

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2012-212846

LORD BYRON SLATER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
#100269

ATTORNEYS FOR RESPONDENT

RECEIVED

OCT 21 2013

S.C. Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985).	3
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).	3, 4
<u>Duckworth v. Eagar</u> , 4921 U.S. 195 (1989).	4
<u>Miranda v. Arizona</u> , 384 U.S. 486 (1966).	4, 5, 6, 7
<u>Missouri v. Seibert</u> , 542 U.S. 600 (2004).	7
<u>State v. Cannon</u> , 260 S.C. 537, 197 S.E.2d 678 (1973).	5, 6
<u>State v. Hoyle</u> , 397 S.C. 622, 725 S.E.2d 720 (Ct. App. 2012).	4, 5, 6
<u>State v. Kennedy</u> , 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996).	6
<u>State v. Navy</u> , 386 S.C. 294, 688 S.E.2d 838 (2010).	7
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).	3, 4
<u>Wolfe v. State</u> , 326 S.C. 158, 485 S.E.2d 369 (1997).	4

QUESTION PRESENTED

- I. Is there probative evidence to support the lower court's ruling that counsel was not ineffective for failing to move to suppress the Petitioner's statement and evidence flowing from the statement when the Miranda warning given the Petitioner was complete and South Carolina courts do not require advisement of the right to terminate questioning at any time?

STATEMENT OF THE CASE

For purposes of this Return, the Respondent adopts the Petitioner's Statement.

ARGUMENT

There is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to move to suppress the Petitioner's statement on the basis that the Miranda warning given was incomplete when South Carolina courts do not require Miranda warnings include the right to terminate questioning at any time.

The Petitioner asserts that the post-conviction relief court erred by finding counsel was not ineffective for failing to move to suppress the Petitioner's statements and evidence flowing from the Petitioner's statement. The Petitioner argues counsel should have objected to the admission of his statement on the basis that the Petitioner was not given adequate Miranda warnings since the first warning given to the Petitioner did not include the right to stop or terminate questioning at any time. The Respondent submits probative evidence exists to support the post-conviction relief court's findings that counsel's performance was not ineffective and that the Petitioner received complete Miranda. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Petitioner did not satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The Respondent submits counsel was not ineffective for failing to move to suppress the Petitioner's statement on the basis that his first Miranda¹ warning was incomplete because it did not include an advisement to the Petitioner on the right to stop or terminate questioning at any time. "To give force to the Constitution's protection against compelled self-incrimination, the United States Supreme Court established in Miranda certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation". State v. Hoyle, 397 S.C. 622, 626, 725 S.E.2d 720. 722 (2012) (quoting Duckworth v. Eagar, 492 U.S. 195, 201 (1989)). The Miranda court held that a suspect in custody must be warned of the following rights:

1. He has the right to remain silent.
2. Anything he says can be used against him in a court of law.
3. He was the right to the present of an attorney.

¹ Miranda v. Arizona, 384 U.S. 486 (1966).

4. If he cannot afford an attorney one will be appointed to him prior to any questions if he so desires. Id.

The testimony presented a trial shows the Petitioner was questioned on two occasions by two different police officers. The Petitioner is challenging the first Miranda warning given.² First, the Petitioner was questioned by Officer Chris Widmer. Officer Widmer testified he advised the Petitioner of his rights after arrest. (App. 321:20-22). He testified his advice to the Petitioner pursuant to Miranda was as follows:

Before we ask you any questions you must understand you have the right to remain silent. Anything you say can be used against you in Court. You have the right to talk to a lawyer for advice before we ask you questions and have a lawyer present while you're being requested. If you cannot afford a lawyer, one will be appointed for you before any questions—before any questioning, if you wish. (App. 67:5-15).

Based on this testimony, the advisement provided to the Petitioner was complete and included all the warnings required by Miranda. The Respondent submits counsel could not have been ineffective for failing to object to the warning given by Officer Widmer because the warning given was complete.

The Respondent also submits this Court should look to State v. Cannon and State v. Hoyle as they are both dispositive on this issue of whether Miranda requires advice on the right to terminate questioning at any time. In Cannon, the defendant alleged his initial warnings were insufficient and incomplete because they did not include the following: "If you decide to answer any questions without a lawyer present, you will still have the right to stop answering at any time or until you talk to a lawyer." 260 S.C. 537, 543, 197 S.E.2d 678, 680 (1973). This Court held that Miranda v. Arizona, 384 U.S. 486 (1966), did not require the inclusion of the above when informing a person of his rights. Id.

² The Petitioner was given Miranda warnings a second time by Officer Doug Hester. Officer Hester's testimony indicates he advised the Petitioner of his right to terminate or stop questioning at any time. (App. 79:6-10).

In Hoyle, the defendant alleged the officer did not advise him that he had a right to terminate interrogation at any time and to not answer any further questions. 397 S.C. 622, 725 S.E.2d 720 (2012). Like the Petitioner, Hoyle relied on State v. Kennedy, and argued this fifth warning was required. 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996). The Court held the language of Miranda is clear that the right to terminate the interrogation at any time and to not answer any further questions is not a required Miranda warning. It held further Miranda only requires four warnings, and the United States Supreme Court did not include the right to terminate the interrogation at any time as one of the four warnings. Id. at 627, 479 S.E.2d at 723. The Hoyle Court went on to conclude the South Carolina Supreme Court does not interpret Miranda to require an oral or written warning on the right to terminate an interrogation at any time and not to answer any further questions. Id. at 629, 479 S.E.2d at 724.

The Petitioner asserts this Court should rely on State v. Kennedy, however, this was the same argument advanced by the defendant in Hoyle and rejected by the Court of Appeals. In Hoyle, the Court of Appeals held the language in Kennedy that seemed to imply the recognition of a fifth warning was dicta and that Cannon served as the controlling precedent for purposes of review. Id.

The Respondent submits counsel's performance was reasonable under the circumstances. Counsel adequately challenged the admissibility of the Petitioner's statement by requesting a Jackson v. Denno hearing and by adequately cross-examining the witnesses presented by the State during the hearing. In light of the controlling case law on this issue, counsel was not ineffective for failing to move to suppress the Petitioner's statement on the basis that the initial Miranda warning he received did not include advisement on the right to terminate questioning.

The Respondent also submits the Petitioner was not prejudiced in any way by counsel's performance. Any motion made on this basis would have been futile and meritless. In support of his prejudice argument, the Petitioner asserts "the police cannot cure defective Miranda warnings with correct Miranda warnings after incriminating information is elicited" and cites Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010)³ in support of this assertion. The Respondent submits this Court need not address the inability of the Petitioner's second Miranda warning to cure the omission of the fifth warning because the initial Miranda warning given to the Petitioner was not defective. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry his burden of proving both deficiency and prejudice as a result of counsel's failure to move to suppress the Petitioner's statements on the basis that he was not advised before giving his initial statement that he could stop or terminate the questioning at any time.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.


[Signature on the following page.]

³ Seibert and Navy both dealt with the admissibility of statements that were the result of the police practice of questioning a suspect until information is elicited and then administering Miranda warning. Nothing in the record indicates this type of police practice was present in the Petitioner's case.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: 

Ashleigh R. Wilson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

Oct. 21, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Stephanie P. McDonald, Circuit Court Judge

LORD BYRON SLATER

Petitioner,

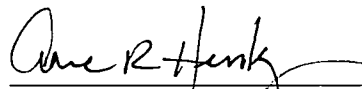
v.

STATE OF SOUTH CAROLINA,

Respondent.

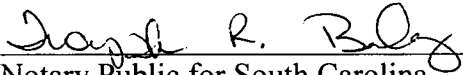
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Returns to Petition for Writ of Certiorari has been served upon opposing counsel, David Alexander, this 21st day of October, 2013.



Anne R. Henley
Legal Assistant

SWORN to before me this
21st day of October, 2013.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 8/22/2022



ALAN WILSON -
ATTORNEY GENERAL

October 21, 2013

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Lord Byron Slater v. State of South Carolina
2011-CP-10-3361
Appellate Case No. 2012-212846

RECEIVED

OCT 21 2013

Dear Mr. Shearouse:

S.C. Supreme Court

Enclosed please find the original and six (6) copies of the Respondent's Returns to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this return today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: David Alexander, Esquire