STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

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

09-GS-21-1564

THE STATE,

RESPONDENT,

V.

DAVID GERRARD JOHNSON,

PETITIONER

Appellate Case No. 2014-001506

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 13, 2014. App. 27.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the trial court's erroneous admission of a statement made by Petitioner to police officers where the undisputed evidence demonstrated Petitioner's lack of mental capacity to making a knowing waiver of his constitutional rights due to his intellectual disability?

II. Did the Court of Appeals err in affirming the trial court's erroneous admission of evidence that was the fruit of the poisonous tree because police located the items as a result of Petitioner's statement, which was made without Petitioner having the capacity to waive his constitutional rights due to his intellectual disability and where Petitioner lacked the capacity to consent to the search of his home?

III. Did the Court of Appeals err in affirming the trial court's erroneous finding that Petitioner knowingly consented to the police taking a DNA sample and fingerprint standard from him where the undisputed evidence demonstrated Petitioner lacked the mental capacity to make a knowing waiver of his rights due to his intellectual disability?

STATEMENT OF THE CASE

A Florence County Grand Jury indicted Petitioner for murder, first degree burglary, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. R. 8, ll. 4-11; R. 632-634. On February 9, 2012, the Honorable Thomas Russo presided over a hearing concerning Petitioner's competency, the admissibility of his statement, the voluntariness of his consent to a buccal swab and fingerprinting, and the admissibility of evidence uncovered as a result of Petitioner's statement. R. 1; R. 4, ll. 6-9; R. 32, l. 10 – R. 33, l. 23. Judge Russo concluded Petitioner was competent. R. 31, ll. 20-25. Judge Russo took the other matters under advisement. R. 167, ll. 10-18.

The prosecution, represented by E.L. Clements, III and John Jepertinger, called the case for trial on February 13, 2012 before Judge Russo and a jury. James Hoffmeyer represented Petitioner. R. 193. Judge Russo ruled Petitioner's statement and the items found as a result of his statement were admissible. R. 205, ll. 13-19; R. 210, ll. 3-25. At the conclusion of the presentation of additional evidence, the judge ruled the buccal swabs and fingerprinting were admissible. R. 231, ll. 9-16. The jury found Petitioner guilty as charged. R. 584, ll. 2-18. Judge Russo sentenced Petitioner to life without parole for murder and a consecutive life sentence for burglary first degree, thirty years for armed robbery, and five years for conspiracy. The sentence for the weapons charge was subsumed with the life sentence. R. 588, l. 10 – R. 589, l. 10; R. 635-639.

Petitioner filed a notice of appeal, which was perfected. The Court of Appeals affirmed Petitioner's convictions and sentences. App. 1-5; State v. Johnson, 2014-UP-167 (S.C. Ct. App. filed April 9, 2014). Petitioner filed a petition for rehearing on April 24, 2014. App. 6-26. On June 13, 2014, the Court of Appeals denied the petition for rehearing. App. 27. Petitioner now files this petition for writ of certiorari requesting review of the Court of Appeals' erroneous decision.

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's erroneous admission of a statement made by Petitioner to police officers where the undisputed evidence demonstrated Petitioner's lack of mental capacity to making a knowing waiver of his constitutional rights due to his intellectual disability.

Relevant facts

During a pretrial hearing, Dr. Alicia V. Hall from the Department of Disability and Special Needs testified regarding whether Petitioner was competent to stand trial. In arriving at her conclusion that Petitioner was competent, Dr. Hall determined that Petitioner suffered from an intellectual disability, formerly called mental retardation. R. 12, ll. 4-16. She placed Petitioner in the mild range of mental retardation. R. 12, ll. 17-23. Petitioner "required more time to understand and answer questions than a person who did not have intellectual disability." R. 18, ll. 13-17. Importantly, Dr. Hall qualified her opinion that Petitioner was competent to enter a guilty plea: "Yes, as long as with the caveat that he was given ample time to understand." R. 19, ll. 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, ll. 18-24.

Petitioner's school records indicated a full scale IQ score of 58 in September 1993 and a score of 51 in September 1996. R. 23, ll. 18-23; R. 24, ll. 2-6. Petitioner's test scores were in the "extremely low range." R. 24, ll. 11-12. During the competency evaluation, Petitioner struggled to understand conspiracy. Dr. Hall educated Petitioner on the topic and he applied this education to a hypothetical case. R. 25, l. 15 – R. 26, l. 6. Additionally, Petitioner 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, ll. 7-12. According to Dr. Hall, a finding of competency required a fairly low standard of understanding. R. 27, ll. 4-7.

At 4 p.m., investigators took Petitioner to the office of Timothy Wade Compton, an officer with the Florence Police Department, to sit while investigators handled other matters R. 37, l. 7 – R. 38, l. 12. Compton played a video game on his computer, and Petitioner laughed about the game. The two talked about the video game. After about an hour, Compton and Petitioner got something to eat and drink from the vending machines. R. 39, l. 10 – R. 40, l. 6. Compton began typing reports, and Petitioner asked permission to take a nap. Petitioner slept in the chair for several hours. R. 40, ll. 7-16; R. 60, ll. 10-15.[1]

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

Initially, Petitioner said he observed others burglarizing the victim's residence. Compton accused Petitioner of lying and instructed him to tell the truth. R. 47, ll. 7-17. Then, Petitioner stated he was there when others went into the victim's residence and stole items. R. 47, ll. 17-19. During the interrogation, two other officers entered the room; thus, three officers participated in the

[1] Compton heard the investigation's details on over the radio. R. 385, line 16 – R. 386, line 4.

interrogation of Petitioner. R. 47, l. 20 – R. 48, l. 10. Thereafter, Compton told Petitioner he needed to tell them where the body was – for the sake of the victim's family. R. 48, ll. 13-17.[2] Petitioner stated he could take them to the body. R. 48, ll. 17-18. Petitioner claimed he knew the location of the body because "Amp" told him. R. 48, l. 24 – R. 49, l. 1. When Petitioner 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, l. 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 Petitioner accordingly. Petitioner stated the deceased's throat was cut. R. 49, l. 17 – R. 50, l. 7. Afterwards, Petitioner, Compton, Officer Calhoun, and Officer Drulis got into a vehicle, followed by Officers Raines, Drayton, and Godwin in a separate vehicle. R. 50, ll. 15-24. Compton did not know what time they left, but admitted it could have been after midnight – or at least eight hours after Petitioner initially arrived in his office. He knew it was "a long time." R. 54, ll. 10-21.[3] Petitioner took them to the body on Malloy Street. R. 51, ll. 1-22. Compton accused Petitioner of lying again. He told Petitioner that he knew the location of the body because he had been shown or he was there when the body was dumped. Petitioner responded "yes, sir." R. 52, ll. 3-13. The officers and Petitioner returned to the police department where everyone entered the conference room and interrogated Petitioner. When "Drayton and Godwin felt they had what they wanted from his statement they recorded his

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[2] Compton gave a spiel about telling the truth and being honest. R. 392, ll. 6-9. 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, ll. 2-7.

[3] During the trial, Compton did not recall testifying previously that he spoke to Petitioner 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, l. 17 – R. 410, l. 10.

statement." Compton then went home. R. 52, l. 18 – R. 53, l. 5. On cross-examination, Compton claimed no prior knowledge of Petitioner and was unaware he suffered from an intellectual disability. R. 57, l. 24 – R. 58, l. 22.

Melvin Godwin, an investigator, 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, ll. 16-18. Godwin advised Petitioner of his rights using his card and had Petitioner sign a waiver of rights form. R. 77, ll. 19-25; R. 88, l. 21 – R. 89, l. 4. Godwin did not know if Petitioner could read and write, so he read the form to Petitioner. R. 80, ll. 9-16. Godwin read the card completely, and then asked if Petitioner understood. R. 78, ll. 6-7. Godwin claimed Petitioner was "clear, coherent," and Goodwin did not notice anything out of the ordinary. R. 78, ll. 19-21.

The officers then talked to Petitioner "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, ll. 1-10. Petitioner "seemed to understand everything that was being stated in the room" and "never made any statement that he didn't understand everything." R. 79, ll. 16-18. The official recorded statement began at 3:15 a.m. – over eleven hours after Petitioner arrived at the police department. R. 86, l. 8 – R. 87, l. 1.

Like Compton, Godwin did not know Petitioner's education level or any other details of his background. R. 88, ll. 3-20. Godwin did not ask Petitioner if he understood the word "waiver." R. 89, ll. 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, ll. 7-11. Larry Drayton, another officer with the police department, testified similarly to Compton and Godwin. R. 92, l. 25 – R. 104, l. 12.

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

Regarding the Miranda rights, Petitioner "would have understood them as well as any kindergartner would have understood them." Petitioner would not have understood the warnings "as far as the implications for stating them." Put simply, in Dr. Price's opinion, Petitioner lacked the ability to understand the Miranda waiver. R. 116, l. 19 – R. 118, l. 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, l. 7 – R. 119, l. 2. Dr. Price discussed the Miranda warnings with Petitioner. He was unable to define "waive." Dr. Price spent a considerable amount of time talking to Petitioner about each right and explaining the implications of each right. Of course, this happened after Dr. Hall saw Petitioner and educated him as well. R. 119, ll. 7-17.

According to Dr. Price, Petitioner 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, l. 11 – R. 121, l. 2. Dr. Price explained that individuals with mental retardation "tend to decompensate under stress." R. 124, ll. 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, ll. 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, l. 25 – R. 134, l. 19.

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

The prosecutor placed emphasis on the fact that Petitioner had entered guilty pleas previously; and therefore, he had been informed of his rights and waived those rights. R. 129, ll. 1-11. Dr. Price explained, again, this was an example of acquiescence as all that was required of Petitioner was agreement. R. 129, ll. 12-21. Dr. Price, like Dr. Hall, explained that competency to stand trial is not the same as competency to enter a guilty plea because Petitioner would require "special education" in order to enter a guilty plea. R. 135, ll. 10-15.

When asked by the trial court about Petitioner's ability to learn from his past exposure with the court system, Dr. Price testified that Petitioner "never profited from any of those experiences and he really doesn't have an ability to learn." After being in school for twelve years, Petitioner can

read words at a third grade level and his reading comprehension was at a kindergarten level. Thus, Petitioner did not profit from formal education. R. 138, l. 24 – R. 140, l. 3.

At the conclusion of the testimony, the prosecutor argued he "fe[lt] like [he] put up gracious sufficient evidence that [Petitioner] 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," which was "well beyond any kindergartner." He argued Petitioner knew what he was doing and no one coerced him. Nevertheless, he admitted that Petitioner did not "understand a lot of things abstractly," but argued Petitioner understood "on a basic level that he had the right to keep his mouth shut." R. 158, l. 24 – R. 162, l. 16.

The prosecutor persisted in arguing the flawed syllogism: if Petitioner were competent to stand trial, then he would be competent to enter a guilty plea; if Petitioner were competent to enter a guilty plea, then he would be competent to waive his rights under Miranda. R. 166, l. 12 – R. 167, l. 9. Petitioner argued the issue was whether Petitioner understood his rights and then freely and voluntarily chose to give up those rights.[4] The evidence was uncontradicted that Petitioner suffered from mental retardation and that it required "real effort" to make sure Petitioner understood information. Petitioner explained the totality of the circumstances included Petitioner's mental

[4] Petitioner renewed his objections contemporaneous with the introduction of the statements at trial. R. 387, ll. 1-19; R. 392, ll. 5-11; R. 471, ll. 2-5; R. 538, ll. 15-19; R. 554, ll. 15-21; R. 858, ll. 19-24.

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, l. 19 – R. 166, l. 10.

Discussion

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, 560 U.S. 370, 384 (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), this 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 Petitioner'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.

Despite the uncontradicted evidence that Petitioner lacked the capacity to understand his rights, Judge Russo ruled Petitioner's statement was admissible.[5] The Court of Appeals affirmed this ruling and 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, the Court of Appeals

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[5] Judge Russo explained "[j]ust the evidence overall taking into consideration both expert and the lay testimony, I believe that it was appropriate for the statement to come in." He acknowledged that Petitioner was "at the police department for some length of time, I mean an inordinate length of time with regards to waiting to give his statement." The judge was persuaded that Petitioner possessed the mental ability to understand his Miranda warnings and knowingly waive them because "he had been through the criminal justice system in the past." He thought all of Petitioner's responses to questions were appropriate. He also accepted the prosecutor's argument that if

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." The 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. The 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.

The trial judge erred in admitting Petitioner's statement to police officers, and the Court of Appeals erred in affirming that ruling, where the record evidence demonstrated Petitioner lacked the requisite mental ability to waive his Miranda rights due to his intellectual disability. The issues are whether Petitioner understood abstract concepts, such as rights, whether Petitioner 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 Petitioner 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

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Petitioner were competent to enter a guilty plea, then he possessed the mental ability to understand and waive his rights knowingly. R. 205, line 2 – R. 208, line 16.

statement. The recorded statement illustrated that although Petitioner provided some narrative, he primarily responded to leading questions by the officers.

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

II. The Court of Appeals erred in affirming the trial court's erroneous admission of evidence that was the fruit of the poisonous tree because police located the items as a result of Petitioner's statement, which was made without Petitioner having the capacity to waive his constitutional rights due to his intellectual disability and where Petitioner lacked the capacity to consent to the search of his home.

Relevant facts

During the pretrial hearing, Godwin testified that after obtaining Petitioner's formal recorded statement, which began at 3:15 am, the officers and Petitioner went to Petitioner's home searching for items relating to the burglary. R. 83, ll. 15-22. According to Godwin, Petitioner led the officers to the items. R. 83, l. 23 – R. 84, l. 5. Godwin testified that Petitioner told them "it was all right to go to the house." R. 84, ll. 12-14. Godwin admitted the police did not have a search warrant to invade the privacy of Petitioner's home. R. 90, ll. 6-9.

At trial, Godwin testified that Petitioner disclosed, during the interrogation, that items stolen from the deceased were at his home. After the interview, Petitioner, accompanied by police officers, went to Petitioner's home where Petitioner showed the items to the officers. R. 474, ll. 3-23; R. 475, ll. 7-8. Petitioner directed the officers to a crawl space of the home. The officers recovered several items believed to belong to the deceased. R. 476, ll. 8-21. Drayton testified at trial that after the officers interrogated Petitioner at the police department, they went with Petitioner to his house where he told them some stolen items were located. R. 541, l. 20 – R. 542, l. 15. Officers found several items belonging to the victim from Petitioner's home. R. 542, ll. 17-24. Drayton testified that Petitioner volunteered to show them where the items were. R. 543, ll. 7-11. Petitioner objected to the introduction of evidence found at his home as the product of his statement, which was obtained illegally. R. 33, ll. 8-25; R. 153, ll. 7-25. Petitioner lacked the ability to consent to the search due to his mental infirmity. R. 154, ll. 10-20.

Discussion

Petitioner incorporates the facts and arguments presented in Issue I, supra. 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.

Judge Russo erred in finding the evidence admissible, and the Court of Appeals erred in affirming his decision. Judge Russo found Petitioner understand his rights and voluntarily offered the information about the location of the stolen items. Therefore, he permitted the state to introduce evidence of the stolen items, the location where officers found the items, and how the officers found the items. R. 64, ll. 9-25. In its opinion, the Court of Appeals 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 the Court of Appeals in determining that Appellant's knowingly waived his rights, the Court erred in concluded the items recovered as a product of Appellant's statement were admissible. Officers learned of the evidence at Petitioner's house through the process of obtaining Petitioner's statement. As explained, supra, Petitioner'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 Petitioner, who lacked the mental ability to provide the consent. The totality of the circumstances demonstrated Petitioner lacked the mental capacity to consent. The alleged consent was obtained while Petitioner was in custody and at some point after Petitioner's recorded statement, which began at 3:15 a.m. At that point, Petitioner 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 Petitioner's alleged consent to search his home was not voluntary.

III. The Court of Appeals erred in affirming the trial court's erroneous finding that Petitioner knowingly consented to the police taking a DNA sample and fingerprint standard from him where the undisputed evidence demonstrated Petitioner lacked the mental capacity to make a knowing waiver of his rights due to his intellectual disability.

Relevant facts

During the pretrial hearings, Shannon Hill, an officer with the Florence Police Department, testified that in September of 2008, he asked Petitioner for voluntary consent for a DNA sample and a fingerprint standard. R. 213, l. 17 – R. 214, l. 4. According to Hill, Petitioner agreed and signed the appropriate waiver. R. 215, ll. 3-10. Hill showed Petitioner the form and explained it to him. R. 215, l. 13 – R. 216, l. 13. Hill claimed Petitioner understood that he wanted to gather a saliva sample and a fingerprint sample and consented to such. R. 216, ll. 7-13. Hill walked Petitioner through the processes for gathering the samples. R. 216, l. 21 – R. 220, l. 18. At the end of Hill's direct testimony, he stated "I was assuming that he was understanding everything I told him." R. 222, ll. 16-17. On cross-examination, Hill testified that he did not read any Miranda warnings to Petitioner. R. 223, ll. 4-11.[6]

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

The prosecutor argued that Petitioner had the ability to waive his Miranda rights, and therefore, and the ability to consent to the search – fingerprints and buccal swab. The prosecutor

[6] Hill testified similarly during the trial. Petitioner renewed his objection contemporaneously. R. 313, ll. 16-22; R. 320, ll. 9-12. Petitioner objected when the DNA analyst testified as well. R. 334, line 24 – R. 335, line 6; R. 357, ll. 10-19.

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, ll. 23 – 15.

Petitioner countered that Petitioner lacked the ability to understand and to consent. Petitioner's mental disability along with other factors comprising the totality of the circumstances prevented Petitioner from making a knowing waiver of his rights. R. 229, l. 17 – R. 230, l. 12.[7] The form used to obtain Petitioner'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." R. 619.

Discussion

Petitioner incorporates the argument presented in Issue I, supra. Petitioner 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, Petitioner was never even advised of his rights and never informed that he could refuse. The totality of the circumstances included Petitioner 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 Petitioner for those nine days while he remained incarcerated.

Over Petitioner's objection, the trial court found the evidence admissible. Finding that according to Dr. Price Petitioner was unable to understand anything beyond that of a kindergartner, the trial court determined that Dr. Price "seemed to completely discount the testimony that

[7] Petitioner repeatedly objected to the introduction of any evidence obtained through the use of comparisons to Petitioner's DNA sample and fingerprint standard. R. 141, ll. 10-13; R. 142, ll. 12-16. Petitioner argued that Petitioner lacked the mental capacity to consent. R. 143, line 21 – R. 144, line 6.

[Petitioner] held a job, received wages, worked a job, that he understood or knew certain things." Judge Russo disagreed and determined that the evidence showed Petitioner "did understand." According to Judge Russo, "the reality of it is he operates well about that level [of a kindergartner]." Thus, Judge Russo concluded Petitioner possessed the intellectual capacity to consent to the buccal swab and fingerprint standards. R. 230, l. 13 – R. 231, l. 16.

The Court of Appeals 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, the Court of Appeals 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.'" The Court of Appeals, 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.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

Opinion No. 2014-UP-167 (S.C. Ct. App. filed 4/9/2014)
09-GS-21-1564

THE STATE,

RESPONDENT,

V.

DAVID GERRARD JOHNSON,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. David Gerrard Johnson #312138, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472 and the S.C. Court of Appeals this 17th day of July, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of July, 2014.

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

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July 17, 2014

Melody J. Brown, Esquire
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. David Gerrard Johnson

Dear Melody:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosures

cc: Court of Appeals