STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMEL RASHOND DANIELS,

APPELLANT

APPELLATE CASE NO. 2013-001210

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in admitting Appellant's statement to law enforcement since Appellant was subject to custodial interrogation and had not been informed of his constitutional rights pursuant to *Miranda v. Arizona*[1] when he made the statement?

[1] 384 U.S. 436 (1966)

STATEMENT OF THE CASE

On August 3, 2012, a Greenwood County Grand Jury indicted Appellant for obstruction of justice. R. 126 – R. 127. His case was called to trial on May 13, 2013 before the Honorable Frank R. Addy, and a jury. R. 1. George P. Callison represented Appellant. Shannon Swords Odom and Aaron Taylor were the assistant solicitors. R. 1.

At the conclusion of the trial on May 15, 2013, the jury found Appellant guilty. R. 115, ll. 5-15. Judge Addy sentenced Appellant to seven years imprisonment. R. 122, ll. 5-10.

This appeal follows.

ARGUMENT

The court erred in admitting Appellant's statement to law enforcement since Appellant was subject to custodial interrogation and had not been informed of his constitutional rights pursuant to *Miranda v. Arizona* when he made the statement.

Trial Facts

During the early morning hours of May 31, 2012, Trooper Cody Bishop of the South Carolina Highway Patrol initiated a traffic stop on a vehicle that was swerving and unable to maintain its lane. Trooper Bishop testified that there were three occupants inside the vehicle and that all appeared to be "extremely fidgety." According to Trooper Bishop, there was so much "movement going on" that he could actually see "the vehicle shaking." Due to the movement and the number of occupants inside the vehicle, Trooper Bishop radioed Trooper J.C. Ashley for back up. R. 48, l. 21 – 50, l. 16.

Trooper Bishop approached the driver side of the vehicle and, when Trooper Ashley arrived, he went to the passenger side. R. 51, l. 5 – R. 52, l. 7. Trooper Ashley testified that when he approached the passenger side of the car he shined his flashlight in the backseat and saw a white Styrofoam cup. Trooper Ashley testified that he opened the rear passenger door, retrieved the Styrofoam cup, and confirmed his suspicion that it contained liquor. Ashley claimed that at that point he noticed a clear plastic bag that contained a white powdery substance located between the rear passenger door and Appellant who was sitting in the back seat. Ashley placed the plastic bag on top of the car and then ordered Appellant to get out of the car. R. 30, ll. 3-23.

Ashley claimed that as he was patting Appellant down for weapons, Appellant continued to "wiggle and struggle a little bit." He explained that while he was attempting to

gain control of Appellant's hands, Appellant allegedly grabbed the plastic bag from the top of the car and put it in his pocket. Trooper Bishop eventually came over to assist Ashley and the two placed Appellant in handcuffs behind his back. R. 30, ll. 3-23.

After placing Appellant in handcuffs, Trooper Ashley went to speak with the front seat passenger. Meanwhile, Trooper Bishop moved Appellant to the rear of the car, retrieved the plastic bag from Appellant's pocket, and placed it on top of the trunk. Trooper Bishop testified that as he was speaking with Appellant, who had his back to the trunk, Appellant somehow, with his hands handcuffed behind his back, grabbed the bag off the trunk and put it in his mouth. Bishop testified, "He did not grab it off the trunk with his mouth. He removed that substance off the trunk of the vehicle, or the vehicle in which he was riding, bent over, placed it in his mouth, and I observed everything, every bit of it." Bishop ordered Appellant to "spit it out," but Appellant allegedly swallowed the bag. R. 54, l. 21 – 92, l. 15.

According to Trooper Ashley, the bag contained a quantity of what "appeared to be cocaine" about the size of a dime. R. 30, l. 24 – 67, l. 1. Trooper Bishop also testified that through his training and experience he believed the substance to be cocaine. R. 56, ll. 1-10. However, the substance was never field tested. R. 39, ll. 3-4.

After Appellant allegedly swallowed the bag, the officers called EMS and Appellant was transported to the hospital. Appellant stayed in the hospital for one to two days, but apparently never passed the plastic bag. R. 41, l. 21 – 42, l. 13; R. 77, l. 8 – 78, l. 16.

Jackson v. Denno[2] Hearing

Defense counsel moved pretrial to exclude any testimony regarding Appellant's statement to law enforcement made while he was in custody, but before he had been informed of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436. Defense counsel argued that since Appellant was in handcuffs, there is "no question" that he was in custody. Defense counsel further argued that before Appellant was informed of his rights, law enforcement asked him a question and Appellant responded. R. 2, l. 7 – 3, l. 25.

Trooper Bishop testified during the hearing that after Appellant was ordered out of the vehicle he was placed in handcuffs with his hands behind his back. R. 10, ll. 13-23. Bishop explained that after Appellant allegedly swallowed the plastic bag containing what Bishop believed to be cocaine, he asked Appellant, **"Why did you do that?"** and ***at least twice*, "Do you think that's going to help you?"**. R. 12, l. 9 – 13, l. 15. Bishop claimed that after he asked Appellant those questions, Appellant responded, "It was just a little coke. Hell. Now you have no evidence." Id. Bishop testified that when he asked Appellant those questions he was not "eliciting a response." He claimed that he was "merely making statements in the heat of a moment . . . that could be perceived as a question. But [he] wasn't looking for a response at all." R. 15, l. 22 – 16, l. 3.

At the conclusion of the hearing, the state conceded that Appellant was in custody for purposes of Miranda. The solicitor stated, "[H]e was definitely in custody. I mean, he was in cuffs. He was in investigative detention." R. 19, ll. 3-6. The solicitor argued, however, that Trooper Bishop's "rhetorical questions" did not fall into the category of

[2] 378 U.S. 368 (1964)

"words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from suspect." The solicitor concluded that Appellant was not being interrogated and, therefore, the police were not required to inform Appellant of his Miranda rights. The solicitor also pointed out that Appellant's statement was made ten to fifteen seconds after Trooper Bishop's questions and thus, even if it was an interrogation, the interrogation had ended at the time Appellant made the statement. R. 19, l. 7 – 20, l. 9.

Defense counsel argued, "I think it's clear, obviously -- and the solicitor agrees -- that [Appellant] was in custody, handcuffed, highly intoxicated, asked a series of questions: 'Why did you do that? Do you think that's going to help you? Do you think that's going to help you?' several 'Spit it out. Spit it out' as they're holding him. You know, if that's not interrogation, I mean . . . that's about as -- you know, as interrogating as you can get." R. 20, ll. 16-24.

The court ultimately ruled that Appellant's statement was admissible because it found the statement was not made in response to any interrogation. The court held, "It is clear to me, from the video, as well as from the testimony, that the officer's reaction to [Appellant] swallowing the items was merely rhetorical . . . it may have been in [the] form of a question, but it was more of a declaratory statement by the officer, as opposed to an effort to elicit information by way of questioning." R. 21, l. 5 – 22, l. 19.

Discussion

The court erred in admitting Appellant's statement to Trooper Bishop since Appellant was subject to custodial interrogation and had not been informed of his constitutional rights pursuant to Miranda when he made the statement.

In Jackson v. Denno, 378 U.S. at 376, the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda. State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

As explained by the United States Supreme Court, "[p]rior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444.

However, the use of these safeguards is required only when the accused is in custodial interrogation. Miranda, 384 U.S. at 445; see also State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Berkemer v. McCarty, 468 U.S. 420, 428 (1984) (citing Miranda, 384 U.S. at 444); Stansbury v. California, 511 U.S. 318, 322 (1994); Oregon v. Mathiason, 429 U.S. 492, 495 (1977). "Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police that the police . . . should know are reasonably likely to elicit an incriminating response." State v. Ledford, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002) (quoting State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998)).

"It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' If a motorist who has been detained pursuant to a traffic stop thereafter is subject to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." McCarty, 468 U.S. at 440.

In this case, while Appellant was not initially in custody during the traffic stop, as soon as he was placed in handcuffs with his hands behind his back, which is "associated with formal arrest," he was in custody for purposes of Miranda. See Id. The state **conceded** this at trial. See R. 19, ll. 3-6.

Not only was Appellant in custody at the time he allegedly made the statement to law enforcement, his statement was also made in direct response to Trooper Bishop's questioning, specifically, "Why did you do that?" and "Do you think that's going to help you?" See R. 12, l. 9 – 13, l. 15. Bishop should have known his questions were reasonably likely to elicit an incriminating response from Appellant. See Ledford, 351 S.C. at 88, 567 S.E.2d at 907.

In Furnish v. Indiana, 779 N.E.2d 576 (Ind. Ct. App. 2002), the defendant was being chased by the police after the police observed him walking around the Save-On Liquor Store at 4:20 am. Id. at 577. Upon catching the defendant and placing him in handcuffs, the police found a significant amount of money wrapped in bank wrappers in his boot. One of the officers who apprehended the defendant stated, "Damn, Delbert, where'd you get all the money" to which the defendant replied, "Save-On." Id. Despite the state's argument that the officer was merely making an observation and was not eliciting a response, the Indiana

Court of Appeals held that this constituted custodial interrogation and remanded the case for a new trial. Id. at 580-582.

The facts in Furnish are similar to the facts in this case in that the officer alleged he asked the defendant a "rhetorical question" in which he claimed he was not attempting to elicit a criminal response. Id. at 581. This Court should likewise find that Appellant was subject to custodial interrogation at the time he made the statement to law enforcement because he was clearly in custody and was being questioned by Trooper Bishop.

Again, the state conceded at trial that Appellant was in custody for purposes of Miranda and, while Appellant was in custody, Bishop repeatedly asked, "Why did you do that?" and "Do you think that's going to help you?" Despite Trooper Bishop's testimony that he was merely expressing that Appellant made a dumb move, a fair reading of the record indicates that Trooper Bishop's should have known that his questioning was likely to elicit a criminal response. A reasonable person in Bishop's position would have known such questioning was likely to elicit a criminal response from Appellant.

The error of admitting Appellant's statement to law enforcement was not harmless. The solicitor repeatedly emphasized Appellant's statement during her closing argument. She argued, "And then you can . . . hear him on the video, especially if you listen closely: 'It was just a bag of coke. Now you ain't got no evidence.' Trooper Bishop testified to that: just a bag of coke. There should be no doubt in your mind. This should be a guilty. This is a guilty." R. 86, ll. 11-15.

Additionally, the jury sent out several notes during its deliberation indicating its difficulty in reaching a verdict. The first note read, "Can we re-watch the video – the part where admits cocaine?" R. 105, ll. 14-17; Court's Exhibit No. 1. After watching a portion

of the video of the traffic stop, the jury sent out a second note. That note read, "Can we please watch the video where he is first out of the car and the contraband is on the roof of car? Until the handcuffs. On the charge of obstruction of justice is it at any point in the video?" R. 108, ll. 13-25; Court's Exhibit No. 2.

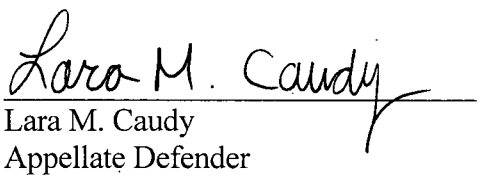
After watching another portion of the video, the jury sends out a third note which reads, "Can we rewatch the entire video? Is it possible to slow motion the video? (the part where the officer approaches the passenger side until he is sat on the ground)?" R. 112, ll. 18-24; Court's Exhibit No. 3. As evidenced by these various notes, the jury had difficulty reaching a verdict in this case and the evidence of Appellant's statement to law enforcement given in violation of Miranda likely tipped the jury in favor of a guilty verdict.

Therefore, Appellant's conviction should be reserved and his case remanded for a new trial.

CONCLUSION

Appellant's conviction should be reversed and this case remanded to the Greenwood County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of June, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 30, 2014

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant 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 30th day of June, 2014.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of June, 2014.

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