THE STATE OF SOUTH CAROLINA
In the Court of Appeals

71700

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.

PETITION TO THE FULL COURT OF APPEALS TO
REHEAR, REVIEW, AND REINSTATE

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, the Respondent petitions this Court to stay the remittitur and requests that the full Court of Appeals review the Order of the Honorable Williams and Konduros filed March 12, 2014 and grant Respondent a rehearing of Opinion No. 2014-UP-110. It is respectfully submitted that the Court of Appeals has erred in the following:

1. The Court of Appeals erred in determining that the Trial Court's Order Granting Respondent's Motion to Dismiss is immediately appealable;
2. The Court of Appeals erred in determining that the Trial Court abused its discretion in finding Respondent's second statement was not voluntary.

## FACTUAL BACKGROUND

Respondent was accused of assault and battery in the second degree. On August 6, 2010, Respondent met with Jeff Kindly, Agent of the South Carolina State Law Enforcement Division. At that time, Respondent signed a statement on a "Voluntarily Statement", form outlining his version of what happened regarding the events surrounding the allegations made by the victim. Prior to signing the statement, Agent Kindly advised Respondent of his Miranda rights. Furthermore, the statement signed by Respondent outlined his Miranda rights and further included a waiver of those rights.

On August 25, 2010, Respondent went to the Greenville County Law Enforcement Center for the purpose of taking a polygraph test. Prior to the test, Respondent signed an affidavit acknowledging that he voluntarily agreed to take a polygraph test. The affidavit also provided that Respondent understood his Miranda rights and that he wished to waive the same. Respondent was subsequently questioned for one hour and 54 minutes during the polygraph test. After the polygraph test, Respondent was questioned for an additional 19 minutes. However, according to the time from the audio of the questioning, Respondent was held in the room for 54 minutes. Subsequent to the questioning by the polygraph examiner, Agent Kindly again met with Respondent. During this time, Respondent signed a second statement. Respondent was not provided his Miranda warnings prior to the questioning by Sergeant Brooks after the polygraph test had ended, nor was he provided with his Miranda warnings prior to the signing the statement with Agent Kindly. Respondent was not told that he had a right to an attorney, nor was he told that he could stop at any time. The second statement dated August 25, 2010, was written on a "Victim/Witness Statement" Form. This form did not include an outline of Respondent's Miranda rights nor did it include a waiver of those rights.

The matter was scheduled for trial before the Honorable Eugene C. Griffith Jr. on May 15, 2012. Prior to the start of the trial, the Trial Court conducted a Jackson v. Denno hearing. After listening to relevant portions of the recorded meeting on August 25, 2010, the Trial Court ruled that the second statement was not voluntarily. Accordingly, the Trial Court suppressed the statement. The following day, the Attorney General's Office filed and served a Notice of Appeal of the Trial Court's ruling suppressing Respondent's statement.

## ARGUMENT

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE TRIAL COURT'S ORDER GRANTING RESPONDENT'S MOTION TO DISMISS IS IMMEDIATELY APPEALABLE.

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)*) However, "A Pre-trial Order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable." State v. McKnight, 287 S.C. 167, 168, 337 S.E. 2d 208, 209(1985)

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 acknowledged embracing and kissing the victim. The fact that Respondent acknowledged touching the victim's breast does not mean that the suppression of the statement will significantly impair the State's 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 in an assault and battery case. It is up to the Jury to decide whether the victim or Defendant is more credible, and it is their duty to determine the facts of the case as they are presented to them. The evidence suppressed in this case is not the "smoking gun" as it would be if the evidence suppressed were DNA confirmation linking the Defendant's to a crime and there was no other evidence. Again, the second statement is not the only evidence linking Defendant to the alleged allegations and the victim can testify as to her recollection of the events surrounding the charge. The suppression of the second statement in no way impairs the State's ability to proceed with trial. Accordingly, the Court of Appeals erred in determining that this issue is immediately appealable.

II. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING RESPONDENT'S SECOND STATEMENT WAS NOT VOLUNTARY.

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*)

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, lns. 20-24) Sergeant Nate Brooks testified that, subsequent to the polygraph test, he questioned Respondent for an additional nineteen (19) minutes. (R. p. 33, lns. 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 first statement given by Respondent on August 6, 2010 was

written on a "Voluntary Statement" Form. (R. p. 65) The second statement, dated August 25, 2010 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 purpose of giving a polygraph test. Subsequent to the polygraph test, Respondent was questioned repeatedly by Sergeant Brooks. At no time was he told he was free to leave or that he didn't have to answer the questions. 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 won't accept Respondent's answers and begins to challenge Respondent on his answers. The questioning becomes confrontational. 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

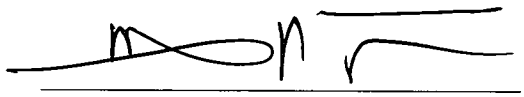
help Respondent keep his job. He told Respondent "I feel more obligated to you because of what you do for a living". Sergeant Brooks also told Respondent that he wants to put Respondent in the best light with the Sheriff. After continuously asking the same question of Respondent and telling Respondent 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 "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

It is therefore respectfully submitted that Raymond Franklin is entitled to a rehearing of Opinion No. 2014-UP-110 filed by the Court of Appeals on March 12, 2014.

TURNER & BURNEY, P.C.



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March 25, 2014
Laurens, South Carolina

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**PROOF OF DELIVERY**

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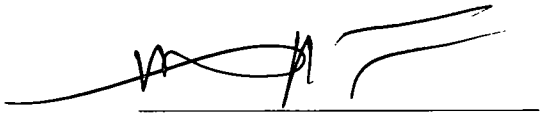
I certify that I have served a copy of the **Respondent's Petition for Rehearing** on William M. Blitch, Jr., Esquire, Assistant Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, by depositing them in the United States Mail, postage prepaid, on the 25 **day of** March **, 2014.**



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March 25, 2014

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Reply to:
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March 25, 2014

The Hon. Jenny A. Kitchings
Clerk of the SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211
Overnight Mail

RE: The State v. Raymond Franklin
Appellate Case Tracking No.: 2012-212013

Dear Ms. Kitchings:

I enclose herewith the original and six (6) copies of the Respondent's Petition for Rehearing in the above matter along with the required filing fee of $25.00. By copy of this letter, I am serving a copy of the Petition for Rehearing on Appellant. I also enclose herewith the original and two (2) copies of the Proof of Delivery for the same.

Please file the originals and return the clocked copies in the enclosed self-addressed stamped envelope.

Thank you for your attention in this matter.

Sincerely,

Matthew P. Turner
MPT/ljf

CC: James E. Bryan, Jr., Esquire
William M. Blitch, Jr., Assistant Attorney General

Enclosures



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