

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case Tracking No.: 2012-212013

The State..... Appellant,

vs.

Raymond Franklin..... Respondent.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. IS THE TRIAL COURT'S ORDER GRANTING RESPONDENT'S MOTION TO SUPPRESS IMMEDIATELY APPEALABLE?
- II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THAT RESPONDENT'S SECOND STATEMENT WAS NOT A VOLUNTARY CONFESSION?

STATEMENT OF CASE

On December 5, 2011 Respondent was indicted on charges of assault and battery 2nd degree by the Laurens County Grand Jury. On May 15, 2012, the Trial Court conducted a pre-trial Jackson v. Denno hearing to determine if a statement made by Respondent dated August 25, 2010 was voluntary and therefore admissible. The Trial Court ruled that the statement was not voluntary and suppressed the statement.

On May 16, 2012, the State served and filed a Notice of Appeal of the Trial Court's ruling at the Jackson v. Denno hearing suppressing Respondent's statement.

ARGUMENTS

Standard of Review

In criminal cases, the Appellate Court seeks 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) The Appellate Court does reevaluate the facts based on its own view of the evidence but simply determines whether the Trial Judge's ruling is supported by any evidence. State v. Kirton, 381 S.C. 7, 671 S.E. 2d 107 (S.C. App. 2008) (*citing State v. Wilson*, 345 S.C.at 6, 545 S.E. 2d 829 (2001))

I. THE TRIAL COURT'S ORDER GRANTING RESPONDENT'S MOTION TO SUPPRESS IS NOT IMMEDIATELY APPEALABLE.

The right of appeal arises from and is controlled by statutory law. Hagood v. Sommerville, 362 S.C. 191, 607 S.E. 2d 707, 708 (2005) (*citing North Carolina Federal Savings and Loan Association v. Twin States Development Corp.*, 289 S.C. 480, 347 S.E. 2d 97(1986)) An appeal ordinarily may be pursued only after a party has obtained a final judgment. State v. Wilson, 387 S.C. 597, 599, 693 S.E. 2d 923(2010) (*citing Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E. 2d 707, 708(2005)) The determination of whether a party may immediately appeal an Order issued before or during trial is governed primarily by § 14-3-330 of the South Carolina Code. An Order generally must fall into one of several categories set forth in that statute in order to be immediately appealable. State v. Wilson, 387 S.C. at 600, 693 S.E. 2d at 924 (*citing Hagood*, 362 S.C. at 195, 607 S.E. 2d 708)

Pursuant to § 14-3-3 of the South Carolina Code,

“The Supreme Court shall have Appellate jurisdiction for correction of errors of law and law cases, and shall review upon appeal: 1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the Court of Common Pleas and General Sessions, brought there by original process or removed there from any

inferior Court or jurisdiction, and final judgment in such actions; provided, that if no appeal be taken until final judgment is entered the Court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from; 2) An order effecting a substantial right made in an action when such order (a) in effect determines the action and prevents judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action; 3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and 4) an interlocutory order or decree in a Court of Common Pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.”

S. C. Code Ann. § 14-3-330

In the case at hand, Respondent is charged with assault and battery 2nd degree stemming from allegations that he inappropriately touched the victim. Respondent gave two (2) written statements. In the first statement, dated August 6, 2010, Respondent admitted to a consensual hugging and kissing of the victim (R.pgs. 65-66). The second statement, dated August 25, 2010, provides additional information, including that Respondent’s hand touched the side of victim’s right breast when they broke from kissing (R.p. 67). The Trial Court granted Respondent’s motion to suppress the second statement on the ground that it was not voluntary. The order is not an order affecting the merits of a case commenced in the Court of General Sessions, it was not entered in a special proceeding or upon a summary application in any action after judgment, and it does not involve an injunction or a receiver in the Court of Common Pleas. Accordingly, the order is not immediately appealable unless it affects a substantial right as defined in South Carolina Code § 14-3-330(2). The order suppressing Respondent’s second statement clearly does not affect the substantial right of the Appellant. The order does not determine the action and prevent a judgment from which an appeal might be taken, it does not grant or refuse a new trial, and it does not strike out an answer or any part thereof or any pleading.

The provisions of § 14-3-330, including sub-section 2, have been narrowly construed, and the immediate appeal of orders issued before or during trial generally has not been permitted. State v. Wilson, 387 S.C. at 601 (*citing Hagood*, 362 S.C. at 196)

Appellant can still present its case despite the absence of the second statement. The victim can testify as to her recollection of the events surrounding this charge. The state can also present Respondent's first statement in which he acknowledges embracing and kissing the victim. This is a typical "he said – she said" case. The state does not normally have the benefit of a Defendant acknowledging that they committed a crime and has to prove the case with other evidence, including the testimony of the victim. The suppression of Respondent's second statement in no way impairs the prosecution of Appellant's case. Accordingly, the Trial Court's ruling is not immediately appealable.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT RESPONDENT'S SECOND STATEMENT WAS NOT A VOLUNTARY CONFESSION.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Kirton, 381 S.C. at 23 (*citing State v. Saltz*, 346 S.C. 114, 121, 551 S.E. 2d 240, 244(2001)) The Trial Judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion. State v. Kirton, 381 S.C. at 24 (*Citing State v. Brazell*, 325 S.C. 65, 78, 480 S.E. 2d 64, 72(1997)) It has been uniformly held, a confession may be introduced upon proof of its voluntariness by a preponderance of the evidence. State v. Washington, 296 S.C. 54, 55, 370 S.E. 2d 611, 612(1998) (*citing State v. Smith*, 268 S.C. 349, 354, 234 S.E. 2d 19, 21(1977)) The prosecution must prove...by a preponderance of the evidence that the confession was voluntary. State v. Washington, 296 S.C. at 55 (*citing Lego v. Twomey*, 404 U.S. 477, 489, 92 S.C.T. 619, 627(1982)) 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. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 624(1966)

The Trial Judge must examine the totality of the circumstances surrounding the confession and determine whether the State has carried its burden of showing the confession was voluntarily made. State v. Santiago, 370 S.C. 153, 185, 634 S.E. 2d 23,

40(Ct. App. 2006) (*citing State v. Childs*, 299 S.C. 471, 475, 385 S.E. 2d 839, 842(1989)) The test of voluntariness is whether a Defendant's will was overborne by the circumstances surrounding the given confession. *State v. Santiago*, 370, S.C. at 186.

A confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence. *State v. Rochester*, 301 S.C. 196, 200, 391 S.E. 2d 244, 246(1990) Certain circumstances may render an innocent Defendant's will to have been overborne resulting in a confession induced by fear of extraneous adverse consequences. *State v. Register*, 323 S.C. 471, 479, 476 S.E. 2d 153, 158(1996) On August 25, 2010, Respondent went to the Greenville County Law Enforcement Center to take a polygraph test. Respondent signed an affidavit acknowledging that he voluntarily agreed to take a polygraph test. (R. p. 68). The affidavit also provided that Respondent understood his Miranda rights and that he wished to waive the same (R. p. 68). Respondent was questioned for one hour and fifty-four minutes during the polygraph test. (R. p. 33, Ins. 20-24) Sergeant Nate Brooks testified that, subsequent to the polygraph test, he questioned Respondent for an additional nineteen (19) minutes. (R. p. 33, Ins. 20-24) However, the CD from the recording lasts approximately fifty-four (54) minutes, which is the amount of time Respondent was held in a room at the Law Enforcement Center subsequent to the polygraph examination. The affidavit signed by Respondent provides that he voluntarily agreed to take a polygraph test. (R. p. 68). The waiver of his rights was also for the polygraph test. (R. p. 37, Ins. 14-16) The affidavit also stated that the (polygraph) examination may be recorded. (R. p. 68). Sergeant Brooks testified that he continued recording his questioning and conversation with Respondent after the polygraph was over. (R. p. 37, Ins. 17-22). Respondent was not given his Miranda warnings prior to the questioning by Sergeant Brooks that took place after the polygraph test was over. Agent Kindly came into the room at the end of the questioning session to get the second statement from Respondent. Agent Kindly did not read Respondent his Miranda rights. (R. p. 19, Ins. 14-17) Agent Kindly also did not tell Respondent he had the right to an attorney, nor did he tell Respondent he could stop at any time. (R. p. 22, Ins. 6-9) The first statement given by Respondent on August 6, 2010 was written on a "Voluntary Statement" Form. (R. p. 65) This statement included an outline of Respondent's Miranda

rights and further included a waiver of those rights. (R. p. 68) The second statement, which is the issue of this appeal, is dated August 25, 2010. It was written on a "Victim/Witness Statement" Form. (R. p. 67) The form does not outline Respondent's Miranda rights nor does it include a waiver of those rights. (R. p. 67) Respondent went to the Law Enforcement Center for the purposes of giving a polygraph test. He signed a waiver of his Miranda rights for the purpose of answering questions at the polygraph. Subsequent to the polygraph test, Respondent was questioned repeatedly by Sergeant Brooks. After being at the Law Enforcement Center for more than two hours, Respondent gave the second statement which was notarized by Agent Kindly. Neither Sergeant Brooks nor Agent Kindly read Respondent his Miranda rights prior to signing the second statement. Furthermore, neither of them told Respondent that the conversation was still being recorded, that he had the right to an attorney, or that he could stop answering questions at any time.

Respondent's statement dated August 6, 2010 outlines his version of what happened regarding the events surrounding the allegations made by the victim in this matter. On August 25, 2010, Respondent was questioned for almost two (2) hours during a polygraph examination. Subsequent to the polygraph examination, Respondent was questioned by Sergeant Brooks of the Greenville County Sheriff's office. Sergeant Brooks told Respondent there were "significant problems" with Respondent's answers during the polygraph examination. (Court Exhibit 7) Sergeant Brooks told Respondent that there were "shades of gray" that needed to be clarified. Sergeant Brooks repeatedly questioned Respondent as to him touching the victim's breast. Sergeant Brooks told Respondent that he needs to "fill in the gaps" regarding touching the victim's breast. Sergeant Brooks repeatedly tells Respondent that he knows that Respondent touched the victim's breast and that he needs to clarify his testimony regarding the same. Sergeant Brooks indirectly threatens Respondent's job as a Deputy with the Laurens County Sheriff's Department. (Court Exhibit 7) Sergeant Brooks tells Respondent that he wants to "put you (Respondent) in the best light with your sheriff" and asks him "what do I tell Chastain," who is the Sheriff of Laurens County. (Court Exhibit 7) Sergeant Brooks also tells Respondent "what I'm worried about is your position down there with the Sheriff's office" and that "she is going to end up with your job". (Court Exhibit 7) Sergeant

Brooks also impliedly promises to help Respondent keep his job. He told Respondent “I feel more obligated to you because of what you do for a living”. Sergeant Brooks also told Respondent that he wants to put Respondent in the best light with the Sheriff. After continuously asking the same question of Respondent and telling Respondent that he needs to clarify his testimony regarding touching the victims’ breasts, Respondent agrees to write another statement. (Court Exhibit 7) Agent Kindly then comes into the room after having spoken with Sergeant Brooks. Agent Kindly told Respondent “I understand that you want to make a statement”. (R. p. 21, lns. 19-20) He further told Respondent “this is what I was told that you wanted to add. If you want to add that, we can put that on your statement.” (R. p. 21, ln. 25 – p. 22, ln. 2) Agent Kindly told Respondent that he wanted him to make an addendum to his previous statement. (Court Exhibit 7) Agent Kindly then told Respondent to “put as much detail as you can remember” and to “describe how your hand went around the side.” (Court Exhibit 7)

There is no question but that Respondent’s will was overborne by the repeated questioning by Sergeant Brooks. Sergeant Brooks would not take Respondent’s version of the facts as his story and continued questioning Respondent until Respondent told Sergeant Brooks what he wanted to hear. The exchange was captured on the audio recording between Sergeant Brooks and Respondent. Sergeant Brooks indirectly threatened Respondent by continuously mentioning Respondent’s boss (Sheriff Chastain) and his job with the Sheriff’s department. He also impliedly promised to help Respondent keep his job by telling he wanted to put Respondent in the best light with the Sheriff and wanted to know what to tell him. Respondent was told what he should put in his statement. Accordingly, the Trial Court properly held that the statement dated August 25, 2010 was not a voluntary confession.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Circuit Court in this matter.

Respectfully submitted,

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July 30, 2013

THE STATE OF SOUTH CAROLINA
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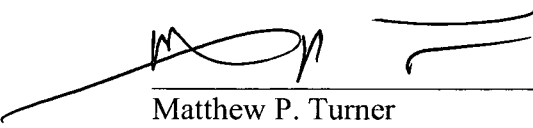
vs.

Raymond Franklin..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent is identical to the Initial Brief, except for inclusion of references to the Record on Appeal, and otherwise complies with Rule 211(b) of the Rules of Appellate Practice.

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PROOF OF DELIVERY

I certify that I have served a copy of the **Respondent's Final Brief** on Alan Wilson, Attorney General and William M. Blich, Jr., Assistant Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, by depositing them in the United States Mail, postage prepaid, on the 2 day of August, 2013.



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August 2, 2013

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