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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 2025-UP-059

THE STATE,

RESPONDENT,

v.

DEVIN JAMEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2019-000938

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Devin Jamel Johnson requests that this Court grant rehearing as to Issue I, because the Court may have overlooked or misapprehended the fact that the denial of a cigarette to a nicotine addict was extraordinarily coercive, as was the threat that Petitioner would never see his child again. This Court may have misapprehended that given the totality of the circumstances, including these two major coercive factors, Petitioner's statement was not voluntarily tendered.

David Osborne interrogated Petitioner on June 10, 2011, two days after Smalls' death. R. 31, l. 13 – R. 32, l. 16; R. 34, ll. 13-15. The five-hour interrogation began with Osborne requesting

a buccal swab from Petitioner pursuant to a search warrant. State's Exhibit #80 at 21:03. Immediately before and after Osborne swabbed Petitioner's mouth, Petitioner asked Osborne *if he could have a cigarette*. Initially, Osborne responded that he *may* be able to work that out. State's Exhibit #80 at 21:05-21:06.

A different officer then read the arrest warrants and left Petitioner with the paperwork. State's Exhibit #80 at 21:08-21:12. After Osborne demanded Petitioner's clothing, Petitioner asked for water *and a cigarette*. Although Osborne agreed, he provided neither. R. 47, ll. 10-12; R. 48, ll. 12-14; State's Exhibit #80 at 21:13-21:14.

At first, Petitioner told Osborne that he was at home in Orangeburg on June 8, 2011. R. 40, ll. 8-15; State's Exhibit #80 at 21:21-21:44. Forty-five minutes into the interrogation, Osborne became exasperated and aggressive. R. 40, l. 22 – R. 41, l. 15; State's Exhibit #80 at 21:45. When Petitioner *again requested a cigarette* an hour into the interview, Osborne informed him *that individuals who cooperate get cigarettes, and individuals who fail to cooperate go to prison*. R. 41, ll. 21-23; State's Exhibit #80 at 22:12. Osborne elaborated on this notion by telling Petitioner that *if he cooperated, he would get a cigarette, but if he failed to cooperate, he would not*. State's Exhibit #80 at 23:46. At another point when Petitioner *requested a cigarette*, Osborne refused stating a cigarette would not change the trouble he was in. State's Exhibit #80 at 22:29-22:30. An hour later, *Petitioner begged for a cigarette*, comparing his nicotine habit to a heroin addict. At this, Osborne responded that *if Petitioner told him what happened, they would walk outside and have a cigarette*. R. 48, ll. 20-24; State's Exhibit #80 at 23:20-23:21. Within minutes, Petitioner *asked for a cigarette* yet again. Osborne responded, *"We are not going to have a cigarette until we get a truthful story out of you."* State's Exhibit #80 at 23:24. Three hours into the interrogation, Petitioner remained

steadfast that he was in Orangeburg and *had requested a cigarette multiple times*. State's Exhibit #80 at 22:05; 22:12; 22:29; 23:20; 23:24; 23:46.

When the show of aggression did not work, Osborne switched gears and threatened Petitioner with his ability to see his daughter again. R. 42, ll. 21-23. Osborne told Petitioner *he would never see his daughter again* because he was facing a murder charge. R. 43, ll. 1-3. Osborne decided to try a new interrogation strategy – allowing Petitioner to contact his mother and girlfriend using Osborne's phone. R. 43, l. 22 – R. 44, l. 7; State's Exhibit #80 at 00:20. Thereafter, approximately four hours into the interrogation, Petitioner stated he was at Georgetown Apartments but denied he was involved in the shooting death of Smalls. R. 45, ll. 11-16.

During the hearing, Osborne admitted that Petitioner asked him repeatedly for a cigarette. R. 36, ll. 3-8; R. 42, ll. 8-11. He further admitted that he had allowed individuals to smoke during interrogations. R. 36, ll. 13-15.

Osborne incredibly testified that he did not think “nicotine [was] that addictive.” R. 47, ll. 22-23. While he admitted that heroin was “a very addictive substance,” he was unwilling to even admit that nicotine was an “addictive substance.” R. 47, l. 24 – R. 48, l. 5.

Defense counsel argued to suppress the statement based upon the totality of the circumstances. First, counsel noted the interrogation “went on for almost 5 hours.” R. 54, l. 19. Second, the denial of nicotine to an addict affected Petitioner's understanding and ability to voluntarily waive his rights. R. 54, l. 23 – R. 55, l. 4. Third, as Osborne mentioned during the interrogation, Petitioner was not familiar with the criminal justice system. R. 55, ll. 5-9. Fourth, the officers threatened Petitioner with the loss of his daughter due to his arrest for murder in order to further manipulate and reduce his will. R. 55, ll. 10-15; R. 56, ll. 20-25. Finally, defense counsel

explained how the police promised Petitioner an opportunity to smoke a cigarette if he would simply give them the information they desired. R. 55, ll. 16-22.

This Court should respectfully reconsider its holding that under the totality of the circumstances, Petitioner's statement was voluntarily made. The denial of nicotine to someone addicted to nicotine should not be viewed any differently than denying drugs to a drug addict until he confessed. The addict's ability to function is dependent on his body receiving that needed drug. Promising the addict that he will get his fix when he gives a statement is incredibly coercive, and this Court respectfully misapprehended the coercive nature of that fact. Petitioner's statement was not voluntary because it was not the product of a free and deliberate choice rather than *intimidation*, *coercion*, or deception. *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *see also State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986).

This Court also overlooked the fact that threatening to take away the defendant's child unless he gave a statement is also unduly coercive and a cruel interrogation tactic. *See State v. Corns*, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992) (holding a statement was involuntary where the police threatened a suspect that his wife could be arrested and their children could be taken away from them). It is apparent that "a statement may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.'" *State v. Miller*, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007) (quoting *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)). "Coercion is determined from the perspective of the suspect." *Miller*, 375 S.C. at 386, 652 S.E.2d at 452.

The detectives repeatedly used Petitioner's six-year-old daughter as leverage to get him to talk. For example, Kosarko told Petitioner that if persisted in "lying," then he would never see his

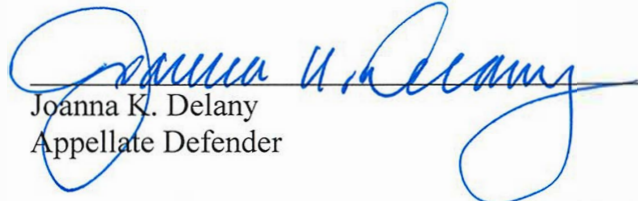
daughter again. State's Exhibit #80 at 22:01; *see also* State's Exhibit #80 at 21:35; 21:46; 22:06; 22:30; 00:09.

Although this Court concluded that Petitioner's phone calls with his mother and his girlfriend influenced him to admit he was at the scene of the shooting, this Court may have misapprehended that that was merely one of the circumstances. Under the totality of the circumstances, the culmination of all the circumstances, including the incredibly coercive tactics of denying Petitioner a cigarette unless he cooperated and threatening him he would never see his daughter again unless he stopped lying, resulted in Petitioner's statement being involuntarily made. Petitioner's statement was extracted through threats and promises and was involuntarily made. *Miller*, 375 S.C. at 386, 652 S.E.2d at 452.

This Court's conclusion that South Carolina appellate courts have recognized that while deprivation of food and sleep can be considered as a factor in determining voluntariness they have made no such finding as to cigarettes, overlooks that in *State v. Collins*, 435 S.C. 31, 40, 864 S.E.2d 914, 918 (Ct. App. 2021), *aff'd as modified*, 442 S.C. 444, 900 S.E.2d 426 (2024), the provision of cigarette breaks to the defendant was a factor discussed during the *Jackson v. Denno*, 378 U.S. 368 (1964), hearing. *See Collins*, 435 S.C. at 40, 864 S.E.2d at 918 ("Appellant never asked to stop the interview, he never asked to leave, he never asked for food, and he was provided with a soft drink as well as cigarette and bathroom breaks.").

Given the totality of the circumstances in this case, including the length of the interrogation, Petitioner's lack of familiarity with the criminal justice system, and most importantly the deliberate and tactical withholding of nicotine from an addict as well as the threat of the loss of his daughter if he failed to cooperate should have resulted in a conclusion that Petitioner's statement was not voluntarily tendered.

This Court should respectfully grant rehearing, and grant Petitioner a new trial.



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ATTORNEY FOR APPELLANT

This 14th day of August, 2025.

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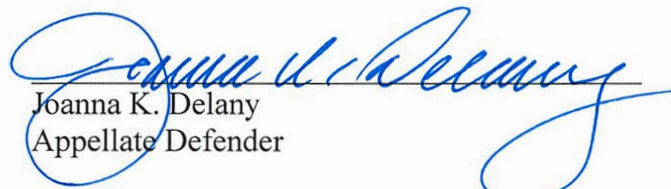
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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Devin Jamel Johnson, #359432, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 14th day of August, 2025.


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