

5

 ORIGINAL

RECEIVED

JUL 25 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY R. WIRTZ,

APPELLANT

APPELLATE CASE NO. 2013-002328

INITIAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Jackson v. Denno, 378 U.S. 368 (1964) 5, 18

Miranda v. Arizona, 384 U.S. 436 (1966) passim

Moran v. Burbine, 475 U.S. 412 (1986)..... 19

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) 25

State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012) 25

State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005)..... 20

State v. Crawley, 349 S.C. 459, 562 S.E.2d 683 (Ct. App. 2002) 18

State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000)..... 25

State v. Goodwin, 384 S.C. 588, 683 S.E.2d 500 (Ct. App. 2009)..... 18

State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007)..... 18, 19, 20

State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010) 19

State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990) 19

State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987) 20

State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)..... 19

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)..... 26

Rules

Rule 403, SCRE 25

Constitutional Provisions

U.S. Const. amend. V..... 17

U.S. Const. amend. VI 17

STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by admitting Appellant's written statements to law enforcement because they were not freely and voluntarily given considering Appellant's mental state, his prior work as an informant for the sheriff's office, the length of his detention, the deception used by law enforcement, and the promises made by Sergeant McMahan where Appellant testified that Sergeant McMahan told him "he could help me out," "implied I would be released," and "implied that [charges] wouldn't be brought against me" since under a totality of the circumstances Appellant statements were induced by a promise of leniency?

2.

Whether the court erred by admitting an audio recording of telephone calls Appellant made the night of his arrest since the probative value of the evidence was substantially outweighed by the danger of unfair prejudice where the telephone conversations involved admissions of criminal conduct unrelated and unnecessary to the jury's determination of guilt in this case?

STATEMENT OF THE CASE

An Oconee County Grand Jury indicted Appellant at the June 11, 2012 term of General Sessions for grand larceny, kidnapping, first degree burglary, armed robbery, and possession of a weapon during the commission of a violent crime. R. *. His case was called to trial on October 14, 2013 before the Honorable Alexander S. Macaulay, and a jury. Tr. 1. E. Delane Rosemond represented Appellant and David Rhys Wagner was the assistant solicitor. Tr. 1.

On October 18, 2013, the jury found Appellant guilty of all charges. Tr. 414, ll. 2-25. Judge Macaulay sentenced Appellant to thirty years imprisonment for first degree burglary, five years consecutive for possession of a weapon during a violent crime, twenty-five years current for armed robbery, ten years concurrent for grand larceny, and twenty-five years concurrent for kidnapping. Tr. 425, l. 3 – 426, l. 16.

This appeal follows.

ARGUMENT

1.

The court erred by admitting Appellant's written statements to law enforcement because they were not freely and voluntarily given considering Appellant's mental state, his prior work as an informant for the sheriff's office, the length of his detention, the deception used by law enforcement, and the promises made by Sergeant McMahan where Appellant testified that Sergeant McMahan told him "he could help me out," "implied I would be released," and "implied that [charges] wouldn't be brought against me" since under a totality of the circumstances Appellant statements were induced by a promise of leniency.

Jackson v. Denno¹ Hearing

A. Testimony

Sergeant David McMahan, an investigator with the Oconee County Sheriff's Office, testified that on February 11, 2012, he was called out to Eric Bush's residence in regards to "a burglary that had just taken place."² Supp. Tr. 48, l. 18 – 49, l. 6. McMahan said, "[W]e determined there was forced entry into the home. The victim, Mr. Bush, was asleep at the time. He was, woke up and found a person in his room. He was tied up and held at gunpoint." Numerous firearms, ammunition, "related gun parts," laptops, billfolds, and credit cards were stolen. Supp. Tr. 49, ll. 15-25.

McMahan testified that after he responded to the home, he instructed Bush to call his credit card company and cancel the stolen cards. According to McMahan, the credit card company told Bush that his card had just been used within the last thirty to forty-five

¹ 378 U.S. 368 (1964)

² The supplemental transcript refers to the pretrial hearing held on October 14-15, 2013.

minutes at the Bountyland Quick Stop in Westminster. McMahan explained that after he finished his investigation at Bush's residence, he immediately went to the Bountyland store in Westminster. Once there, McMahan claimed he was able to view video from the store's four security cameras. The security cameras captured footage of the man using Bush's credit card. According to McMahan, he was able to identify this individual as Appellant, who then became a suspect in the burglary. Supp. Tr. 50, l. 4 – 51, l. 25.

McMahan testified that Appellant's name also came "up through other sources," which led McMahan to "direct [his] full attention to [Appellant]." Supp. Tr. 52, ll. 1-6. He explained that he arranged a meeting with Appellant at Tabor Baptist Church after "some of [Appellant's] acquaintances told [Appellant] that [McMahan] wanted to talk to him." According to McMahan, Appellant arrived at the church on February 14, 2012 between four and five o'clock with Carrie Tyner. The two were driving a 1999 Ford Taurus that belonged to Appellant and his wife, Amanda Wirtz. Supp. Tr. 52, l. 11 – 53, l. 8; Supp. Tr. 82, ll. 1-14.

McMahan claimed that Appellant "agreed to come to the Sheriff's Office and discuss the case." Supp. Tr. 53, ll. 9-12. Before driving Appellant to the sheriff's office, McMahan testified that he read Appellant his Miranda³ rights at 5:08 pm in the back seat of a Tahoe owned by the sheriff's office. According to McMahan, Appellant initialed by each line and signed the bottom of the waiver form. Supp. Tr. 55, l. 1 – 57, l. 11. McMahan admitted that Appellant seemed tired, but claimed Appellant did not appear to be under the influence of drugs or alcohol because he was "coherent" and "responded as a normal person would" respond to McMahan's questions. Supp. Tr. 57, l. 21 – 58, l. 58, l. 8.

³ Miranda v. Arizona, 384 U.S. 436 (1966)

Once the pair arrived at the sheriff's office, McMahan took Appellant to an interview room in the investigations division. McMahan said that when the two first began discussing the case, only Appellant and McMahan were in the room. However, once Appellant began talking about the burglary, McMahan asked Lieutenant Gentry Hawk to join them. McMahan and Appellant discussed the fact that Appellant was seen on the security video at the Bountyland Quick Stop and that Appellant was found in possession of two of the stolen firearms.⁴ Supp. Tr. 59, l. 9 – 60, l. 17. After some initial discussions, McMahan testified Appellant agreed to give a written statement. While Appellant was writing out his statement, McMahan said he and Lieutenant Hawk left the room. Supp. Tr. 60, l. 21 – 61, l. 21.

McMahan generically claimed he did not offer Appellant any hope of a reward or leniency if Appellant gave a statement. He also denied that any promises or threats were made to Appellant. Supp. Tr. 61, l. 25 – 62, l. 18. McMahan testified that prior to Appellant giving this written statement, he reviewed with Appellant the Miranda rights that were listed at the top of the "Voluntary Statement" form. Supp. Tr. 62, l. 22 – 63, l. 14. The start time listed on the statement was 6:30 pm and the end time was listed as 9:05 pm. However, McMahan claimed that the end time was a typographical error and it only took Appellant approximately thirty minutes to complete this statement. Supp. Tr. 66, l. 10 – 67, l. 13.

McMahan testified that after Appellant gave this first statement, he decided to write a second statement because "he left something out." This second statement started at 7:37

⁴ McMahan testified that two of the stolen shotguns were found in Appellant's car when he arrived at Tabor Baptist Church on February 14, 2012. According to McMahan, Carrie Tyner handed him the firearms. Supp. Tr. 96, ll. 10-25.

pm and ended at 7:40 pm. McMahan again generically claimed that he did not promise Appellant anything, hold out any hope of leniency, or threaten or coerce Appellant to give this second statement. Supp. Tr. 68, l. 20 – 69, l. 24.

After Appellant gave these two written statements, McMahan testified that Appellant made several telephone calls to attempt to get some of the stolen firearms back. McMahan said, “Well, the phone calls were a result of Mr. Wirtz [Appellant] being cooperative and he - - I told him that these guns meant a lot to the victim, that they were cherished items, and it would be a great opportunity for us to get these guns back if he could help us find out where all of them went to, places wherever they were distributed. So he was agreeing to try to make some phone call contacts to try to get these guns back.” McMahan claimed that he did not promise Appellant anything to persuade him to help get the guns back. Supp. Tr. 72, ll. 20-23. The phone calls were made from Appellant’s phone and were recorded by the sheriff’s office.

On cross-examination, McMahan denied that he told Appellant “if you help me out, then I will let you go.” McMahan admitted that on the recording of the telephone calls Appellant made that night, Appellant told various people that “I’m going to get out of here, I’m about to get out of here” and “the only thing that Mr. McMahan was wanting was the gun back and we’ll all be cleared.” However, McMahan testified that Appellant was “saying whatever he can to get the guns back,” and that he did not think Appellant actually thought he was going home that night. Supp. Tr. 88, l. 11 – 89, l. 12.

McMahan agreed with defense counsel that he “exerted some influence over [Appellant] to get [Appellant] to get the guns back.” He said, “I told him it would be nice if we could get the guns back.” Supp. Tr. 94, ll. 16-24. McMahan denied that he told

Appellant, “all we want is the guns and everybody is cleared.” However, he did admit he told Appellant, “The people that he was calling, I made the statement that the guns can be given back and that’s all I want is the guns back in reference to the people who had possession of the guns at the time, not Time Wirtz [Appellant].” Supp. Tr. 97, ll. 11-24. McMahan testified that he never charged anyone with possession of the stolen firearms. Supp. Tr. 97, l. 25 – 98, l. 1.

McMahan also recognized that Appellant attempted to make several drug deals over the telephone. However, McMahan claimed he did not know Appellant had previously worked as an informant for the sheriff’s office and had been paid to purchase drugs. Despite the fact that Appellant had previously received compensation from the sheriff’s office for his work as an informant, McMahan claimed that he did not think it was reasonable for Appellant to think he would receive leniency from McMahan that night in exchange for cooperating and providing the officers with a written statement. Supp. Tr. 93, l. 7 – 94, l. 15.

At no time during the interrogation or subsequent telephone calls did the officers tell Appellant that he was under arrest or that they already had warrants for his arrest. Appellant was not placed under arrest until 12:47 am on February 15, 2012, meaning he had been in police custody for at least seven and a half hours before he was booked at the local detention center. Supp. Tr. 91, l. 13 – 93, l. 1.

Additionally, McMahan admitted that he knew Appellant “ha[d] been on meth for a long time . . . [s]everal years is what I’ve been told.” However, McMahan claimed that he did not know Appellant had used methamphetamine on February 14, 2012, the day of the interview. He stated, “I have no way of knowing that.” McMahan also claimed that he did

not remember whether he asked Appellant if he had used methamphetamine that day. Supp. Tr. 95, l. 19 – 96, l. 9.

Lieutenant Gentry Hawk of the Oconee County Sheriff's Office was the next to testify. He explained that he was present during the interrogation of Appellant on February 14, 2012. Hawk testified that after McMahan reviewed with Appellant the Miranda rights that were listed at the top of the voluntary statement form and Appellant initialed the form, he and McMahan exited the room while Appellant wrote out his statement. When Appellant finished writing his statement, McMahan and Hawk signed the statement as witnesses. Supp. Tr. 103, l. 18 – 105, l. 21. Hawk claimed in a conclusory fashion that nobody in his presence promised Appellant any leniency, held out any hope of a reward, or threatened Appellant to get him to give law enforcement a statement. Supp. Tr. 105, l. 22 – 106, l.

Hawk testified that Casey Bowling and Tyrel Woodring, who were narcotic officers for the Oconee County Sheriff's Office, also sat in on part of the interview and were present when Appellant called various individuals in an attempt to get the firearms back. He explained, “[T]hey were there because it was in the drug world and they had some connections with people that, from what I understand, were involved in the case.” Hawk claimed that neither Bowling nor Woodring promised Appellant anything. However, he admitted that he “was in and out” of the interview room and was not present during the entire interview or the entire time Appellant was making the telephone calls. Supp. Tr. 106, ll. 3-24.

Hawk also claimed Appellant did not appear under the influence of drugs or alcohol that evening. He testified, “[H]e appeared to be coherent. He was answering our questions without hesitation. He seemed to know exactly what was going on.” Supp. Tr. 107, ll. 3-18.

Defense counsel then called Officer Brandon Long of the Oconee County Sheriff's Office to the stand. Long, a member of the Narcotics and Vice Division, testified that Appellant signed up to work as an informant for the narcotics division on January 20, 2011, approximately a year before this burglary and Appellant's subsequent interview. Long explained that Appellant made two controlled purchases and he was paid money in exchange for his assistance. Long said that Appellant provided reliable information and that at least one of these purchases resulted in an arrest. Supp. Tr. 130, l. 19 – 131, l. 25. On cross-examination, Long explained that the narcotics division assisted Sergeant McMahan in locating Appellant, "but that was about the extent of it." He claimed he did not make Appellant any promises in exchange for his cooperation and said, "I never even talked to him [Appellant] about this case here." Supp. Tr. 132, l. 13 – 133, l. 2.

Appellant testified that around 11:00 am on the morning of February 14, 2012, the day he ultimately gave law enforcement the written statements, he went to Shane Elliott's apartment. He stayed at Elliott's apartment until around 1:00 pm and then went to Carrie Tyner's grandmother's house. Appellant testified that he purchased five Xanax pills from Tyner that afternoon and immediately took three of them. In addition to regularly ingesting Xanax, Appellant explained that he also regularly injected methamphetamine. He said that on the day of the interview he had been up for six to seven days on methamphetamine. Appellant testified, "I was pretty tired. I would say meth kind of makes you crazy, makes you very unpredictable." Supp. Tr. 134, l. 5 – 136, l. 8.

Sometime that afternoon, Tyner asked Appellant if he was willing to go with her to sell some methamphetamine and Appellant agreed. Appellant said that as the two were driving, Tyner, who had been using Appellant's cell phone, "looked at [Appellant] and said,

do you realize you may have warrants on you?" Appellant explained that Tyner then told him "she wanted to meet with Tyrel Woodring of the Narcotics Unit at Tabor Church" and that Tyner ended up driving Appellant to the church. Appellant testified that "[t]o [his] recollection" they arrived at the church around 2:30 or 3:00 pm. Supp. Tr. 136, l. 9 – 137, l. 4.

Once at the church, Appellant explained, "I was approached by Tyrel Woodring first, he came up to the vehicle. I spoke with Tyrel for a few minutes. He told me [that he] was a narcotics agent. I'd never met Tyrel before. Mr. McMahan approached me, and while I was speaking with McMahan, Carrie Tyner opened the trunk of the car [which belonged to Appellant's wife] and took out two shotguns." Tyner handed the firearms to McMahan. McMahan then spoke to Appellant "for a few minutes about a possible burglary" and ultimately "asked [Appellant] if [he] would come back to the Sheriff's Department" to be interrogated. Once at the sheriff's office, Appellant was placed in an interrogation room. Appellant explained that he "was very high" and did not remember McMahan advising him of his Miranda rights. However, Appellant identified his signature at the bottom of the waiver of rights form. Supp. Tr. 137, l. 5 – 138, l. 21.

Appellant testified that "it was just Mr. McMahan at first" in the interview room, but then "[t]here were officers in and out. I believe - - I know Casey Bowling was in there at one time. Mr. Hawk, I do remember seeing Mr. Hawk. I believe Scott Arnold was in there. It was kind of an all-day event. There was people in and out, in and out, in and out." Supp. Tr. 138, l. 22 – 139, l. 14.

Appellant said that he told McMahan that he "did know some about the burglary." He testified, "I believe I told him [McMahan] that I knew that Chad Bush had been

implicated in it. I told him that I knew where it was actually planned at because I was present when this burglary was planned . . . We were at Chad Bush's mother's house . . . in the basement. There was Gene Poole, Greg Bates, me, Timothy Wirtz; Carrie Tyner, Heath Bates, Chad Bush, Gary Smith, Amanda Wirtz. I want to say that's all, but there were a lot of people there that night." The group discussed breaking into Chad Bush's brother's house. Supp. Tr. 139, l. 15 – 140, l. 22.

Appellant explained that after he told McMahan this information, "**Mr. McMahan informed me that he needed to place someone at the scene.** He needed some help because he thought it was wrong what Chad had done to his brother. From talking to Mr. McMahan he really does not like Mr. Bush. **So he told me since I had been working for the police and I had been working for Brandon Long, he asked me if I would make a statement for him.**" (emphasis added). Supp. Tr. 140, l. 23 – 141, l. 6. Appellant then gave a written statement. Supp. Tr. 141, ll. 7-8.

Appellant testified that he gave a statement "[b]ecause Mr. McMahan informed me that he needed to place someone at the scene. **He told me he could help me out on, with the fact of the guns being in the car** [at Tabor Baptist Church]. **He told me he needed to place someone at the scene of the burglary.**" Supp. Tr. 141, ll. 13-18 (emphasis added). Appellant said further, "**He [McMahan] implied I would be released. He implied that it [criminal charges] wouldn't be brought against me.**" Supp. Tr. 141, ll. 19-21 (emphasis added).

Additionally, in regards to the telephone calls Appellant made after he gave the written statements, Appellant testified, "I really don't have a recollection of making the phone calls in the state I was in. But I would assume from prior knowledge that my phone

was wired by the Narcotics Unit the way that they had, the way we had made buys in the past.” Appellant said he set up a drug deal that night “[b]ecause Casey Bowling had come in and spoken to me about setting up a drug buy because they were attempting to bust Shane Elliott.” Supp. Tr. 142, ll. 4-13. In exchange for his help setting up the drug deal, Appellant testified that he expected, “payment and release.” Supp. Tr. 142, ll. 14-16 (emphasis added). During one of the telephone conversations in which Appellant set up a drug buy, Appellant told the person on the other line that he would be there in twenty minutes. Appellant testified that he got this idea from Casey Bowling and McMahan. However, he was never released that night. Supp. Tr. 142, ll. 17-24.

Appellant later testified that he made the telephone calls “[b]ecause Mr. McMahan told me that if I could get the guns back, I could go home.” Supp. Tr. 144, ll. 7-10. He also explained that at the time he gave the written statements and made the telephone calls, he did not know law enforcement already had warrants for his arrest. Supp. Tr. 144, ll. 11-13. Moreover, Appellant testified that when he had worked for Brandon Long in the past, Long had paid him money and helped him with a probation violation. Supp. Tr. 144, l. 19 – 145, l. 5.

Furthermore, Appellant testified that after listening to the tapes of the telephone conversations, he remembers telling Shane Elliott “that I needed to get some guns back, that it was gonna clear everybody’s name and I would be released.” He also said that he spoke to Carrie Tyner and “acknowledged many times that she was gonna pick me up and I would be leaving soon.” Appellant said that at the time he believed this to be true. Supp. Tr. 145, l. 19 – 146, l. 11.

Appellant explained that Casey Bowling ultimately arrested him “well after midnight” and took him to the detention center. He said, “I actually argued with Casey Bowling for about five to ten minutes about why I was being arrested.” Appellant testified that he argued with Bowling “[b]ecause **they had promised me I was going home. I’d set up drug deals, I had tried to get guns back. I’d just done what they told me to. I had no knowledge I was gonna be arrested.**” Supp. Tr. 146, l. 12 – 147, l. 1 (emphasis added).

Again, Appellant testified that he gave a written statement that night because McMahan “asked me to” and because “I was told that I was going home.” Supp. Tr. 148, ll. 4-9.

On cross-examination by the state, Appellant testified that he was not present at the scene of the burglary and armed robbery on February 11, 2012. Supp. Tr. 149, ll. 20-24. Appellant explained that McMahan told him about the burglary and “asked me to place myself at the scene.” He said McMahan told him the details “such as the door being busted, things like that.” Supp. Tr. 150, l. 24 – 151, l. 8. When questioned about the discrepancy between his written statement where he said the burglary was planned in his car and his testimony that the burglary was planned in Chad Bush’s mother’s basement, Appellant confirmed the planning took place in the basement and testified, “I had also been up six to seven days and taking narcotics pills when I wrote this [referring to the statement].” Supp. Tr. 151, ll. 8-23.

Furthermore, Appellant testified that he “do[es] not deny using the credit card, I never have.” Supp. Tr. 154, ll. 19-22. He explained that Chad Bush gave him the credit card because “Mr. Bush owed me \$80 for meth and he contacted me and said he had my money.” Supp. Tr. 161, ll. 5-9. Appellant said he met Chad Bush at the Bountyland and

“Mr. Bush told me that I could get my money out of the ATM machine, he was parked beside the building. I told him that I needed some fuel. Mr. Bush said that I could get fuel and get the rest of the money out of the ATM machine.” After Appellant met Chad Bush by the side of the building, he pumped gas, and then went inside to use the card at the ATM, but the PIN number Bush had provided did not work. Supp. Tr. 162, l. 18 – 164, l. 14.

B. Arguments

Defense counsel argued that under the totality of the circumstances Appellant’s statements were not freely and voluntarily given because of law enforcement’s deception, promises of leniency, exertion of improper influence upon Appellant, and the direct and indirect promises law enforcement made to Appellant. Supp. Tr. 172, l. 21 – 173, l. 4. Defense counsel also stressed that Appellant was tired and under the influence of methamphetamine and narcotic pills, including Xanax, at the time he gave the written statements. He commented on the fact that Appellant stated he had been up for several days and argued that Appellant’s “mental health was shaky at best.” Supp. Tr. 169, ll. 13-23.

Furthermore, defense counsel argued that Appellant’s statements on the recorded telephone calls show Appellant expected to be released based on his cooperation with the sheriff’s office. He said, “Your Honor, he thought he was going to be released because he told the person on the phone, ‘I’ll be there in 20 minutes and I’ll get a gram for you.’” Defense counsel also noted that Appellant told several of the individuals he called that night that if the guns were returned, “[A]ll of us will be cleared or we will be cleared.” Supp. Tr. 171, l. 17 – 172, l. 24.

Additionally, defense counsel maintained, “[T]he deception in this case, Your Honor, was he [Appellant] thought that if he would make this drug deal, he was going to be

hooked up, wired, and go out and make this drug deal with the person that he was talking to on that particular phone call. But at no time did the Sheriff's Office have any intention of letting him do that drug deal . . ." Supp. Tr. 172, ll. 8-19.

Based on the involuntariness of the statements, defense counsel argued the written statements should be suppressed.⁵ Supp. Tr. 173, ll. 4-8.

The solicitor argued that Appellant had been read his Miranda rights and "understood what he was doing. The officers said he seemed tired but that he did not seem high, did not seem under the influence, and I think his voice on that tape when he's making these phone calls also shows that his, that he was not high." The solicitor also claimed, "[I]n his statement, he minimizes his involvement, which again I submit shows he knew what he was doing when he was giving that statement." Furthermore, the solicitor said, "Both officers have testified no promises were made. He was held out no hope for reward. He was not told that he could go home, that he wouldn't be charged. He was not threatened, he was not coerced, that they didn't tell him what to say. They left him alone in the room and let him write the statement, which he did, and his handwriting is legible and his signature is legible, and he gives details that only somebody involved in the crime would have known." Supp. Tr. 165, l. 3 – 168, l. 5.

C. Court's Ruling

The court ruled that the written statements were admissible because it found "by a preponderance of the evidence that the Defendant was fully advised of his rights under the Fifth and Sixth Amendments" and subsequently "knowingly and intelligently waived his

⁵ Defense renewed his motion and objection to the admissibility of Appellant's written statements before the statements were admitted into evidence and published to the jury. Tr. 139, l. 3 – 140, l. 3; See Tr. 147, ll. 1-2.

rights.” The court also found “that the alleged statements or confessions obtained from the Defendant were freely and voluntarily given without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without promise of leniency, without threat of injury, without . . . inducement of any kind; it being the statement of the officers that no . . . promise or anything was made.” Supp. Tr. 176, l. 2 – 177, l. 23.

Discussion

The trial court erred by admitting Appellant’s written statements to law enforcement because under the totality of the circumstances, the statements were not freely and voluntarily given considering Appellant’s mental state, his prior work as an informant for the sheriff’s office, the length of his detention, the deception used by law enforcement, and the promises made by Sergeant McMahan that “he could help [Appellant] out,” “implied [Appellant] would be released,” and “implied that [charges] wouldn’t be brought against [Appellant].” See Supp. Tr. 140, l. 23 – 141, l. 21.

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. 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. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver of one’s Miranda rights 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).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: Did the 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) (emphasis added).

“A statement may not be ‘extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.’” Miller, 375 S.C. at 386, 652 S.E.2d at 452 (quoting State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)); See also State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990) (threat that charges could be brought if information was withheld made the confession inadmissible in the same manner as a promise of leniency made the statement that followed the promise inadmissible). “A statement ‘induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the

promise.” Miller, 375 S.C. at 386, 652 S.E.2d at 452 (quoting State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005)).

In State v. Peake, 291 S.C. 138, 138, 352 S.E.2d 487, 488 (1987), our supreme court held the defendant’s statement made to an investigating officer was induced by a promise of leniency because the officer told the defendant the state would not seek the death penalty if he made a statement. Because the statement was induced by a promise of leniency, the court held the statement should have been excluded and reversed the defendant’s conviction for murder. Id.

This Court should likewise find Appellant’s inculpatory statements were not freely and voluntarily given because they were induced by a promise of leniency. Appellant testified that Sergeant McMahan repeatedly told him “he needed to place someone at the scene” of the burglary and asked Appellant to give a statement “since [Appellant] had been working for the police and had been working for Brandon Long.” Appellant said the only reason he gave a written statement was because McMahan told him “he could help me out,” “implied I would be released” from custody, and “implied that [charges] wouldn’t be brought against me.” Supp. Tr. 140, l. 23 – 141, l. 21. Appellant also said that the reason he later made numerous telephone calls that evening was “[b]ecause Mr. McMahan told me that if I could get the guns back, I could go home.” Supp. Tr. 144, ll. 7-10.

Appellant’s testimony during the suppression hearing was corroborated by the statements Appellant made to several individuals he called while in police custody on the night of his arrest. These telephone calls were recorded by the sheriff’s office. See State’s Exhibit No. 4 (CD of Telephone Calls). For example, Appellant told Shane Elliott during one of the telephone calls “that I needed to get some guns back, that it was gonna clear

everybody's name and I would be released." Supp. Tr. 145, ll. 19-25. He also "acknowledged many times" during a telephone conversation with Carrie Tyner that night "that she was gonna pick me up and I would be leaving soon." Supp. Tr. 146, ll. 1-11. Even Sergeant McMahan acknowledged that Appellant said during the recorded telephone conversations "I'm about to get out of here" and "the only thing that Mr. McMahan is wanting was the guns back and we'll all be clear." Supp. Tr. 88, l. 17 – 89, l. 1.

Furthermore, Appellant's mental state at the time he gave the statements was "shaky at best," which made him more susceptible to improper police influence. See Supp. Tr. 169, l. 23. Appellant testified that by the night of his arrest, he had been awake for six to seven days because he had been injecting methamphetamine into his body. He also testified that he had taken several Xanax pills that afternoon and that he was under the influence during his interview with law enforcement. See Supp. Tr. 135, l. 6 – 136, l. 8. Even Sergeant McMahan testified that Appellant appeared tired during the interrogation. See Supp. Tr. 57, l. 21 – 58, l. 2.

Moreover, Appellant had previously worked as an informant for the narcotics division of the Oconee County Sheriff's Office. See Supp. Tr. 131, ll. 2-25. At the time Appellant gave the written statements to law enforcement he was aware of the benefits of working with and cooperating with the police. He had previously been paid money for setting up controlled drug buys and had been told by Brandon Long that Long would help him with a potential probation violation his was facing. See Supp. Tr. 144, l. 14 – 145, l. 3. Therefore, Appellant was even more predisposed to rely on McMahan's promises of leniency and statements that he could help Appellant if he cooperated and gave a statement placing himself at the scene.

Appellant's mental state, specifically that he had been up for six to seven days due to methamphetamine use and was high on narcotic pills, coupled with the officers' deception and promises of leniency and the fact that Appellant had previously worked as an informant rendered Appellant's statement unknowing, involuntary, and compulsory. Thus, the lower court erred in finding Appellant's written statements were admissible.

The court erred by admitting an audio recording of telephone calls Appellant made the night of his arrest since the probative value of the evidence was substantially outweighed by the danger of unfair prejudice where the telephone conversations involved admissions of criminal conduct unrelated and unnecessary to the jury's determination of guilt in this case.

Relevant Facts

Defense counsel objected pretrial to the state admitting audio recordings of telephone calls Appellant made to various individuals on the night of his arrest. Appellant made these telephone calls while he was in police custody after Sergeant McMahan asked him to help get the stolen firearms back. During these telephone calls Appellant attempted to arrange several drug transactions with the various individuals he called. See State's Exhibit No. 4 (CD of Telephone Calls); see also Supp. Tr. 89, l. 22 – 90, l. 11 (McMahan testified that Appellant set up a drug deal with Gene Poole during the second to last telephone call he made that evening); see also Supp. Tr. 94, ll. 6-9 (McMahan testified that he heard "at least two drug deals on" the recording of the telephone calls); see also Supp. Tr. 142, ll. 4-24 (Appellant testified that he set up a drug deal during his telephone conversation with Shane Elliott that night).

Appellant also demonstrated knowledge of who possessed several of the firearms that were stolen during the burglary of Eric Bush's residence. See State's Exhibit No. 4 (CD of Telephone Calls); see also Supp. Tr. 72, l. 24 – 73, l. 11 (McMahan testified that Appellant called individuals who he thought had possession of the firearms and attempted to get them back).

Defense counsel argued that under Rule 403, SCRE, although relevant, the recordings of the telephone calls should be excluded because of the “needless presentation of cumulative evidence” and because the probative value of the recordings was substantially outweighed by the danger of unfair prejudice. He also argued, “[T]hose phone calls were not solely for the purpose of bringing those guns back, but certainly it was also for the purposes of this CI [confidential informant] [Appellant] going out and making some buys in hopes of some consideration later on down the road . . .” Supp. Tr. 180, ll. 8-21.

In response, the solicitor argued that the audio recording of the telephone calls were probative because the “phone calls help corroborate what [Appellant] said in his statement as being accurate and true, plus he makes the admission on one of the phone calls that he doesn’t want someone else to get in trouble for something that he did.” The solicitor also said, “I think the purpose [of the telephone calls] was to try to recover the firearms . . . that he [Appellant] admits he traded for methamphetamine in his statement . . . he had taken the guns to his own residence and then traded them to these folks for methamphetamine. These are the people that he called back, Shane Elliott and Heath Bates, who they recovered one of the stolen firearms [from] . . . And Heath Bates will testify and say that, or at least that he gave a statement saying that he bought one of the guns from the Defendant like a day after.” Furthermore, the solicitor maintained that during “the last phone call[] he [Appellant] admits selling one of the pistols he refers to it as a 40, to a Tim Elrod, who the State ha[s] a witness to say that she went over there . . . with Tim Elrod and they bought two pistols from the Defendant.” Supp. Tr. 178, l. 21 – 180, l. 7.

The Court ultimately ruled that the audio recording of the telephone calls were admissible because the “calls corroborate the statement made or the statements made by the

Defendant” and because “they go directly to the . . . Defendant’s knowledge of the alleged offenses.” Supp. Tr. 181, ll. 2-24.

Defense renewed his motion and objection to the admissibility of the recorded telephone calls before the audio recording was admitted into evidence and published to the jury. Tr. 139, l. 3 – 140, l. 3; See Tr. 147, ll. 1-2.

Discussion

The court erred by admitting the audio recording of the numerous telephone calls Appellant made the night of his arrest since the probative value of this evidence was substantially outweighed by the danger of unfair prejudice where the telephone conversations involved admissions of criminal conduct unrelated and unnecessary to the jury’s determination of guilt in this case.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest decision on an improper basis.” State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000) (citing State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)).

“[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.” State v. Collins, 398 S.C. 197, 203, 727 S.E.2d 751, 754 (Ct. App. 2012). “Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case.” Collins, 398 S.C. at 207, 727 S.E.2d at 757; See State v. Wilson, 345 S.C. 1, 7,

545 S.E.2d 827, 830 (2001) (“The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.”).

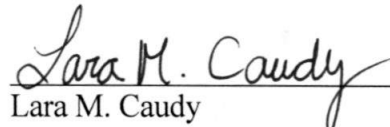
Here, the tape recording of Appellant’s telephone conversations should have been suppressed because its contents unfairly prejudiced Appellant in that it suggested to the jury that it should convict Appellant because he was involved with drugs and because he had knowledge of who possessed the stolen firearms. Appellant’s knowledge of who possessed the stolen firearms would be an improper basis for the jury to convict Appellant of grand larceny, first degree burglary, armed robbery, and the other related charges. Furthermore, the fact that Appellant was attempting to make numerous drug deals may have made the jury more inclined to find him guilty of the charges.

Consequently, the court erred by failing to suppress the tape recording of the telephone calls Appellant made on the night of his arrest. As a result, Appellant’s convictions should be reversed and this case remanded to the Oconee County Court of General Sessions for a new trial.

CONCLUSION

Based on the foregoing arguments, Appellant's convictions should be reserved and this case remanded to the Oconee County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY R. WIRTZ,

APPELLANT

APPELLATE CASE NO. 2013-002328

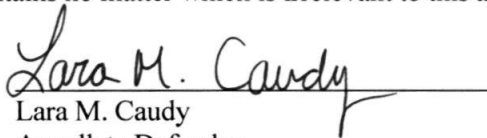
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Cover page of trial transcript dated October 14 and 15, 2013;
- (3) Supp. Tr. 2-3; Supp. Tr. 47-118; Supp. Tr. 127-181;
- (4) Cover page of trial transcript dated October 16-18, 2013 Volume 1;
- (5) Cover page of trial transcript dated October 16-18, 2013 Volume II;
- (6) Tr. 2-4; Tr. 24-64; Tr. 67-102; Tr. 106-165; Tr. 175-176; Supp. Tr. 183-237; Tr. 239-251; Tr. 257-264; Tr. 271-303; Tr. 307-308; Tr. 315-345; Tr. 347-349; Tr. 358-403; Tr. 407-411; Tr. 413-415; Tr. 421; Tr. 425-426.
- (7) State's Exhibit No. 1 (Waiver of Rights Form)
- (8) State's Exhibit No. 2 (Voluntary Statement)
- (9) State's Exhibit No. 3 (Voluntary Statement)
- (10) State's Exhibit No. 4 (CD of Telephone Calls).

I certify that this designation contains no matter which is irrelevant to this appeal.

July 25th, 2014


Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

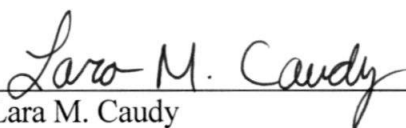
V.

TIMOTHY R. WIRTZ,

APPELLANT

CERTIFICATE OF SERVICE

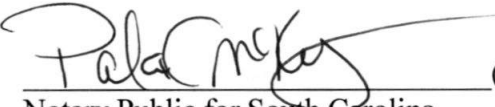
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of July, 2014.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of July, 2014.



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