ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2012-212013

The State, Appellant,

vs.

Raymond Franklin, Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. The trial court abused its discretion in finding the second statement given by Respondent was involuntary. The only evidence in the record indicates the statement was not induced by threats or violence, obtained by any direct or implied promises, nor obtained by the exertion of improper influence such that Respondent's will was overborne. The trial court erred in relying on the fact suggestions were made by the officers in order to find the statement involuntary 3

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Beckwith v. United States, 425 U.S. 341, 343, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976) 8

Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) 4

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) 4

Frazier v. Cupp, 394 U.S. 731, 737–38, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) 8

Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) 4

Jackson v. Denno, 378 U.S. 368, 377, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) 2

Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986) 6, 7

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 4, 5

Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) ... 4

State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) 3

State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) 4

State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) 2

State v. Moses, 390 S.C. 502, 513-514, 702 S.E.2d 395, 401 (Ct. App. 2010) 4

State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) 3

State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008) 8

State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) 3

State v. Register, 323 S.C. 471, 478–80, 476 S.E.2d 153, 158–59 (1996) 7

State v. Rochester, 301 S.C. 196, 199, 391 S.E.2d 244, 246 (1990) 7

State v. Santiago, 370 S.C. 153, 187, 634 S.E.2d 23, 41 (Ct. App. 2006) 4, 5

State v. Von Dohlen, 322 S.C. 234, 245, 471 S.E.2d 689, 696 (1996) 6, 7

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) 3

United States v. Vera, 701 F.2d 1349, 1363–64 (11th Cir.1983) 7

Other Authorities

S.C. Code Ann. § 14-3-330(2)(a) (1976) 2

STATEMENT OF ISSUES ON APPEAL

I. The trial court abused its discretion in finding the second statement given by Respondent was involuntary. The only evidence in the record indicates the statement was not induced by threats or violence, obtained by any direct or implied promises, nor obtained by the exertion of improper influence such that Respondent's will was overborne. The trial court erred in relying on the fact suggestions were made by the officers in order to find the statement involuntary.

STATEMENT OF THE CASE

On December 5, 2011, Respondent was indicted on charges of Assault and Battery Second Degree by the Laurens County Grand Jury. On May 15, 2012, the trial court conducted a pretrial Jackson v. Denno[1] hearing to determine whether two statements made by Respondent were voluntary and admissible. The trial court suppressed one of the two statements.

On May 16, 2012, the State served and filed a Notice of Appeal pursuant to State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), and section 14-3-330(2)(a) of the South Carolina Code (1976), because the circuit court's ruling significantly impaired the State's ability to proceed with the prosecution of the case. This appeal follows.

[1] Jackson v. Denno, 378 U.S. 368, 377, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

ARGUMENT

I. The trial court abused its discretion in finding the second statement given by Respondent was involuntary. The only evidence in the record indicates the statement was not induced by threats or violence, obtained by any direct or implied promises, nor obtained by the exertion of improper influence such that Respondent's will was overborne. The trial court erred in relying on the fact suggestions were made by the officers in order to find the statement involuntary.

The trial court erred in finding the second statement given by Respondent was involuntary.[2] The court's finding is completely unsupported by the evidence in the record. Further, the fact the officers made suggestions of what to include in the statement did not render it involuntary, instead there was absolutely no evidence Respondent's will was overborne by the officers. The only evidence in the record demonstrates the statement was not the product of threat, inducement, or improper influence. Accordingly, the trial court erred in denying admission of the statement.

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). The court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). "On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004).

[2] It should be noted the court found Respondent's first statement voluntary and Respondent's counsel indicated he had no objection to the first statement.

In order to introduce into evidence a confession, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and, if the result of custodial interrogation, was taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." State v. Moses, 390 S.C. 502, 513-514, 702 S.E.2d 395, 401 (Ct. App. 2010). "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.' " Dickerson v. United States, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (citations omitted).

As this Court has explained:

> Coercive police activity is a necessary predicate to finding a confession is not voluntary. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) Coercion is determined from the perspective of the suspect. Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).

State v. Santiago, 370 S.C. 153, 187, 634 S.E.2d 23, 41 (Ct. App. 2006) (internal citations omitted). "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "The appellate entities of South Carolina have recognized that appropriate factors include: background, experience, and conduct of the accused; age; length of custody; police

misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency." Santiago, 370 S.C. at 188, 634 S.E.2d at 42.

First, the State asserted and demonstrated the officers complied with Miranda, to the extent it was necessary. Respondent waived his Miranda rights prior to giving the first statement, and then he waived them again prior to the polygraph examination which immediately preceded the second statement being given. (T.7; 10-11; 27-29; Ct. Exhibit 1; Ct Exhibit 4; R. 7; 10-11; 27-29; 64; 68). Further, it is questionable whether he was in custody requiring Miranda warnings be given at all. As a result, the State properly met its requirement of demonstrating if Respondent was in custody at the time of the statement, he was properly afforded his rights under Miranda.

In addition, there is no indication of a violation of his Miranda rights. Respondent never asked for an attorney, never asked to stop the questioning, and was never denied a break or the ability to leave. As a result, he voluntarily waived his Miranda rights and agreed to talk with the officers. (T. 7-9; 30-31; R.7-9; 30-31).

At the hearing, the State properly argued the determination for whether the statements were voluntary rested on an examination of the totality of the circumstances. Further, the State correctly maintained there was no evidence of coercion, threat, or promises which would cause Respondent's statement to be involuntary. (T.47-51; R. 47-51). The State noted Respondent's education and background in law enforcement, noted Respondent knew his rights and understood his rights; and voluntarily waived his rights. (T.49-50; R. 49-50).

At the hearing, the judge listened to a recording of the polygraph examination and the interrogation of Respondent after its conclusion. Officer Brooks details the deception

detected in the polygraph, especially as it relates to Respondent's touching of the victim's breasts. He tells Respondent he needs to explain the deception and explain how he touched the breasts. Officer Brooks tells him it could help him to have the explanation and is sympathetic to Respondent. (Court Exhibit 7 to be transported to the Court). Respondent, of his own free will, then agrees to write the Statement at issue. (Ct. Exhibit 3; R. 67).

The recording provides no evidence of coercion, threats, or undue influence. The officer is merely attempting to be sympathetic to Respondent's situation while explaining the need to address all of what he continually refers to as "gray areas." During the recording, Officer Brooks repeatedly tells him to address the polygraph results indicating Respondent touched the victim's breast. He tells him that an explanation will be necessary in order for Respondent's side of the story to be believed. He never threatens him or coerces him; instead Officer Brooks merely acts sympathetic to Respondent. The trial court, however, found because the officers made suggestions of what the statement should contain, the statement was involuntary. (T.54-55; R. 54-55).

In State v. Von Dohlen, the South Carolina Supreme Court found empathy by someone who knew the defendant did not render the subsequent statement involuntary. State v. Von Dohlen, 322 S.C. 234, 245, 471 S.E.2d 689, 696 (1996). In doing so, the Court relied on Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986). In Miller, the Court explained:

> [I]t is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. See Haynes v. Washington, supra, 373 U.S. at 514–15, 83 S.Ct. at 1343–44. For example, the interrogator may play on the suspect's sympathies or explain that honesty might be the best policy for a criminal who hopes

> for leniency from the state, see Rachlin v. United States, 723 F.2d at 1378 (agents may have told suspect that it was in his best interest to cooperate, but resulting confession was voluntary); United States v. Vera, 701 F.2d 1349, 1363–64 (11th Cir.1983) (agent told suspect that he could help himself by cooperating, but resulting confession was voluntary). These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary. The question we must answer, then, is not whether Detective Boyce's statements were the cause of Miller's confession—indeed, we assume that to be the case—but whether those statements were so manipulative or coercive that they deprived Miller of his ability to make an unconstrained, autonomous decision to confess.

Miller, 796 F.2d at 605. As in Miller, the question here is whether the sympathy or suggestions made by Officer Booker and Agent Kindly caused Respondent's will to be overborne, whether he had no ability to make an "unconstrained autonomous decision to confess."

This Court and the South Carolina Supreme Court have found the police may empathize with the defendant and may even mislead or misrepresent evidence to the defendant without rendering a statement *per se* involuntary. In State v. Rochester, the South Carolina Supreme Court found the polygraph examiner's statement that it would be in appellant's best interest to tell the truth was insufficient to render a statement involuntary. State v. Rochester, 301 S.C. 196, 199, 391 S.E.2d 244, 246 (1990). The South Carolina Supreme Court has also recognized that misrepresentations of evidence by police, although relevant, do not render an otherwise voluntary confession inadmissible. See Von Dohlen, 322 S.C. at 243, 471 S.E.2d at 695; State v. Register, 323 S.C. 471, 478–80, 476 S.E.2d 153, 158–59 (1996).

Finally, this case is similar to State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008). In Parker, the officer conducting the interrogation made the defendant believe he understood him and that he agreed there was a justification for what he did. The officer testified:

> I did say it with the hopes that I could give Mr. Parker a platform if you will, to admit that he shot Mr. Savage. And I thought it would be easier for him to come out with the admission if he thought that I thought there was some justification for it. And that he was not the bad guy that he had been portrayed or perceived to be; that maybe there was a reason that he shot him. Maybe, you know, maybe he was scared. Maybe he was upset. Maybe Mr. Savage did something that frightened him or upset him and made him shoot. But when I do interviews, you know, I try to create an environment for someone to be comfortable with me, to want to talk to me. And in effect, get if off their chest and have an opportunity to unload.
>
> And that's what I was trying to do with Mr. Parker when I interviewed him, is try to put him at ease, and try to give him an out, if you will, to make that admission. And that's certainly accurate.

Parker, 381 S.C. 68, 78-79, 671 S.E.2d 619, 624. This Court found: "Nevertheless, the 'good guy' approach is recognized as a permissible interrogation tactic." Id. at 89, 671 S.E.2d 619, 630. See also, Beckwith v. United States, 425 U.S. 341, 343, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976) (interrogator had sympathetic attitude but confession voluntary); Frazier v. Cupp, 394 U.S. 731, 737–38, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (confession voluntary when petitioner began confessing after the officer "sympathetically suggested that the victim had started a fight.").

The officer's in this case merely played the "good guy" by encouraging Respondent to give a complete statement and by providing him with assurances they understood his actions. Respondent's will was not overborne, and he freely chose to

accept the suggestions proposed by the officers. He handwrote the statements in his words and there is no evidence he was compelled or coerced into accepting their suggestions. The record contains no evidence Respondent was worn down by improper interrogation tactics such as lengthy questioning, trickery, or deceit. The statement was not induced by force, psychological or physical, or by direct or implied threats. The trial court, by finding the statement *per se* involuntary because the officers suggested language or topics of inclusion, abused his discretion.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court suppressing Respondent's statement be reversed, and the case remanded for trial allowing the admission of the voluntary statement.

Respectfully submitted,

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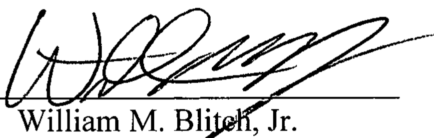

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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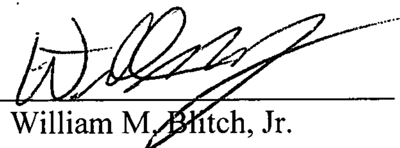
BY: 
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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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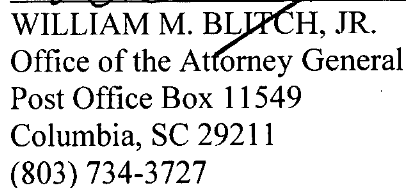
I further certify that all parties required by Rule to be served have been served.
This 25th day of July, 2012.



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