S. 582 (1990), where the court held that a DUI arrestee who had to count per the field sobriety test qualified as a response to a custodial interrogation. Here, the lower court erred in allowing the admission of incriminating evidence in the case because the arresting officer failed to advise appellant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966) while he was in police custody, which in turn violated appellant's rights under the Fifth and Sixth Amendments to the United States Constitution and article 1 §12 and §14 of the South Carolina Constitution.

QUESTION II

The trial judge erred in refusing to remove and replace the sleeping juror in the case.

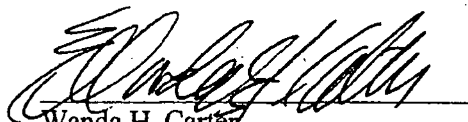
At the close of the judge's charge, appellant's counsel moved to have a sleeping juror moved from the jury panel. Counsel reported that said juror slept "pretty much all day" and that she slept through his and the solicitor's closing statements and "his honor's entire charge." Tr. p. 15, line 8 – p. 152, line 7. The court denied the motion. Tr. p. 152, lines 17 – 22; Tr. p. 153, lines 1 – 9.

A sleeping juror is considered a form of juror misconduct. The misconduct of a juror is a fact to be determined by the trial judge and the test is whether in fact there was misconduct and, if so, whether any harm resulted to the defendant as a consequence. State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (2000); State v. Hurd, 325 S.C. 384, 480 S.E.2d 94 (1996). In Hurd, the court held the trial judge should at least make a determination regarding the validity of a sleeping juror claim. In Smith, the trial judge, who made a determination concluding that the juror accused of misconduct was awake and listening with her eyes closed, was found not to have erred in failing to remove said juror. Here, the trial judge admitted that the juror in question had her head down and that she had her head back and that she "may not have been the most alert juror." Clearly, the trial judge erred in refusing to remove the sleeping juror in this case in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article 1 §14 of the South Carolina State Constitution.

CONCLUSION

Based on the following, the appellant's convictions and sentences should be reversed and this case remanded to the lower court for a new trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT.

August 3, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Howard P. King, Circuit Court Judge

THE STATE,

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APPELLANT

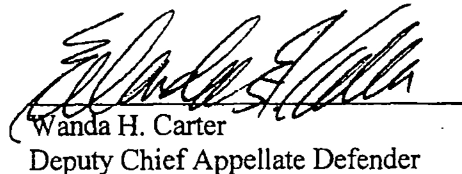
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True-billed indictment(s);
(2) Entire Trial Transcript dated May 22, 2008;
(3) Motion to Suppress;
(4) Entire Trial Transcript dated May 27 – 28, 2008

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

August 3, 2009



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Howard P. King, Circuit Court Judge

THE STATE,

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WAYNE MCLAUGHLIN,

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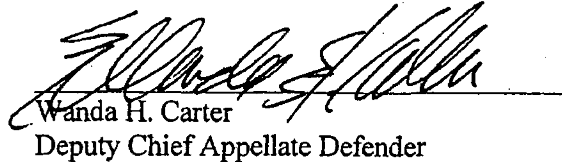
CERTIFICATE OF SERVICE

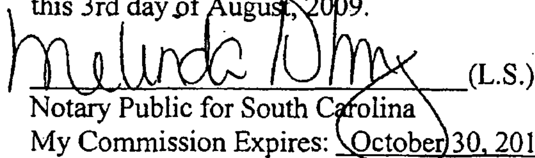
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 3rd day of August, 2009.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 3rd day of August, 2009.



_________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018 .