STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KASHAUN BANKS,

APPELLANT

APPELLATE CASE NO. 2013-001036

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in ruling Appellant's confession was admissible given under the totality of the circumstances Appellant's confession was not freely and voluntarily tendered and where there was evidence Appellant invoked his right to terminate the custodial interrogation?

STATEMENT OF THE CASE

On December 12, 2011, the Charleston County Grand Jury indicted Kashaun Christian Banks (Appellant) on a charge of armed robbery. These charges stemmed from Appellant's alleged participation in an incident on October 15, 2011 at Exxon Gas Station in North Charleston, South Carolina where Tenille Wilson and Keisha Holmes were robbed. On April 22, 2013, a Jackson v. Denno hearing was on the issue of whether Appellant's confession to Lieutenant Hill was admissible at trial. Tr. 58. Andrew Grimes and Megan Ehrlich represented appellant, while E. Culver Kidd and Elizabeth Riddle represented the State.

On April 23 – 25, 2013, Appellant proceeded to trial before Judge Harrington and a jury. Tr. 220. The jury found Appellant guilty of armed robbery. Tr. 528, ll. 13 -16. Judge Harrington sentenced Appellant to twelve years imprisonment with the Department of Corrections. Tr. 546, ll. 4-7. Appellant's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in ruling Appellant's confession was admissible given the totality of the circumstances indicated Appellant's confession was not freely and voluntarily tendered and evidence showed Appellant invoked his right to discontinue the custodial interrogation.

Appellant was arrested on October 15, 2011 in connection with an armed robbery that occurred at Exxon Gas Station, located at 3700 Rivers Avenue in North Charleston. Arrest Warrant. He was taken to the interview room at the North Charleston Police Department, where Lieutenant Hill advised him of his Miranda rights. Tr. 60, ll. 24 – Tr. 61, ll. 2. During the initial interview, Appellant was seventeen years old and had completed the tenth grade. Tr. 62, ll. 6-8. Appellant told Hill he could not read and he had a learning disability. Tr. at 62, ll. 9-11; Tr. 89, ll. 9-11. Appellant's most recent Individualized Education Program indicated he read on a kindergarten level and his IQ level placed him in the mildly mentally disabled range. Tr. 102, ll. 1-4; Tr. 103, ll. 13-16. Hill read each of Appellant's rights to him and had him initial after each one. Tr. 62, ll. 16-25.

Lieutenant Hill then began to question Appellant. Tr. 65, ll. 3-4. Shortly after questioning began, Appellant requested to make a phone call to his sister to obtain help. Tr. 118, ll. 3-8. Hill refused to allow the phone call. Tr. 118, ll. 23 – Tr. 119, ll. 4. Appellant interpreted the refusal as an indication he was required to keep answering Hill's questions. Tr. 119, ll. 2-4. At no point during Appellant's request for a phone call was the interview stopped. Tr. 119, ll. 5-7.

During questioning, Appellant indicated he had plans to enter the military. Tr. 65, ll. 22 – 25. Hill responded by telling Appellant it was unlikely he would be able to enter the military with a robbery conviction and encouraged Appellant to "come clean." Tr. 68, ll. 1-7. Appellant denied robbing the Exxon and told Hill that was his "final word." Tr. 68, ll. 22-25. Appellant then asked if they could continue, meaning he was ready to finish the interview and proceed to jail. Tr. 119, ll. 19 – 24. Hill asked if Appellant had anything else to say, to which he responded "no." Tr. 70, ll. 8-13. The initial interview concluded at 12:14am. Tr. 70, ll. 22 – 24.

Hill returned to the interview room at 12:25am, and again advised Appellant of his Miranda rights. Tr. 71, ll. 2-6; Tr. 81, ll. 14-16. Hill then asked Appellant if he wanted to change his story and told him it would not look good if he didn't tell the truth. Tr. 81, ll. 17-19; Tr. 87, ll. 23-25. Hill testified he proceeded this way because it was his job to get Appellant to confess. Tr. 88, ll. 4-12. During the second portion of the interview, Appellant confessed to robbing the Exxon as he felt it was what Hill "wanted to hear," and confessing would end the interview process. Tr. 75, ll. 10-16; Tr. 126, ll. 6-8.

Prior to trial, the judge held a Jackson v. Denno hearing to determine the admissibility of Appellant's confession. Tr. 58 – 142. Appellant, relying on State v. Kennedy, 333. S.C. 426, 510 S.E.2d 714 (1998), argued the confession should be suppressed because it was the result of a police initiated interrogation conducted after Appellant unequivocally invoked his right to remain silent. Tr. 94, ll. 2-24. The State argued, pursuant to State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), Appellant did not invoke his right to remain silent because Appellant's statement that he was done talking was ambiguous and

not an unequivocal invocation of his right to discontinue questioning. Tr. 96, ll. 13 – Tr. 97, ll. 25.

Appellant also argued, under State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987), Hill's statement that Appellant would not be able to join the military unless he confessed amounted to a promise of leniency. Tr. 134, ll. 21 – Tr. 135, ll. 1. The State argued Hill's encouraging Appellant to tell the truth did not render his confession involuntary. Tr. 137, ll. 5-10. The judge found Appellant's statement in response to Lieutenant Hill was not an unequivocal invocation of his right to discontinue questioning and that Hill's statements regarding Appellant's ability to enter the military did not equate to a promise of leniency. Tr. 141, ll. 10 – Tr. 142, ll. 1. The judge erred.

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977). It is the prosecution's duty to prove a confession was voluntarily made. State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977). The burden is also on the state to prove by a preponderance of the evidence that a defendant's rights were voluntarily waived. State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988). A determination of whether a confession was voluntarily given requires an examination of the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Coercion is determined from the viewpoint of the suspect. State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). The court must determine if the defendant's will was overborne. See Dickerson v. United States, 530 U.S. 428, 433 (2000). "Appellate entities in South Carolina have recognized that appropriate factors to

consider in the totality-of-circumstances analysis 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." State v. Parker, 381 S.C. 68, 87, 671 S.E.2d 619, 629 (2008).

The Supreme Court of the United States has held the Miranda opinion requires a person not only be notified of their rights under Miranda, but also any exercise of those rights be scrupulously honored. Michigan v. Mosley, 423 U.S. 96, 103 (1975). Specifically, the Supreme Court has found the critical safeguard regarding Miranda warnings is a person's right to cut off questioning. Id. The purpose of requiring law enforcement to respect a person's exercise of that right is to counteract the coercive pressures of the custodial setting. Id. at 104. "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends... on whether his 'right to cut off questioning' was 'scrupulously honored.'" Id.

Several Federal Courts have discussed the requirement to scrupulously honor an individual's right to cut off questioning as it applies to the time period between questioning sessions. For example, the United States District Court for the Southern District of Georgia held a defendant's rights were not scrupulously honored where the time period between when questioning ceased and then resumed was a mere fifteen minutes. U.S. v. Morris, 491 F.Supp. 226, 231 (S.D. Ga. 1980). In U.S. v. Morris, the defendant was read Miranda warnings and indicated he did not wish to talk. Id. Questioning immediately ceased but was resumed approximately fifteen minutes later, after the defendant was again informed of his rights. Id. The court noted the factors to be considered when determining whether the defendant's rights were honored were passage

of a substantial period of time, subsequent questioning on a distinct charge, and the discovery of new and different facts. Id.

Similarly, the United States District Court for the District of Kansas has held the passage of twenty minutes between interrogations, absent any other occurrences, is not sufficient to find a defendant's rights were scrupulously honored. U.S. v. Stewart, 51 F.Supp.2d 1136, 1145 (D. Kan. 1999). In U.S. v. Stewart, the defendant received Miranda warnings and was questioned for approximately ten minutes before he indicated he no longer wanted to talk to the investigator. Id. at 1142. Approximately twenty minutes later, the investigator returned to the interview room and conducted a second interrogation. Id. In determining the defendant's right to terminate questioning was not scrupulously honored, the court noted the defendant did not initiate any conversation with the investigator after invoking his right to remain silent, nor had anything occurred or otherwise developed during the twenty minute break which would justify the second interrogation. Id. at 1145.

Relying on the factors discussed in State v. Parker, the facts in the instant case reveal Appellant's confession was not freely and voluntarily given under the totality of the circumstances. At the time of his arrest, Appellant was a seventeen year old minor with a kindergarten reading level and a documented learning disability. Appellant had only completed through the tenth grade and his IQ placed him in the category "mildly, mentally disabled." Additionally, Lieutenant Hill admitted he specifically told Appellant he would not be able to join the military if he did not confess to the armed robbery. He explained he proceed in that fashion because it was his job to get a suspect to confess. This clearly amounts to police misrepresentation. Furthermore, Appellant's mother was

not present at the interrogation and Appellant's requests to make a phone call to contact a family member were ignored. Appellant also testified he only told Hill he committed the robbery because he felt it was what Hill "wanted to hear," and was the only way he could end the interrogation. The coercive nature and undue pressure placed on Appellant during the interrogation, combined with Hill's misrepresentations about Appellant's ability to enter in the military and Appellant's age and mental disability, clearly indicate Appellant's confession was neither voluntary nor freely given, and was therefore, not admissible.

Furthermore, it is evident Appellant's invocation of his right to terminate questioning was not scrupulously honored. Appellant stated he no longer wanted to talk to Hill during the first investigation and declared he had given his "final word." While Hill did stop the interrogation initially, he returned to the interview room a mere eleven minutes later and resumed questioning. Under Morris and Stewart, this is simply not enough time. During the eleven minute break, Appellant did not request to resume the interview. Moreover, there were no new developments or factual discoveries during the eleven minute break that would have justified the resumption of questioning. Based on the facts, it is abundantly clear Appellant's invocation of his right to terminate the interview was not scrupulously honored, and thus, his confession was not admissible.

The State may argue Appellant did not invoke his right to remain silent, and thus waived his rights based on State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); however this case is clearly distinguishable. In Aleksey, the Supreme Court held the defendant's statement, "That's all I've got to say," was not an unequivocal invocation of his right to discontinue questioning. Id. at 31, 538 S.E.2d at 253-54. In Aleksey, *the*

defendant reinitiated communication with the police after he initially stated he was done talking. Id. at 31, 538 S.E.2d at 253 (emphasis added). The court noted the suspect, not the police, must control the time, duration and subject matter of an interrogation. Id. at 31, 538 S.E.2d at 254. In ruling the confession was admissible, the court relied heavily on the fact the defendant himself initiated further communication with law enforcement after his initial interrogation. Id. "[L]aw enforcement officers may certainly speak with a suspect who reinitiates communication subsequent to an invocation of rights." Id.

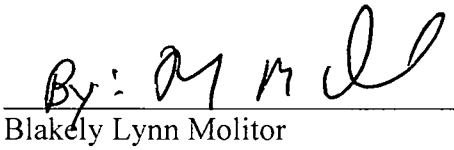
Appellant's case is distinguished from Aleksey in that the defendant in that case requested to speak to law enforcement on his own accord. Had the defendant in Aleksey not requested to speak with the officer again, the interrogation would have been over completely. Conversely, in this case, it was Hill who resumed the interrogation after Appellant stated he had said his "final word." Unlike the defendant in Aleksey, Appellant did not reinitiate communication with Lieutenant Hill after the first portion of the interview was completed. Instead, Hill returned to the interview room after a brief break and resumed the interview even though Appellant had previous given his "final word."

Under the totality of the circumstances, the state failed to prove appellant's confession was freely and voluntarily tendered, and that Appellant's invocation of his right to termination questioning was scrupulously honored. Appellant should consequently be granted a new trial.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for a new trial.

Respectfully submitted,

By: 

Blakely Lynn Molitor
Robert M. Dudek
Appellate Defenders

ATTORNEYS FOR APPELLANT

This 27th day of November, 2013.

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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(s);
(2) Arrest Warrant
(3) Affidavit
(4) Amended Indictment
(5) Verdict Form
(6) Sentence Sheet
(7) Trial transcript cover page
(8) Tr. 58-142
(9) Tr. 220-230;
(10) Tr. 477-500

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

November 27th, 2013

By: M M

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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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. Kashaun Banks, #355175 Turbeville Correctional Institution PO Box 252 Turbeville, SC 29162, this 26th day of November, 2013.

By: RMD

Blakely Lynn Molitor
Robert M. Dudek
Appellate Defender

ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of November, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.