

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES IRBY,

APPELLANT

APPELLATE CASE NO. 2012-213028

INITIAL BRIEF OF APPELLANT

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Chief Appellate Defender

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ruling appellant's confession was admissible where Detective Danny Morgan admitted he told appellant he could be "thrown to the wolves" if he continued to maintain his innocence and Morgan also acknowledged he told appellant of another defendant who allegedly received the maximum sentence because he only belatedly admitted his guilt since appellant's confession was induced by threats and the promise of a lesser sentence if he confessed and it was not admissible?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for the offense of criminal sexual conduct with a minor in the second degree. R. *. A Jackson v. Denno, 378 U.S. 368 (1964) hearing was held on January 29, 2011 before the Honorable J. Derham Cole. Christopher Brough represented appellant. Susan Reese and Jennifer Jordan were the assistant solicitors. Tr. 1. At the conclusion of the Jackson v. Denno hearing Judge Cole took the matter of the admissibility of appellant's statements under advisement. Tr. 98, ll. 7-8.

Appellant's case came on for trial on November 18, 2012 before the Honorable J. Derham Cole. Christopher Brough represented appellant. Susan Reese was the assistant solicitor. Supp. Tr. 1. Judge Cole ruled immediately prior to trial that motion to suppress appellant's confession was denied. Supp. Tr. 5, ll. 1-9.

On November 19, 2012 the jury found appellant guilty. Supp. Tr. 248, ll. 7-12. Judge Cole sentenced appellant to eighteen years imprisonment. Supp. Tr. 253, ll. 1-3.

This appeal follows.

ARGUMENT

The court erred by ruling appellant's confession was admissible where Detective Danny Morgan admitted he told appellant he could be "thrown to the wolves" if he continued to maintain his innocence and Morgan also acknowledged he told appellant of another defendant who allegedly received the maximum sentence because he only belatedly admitted his guilt since appellant's confession was induced by threats and the promise of a lesser sentence if he confessed and it was not admissible.

Jackson v. Denno hearing

A Jackson v. Denno, 378 U.S. 368 (1964), hearing was held on January 29, 2011. Spartanburg Department of Social Services worker Brenda Azzara testified that on November 14, 2007 that appellant was asked to come in for an interview. Appellant and his wife came to the Department of Social Services office in Spartanburg in their own automobile. Detective Tonya Aldredge was also invited to the interview by Azzara. The interview concerned appellant allegedly having sexual contact with his thirteen year old stepdaughter. Tr. 14, l. 3 – 15, l. 12.

Detective Aldredge read appellant his Miranda¹ rights and had him sign a pre-interrogation waiver form. Tr. 15, ll. 16-19. Azzara recalled that appellant spoke "freely and willing" during the entire interview. Tr. 16, ll. 12-15.

Appellant told Aldredge and Azzara that the allegations were not true. He told his stepdaughter to clean her room, and that if he did not see progress she was not going on the class field trip to the Biltmore Estates. Appellant explained that he and the minor's mother had a hard time coping with the problems the minor was having at home and at school.

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

Appellant related that on the evening he told his stepdaughter she could not go on the field trip “she got mad and went into her room.” Appellant recalled: [T]he next thing he knew Jennifer [his wife’s sister and the stepdaughter’s Aunt] and the police were there.” Tr. 17, ll. 4-25. Appellant told Azzara and Aldredge that the child made the story up out of spite because she could not go on the field trip. Tr. 17, l. 25 – 18, l. 13.

Azzara testified that appellant refused to take a polygraph exam at a later date, and he stated he did not “believe in them.” Tr. 21, ll. 3-17. Appellant did not make any admissions of guilt, and he did not ask for an attorney. He was not arrested, and left after the interview. Tr. 22, ll. 7-13.

Detective Aldredge was the state’s next witness. Aldredge said she was merely present at the November 14, 2007 interview at DSS, and that Azzara asked all of the questions. Tr. 23, l. 14 – 24, l. 11.

Aldredge said she next saw appellant at the “detention center” on November 30, 2007, where he apparently was present for failure to pay child support. Tr. 24, l. 21 – 25, l. 1. Aldredge admitted appellant did not sign a pre-interrogation form before she spoke to him. Tr. 42, l. 25 – 43, l. 10. Aldredge again asked appellant if he would take a polygraph exam, and this time appellant agreed. Aldredge said the polygraph exam was then scheduled for December 5, 2007. Tr. 25, ll. 2-23.

Aldredge recalled that on December 5, 2007, prior to the polygraph examination, appellant offered to write his own statement. Aldredge said it took appellant about thirty minutes to write the statement. R. p. *. Tr. 26, l. 24 – 27, l. 25.

Aldredge said after appellant finished his statement she took him to Detective Danny Morgan who was the polygraph operator. Tr. 28, ll. 4-13. Appellant denied he did anything

improper in his written statement. He wrote that his stepdaughter did not like to behave, and she made a sexually explicit remark to him that he reported to his wife, the minor's mother. State's exhibit 3, R. *; Tr. 28, ll. 4-16.

Aldredge remembered appellant had to be at his family court hearing on December 5, 2007, so she brought him to the courthouse after the polygraph exam. Detective Morgan testified that appellant finished the polygraph but he did not have time to tell him the results before appellant was taken to his family court hearing. Aldredge said on the way back from the family court hearing she stopped at McDonald's and got appellant something to eat. Tr. 29, ll. 1-23.

Azzara confirmed appellant gave the five page statement after the polygraph exam, and then another one page statement. These are the inculpatory statements at issue. Tr. 31, ll. 15-25. Aldredge not locate the pre-interrogation waiver form from December 5, 2007 but she insisted: "I did read him his rights. I believe he signed a pre-interrogation form, but I could not locate that form." Tr. 34, l. 7 – 36, l. 12. On cross-examination Aldredge denied that she in fact never advised appellant of his Miranda warnings on December 5, 2007 and she insisted she read appellant his rights. Tr. 44, l. 13 – 45, l. 7.

The key witness during the Jackson v. Denno hearing was polygraph operator Danny Morgan. Morgan was subsequently terminated from the Sheriff's Department for "making some inappropriate comments while I was working a part time job." He denied he was terminated for misconduct while conducting a polygraph exam. Tr. 61, l. 25 – 62, l. 8.

Morgan identified the waiver of rights form he had appellant sign at 11:00 a.m. on December 5, 2007. Tr. 47, ll. 4-8; R. *, State's exhibit 3.

Morgan testified appellant was cooperative during the polygraph exam. After the polygraph exam was completed he received a telephone call stating that appellant "had to be in family court sometime around 2:00 or something like that. And routinely the polygraph process to get to completion usually runs between two and a half, around two and a half hours, maybe three." Tr. 51, ll. 6-25.

Morgan testified once appellant arrived back at the police station from family court he spoke with him about the results of the polygraph exam. Morgan informed appellant that he had failed the polygraph exam. Morgan said appellant then "began to change his 'story'" about thirty minutes later. Tr. 53, ll. 2-9; Tr. 65, ll. 10-23. Morgan admitted the obvious -- that if appellant confessed it made his case much better. Tr. 66, l. 25 - 67, l. 3. The following occurred on cross-examination of Detective Morgan after defense counsel played a portion of the DVD of the interrogation that is now before this Court:

(Whereupon, the tape was played.)

Q. Now, you talk to him about going this way or going that way. Would you agree with me that you were talking about choosing to remain silent or choosing to confess?

A. No, not choosing to remain silent, *about choosing to continue to lie about the allegation or what he had done or choosing to tell the truth about what he had done.* That's what I was talking about.

Q. You indicated that you said you're not saying you can make it all better. Do you recall saying that?

A. Yes.

Q. Would you agree with me that that also implies you can make at least some of it a little better?

A. No, sir. The very statement says, *was that I can help you to understand what will happen or what is likely to happen. That was based on my experience. So the portion of that was*

to help him to understand where he was at based on the choices that he might make.

Tr. 66, l. 6-24. (emphasis added).

Morgan admitted he talked to appellant about being him “throwing him to the wolves” because Morgan said “from the standpoint of my past experience this is what could happen.” Tr. 67, l. 12 – 68, l. 3.

Morgan said he talked to appellant about being “thrown to the wolves” because he wanted appellant to understand what his “choices could be.” Tr. 69, ll. 2-13. Morgan admitted to telling appellant about another defendant who would not confess, “and he got the maximum sentence. That’s what you told Mr. Irby.” Morgan did not deny telling appellant about another defendant who got the maximum sentence and the following occurred:

A. And I made a distinction that that was different person and the ages of those children were like six and seven.

Q. Okay. So, in other words, you didn’t tell him specifically he would get the maximum sentence, but you talked about other people in the context of giving him choices, correct?

A. I told him about things that I had seen happen before.

Q. And this is after the conversation where you basically told him that if he wasn’t truthful you didn’t want to see him thrown to the wolves, correct?

A. Yes.

Q. Okay. You’d agree with me that those are coercive efforts, correct?

A. No, sir.

Q. You used a good bit of psychology in this interview to get him to confess, didn’t you?

A. I'm not a psychologist. I just talk to people.

Q. Talked to Mr. Irby for a long time, didn't you?

A. Yes, I did.

Tr. 71, 22 – 72, l. 16.

On re-direct examination the solicitor asked Morgan about a portion of the tape where Morgan told appellant about another defendant who had gotten sixty years in prison. Morgan's point to appellant, as he again stated before the jury, was that the defendant's belated confession came too late to help him. Tr. 72, l. 20 – 73, l. 14; tr. 148, ll. 10-25. The entire tapes of the interrogations, State's exhibits 2 and 3, are before this Court for review since court reporters refuse to transcribe the **actual portions** of the DVD's as they are played live in court. Regardless, the import was obvious that there was a point of no return for appellant and that he had better confess so that he too did not get thrown to the wolves and receive the maximum sentence.

Appellant then took the stand in his own defense. He testified that Morgan "was saying that, you know, if I didn't tell him something they would give me so many years, and if I did tell him something, then they would give me like five or four years." Appellant said after he took the polygraph is when he started feeling the threats. He testified that he was in leg irons at the time, in a small interrogation room, and that Detective Morgan was a bigger man. Tr, 77, l. 1 – 79, l. 10.

Consistently with the officer's testimony appellant said he was told if he didn't tell Morgan "something, then they was going to give me the maximum." Appellant said conversely he was told he would probably four or five years if he confessed. Tr. 77, l. 1 – 78, l. 5; 79, l. 18 – 82, l. 12.

Defense Counsel Brough argued that appellant was told he needed to confess or he was going “**to be thrown to the wolves.**” Brough said Detective Morgan clearly conveyed to appellant that if he talked to Morgan and told him the truth he would be treated better “and less harshly, because given Detective Morgan’s experience with people that he had dealt with in the past that didn’t come forward **and had to have it dragged out of them received the maximum sentence.**” Tr. 95, ll. 4-12. (emphasis added). Brough argued that this was a threat and that confessions given by threats or promises, however slight, were not admissible. Tr. 95, l. 4 – 96, l. 16.

The assistant solicitor attempted to argue that Morgan was trying to convey to appellant that “look you’ve got two roads to go down, you can take one of two, in my experience it’s better to tell the truth.” Tr. 97, ll. 20-23.

The defense and solicitor agreed that the judge should consider the portions of the DVD showed to him in court, and he did not need to view the entire interrogations to understand the points that were made. Tr. 90, l. 2 – 91, l. 9.

The Trial

As stated above, prior to the trial beginning the judge summarily denied the motion to suppress appellant’s confession. Appellant’s seventeen-year-old stepdaughter then testified and claimed that on one occasion appellant grabbed her from behind and started to pull down her underwear. Supp. Tr. 52, l. 5 – 53, l. 8. The minor said she talked to her mother about it but her mother did not believe appellant had done anything to her. Supp. Tr. 53, ll. 16-24.

The minor maintained on other occasions appellant would come into her room and touch her on her leg. She said she would tell appellant to stop and he would leave the room. Supp. Tr. 54, l. 6 – 55, l. 21.

The stepdaughter testified that one time appellant forcibly had sex with her. She said she told her mother twice about the incident. She said she called her aunt because her mother thought she was lying. The minor said her aunt called the police, and the police came to their house. Supp. Tr. 56, l. 6 – 57, l. 23.

The stepdaughter insisted she would “screamed” for her mother when she was sexually assaulted. She claimed her mother made no effort to check on her when she screamed. Supp. Tr. 61, ll. 5-17.

The minor remembered going to one counseling session together with her mother at the insistence of the Department of Social Services. Supp. Tr. 62, ll. 16-21. Appellant’s wife, and the child’s mother, Ms. C. said during the counseling session she asked her daughter three times if anything happened. Her daughter, and appellant’s stepdaughter, told her three times that “nothing happened.” Ms. C. remembered that the counselor terminated the session. Supp. Tr. 165, l. 11 – 167, l. 6; Defendant’s exhibit for ID # 1; R. p. *.

Gina Odem, the counselor, was called as a reply witness. Odem claimed that the child did not recant her allegations in that single session with her mother. Odem said she thought the presence of Ms. C. in the future was going to be “counterproductive” since she thought her daughter was lying. Supp. Tr. 183, l. 5 – 185, l. 23.

Detective Danny Morgan testified before the jury about the December 5, 2007 interrogation of appellant. Morgan said the interrogation started at about 9:30 in the

morning and that appellant had a break for a family court hearing before the interview again resumed. Supp. Tr. 119, l. 18 – 125, l. 18; Supp. Tr. 144, ll. 20-24.

On cross-examination Morgan admitted he had told appellant he would hate to see him “thrown to the wolves.” Morgan said that he was confident appellant had sexual conduct with his stepdaughter. Supp. Tr. 149, ll. 1-21.

Morgan also admitted he told appellant about another man who had received the maximum sentence because it took him “a very long time to come out with the truth and at that point that person . . . kind of like had his back against the wall and had no choice but to give the truth he finally did give the truth” and he ended up receiving the maximum penalty on it. Supp. Tr. 148, l. 10 – 149, l. 21. Morgan said he did not view any of this as a threat. Supp. Tr. 149, ll. 22-23.

Appellant testified in his own defense and denied sexually abusing his stepdaughter. Appellant said he confessed because he was threatened, and told that he would be “thrown to the wolves” if he did not admit to having sex with his stepdaughter. Appellant testified that he and his wife discussed Morgan’s statement that he would probably do about five years if he admitted the sexual misconduct “even though I didn’t do nothing. That is what I was going to do. But I did not do this.” Supp. Tr. 182, ll. 14-19; Supp. Tr. 179, l. 18 – 180, l. 17.

Discussion

As seen, Detective Morgan acknowledged telling appellant he could be “thrown to the wolves” or he did not want to see him “thrown to the wolves” because he would not be “truthful.” Detective Morgan also admitted he talked to appellant about another defendant who received the maximum sentence because he did not admit his guilt until it was too late

in the process for him to be helped. Appellant also testified that Morgan mentioned a sentence of about five years if he was “truthful”, and when compared with the threat of the maximum sentence and being “thrown to the wolves” he confessed.

In addition to feeling threatened by the above, appellant noted he was in a small room with Detective Morgan who was a bigger man while appellant was in leg irons after a long day of interrogation.

In State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990) the Supreme Court considered a case where the defendant was told she did not have to say anything but if she withheld evidence she could be charged with a crime. The Supreme Court found that the defendant’s confession given under these circumstances was coerced.

In State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990), the Supreme Court held that a confession induced by threats or promises, however slight, was not admissible. The Court in State v. Osborne distinguished Rochester on the grounds that the polygraph examiner in Rochester only told the defendant that it would be “in his best interest” to tell the truth. ” The present case is Osborne and not Rochester.

Detective Morgan admitted he talked to appellant about “being thrown to the wolves,” and told him about another defendant who received the maximum sentence because his cooperation with the police came too late in the process. Appellant was informed essentially that time was of the essence to tell the truth. Otherwise he was passing the point of no return, and he would be “thrown to the wolves.”

Appellant’s confession in this case was induced by these threats and the promise that if he confessed he would be treated less harshly, and even with leniency. In Clanton v. Cooper, 129 F.3d 1147 (10th Cir. 1997), a civil §1983 case, the Court held that falsely telling

a defendant that physical evidence linked him to the crime was insufficient to establish a coerced confession, but telling the defendant he would get a twenty-five year sentence if he did not confess and “would get off lightly” if the defendant confessed created a jury issue in the violation of a constitutional right under the color of state law action.

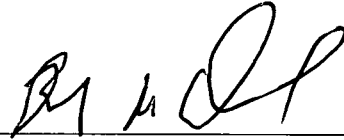
Similar to the sheriff in State v. Osborne, Detective Morgan here stated that he did not consider his statements to appellant a threat or a promise. Again, Morgan admitted he told appellant he could be “thrown to the wolves” for not being honest and that he told appellant about another defendant who received the maximum because of his untimely cooperation. The state failed in its burden of showing appellant’s confession was voluntary under these circumstances. See Lego v. Tomey, 404 U.S. 477 (1972).

Appellant’s confession in this case was coerced, and the trial judge’s summary ruling otherwise was error. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

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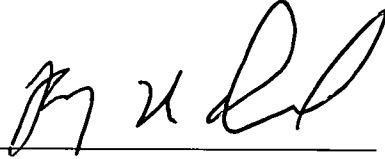
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) State's exhibits 1-5;
- (3) State's exhibits 2-3 (DVD's from the suppression hearing;
- (4) Defendant's exhibit 1 for ID;
- (5) Cover page of suppression hearing of January 29, 2011;
- (6) Tr. 5 - 98;
- (7) Cover page of the trial held November 18-19, 2012 (the court reporter lists the date as September 18-19, 2012 in his certificate);
- (8) Tr. 5-6;
- (9) Tr. 44-160;
- (10) Tr. 164-187;
- (11) Tr. 193-248;
- (12) Tr. 252-253.

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

November 8th, 2013

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

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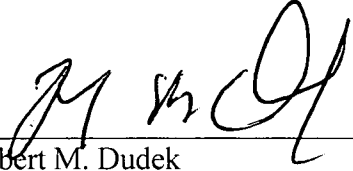
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APPELLATE CASE NO. 2012-213028


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, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of November, 2013.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of November, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023