STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Roger M. Young, Sr., Trial Court Judge

J.C. Nicholson, Jr., Sentencing Judge

BERNARD O. GILLIARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000193

ANDERS BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding the prosecution had proven by a preponderance of the evidence that Petitioner's statement to police was made pursuant to a knowing and voluntary waiver of his rights in light of the totality of the circumstances?

STATEMENT OF THE CASE

A Charleston County grand jury indicted Petitioner for murder (2010-GS-10-2061), armed robbery (2010-GS-10-2060), and possession of a firearm during the commission of a violent crime (2010-GS-10-2059). App. 774-775; App. 777-778; Supp. App. 1-2. During its April 2010 term, the Charleston County grand jury indicted Petitioner for unlawful carrying of a pistol in an unrelated incident. Supp. App. 4-5.

On May 24, 2010, the state, represented by Rutledge DuRant and Chad Simpson, called Petitioner to trial before the Honorable Roger M. Young, Sr., and a jury on the charges of murder, armed robbery, and possession of a firearm during the commission of a violent crime. App. 1. Michael Bosnak represented Petitioner. App. 1. The jury found Petitioner guilty of armed robbery, but was unable to reach a verdict on the murder charge and the firearm charge. App. 611, lines 11-24. Therefore, Judge Young declared a mistrial as to those two charges. App. 612, lines 20-23. Judge Young deferred sentencing on the armed robbery. App. 617, lines 8-23. No notice of appeal was filed on Petitioner's behalf following the sentencing.

On February 25, 2011, Petitioner was tried again on the murder and firearm charge before the Honorable J.C. Nicholson, Jr. App. 691. When the jury was unable to reach a verdict yet again, Judge Nicholson sentenced Petitioner to 25 years' imprisonment on the armed robbery conviction. App. 703, lines 10-13; App. 779. On April 21, 2011, Petitioner entered a guilty plea to voluntary manslaughter, possession of a firearm during the commission of a violent crime, and an unrelated charge of unlawful carrying of a pistol before the Honorable Thomas L. Hughston. App. 708. Judge Hughston sentenced Petitioner to twenty years' imprisonment for armed robbery, five years' imprisonment for

possession of a firearm during the commission of a violent crime, and one year imprisonment for unlawful carrying of a pistol. App. 717, line 24 – App. 718, line 4; App. 776; App. 779; Supp. App. 3; Supp. App. 6.

Petitioner filed an application for post-conviction relief (PCR) on November 15, 2012. App. 720-731. Petitioner filed an amended application on November 8, 2013. App. 737-738. The Honorable Stephanie P. McDonald presided over a hearing on the matter on November 20, 2013. T. Dylan Rankin represented Petitioner, and Ashleigh R. Wilson represented the state. App. 739. By an order filed on January 13, 2014, Judge McDonald granted Petitioner a belated direct appeal. App. 770-773.

Petitioner filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

Petitioner and the deceased were drug dealers in the same general area. Although the two had been friendly, the relationship deteriorated over a series of events. First, the deceased beat Petitioner's mother related to a drug debt. App. 290, lines 22-24; App. 431, line 21 – App. 432, line 12; App. 435, lines 13-14. Second, Petitioner and the deceased's girlfriend were friendly causing the deceased to be jealous. App. 436, line 7 – App. 438, line 3. Third, Petitioner's girlfriend was having sex with the deceased and using her relationship with the two men to antagonize them. App. 284, lines 2-7; App. 286, lines 5-11; App. 290, lines 15-21; App. 292, lines 2-5; App. 438, line 11 – App. 440, line 5. Finally, Petitioner sold crack to one of the deceased's regular customers. App. 360, lines 17-20; App. 441, line 18 – App. 442, line 13; App. 444, lines 18-23. The deceased, believing he was entitled to the sale, was enraged with Petitioner. He threatened to kill Petitioner if he saw him in the area again. App. 307, lines 14-25; App. 308, lines 8-17; App. 444, line 24 – App. 447, line 7. Petitioner armed himself in light of the deceased's repeated threats. App. 448, lines 2-3; App. 449, lines 19-23; App. 453, lines 6-10.

In an effort to ameliorate the tensions between the two, Petitioner offered to pay the deceased a portion of the proceeds he received from the drug sale. App. 361, lines 12-15; App. 458, line 17 – App. 459, line 5. When Petitioner asked to meet at a local store to deliver the funds, the deceased refused and requested to meet in a nearby residential neighborhood. App. 361, lines 15-17; App. 459, line 22 – App. 461, line 4. Petitioner arrived on foot to the residential neighborhood first. App. 361, lines 17-19; App. 461, lines 10-25. Shortly, the deceased arrived in a rental car. App. 361, lines 24-25; App. 251, line 19 – App. 252, line 12 App. 461, line 25 – App. 462, line 1. Petitioner gave the deceased

between $200 and $300 to settle the dispute, but the deceased refused to accept the amount, and requested more. App. 463, line 10 – App. 464, line 4. When Petitioner refused to give more, the deceased threatened to shoot Petitioner and made a movement toward a gun sitting in the passenger seat. Petitioner then shot the deceased. App. 362, lines 4-7; App. 464, line 11 – App. 465, line 19; App. 466, line 6. After shooting the deceased, Petitioner started running away. However, Petitioner doubled back to the car and took money from the deceased.[1] Then, Petitioner ran again. App. 362, lines 8-13; App. 466, lines 7-21.

[1] Petitioner testified that he took the money that he had given the deceased, which was on the deceased's lap. App. 466, lines 14-21. The evidence supported this testimony because the police found a total of $1,607.02 and marijuana in the deceased's pockets when they arrived to process the scene. App. 206, lines 14-22; App. 237, lines 18-19; App. 240, lines 8-21. However, Petitioner's statement to police provided: "I then turned around to take his money out of his pocket and then I left." App. 362, lines 9-10. A witness claimed he saw the assailant run back to the car and "ransack[] his pockets" before running again. App. 152, line 23 – App. 153, line 3; App. 159, line 4 – App. 162, line 10. This testimony was contradicted by the crime scene investigator who testified the deceased's pockets were undisturbed. App. 226, lines 11-13.

ARGUMENT

The trial judge erred in finding the prosecution had proven by a preponderance of the evidence that Petitioner's statement to police was made pursuant to a knowing and voluntary waiver of his rights in light of the totality of the circumstances.

Relevant facts

Prior to trial, the state moved to admit a nine-page statement allegedly made by Petitioner to police on April 22, 2009. In light of the state's motion, the judge required a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964). Detective Nicholas R. Wagner admitted that at 8 p.m. on April 22, 2009, he, with assistance from the United States Marshals took Petitioner into custody. App. 44, line 16 – App. 45, line 5. Wagner transported Petitioner to the sheriff's office, arriving at approximately 8:30 p.m. App. 45, line 5 – App. 46, line 8. Thereafter, Wagner and Detective James Perkins commenced to interrogate Petitioner for three hours extracting multiple unrecorded verbal statements and a single nine-page written statement.

Wagner and Perkins claimed they reviewed Petitioner's rights with him using the form designed by the sheriff's office. App. 47, lines 1-25. They further claimed Petitioner understood his rights. App. 48, line 1 – App. 49, line 7. After completing the advisement of rights form, Wagner and Perkins asked Petitioner to waive his rights and give incriminating statements to the police concerning the death of the deceased. When Petitioner signed the documentation agreeing to waive his rights, the three hour interrogation by the two

seasoned[2] investigators commenced. App. 50, line 5 – App. 51, line 16; App. 65, lines 7-14; App. 72, lines 4-7.

Initially, Wagner and Perkins spoke to Petitioner verbally about the death of the deceased. App. 51, lines 17-20. Forty minutes into the interrogation, the investigators needed a break. App. 52, lines 11-25. After a ten-minute break, the interrogation resumed. App. 54, lines 14-18. After the experienced investigators got the answers they wanted, they requested Petitioner execute a written statement and he complied. App. 51, line 21 – App. 52, line 6; App. 54, line 16 – App. 55, line 20. Over the next fifty minutes, Petitioner wrote a two-page statement. App. 56, line 23 – App. 57, line 9.

The investigators then took a forty-minute break, during which Petitioner received food. App. 57, lines 10-24. Once again, the interrogation resumed at 11:30 p.m. The officers engaged in what they called "a question and answer session." App. 58, lines 4-9. After the investigators finished with their three-hour interrogation, they had a nine-page written statement from Petitioner, in which he admitted to shooting the deceased in self-defense. App. 58, lines 16-18; App. 65, lines 7-14.

Although the Charleston County Sherriff's Office had the capability of audio and video recording the interrogation, the investigators simply failed to use the equipment because "[i]t's a practice of the Charleston County Sheriff's Office not to record ore videotape a statement." App. 61, line 25 – App. 62, line 16. The investigators admitted the written statement included only a small fraction of what was said during the interrogation. App. 63, lines 14-25; App. 66, line 15 – App. 66, line 14.

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[2] Wagner received extensive training in interrogation techniques, which he employed during this interrogation. He claimed "it require[d] something a little bit more than the average person off the street" had to conduct an interrogation. App. 67, lines 8-12.

The following day, Perkins wanted to talk to Petitioner again. App. 73, lines 4-8. When Perkins advised Petitioner of his rights, Petitioner refused to speak with Perkins and requested the presence of his attorney. App. 73, lines 9-14. Perkins wanted to interrogate Petitioner about the gun Petitioner used. Perkins "didn't want anybody to find it like a young child or anything and get injured." App. 74, lines13-16. Perkins' desire to continue the interrogation due to his alleged desire to find the location of the gun was incongruous with Petitioner's statement that he had thrown the gun into the river. App. 74, lines 6-25.

Trial counsel argued the trial judge should exclude the statement because Petitioner's request for a lawyer on the following day indicated his statement the previous day was involuntary and unknowing. The professed reason for speaking to Petitioner - the location of the gun – was "very, very strange" in light of Petitioner's statement that he had thrown it in the river. App. 75, lines 17-25. Additionally, trial counsel argued for exclusion of the statement due to the officers' failure to audio or video record it despite having the capability of doing so. This failure resulted in an incomplete statement because the investigators admitted Petitioner made statements not included in the written document. App. 76, lines 1-3. Trial counsel noted the statements and advisement of rights were undated by the signatures, but had typed dates at the top. Those "could be easily changed." App. 76, lines 11-19.

The trial judge found, by a preponderance of the evidence, that Petitioner made a voluntary statement to police. After finding Petitioner was in custody, the judge also found Petitioner was advised of his rights. Thereafter, Petitioner "freely, voluntarily, and intelligently waived his rights and made his statement." The judge found no coercion "or

anything on the surface to make this statement" involuntarily or unknowingly given. App. 77, lines 4-9.

Petitioner objected contemporaneously when the prosecution sought to introduce the statement during the trial. The judge overruled the objection, and Wagner read the complete statement to the jury. App. 359, lines 10-14; App. 360, line 15 – App. 367, line 21.

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. 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). 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).

An examination of the totality of the circumstances reveals Petitioner did not waive his Miranda rights in a knowing and voluntary manner. Petitioner was interrogated for three hours by seasoned detectives using the skills they learned from years of experience and training classes to extract confessions. Petitioner was a young man of only twenty-one years and of limited education, having not received a high school diploma, but managing to complete a GED program. App. 53, lines 8-10. The interrogation continued for hours into the night and continued even into the following day. Further, the interrogators refused to use readily available audio and video equipment, which would have captured the complete interrogation. Thus, the jury was left with only the portions of the interrogation that the investigators wanted the jury to hear.

In light of the totality of the circumstances, including Petitioner's age and education level, the duration of the interrogation, and the incomplete nature of the interrogation, the state failed to prove by a preponderance of the evidence that Petitioner's statement to police was given following a freely and knowingly made waiver of his rights to counsel and silence.

CONCLUSION

Petitioner respectfully requests this Court reverse his conviction for armed robbery and remand this case for a new trial on the armed robbery charge.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

BERNARD O. GILLIARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bernard O. Gilliard states:

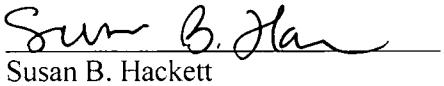
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's trial before Judge J. C. Nicholson, Jr., which was held on February 25, 2011, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Bernard O. Gilliard.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2014.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Ashleigh R. Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Bernard O. Gilliard, #314249, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 30th day of September, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

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

(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022 .