STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERELL GREEN,

APPELLANT

APPELLATE CASE NO. 2011-201486

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to suppress appellant's coerced inculpatory statement to the police since appellant was a fourteen-years-old youth with Attention Deficit Hyperactivity Disorder who was in special education classes, and he was handcuffed to a chair for hours, and left handcuffed alone in a small room for at least an hour and a half where an investigator admitted appellant's demeanor showed he was overwhelmed after the police did not believe his first statement?

STATEMENT OF THE CASE

Fourteen-year-old Derell Green had a Family Court petition issued against him for allegedly shooting another young man on the streets of Charleston. R. 639. After a Family Court waiver hearing before the Honorable Judy L. McMahon on August 25-26, 2010, Judge McMahon ordered jurisdiction transferred to the Court of General Sessions.

On October 21, 2010, a motion to reconsider the transfer of jurisdiction hearing was held before Judge McMahon. Megan Ehrlich represented appellant. Anne B. Seymour was the assistant solicitor. Assistant Solicitor Seymour argued that appellant shot and killed a seventeen-year-old classmate after school and that he should be tried in General Sessions Court. R. 5, l. 2 – 8, l. 2. The assistant solicitor admitted the waiver report showed appellant had difficulty making rational decisions and "weighing the pros and cons when making decisions . . . and understanding the long term consequences of his actions." The judge denied the motion to reconsider. R. 8, ll. 3-12.

Appellant's case was thereafter called to trial in General Sessions Court before the Honorable J. C. Nicholson, Jr. and a jury. Meghan Ehrlich and Lorelle Proctor represented appellant. Douglas Bruce Durant and Jennifer K. Shealy were the assistant solicitors. R. 1. The judge ultimately denied the motion to return the case to the jurisdiction of the Family Court and the trial began.

At the conclusion of appellant's trial on August 25, 2011, appellant was found guilty of murder. R. 630, ll. 19-25. On September 1, 2011, Judge Nicholson sentenced appellant to forty years imprisonment. R. 638, ll. 16-19.

This appeal follows.

ARGUMENT

The court erred by refusing to suppress appellant's coerced inculpatory statement to the police since appellant was a fourteen-years-old youth with Attention Deficit Hyperactivity Disorder who was in special education classes, and he was handcuffed to a chair for hours, and left handcuffed alone in a small room for at least an hour and a half where an investigator admitted appellant's demeanor showed he was overwhelmed after the police did not believe his first statement.

Relevant Facts

A Jackson v. Denno, 378 U.S. 368 (1964) hearing was held on August 22, 2011. Detective Alan Kramitz testified he became involved in the shooting death of Larry Taron Maybank on the day of the shooting, February 5, 2010. R. 16, ll. 11-18. At one thirty in the afternoon that day Kramitz went to the home of the fourteen-year-old Derell Green with Sergeant John Reynolds. R. 17, l. 12 – 18, l. 6.

Kramitz claimed he asked appellant's parents, Mr. and Mrs. Nelson, to come to the police station with him, and appellant. He maintained they refused and told him: "Do what you have to do. If Derell's done something wrong he needs to tell you." R. 22, l. 12 – 23, l. 9.

Appellant's mother would later dispute this assertion testifying that she was told she could not accompany her son "right now, they would call me." Appellant was taken from his home in handcuffs. Mrs. Nelson eventually received a phone call from the police about 9:00 that night after appellant had given his inculpatory statement, and she arrived at the police station at about 10:00 p.m. R. 112, l. 13 – 115, l. 12.

Kramitz maintained appellant was calm when they arrived at the North Charleston police station. Appellant told him he was fourteen-years-old and in the eighth grade. R. 24, l. 14 – 25, l. 17. Kramitz said he read appellant his Miranda[1] warnings. Kramitz finished advising appellant of his rights at 3:47 p.m. R. 25, l. 2 – 29, l. 17.

Kramitz said appellant told him after being read his rights at about 3:55 p.m. that he was not involved in the shooting. R. 32, l. 2 – 33, l. 3.

After denying he was involved in the shooting appellant was left alone in the small interview room handcuffed to a chair. Kramitz said appellant was left alone from about 5:30 to 7:30, but claimed he checked on him "periodically." After about an hour and a half, at 7:00 p.m. – Kramitz's times (7:00 or 7:30) did not match -- Kramitz said Detective Sturkie went into the interview room to talk to appellant. Kramitz said the police had interviewed witnesses and possibly viewed a videotape which refuted appellant's statement that he was not involved in the incident. R. 34, ll. 5-21.

Kramitz testified that after Sturkie went into the interview room at about seven o'clock he was later told that "Derell wanted to change his statement, that he needed to tell the truth . . . I went back inside and did another statement form on Derell." R. 36, ll. 8-16. Kramitz said he started taking the second statement, without further Miranda warnings, at about 7:45 p.m. R. 37, ll. 16-18.

During this statement appellant told the detectives that he had been involved in a fight with the decedent about a month before the incident wherein the decedent stole his gold chain. He said on the day of the incident that the decedent was "mean mugging" him. Appellant said he had a gun hidden under an abandoned house that he retrieved, and he shot

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

the decedent "four or five times, and then he ran down the street and went home. He jumped some fences." R. 38, l. 18 – 39, l. 13.

On cross-examination Kramitz acknowledged appellant was handcuffed when he was taken from his parents' house. A search warrant was obtained around 5:00 p.m. for appellant's house while he was at the police station.

Kramitz estimated appellant arrived at the police station about 2:30 p.m and the first interview began about 3:45 p.m.. Kramitz admitted appellant was left alone in the room after the first interview. Kramitz was aware appellant was only fourteen-years-old, and that he was in the eighth grade. R. 42, ll. 2-25. Kramitz acknowledged there were about **three hours** between his first statement denying involvement and his second statement. R. 46, l. 21 – 48, l. 7. The second statement started at 7:45 p.m. and appellant, with at least one of his hands handcuffed to the chair the entire time, admitted involvement in the shooting. R. 50, l. 21 – 54, l. 16.

North Charleston Detective James Sturkie then testified. R. 56, ll. 9-25. Detective Sturkie said on February 5, 2010 he was informed about 7:00 p.m. that appellant had been read his Miranda rights. Sturkie went back to interview appellant a second time "because there was a legitimate question of whether or not he was telling the truth and we had information that he was not." R. 57, ll. 18-22.

Sturkie said appellant seemed very calm and "collected and understood what was going on." R. 58, ll. 19-21. Sturkie said he urged appellant to tell the truth and asked him if the shooting occurred over "some money, some girls, or some other property that belonged to him or something, you know, that would - - a high school kid would be concerned with." R. 60, ll. 7-14. Sturkie said appellant finally told him about an earlier incident involving " a

gold chain with a Jesus head on it that had been stolen from him" by the decedent. R. 60, ll. 7-22. Sturkie said appellant admitted he shot the decedent and threw the gun away. R. 61, ll. 9-14.

On cross-examination Sturkie said he did not call appellant's mother, but he did not recall appellant asking for his mother. R. 65, ll. 5-8. Sturkie acknowledged appellant's lips were "quivering, he was like what would happen to me if this, what would happen to me if I did that, that kind of thing." R. 67, l. 12 – 68, l. 1. Sturkie admitted appellant's demeanor *showed he was overwhelmed or very scared* about what was happening. Sturkie admitted he was a large man, about 6'5," but he said he only touched appellant on the shoulder to urge him to admit his involvement in the shooting. R. 68, l. 2 – 69, l. 11.

Investigator Christopher Miller also testified that he went into the interview room for the second interview of appellant with Detective Sturkie. R. 71, ll. 14-19. Miller admitted appellant seemed "withdrawn." R. 74, ll. 14-16. Miller readily acknowledged he wanted appellant to confess that he was the shooter. R. 75, l. 22 – 76, l. 20.

Special Education Coordinator Carol Fila testified that appellant had a learning disability, and "he was receiving what we call pull-out resource services." R. 84, l. 14 – 86, l. 23. She testified appellant was in special education classes and that he had failed the first grade. R. 87, l. 4 – 88, l. 22.

Appellant was sent to Daniel Jenkins Academy, a special school for learning disabled children, as a result of his disabilities. Appellant was tested as being one to one and a half years behind his grade level. R. 96, l. 2 – 98, l. 18.

Department of Juvenile Justice employee Hannah Hyrne supervised appellant on probation. R. 99, ll. 11-21. Hyrne said appellant "struggled" through questions and

answers during the evaluation. Appellant needed the questions re-explained to him. Appellant looked to his mother for help during the DJJ questioning process. R. 103, l. 4 – 104, l. 14. Hyrne said she did not know if appellant understood the questions about the court process or whether he did not understand them. R. 106, l. 3 – 108, l. 13; R. 110, ll. 3-5.

Appellant's mother, Tamica Nelson, testified she was home on February 5, 2010 when the police arrived. As seen, Mrs. Nelson was told she could **not** go to the police station with appellant and she finally ended up going to the police station at ten o'clock that evening. The damage had been done. R. 111, l. 19 – 112, l. 23.

Appellant also testified during the suppression hearing. R. 117, l. 18 – 118, l. 25. Appellant admitted he was nervous, and that he was not comfortable meeting people. "I don't like talking." Appellant also offered that his favorite television show at the age of fourteen was Tom and Jerry. R. 120, l. 18 – 122, l. 24.

Appellant related that he was very scared when the police arrived at his house that day. Once he was at the police station he was placed in a small room with a table and chairs. He noticed a covered camera in the ceiling. R. 126, ll. 1-25. Appellant said he was handcuffed to a chair and that he really did not understand what Detective Kramitz was talking about, but he signed the form as requested. R. 127, l. 15 – 128, l. 24.

Appellant said he was threatened that day and he was told: "We know you done it. We've got people behind the glass pointing you out . . . you'll never go home. You'll never see daylight unless you tell the truth." R. 130, ll. 15-23.

Appellant testified that he asked to talk to his mother during the first statement. R. 132, ll. 20-22. Appellant said he did not understand that he could have had an attorney present during questioning. R. 134, ll. 15-20.

On cross-examination appellant said he did understand he could have had a "free lawyer" at some point if he could not afford one. R. 138, l. 5 – 139, l. 7.

Arguments

Defense counsel Ehrlich noted it was undisputed that appellant was fourteen-years-old, in special education, and not working. He was living at home with his parents and he had never been interviewed by the police before this incident. R. 158, l. 3 – 160, l. 9.

Ehrlich pointed out that appellant was much better with the support of an attorney and his mother during questioning. Ehrlich reminded the judge of the evidence of appellant being intimidated and threatened by the authorities that he would never see the light of day or never go home unless he told the police the truth. R. 160, l. 20 – 164, l. 17.

The trial judge first expressed dismay at the police not recording the interrogation. R. 164, ll. 5-7. The solicitor had called Detective Thomas Deckard as a reply witness during the suppression hearing. Deckard said "bowls" were used to cover the cameras in the interview rooms because of technical problems. Deckard admitted the solicitor's office was involved in the decision to cover the cameras, but he added the solicitor's office never instructed them not to tape interrogations. Deckard claimed it was simply a funding matter on not taping the interrogation. R. 150, l. 22 – 156, l. 19.

Defense counsel argued that appellant was even younger than his age of fourteen noting Tom and Jerry was his favorite television show. She noted that although it was not a legal requirement that appellant have an adult present, the fact appellant's mother was not there for him was a factor the judge had to consider. The judge noted that the document in front of him, court's exhibit one, revealed that appellant had exhibited behavior consistent with a diagnosis of "ADHD," which is Attention Deficit Hyperactivity Disorder. R. 657; R. 166, l. 2 – 168, l. 20.

The judge stated he was very concerned because of appellant's Attention Deficit Hyperactivity Disorder that appellant was handcuffed to a chair for hours. The judge noted the first statement was at 3:45 p.m., and the second statement was at 7:45 p.m. R.168, l. 18 – 169, l. 7.

The solicitor argued appellant was given the opportunity to eat and drink and go to the bathroom. The solicitor argued that appellant was read his rights at three forty-seven and a statement began at three fifty-five. The solicitor argued that appellant was by himself from "essentially from 5:30 to 7 o'clock." R. 169, l. 6 – 170, l. 8.

The judge expressed concern that appellant, with Attention Deficit Hyperactivity Disorder, was going to be hyper and that he was confined and handcuffed to a chair in a small room. "What's it going to do to him mentally?" R. 170, ll. 17-20.

Defense counsel argued that the length of detention and appellant being handcuffed to a chair "sitting there looking at a wall" took its toll on the already scared appellant. She urged the judge to remember that appellant was only fourteen-years-old at the time he was left alone handcuffed to a chair. In the year and a half since that time appellant had been exposed to "significant hearings over and over again," he had the

advice of attorneys, and it was only expected that he would now have a better understanding of what was occurring than he did when he was handcuffed to the chair and left alone. R. 172, ll. 4-24.

At the time appellant had been diagnosed with ADHD and ODD. Since that time "they've changed medications." "Now, the length of detention for somebody of a different age, of a different maturity level might not seem quite as bad and long, but for a 14-year-old in his shoes, I think it was too long." R. 172, l. 4 – 173, l. 7.

The solicitor then referenced a case he said involved a seventeen-year-old with a learning disability with a third grade reading level where a court found his statement was voluntarily tendered. The solicitor offered that the defendant in that case was not threatened, and the record did not indicate the defendant, Moses, was detained for an extended period of time. Despite his age and his learning disability and his separation from his mother the court in that case found his statement was voluntarily given, and the appellate court found no abuse of discretion. "Pretty close factually to what we have here, Your Honor." R. 173, l. 9 – 174, l. 25.

The judge then ruled that he found no police coercion in this case. He noted the length of interrogation and the diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). The judge said the defendant's "maturity, education, physical condition, mental health" -- "the Court finds that none of those appear to have affected his ability to be aware of his circumstances -- [or his] understanding the circumstances." The judge noted that appellant signed and initialed the form after being given Miranda warnings, and the judge ruled appellant's statements were admissible. R. 175, l. 4 – 178, l. 6.

At the time appellant's second statement was introduced through the testimony of Detective Kramitz the defense timely objected. The objection was overruled, and the jury then heard of appellant's second statement to the police where he referenced the gold chain being stolen from him by the decedent about a month beforehand. Appellant said the decedent "mugged" him on the day of the shooting. In appellant's second statement he told the police he had hidden a .38 revolver in an abandoned house. He shot the decedent four or five times and he ran through a yard and jumped two fences. R. 462, l. 9 – 466, l. 24.

Discussion

A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession. Jackson v. Denno, 378 U.S. 368 (1964). "This principle is best justified when viewed as part and parcel of "fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feelings of the American people and are enshrined in the Due Process Clause of the Fourteenth Amendment." Haley v. Ohio, 332 U.S. 596, 607 (1948) (Frankfurter, J., concurring). State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007).

The Court considers the totality of the circumstances surrounding the defendant's giving the confession when determining if it was voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

"The totality of the circumstances includes "*the youth* of the accused, his *lack of education or his low intelligence*, the lack of any advice to the accused of his constitutional rights, the *length of detention, the repeated and prolonged nature* of the questioning, and the use of physical punishment such as the deprivation of food or sleep." Id. (internal citations

omitted). Furthermore, no one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. Id." (emphasis added).

As our Supreme Court explained in State v. Pittman, 373 S.C. 527, 566, 647 S.E.2d 144, 164-165 (2007):

"In Haley v. Ohio, 332 U.S. 596 and again in Gallegos v. Colorado, 370 U.S. 49 (1962), [internal citations omitted] the United States Supreme Court reversed juveniles' convictions on the grounds that the confessions were involuntarily gathered. Though the court addressed the scrutiny applied to juveniles' confessions with quite broad language in each opinion, it is firmly established that a minor has the capacity to make a voluntary confession . . . without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." Jenkins v. State, 265 S.C. 295, 300, 217 S.E.2d 719, 722 (1975); see also Vance v. Bordenkircher, 692 F.2d 978 at 980 (4th En Banc 1983) (quoting Williams v. Peyton, 404 F.2d 528, 530 (4th Cir.1968) ("Youth by itself is not a ground for holding a confession inadmissible."); Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir.1978); and United States v. Miller, 453 F.2d 634, 636 (4th Cir.1972).

For example, the court stated:

> That which would leave a man cold and unimpressed can overawe a lad in his early teens ... we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. **He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.** Haley, 332 U.S. at 599–600, 68 S.Ct. 302. Similarly:

> [A juvenile] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—**from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself.** A lawyer or an adult relative or friend could have given the Appellant the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. **Without some adult protection against this inequality, a 14–year–old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.** Gallegos, 370 U.S. at 54–55, 82 S.Ct. 1209.

State v. Pittman, 373 S.C. 527, 566, 647 S.E.2d 144, 164-165 (2007). (emphasis added).

Here, appellant was only fourteen years old. He was a special education student, who went to a special school, and he had Attention Deficit Hyperactivity Disorder (ADHD). He was only in the Eighth grade. ADHD is a disorder addressed in the DSM-IV, and it readily apparent *why* leaving the fourteen-year-old appellant, who was a special education student, with ADHD handcuffed to a chair for hours, and alone handcuffed to a chair in a small room for at least an hour and a half to two hours *is comparable to torture* given the inability of an ADHD individual to concentrate, his natural avoidance of tasks demanding concentration, and his hyperactivity that commands activity. See DSM-IV at 78-85. The judge rightfully wondered what this did to appellant "mentally."

The trial judge was correctly very concerned about the voluntariness of the fourteen-year-old appellant's confession where he suffered from the ADHD disorder, and was handcuffed to a chair in a small room, and left alone to stare at the wall for a lengthy period

of time before he gave the confession the Detective admitted he wanted. The judge should have gone the final step and suppressed appellant's confession especially given the other factors involved in this case.

Appellant's mother testified that she was told that she was not allowed to be with fourteen-year old-appellant when he was interrogated by the police. Although the detective denied that assertion, appellant was nonetheless on his own -- without any adult to advise or assist him -- as he dealt with experienced detectives. Appellant said he asked for his mother. Appellant also had intellectual deficits since he was in special education classes at an alternative school, was a year and a half behind at that, in the Eighth grade, and he had ADHD.

Appellant denied involvement in the shooting, and it is undisputed the authorities made it known they did not believe him. They attempted to make appellant feel the authorities understood that the shooting must have occurred over a girl or money or property. They urged appellant to "tell the truth." Appellant testified he was threatened if he did not tell the truth that he would never see daylight again and he would he never go home.

Appellant was taken from his home in handcuffs. The solicitor admitted appellant was handcuffed for about five hours. After his first statement he remained alone and handcuffed to a chair in a small room for an hour and a half to two hours depending on the Detective's own internally contradictory testimony. Although the detective stated that he looked in on appellant from time to time, the trial judge, as seen, was correctly concerned that appellant, who had Attention Deficit Hyperactivity Disorder, might have had his will

overborne given the totality of the situation. There was testimony from a police detective that appellant's demeanor in fact showed he was overwhelmed by the situation.

The judge's concerns in this case were correct. It was unfortunate that he might have been persuaded by the solicitor's citation to some case where a court found it was not an abuse of discretion for the trial judge to admit a statement given by seventeen year old defendant with a learning disability without an adult present. That seventeen-year-old was only a year away from being an adult himself.

The conduct of the police in this case in handcuffing the fourteen-year-old appellant to a chair for hours, and then leaving him alone handcuffed to that chair in a small room for a lengthy period of time, where they let appellant know they did not believe he was telling the truth, and admitted they knew appellant felt overwhelmed but wanted a confession nonetheless in the absence of an adult constituted coercive police activity which rendered appellant's statement not voluntary. See Colorado v. Connelly, 479 U.S. 157, 167 (1986) (coercive police activity renders a confession involuntary within the meaning of the Due Process Clause of the Fourteenth Amendment). See also, State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001).[2]

Appellant's second statement wherein he admitted he shot the decedent because he was "mugging" him, and because the decedent had stolen his gold chain with the Jesus head a month before this incident should have been suppressed. Appellant's conviction was based -- at least in part on his involuntary confession – and his conviction should therefore

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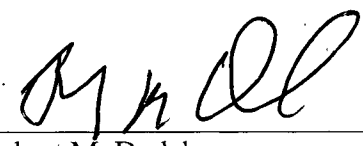
[2] The Supreme Court in State v. Hook, 356 S.C. 421, 590 S.E.2d 25 (2003), affirmed the decision of the Court of Appeals as modified. The Supreme Court reasoned the Court of Appeals could have simply found the statement inadmissible under S.C. Code § 24-24-290. The Court of Appeals decision is nonetheless instructive on an **adult** who felt compelled to cooperate.

be reversed. Jackson v. Denno, 378 U.S. 368 (1964). Further, without appellant's coerced inculpatory statement the state could not have proved his guilt beyond a reasonable doubt. For all of the reasons above, appellant therefore should be granted a new trial.

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of January, 2014

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IN THE COURT OF APPEALS

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THE STATE,

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V.

DERELL GREEN,

APPELLANT

APPELLATE CASE NO. 2011-201486

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 Alphonzo Simon Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of January, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of January, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.