STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
JUL 17 2014
S.C. Supreme Court

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

Opinion No. 2014-UP-167 (S.C. Ct. App. filed 4/9/14)

09-GS-21-1564

THE STATE,

RESPONDENT,

V.

DAVID GERRARD JOHNSON,

PETITIONER

APPELLATE CASE NO. 2014-001506

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX i

UNPUBLISHED OPINION NO. 2014-UP-167, FILED APRIL 9, 2014 1

PETITION FOR REHEARING 6

ORDER DENYING PETITION FOR REHEARING 27

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Gerrard Johnson, Appellant.

Appellate Case No. 2012-209267

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Unpublished Opinion No. 2014-UP-167
Heard February 6, 2014 – Filed April 9, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody Jane Brown, all of Columbia; and Solicitor E.L. Clements, III, of Florence, for Respondent.

PER CURIAM: David Gerrard Johnson appeals his convictions for murder, first-degree burglary, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy, arguing the trial court erred in (1) admitting a statement Johnson made to the police and evidence that was the product of this statement, (2) finding Johnson knowingly and voluntarily consented to providing DNA and fingerprint evidence, (3) excusing a juror, and (4) admitting graphic photographs of the deceased victim's body. We affirm.

Family members of the victim initially became concerned after receiving a call informing them the victim failed to show up for work. They went to her home, where they noticed signs of suspicious activity. The police later found the victim's car away from her home. Nearby, they found a bag of pillows that tested presumptive positive for blood.

After additional investigation, police notified Johnson through Johnson's father and "word on the street" that they wanted to speak with him about the victim's disappearance. Johnson voluntarily went to the police station and, after waiting several hours, agreed to talk with one of the officers. The officer then read Johnson his *Miranda* rights.[1] Johnson then proceeded to give several different accounts about what had happened, but eventually led the police to the victim's body. When the officers returned to the police station with Johnson, Johnson again received *Miranda* warnings, after which he gave a formal statement in which he admitted to being in the victim's home when she died and witnessing her death at the hand of another individual. He also told police he accompanied other participants in the crime when they removed the victim's body, which they accomplished by using her car to drive it to a remote location. Johnson also revealed that after he and other participants drove the victim's car back to her home, he remained inside the car while the others stole items from inside the residence. Johnson also showed the police various electronic items that had been taken from the victim's home and were being stored at his father's house.

Johnson later signed a release form authorizing law enforcement to obtain his fingerprints and a sample of his saliva. Forensics testing showed the victim's blood on the mattress, bed clothes, and furniture in her bedroom. Additional tests

---

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

revealed Johnson's DNA on the steering wheel of the victim's car and his fingerprints on the driver's side area.

Johnson was subsequently indicted for murder, first-degree burglary, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. A jury found him guilty on all charges.

1. Johnson first argues that because of the evidence demonstrating his lack of mental capacity to make a knowing and voluntary waiver of his constitutional rights, the trial court should not have admitted the statement he made to the police. We hold the trial court did not abuse its discretion in admitting the statement; therefore, we affirm the court's ruling. *See State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) ("On appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show an abuse of discretion."). Here, the trial court, though acknowledging the prolonged time that Johnson was at the police department before giving his statement, noted: (1) there was no undue coercion, threats, or force on the part of law enforcement in procuring the statement; (2) Johnson had come to the police station voluntarily; (3) before making his statement, Johnson had been provided food, drink, and the opportunity to rest; (4) Johnson had been read his *Miranda* rights twice and signed a waiver form; (5) Johnson had previously been through the criminal justice system, having entered into guilty pleas in the past; (6) none of the officers had reason to believe that Johnson did not understand his rights as read and explained to him; and (7) Johnson's responses throughout the transcript of his statement indicated he understood the questions that the officers asked him. Furthermore, a clinical psychologist who evaluated Johnson a few months before his trial testified that Johnson understood that he should not talk to the solicitor without his attorney being present and could not be forced to talk in court. Even with the acknowledgment that Johnson may have had cognitive deficits, there is evidence to support the trial court's admission of his statement. *See State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) ("A determination whether a confession was 'given voluntarily requires an examination of the totality of the circumstances.'" (quoting *Von Dohlen*, 322 S.C. at 243, 471 S.E.2d at 694-95)); *State v. Miller*, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007) ("When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." (citing *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001))).

2. Johnson also argues the trial court erred in admitting evidence that was the product of his statement because that evidence was the fruit of the poisonous tree. Because, however, Johnson's statement was obtained legally, the admission of any evidence resulting from the information he provided is not barred by the doctrine of the fruit of the poisonous tree. *See State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality.").

3. Johnson also argues the trial court erroneously found he knowingly and voluntarily consented to providing the police a DNA sample and fingerprint standard, again relying primarily on evidence that he lacked the mental capacity to make a knowing and voluntary waiver of this right. Intellectual disability alone, however, does not amount to an inability to give consent, which, like knowledge in a waiver situation, requires a determination based on the totality of the circumstances. *See State v. Wallace*, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977) ("Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the 'totality of the circumstances.'"). Here, the trial court, when determining whether Johnson signed the consent form voluntarily, noted Johnson had held a job and received wages, thus evidencing some ability to understand a request for fingerprint and DNA evidence. Furthermore, "our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent." *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

4. Johnson next contends he did not receive a fair trial because the trial court erroneously excused a juror who stated she could be fair and impartial even though she knew members of Johnson's family. We find no error in the trial court's decision to excuse the juror. By statute, the trial court must make its own determination as to whether a prospective juror should be excused from serving on a particular case and "[i]f it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called." S.C. Code Ann. § 14-7-1020 (Supp. 2013); *see also State v. Franklin*, 267 S.C. 240, 248, 226 S.E.2d 896, 899 (1976) (stating the words "if it appears to the court," as used in a prior version of section 14-7-1020, "are evidence of discretion vested in the trial judge" (citing *State v. Faries*, 125 S.C. 281, 287, 118 S.E. 620,

622 (1923))). Here, even though the juror stated she could be fair, she also expressed discomfort about the prospect of having to face Johnson's family if she were to sit on a jury that eventually convicted him. Given the juror's hesitation, we hold the trial court, as required by statute, made an independent finding as to whether the juror was genuinely "indifferent in the cause" and properly exercised its discretion in excusing her. *See State v. Rogers*, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974) (stating the "applicable general rule" that the "matter of excusing jurors is addressed to the sound discretion of the trial judge, the exercise of which will not be interfered with unless it is clearly shown to have been abused to the actual prejudice of the complaining party" (quoting 50 C.J.S. Juries § 205 (1947))); *State v. Faries*, 125 S.C. 281, 288, 118 S.E. 620, 622 (1923) ("The manner and bearing of the juror, nature's stamp of character on form and countenance, are evidential exhibits for the consideration of the circuit judge, which may be more indicative of the juror's real attitude than his words. Those things cannot adequately be spread upon the record." (citation omitted)).

5. Finally, Johnson takes issue with the trial court's decision to admit three photographs of the deceased victim's body. We find no error. The photographs were relevant, as required by Rule 401, SCRE, in that they had a tendency to enhance the probability of the existence of certain facts, including information in Johnson's statement about the manner of the victim's death and the concealment and removal of her remains. Furthermore, the photographs, in addition to being relevant, were not "calculated to arouse the sympathy or prejudice of the jury" so as to justify their exclusion. *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). To the contrary, the trial court was presented with other photographs, which it excluded as overly gruesome and graphic.

AFFIRMED.

HUFF, THOMAS, and PIEPER, JJ., concur.

6

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID GERRARD JOHNSON,

APPELLANT

Appellate Case No. 2012-209267

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

Opinion No. 2014-UP-167

PETITION FOR REHEARING

On April 9, 2014, this Court issued an unpublished opinion affirming Appellant's convictions and sentences. State v. Johnson, 2014-UP-167 (S.C. Ct. App. filed April 9, 2014). In his brief, Appellant raised five issues on appeal. In his petition for rehearing, Appellant respectfully requests this Court rehear the matter – specifically, the first three issues - pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by this Court in its decision.

The first issue raised by Appellant was whether the trial court erred by admitting a statement made by Appellant to police where the undisputed evidence demonstrated Appellant's lack of

disability and the totality of the circumstances. This Court concluded that "[e]ven with the acknowledgement that [Appellant] may have had cognitive deficits, there is evidence to support the trial court's admission of his statement." This was error because the trial court abused its discretion in admitting Appellant's statements to police where the totality of the circumstances clearly demonstrated Appellant did not make a knowing waiver of his rights, as will be discussed in greater detail below. Additionally, this Court relied upon a statement by a clinical psychologist, who evaluated Appellant for competency to stand trial, that Appellant "understood that he should not talk to the solicitor without his attorney being present and could not be forced to talk in court." This Court's opinion neglected to note that the clinical psychologist had to educate Appellant on several topics in order to deem him competent to stand trial. This Court also neglected to note the psychologist's testimony that Appellant "said he could not be forced to talk in court whether he wanted to or not." This demonstrated Appellant's lack of understanding of his rights. Certainly, Appellant could not be forced to testify, but the second aspect of this statement – he could not be forced to testify even if he wanted to – is illogical. Further, the evaluation by the state's psychologist occurred after Appellant had been arrested and educated on the legal system by his attorney and the psychologist. Her evaluation and testimony went to what Appellant understood at the time of the trial as that would be the critical time for competency.

Dr. Alicia V. Hall from the Department of Disability and Special Needs, the clinical psychologist referred to in this Court's opinion, testified regarding whether Appellant was competent to stand trial. In arriving at her conclusion that Appellant was competent, Dr. Hall determined that Appellant suffered from an intellectual disability, formerly called mental retardation. R. 12, lines 4-16. Dr. Hall testified that Appellant "required more time to understand and answer questions than a person who did not have intellectual disability." R. 18, lines 13-17.

Importantly, Dr. Hall qualified her opinion that Appellant was competent to enter a guilty plea: "Yes, as long as with the caveat that he was given ample time to understand." R. 19, lines 9-13. Even more importantly, she qualified her finding of competency – "he met the standard for competency, but that he does require more time to answer questions and make sure that he's fully understanding what is being asked of him." R. 27, lines 18-24.

Appellant's school records indicated a full scale IQ score of 58 in September 1993 and a score of 51 in September 1996, which were in the "extremely low range." R. 23, lines 18-23; R. 24, lines 2-6; R. 24, lines 11-12. During the competency evaluation, Appellant struggled to understand conspiracy. Dr. Hall educated Appellant on the topic and he applied this education to a hypothetical case. R. 25, line 15 – R. 26, line 6. Additionally, Appellant struggled with the concept of a plea bargain, and educating him on this topic required "a good deal of effort and education" by the doctors. R. 26, lines 7-12. According to Dr. Hall, a finding of competency required a fairly low standard of understanding. R. 27, lines 4-7.

Dr. David Richard Price testified that testing revealed Appellant had an IQ of 59. This placed Appellant at the low end of mild mental retardation. R. 110, lines 11-25. Additionally, testing placed Appellant at a grade equivalency of a kindergartner. R. 112, lines 14-24. In Dr. Price's expert opinion, Appellant lacked the ability to understand "complex words, complex sentences, complex phrases." R. 113, lines 16-17. For word reading, Appellant scored a grade equivalency of a second grader, but sentence comprehension and verbal comprehension showed severe deficits. R. 113, lines 17 – R. 114, line 2. Appellant's school records supported Dr. Price's results. R. 114, lines 3-17. Appellant could write and read "very simply," but reading did not amount to comprehending. R. 114, lines 18-23.

Regarding the Miranda rights, Dr. Price testified that Appellant "would have understood them as well as any kindergartner would have understood them." Appellant would not have understood the warnings "as far as the implications for stating them." Put simply, in Dr. Price's opinion, Appellant lacked the ability to understand the Miranda waiver. R. 116, line 19 – R. 118, line 6.

People with intellectual disabilities learn to adapt through acquiescence – they claim to understand when they do not and laugh at jokes they do not understand. R. 118, line 7 – R. 119, line 2. Dr. Price discussed the Miranda warnings with Appellant. He was unable to define "waive." Dr. Price spent a considerable amount of time talking to Appellant about each right and explaining the implications of each right. Of course, this happened after Dr. Hall saw Appellant and educated him as well. R. 119, lines 7-17.

According to Dr. Price, Appellant was more agreeable with the officers because he had been in custody for over eleven hours, it was the middle of the night, and at least three officers were present for the interrogation. R. 120, line 11 – R. 121, line 2. Dr. Price explained that individuals with mental retardation "tend to decompensate under stress." R. 124, lines 11-12.

> Under unusual periods of stress they tend to disintegrate, may need special assistance and counseling. They just cannot factor and process information about what's going on and understanding what's happening around them, cannot make rational decision during those periods.

R. 133, lines 13-24. Being under police investigation and being in custody for over eleven hours would cause a person with mental retardation to withdraw and it would decrease their ability to comprehend and make informed choices and decisions. R. 133, line 25 – R. 134, line 19.

On cross-examination, Dr. Price testified that individuals with mild mental retardation may hold a job. When the prosecutor asked about the ability of kindergartners to hold a job, Dr. Price explained that even kindergartners can perform routine skills. Appellant worked at McDonald's. R.

124, line 19 – R. 125, line 16. Additionally, Appellant drove a car, despite doing so without a license. R. 126, lines 12-17. Nevertheless, Dr. Price testified that the police officer's statements regarding how Appellant informed them of the location of the body supported Appellant suffering from mental retardation because he failed to use street names and used other landmarks for his guide. R. 127, lines 11-15.

At 4 p.m., investigators brought Appellant to fellow officer Timothy Wade Compton's office for Compton to sit with him while investigators handled other matters. R. 37, line 7 – R. 38, line 12. Compton was playing a video game on his computer and Appellant laughed about the game. The two then talked about the video game. After about an hour, Compton and Appellant got something to eat and drink from the vending machines. R. 39, line 10 – R. 40, line 6. Compton began typing reports, and Appellant asked permission to take a nap. According to Compton, Appellant slept in the chair for several hours. R. 40, lines 7-16; R. 60, lines 10-15.[1]

Compton "got tired of typing" and his curiosity as a detective took over. He "decided [he] wanted to see if [Appellant would] like to talk." Compton told Appellant the other detectives were down the hall talking to others and "before they tell them what happened, how about you talk to me." Appellant agreed to talk. Compton stated "before we talk I need to read your rights to you." Compton then read the rights, <u>in toto</u>, from a card. R. 40, line 19 – R. 41, line 8; R. 41, line 24 – R. 42, line 6; R. 57, lines 10-17. At the conclusion of the recitation, Compton asked if Appellant understood and if he wished to talk. R. 45, lines 3-24. Compton claimed Appellant understood his rights, and Compton had no reason to believe otherwise. R. 45, line 21 – R. 46 1; R. 46, lines 17-23.

[1] During the trial, Compton testified that he knew the investigators were working the case because he heard what was going on over the radio. R. 385, line 16 – R. 386, line 4.

Initially, Appellant claimed he observed others burglarizing the victim's residence. Compton accused Appellant of lying and instructed him to tell the truth. R. 47, lines 7-17. Then, Appellant stated he was there when others went into the victim's residence and stole items. R. 47, lines 17-19. During the interrogation, two other officers entered the room; thus, three officers participated in the interrogation of Appellant. R. 47, line 20 – R. 48, line 10. Thereafter, Compton told Appellant he needed to tell them where the body was – for the sake of the victim's family. R. 48, lines 13-17.[2] Appellant stated he could take them to the body. R. 48, lines 17-18. Appellant claimed he knew the location of the body because "Amp" told him. R. 48, line 24 – R. 49, line 1. When Appellant moved toward the door to direct the officers to the location, Compton ordered him to stop and directed him to return to his seat. R. 49, line 8-13.

Although Compton claimed he had very limited involvement in the investigation, he knew the suspected cause of death. Therefore, he decided to query Appellant accordingly. Appellant stated the victim's throat was cut. R. 49, line 17 – R. 50, line 7. Afterwards, Appellant, Compton, Officer Calhoun, and Officer Drulis got into a vehicle, followed by Officers Raines, Drayton, and Godwin in a separate vehicle. R. 50, lines 15-24. Compton did not know what time they left, but admitted it could have been after midnight – or at least eight hours after Appellant initially arrived in his office. He knew it was "a long time." R. 54, lines 10-21.[3] Compton testified that Appellant took them to the body on Malloy Street. R. 51, lines 1-22. Compton accused Appellant of lying

[2] At trial, Compton testified that he gave a spiel about telling the truth and being honest. R. 392, lines 6-9. Additionally, Compton "tried to play on a sympathy card, you know, that we call it. You know, say hey, the family needs closure, we know she is deceased." R. 394, lines 2-7.

[3] During the trial, Compton testified that he did not recall testifying previously that he spoke to Appellant after midnight about the crime. However, he admitted that when they went looking for the body, it was some time the next day. It may have been between the hours of two and three in the morning. R. 409, line 17 – R. 410, line 10.

again. He told Appellant that he knew the location of the body because he had been shown or he was there when the body was dumped. Appellant responded "yes, sir." R. 52, lines 3-13. The officers and Appellant returned to the police department. Everyone entered the conference room and interrogated Appellant. When "Drayton and Godwin felt they had what they wanted from his statement they recorded his statement." Compton then went home. R. 52, line 18 – R. 53, line 5. On cross-examination, Compton testified that he had no prior knowledge of Appellant and was unaware he suffered from an intellectual disability. R. 57, line 24 – R. 58, line 22.

Melvin Godwin, an investigator on the case, testified that after the individuals searched for the body, everyone returned to the police department "[t]o get a formal statement from the defendant." R. 77, lines 16-18. Godwin advised Appellant of his rights using his card and had Appellant sign a waiver of rights form. R. 77, lines 19-25; R. 88, line 21 – R. 89, line 4. Godwin did not know if Appellant could read and write, so he read the form to Appellant. R. 80, lines 9-16. Godwin read the card completely, and then asked if Appellant understood. R. 78, lines 6-7. Godwin claimed Appellant was "clear, coherent," and Goodwin did not notice anything out of the ordinary. R. 78, lines 19-21.

The officers then talked to Appellant again, "to clear the matter, anything discrepancies, to get more detail about what happened" before commencing "the official recorded statement." Godwin did not know how long this process took. R. 79, lines 1-10. Appellant "seemed to understand everything that was being stated in the room" and "never made any statement that he didn't understand everything." R. 79, lines 16-18. The official recorded statement began at 3:15 a.m. – over eleven hours after Appellant arrived at the police department. R. 86, line 8 – R. 87, line 1.

Like Compton, Godwin did not know Appellant's education level or any other details of his background. R. 88, lines 3-20. Godwin did not ask Appellant if he understood the word "waiver." R. 89, lines 12-14. Godwin claimed to have previous experience with severely mentally retarded people, and he knew of their disabilities based on "their behavior and actions." R. 91, lines 7-11. Larry Drayton, another officer with the police department, testified similarly to Compton and Godwin. R. 92, line 25 – R. 104, line 12.

At the conclusion of the testimony, the prosecutor argued he "fe[lt] like [he] put up gracious sufficient evidence that [Appellant] knew what he was doing." According to the prosecutor, "there's nothing complex" about "you have the right to remain silent." He argued it takes very little intelligence to "understand you got the right to keep your mouth shut." He went through each of the warnings and argued "there was nothing complex" about them. The prosecutor found "it ludicrous that you'd think that he's in kindergarten or that he - - or that you would try to argue he was on a kindergarten scale. He held a job at McDonald's for over a year." Holding a job at McDonald's was "well beyond any kindergartner." He argued Appellant knew what he was doing and no one coerced him. Nevertheless, he admitted that Appellant did not "understand a lot of things abstractly," but argued Appellant understood "on a basic level that he had the right to keep his mouth shut." R. 158, line 24 – R. 162, line 16.

The prosecutor persisted in arguing a flawed syllogism. He argued that if Appellant were competent to stand trial, then he would be competent to enter a guilty plea; if Appellant were competent to enter a guilty plea, then he would be competent to waive his rights under Miranda. R. 166, line 12 – R. 167, line 9.

Appellant argued the issue was whether Appellant understood his rights and then freely and voluntarily chose to give up those rights. The evidence before the court was uncontradicted that

Appellant suffered from mental retardation and that it required "real effort" to make sure Appellant understood information. Appellant explained the totality of the circumstances included Appellant's mental deficiency, the length of time he had been in police custody, the length of time he had been interrogated, and the number of officers in the room during the interrogation. R. 162, line 19 – R. 166, line 10.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), 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 v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); 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); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250 (2010)(citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted). Consideration of a person's mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974)(citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)).

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), the South Carolina Supreme Court held that although Davis suffered from mild mental retardation with an IQ of 66, he had the capacity to make a knowing waiver of his constitutional rights to silence and counsel. After Davis's arrest, an officer read the standard Miranda warnings to Davis from a card. The officer testified he "read slowly, paused after each sentence, looked at Davis, and asked him to verbally indicate whether he understood what had been read to him." Davis responded affirmatively that he understood each of his rights. When asked if he wanted a lawyer present, Davis stated he did not need a lawyer. The officer also "explained" that Davis could end the interrogation at any time. Davis indicated he

understood this and agreed to give a taped statement. Due to a problem with the audio equipment, the officer asked Davis for a second statement. Again, the officers explained to Davis his constitutional rights and Davis waived those rights and provided a statement. Id. at 336, 422 S.E.2d at 140.

A forensic psychiatrist testified that he interviewed Davis in detail regarding his understanding each of the rights afforded to him pursuant to Miranda. Id. at 336-337, 422 S.E.2d at 140. The psychiatrist admitted Davis's understanding "would be on a different, less abstract, level from a person of average intelligence, but Davis's comprehension was adequate to enable Davis to knowingly and intelligently waive those rights." On the other hand, Davis presented experts who testified he lacked the mental ability to understand the implications of Miranda. Id. at 337, 422 S.E.2d at 140. The Supreme Court held "there was sufficient evidence on the record, both lay and expert, to support the trial judge's determination that Davis was competent to waive his Miranda rights." Id.

In striking contrast to the instant matter, the officers in State v. Jennings, 280 S.C. 62, 63-64, 309 S.E.2d 759, 760 (1983) were aware of the defendant's low intellectual functioning and exercised caution to be sure he understood their communications with him. Based upon law enforcement's careful questioning and the remaining circumstances, the Court found Jennings's statement was admissible.

Numerous courts throughout the country have found statements to police inadmissible where the defendants lacked the ability to understand their rights and the implications of waiving such rights. In State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987), the New Jersey court found a defendant's statement was inadmissible based on the testimony of three teachers who taught the defendant seven years earlier. The teachers testified the defendant had a second or third grade level

vocabulary and required instructions in very basic terms. Due to his low level of functioning, he was unable to grasp abstract concepts. The teachers opined that he would not understand his Miranda rights even if explained to him.

Similarly, a psychiatrist and a psychologist testified that the defendant had a mental age of ten or eleven, required instructions to be given in a very slow and deliberate manner, and would not have been able to understand his rights unless they were very carefully explained to him. The defendant would do what he perceived an authority figure wanted him to do. The court held the statement was inadmissible because the warnings had not been given slowly and carefully enough or with any consideration of the defendant's intellectual functioning, thereby preventing the defendant from making a knowing waiver. State v. Rossiter, 623 N.E.2d 645 Ohio Ct. App. (1993). A court found a defendant's statement inadmissible because she lacked the ability to comprehend her rights where she suffered from mild mental retardation and she functioned on the equivalent of an eight-year old child. People v. Daniels, 908 N.E.2d 1104 (Ill. App. 2009). Although the defendant understood some of his rights and he was the manager of a local restaurant, a trial court properly excluded a statement by a mentally impaired individual, whose IQ was 71, where the expert testified the individual suffered from depression, which would affect his IQ. Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011).

In a case very similar to Appellant's, the Tennessee Supreme Court held a defendant did not knowingly and intelligently waive his rights before police interrogation, even though he appeared to understand his rights and was later found competent to stand trial because evidence showed that he was mentally retarded, with an IQ of 55, and functioned on the level of a child from six to nine years old. State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000).

According to empirical research, "mental retardation makes some people incapable of understanding either the text of the Miranda rights or the consequences of forsaking them. For these people, the words of the warnings latterly have no useful meaning.". Morgan Cloud, et al., Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 499 (Spring 2002). The results of the authors' study revealed

> mentally retarded people simply do not understand the Miranda warnings [because v]irtually all of the disabled subjects failed to understand the context in which interrogation occurs, the legal consequences embedded in the rules or the significance of confessing, the meaning of the sentences that comprise the warnings or even the individual operative words used to construct the warnings.

Id. at 501. Notably, the research showed that not only did people suffering from severe mental retardation not comprehend the warnings, but those classified as mildly mentally retarded failed to understand the warnings as well. Id.

The trial judge erred in admitting Appellant's statement to police officers where the record evidence demonstrated Appellant lacked the requisite mental ability to waive his Miranda rights due to his intellectual disability and this Court erred in affirming that decision. The issues are whether Appellant understood abstract concepts, such as rights, whether Appellant understood the words used in the warnings and waiver request, and whether he understood the implications of waiving his rights. The undisputed evidence was that Appellant had an IQ in the 50s, that his ability to understand was the equivalent of a kindergartner, that he was interrogated by multiple officers, that he remained in police custody for approximately eight hours before the initial questioning and was in police custody for approximately eleven hours before the police initiated recording of his statement. The recorded statement illustrated that although Appellant provided some narrative, he primarily responded to leading questions by the officers.

The state's own witness, Dr. Hall, testified Appellant required more time to understand information presented to him. In fact, in order to render him competent, the state's doctors had to educate Appellant on multiple aspects of his case and the judicial process. Appellant could not understand complex sentences or even complex words. No officer read the warnings singly and ensured Appellant's understanding of each. No officer explained the ideas, concepts, and rights comprising the warnings. As indicated by Dr. Price, Appellant did not understand his Miranda warnings or the implication of the waiver. Perhaps most convincing that Appellant did not understand the warnings was the prosecutor's admission that Appellant "did not understand a lot of things abstractly."

The second and third issues on appeal and that are the subject of this petition for rehearing flow from the first issue; therefore, Appellant respectfully requests this Court rehear those issues as well and to include the law and analysis applicable to the first issue as it applies to the second and third issues. Concerning the second issue,[4] this Court explained that because of the finding that Appellant's "statement was obtained legally, the admission of any evidence resulting from the information he provided [was] not barred by the doctrine of the fruit of the poisonous tree." In light of the error made by this Court in determining that Appellant's knowingly waived his rights, this Court erred in concluded the items recovered as a product of Appellant's statement were admissible.

After obtaining Appellant's formal recorded statement, which began at 3:15 am, the officers and Appellant went to Appellant's home searching for items relating to the burglary. R. 83, lines 15-22. According to the police, Appellant led the officers to the items. R. 83, line 23 – R. 84, line 5. An officer testified that Appellant told them "it was all right to go to the house." R. 84, lines 12-

[4] This issue was the third issue in Appellant's brief, but this Court analyzed it second in its opinion. To ensure clarity, Appellant is addressing this issue second in this petition for rehearing.

14. The police did not have a search warrant to invade the privacy of Appellant's home. R. 90, lines 6-9. Appellant objected to the introduction of evidence found at his home as the product of his statement, which was obtained illegally. R. 33, lines 8-25; R. 153, lines 7-25. Appellant lacked the ability to consent to the search due to his mental infirmity. R. 154, lines 10-20.

This issue involves whether the police had the authority to search Appellant's home based upon the consent he provided. Therefore, it is necessary to address the Fourth Amendment's protections as well as the totality of the circumstances surrounding an alleged consent. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Consequently, the United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974).

The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961). The exclusionary rule prohibits the admission of evidence that is the product, or fruit, of an unlawful search, or poisonous tree. Murray v. United States, 487 U.S. 533, 536-537 (1988); Wong Sun v. United States, 371 U.S. 471, 488 (1963); State v. Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975); see also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding if law enforcement exploit an unlawful search to seize evidence that would not have otherwise come to light, that evidence is the "fruit of the poisonous tree" and is not admissible); State v. Brown, 389

S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997).

Furthermore, the United States Supreme Court has held that "searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted); see Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971); see also State v. Weaver, 361 S.C. 73, 80–81, 602 S.E.2d 786, 790 (Ct. App. 2004). "The exceptions are "'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption...that the exigencies of the situation make the course imperative.'" Coolidge, 403 U.S. at 455. More specifically, the burden is on the State to justify a warrantless search or seizure, and the recognized exceptions have included: (1) search incident to a lawful arrest; (2) "hot pursuit;" (3) "stop and frisk;" (4) "automobile exception;" (5) the "plain view" doctrine; and (6) consent. Id.

Yet, despite these exceptions, the United States Supreme Court has emphasized its concern with warrantless searches and seizures:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 14-15 (1948). The Supreme Court of the United States has also addressed the warrant requirement's effect on the seizing officer: "In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages.

In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." Carroll v. United States, 267 U.S. 132, 156 (1925).

In order to introduce evidence based upon a purported consent to search, the prosecution must show the consent was voluntary. Voluntariness is determined by an examination of the totality of the circumstances. State v. Wallace, 269, S.C. 547, 550, 238 S.E.2d 675, 676 (1977)(citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Newman, 261 S.C. 352, 200 S.E.2d 82 (1973)); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001); State v. Dorce, 320 S.C. 480, 465 S.E.2d 772 (Ct. App. 1995). One of the factors to be considered in determining whether consent was voluntarily given is custodial setting. Wallace, 269 S.C. at 552, 238 S.E.2d at 677; Brannon, 347 S.C. at 90, 552 S.E.2d at 775.

In State v. Pichardo, 367 S.C. 84, 106, 623 S.E.2d 840, 852 (Ct. App. 2005), this Court affirmed a trial court's ruling that a car owner did not consent to a search the car voluntarily. The officer initially testified the owner gave consent, but then stated he needed to be certain the owner responded affirmatively. The owner asserted that he did not consent and did not understand English well enough to give consent. Expert testimony supported the owner's assertion that he spoke little or no English, did not understand English, and had a very limited education. Thus, this Court concluded there was no voluntary consent and the search of the vehicle was not valid.

Officers learned of the evidence at Appellant's house through the process of obtaining Appellant's statement. As explained, supra, Appellant's statement was obtained illegally because he did not knowingly waive his Miranda rights. Therefore, the items were the fruit of the poisonous tree.

Additionally, the officers found the items and seized the items by requesting consent from Appellant, who lacked the mental ability to provide the consent. The totality of the circumstances demonstrated Appellant lacked the mental capacity to consent. The alleged consent was obtained while Appellant was in custody and at some point after Appellant's recorded statement, which began at 3:15 a.m. At that point, Appellant had been in police custody over eleven hours and had been interrogated at least over three hours. His prolonged detention, the presence of numerous police officers maintaining his continued custody by the police, his undisputed lack of intellectual capacity, and the marathon interrogation easily show Appellant's alleged consent to search his home was not voluntary.

Turning to the third issue,[5] Appellant respectfully requests this Court rehear the matter based upon the points overlooked or misapprehended by this Court in determining Appellant possessed the mental capacity to knowingly agree to a DNA sample and fingerprint standard after reviewing the totality of the circumstances. This Court stated "[i]ntellectual disability alone, however, does not amount to an inability to give consent, which, like knowledge in a waiver situation, requires a determination based on the totality of the circumstances." Additionally, this Court noted that "'our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent.'" This Court, like the trial court, relied upon Appellant having held a job and earned wages to demonstrate his ability to understand a request for fingerprint and DNA evidence. This was in error.

Appellant lacked the ability to knowingly and voluntarily consent to providing the police with a DNA sample and fingerprint standard. Shannon Hill, an officer with the Florence Police

[5] This issue was the second issue presented in Appellant's brief, but this Court has addressed it as the third issue in its opinion.

Department, testified that in September of 2008, he asked Appellant for voluntary consent for a DNA sample and a fingerprint standard. R. 213, line 17 – R. 214, line 4. According to Hill, Appellant agreed and signed the appropriate waiver. R. 215, lines 3-10. Hill showed Appellant the form and explained it to him. R. 215, line 13 – R. 216, line 13. Hill claimed Appellant understood that he wanted to gather a saliva sample and a fingerprint sample and consented to such. R. 216, lines 7-13. Hill walked Appellant through the processes for gathering the samples. R. 216, line 21 – R. 220, line 18. At the end of Hill's direct testimony, he stated "I was assuming that he was understanding everything I told him." R. 222, lines 16-17. On cross-examination, Hill testified that he did not read any Miranda warnings to Appellant. R. 223, lines 4-11.

Dr. Price opined that Appellant did not understand the request for consent for police to obtain a DNA sample from him. Appellant would have acquiesced to the request as part of his adapting. R. 119, lines 18-24.

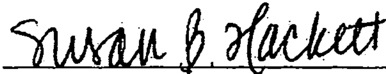
The prosecutor argued that Appellant had the ability to waive his Miranda rights, and therefore, and the ability to consent to the search – fingerprints and buccal swab. The prosecutor argued "I don't think a rocket scientist would be needed when you go and ask somebody, hey, can I take your fingerprints, and he could say no. Or can I take a buccal swab; you can say no. It's not exactly rocket science." R. 228, line 23 – 15.

Appellant countered that Appellant lacked the ability to understand and to consent. Appellant's mental disability along with other factors comprising the totality of the circumstances prevented Appellant from making a knowing waiver of his rights. R. 229, line 17 – R. 230, line 12. The form used to obtain Appellant's consent provided as follows: "I, the undersigned, do hereby voluntarily consent that the City of Florence Police Department obtain from me the following items for the Suspect Evidence Collection Kit: Saliva Sample, Fingerprints." State's Exhibit #117.

Just as Appellant lacked the ability to understand his rights and waive those rights in order to give police a statement, Appellant lacked the ability to understand his rights and waive those rights to submit to giving a saliva sample and fingerprint standard. In light of the procedures used for obtaining the samples, Appellant was never even advised of his rights and never informed that he could refuse. The totality of the circumstances included Appellant being in police detention from August 27, 2008 through September 5, 2008 when Hill sought the saliva sample and fingerprint standard and the apparent lack of the appointment of counsel for Appellant for those nine days while he remained incarcerated.

Appellant respectfully requests this Court rehear his case as it pertains to the first three issues presented based on the points overlooked or misapprehended explained above in arriving at this Court's decision to affirm Appellant's convictions and sentences.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

This 24th day of April, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

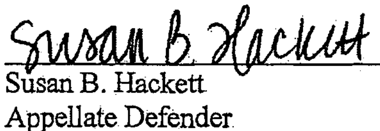
V.

DAVID GERRARD JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

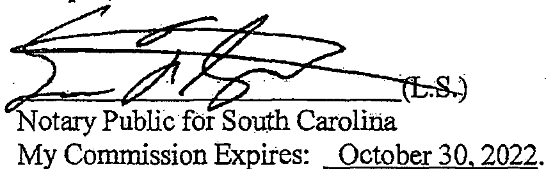
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. David Gerrard Johnson, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of April, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day
of April, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

David Gerrard Johnson, Appellant.

Appellate Case No. 2012-209267

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff, J.

Paula H. Thomas, J.

Daniel F. Pieper, J.

Columbia, South Carolina

cc:
Susan Barber Hackett, Esquire
Melody Jane Brown, Esquire

FILED
June 13, 2014

RECEIVED
JUN 13 2014
SC OFFICE OF
APPELLATE DEFENSE