STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Clifton Newman, Circuit Court Judge

Opinion No. 2014-UP-304 (S.C. Ct. App. filed 7/30/2014)

09-GS-45-0180

THE STATE,

RESPONDENT,

V.

TAWANDA ALLEN,

PETITIONER

APPELLATE CASE NO. 2014-002245

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 September 18, 2014.

QUESTION PRESENTED

Whether the Court of Appeals erred by holding it was not an abuse of discretion for the trial court to admit petitioner's confession where petitioner was threatened that she would be charged with murder if she did not "come straight," since a confession that is procured as a result of a threat is not admissible?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Williamsburg County Grand Jury for the offences of murder, burglary in the first degree, and criminal conspiracy. R.474. Her case was called to trial on August 30, 2010, before the Honorable Clifton Newman, and a jury. Kimberly Barr and Doward Harvin were the assistant solicitors. Verdell Barr represented petitioner. R. 39.

At the conclusion of the trial, the jury found petitioner guilty on all three (3) counts. R. 470, l. 17-23. Judge Newman sentenced petitioner to forty-five years imprisonment for murder, and he imposed concurrent sentences of thirty years for burglary in the first degree and five years for criminal conspiracy. R. 472, l. 13 – 473, l. 4.

Petitioner's convictions were affirmed in State v. Tawanda Allen, 2014-UP-304 (filed July 30, 2014). App. 1-6. Petitioner filed for rehearing. Appp. 7-11. Rehearing was denied. App. 12. This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by holding it was not an abuse of discretion for the trial court to admit petitioner's confession where petitioner was threatened that she would be charged with murder if she did not "come straight," since a confession that is procured as a result of a threat is not admissible

Relevant Facts

Kenyon Dorsey was murdered on April 15, 2009. R. 8, l. 14 – 9, l. 1. Petitioner's son, Ronald Mack, pled guilty to the murder of Kenyon Dorsey. R. 389, l. 1 – 390, l. 25. Petitioner's boyfriend, Kelvin Bowen, was also later convicted in the murder.

A suppression hearing was held before Judge Newman on August 23, 2010. R. 1. Williamsburg County Sheriff's Office Investigator Pamela Lail testified that she was assigned to the murder case, and Lail said that petitioner was later arrested in Maryland and transported back to Williamsburg County for her alleged involvement in the murder.

Lail interrogated petitioner on May 28, 2009. R. 9, ll. 4-14. The interrogation began at 10:30 a.m. Petitioner had been arrested for accessory before and after the fact of murder. She was **not charged with murder**. R. 10, l. 12 – 11, l. 4.

Lail testified on direct-examination during the suppression hearing that petitioner was read her Miranda[1] warnings and that she understood them. R. 13, l. 14 – 16, l. 21. Specifically, Lail denied she threatened petitioner "in any way." R. 16, ll. 10-13. Her self-serving conclusion belied what actually happened. Lail also said petitioner never

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

requested an attorney during the one-hour interrogation. R. 16, l. 23 – 17, l. 18. Lail related that petitioner ultimately confessed to driving her boyfriend from Maryland "and being the driver so-to-speak for this murder." Lail said petitioner also implicated her son, Ronald Mack, her boyfriend Kelvin Bowen, and Antonio McClary. R. 18, ll. 3-11.

On cross-examination, defense counsel focused on threats that were made to petitioner. Lail acknowledged that petitioner was originally charged with accessory before and after the fact of murder, but she maintained that petitioner ultimately being charged with murder was the charging decision of the solicitor's office. R. 20, ll. 2-16. As will be seen infra, Lail admitted the obvious during petitioner's trial: That the police department and the solicitor's office work very closely on these cases.

Lail acknowledged during the interrogation that Detective Collins told petitioner "that she needed to come straight." Lail acknowledged they thought petitioner was lying to them at that point during the interrogation. R. 21, ll. 12-25. Lail maintained petitioner was "just roaming and rambling on," and that she would not tell the police what really happened. R. 22, ll. 8-24.

Lail admitted that petitioner was told she needed to come straight or she could be charged with murder. Lail denied that telling petitioner she could be charged with murder if she did not "come straight" was a threat. R. 22, l. 25 – 24, l. 11. Petitioner was told "**don't let us have to change your charge to murder, so you need to tell us exactly what happened**. I have been sitting here listening to you roam on about what happened. All that is good, but you're here, so let's start on the fourth, which is a Saturday, when Kenyon got killed that night." R. 24, l. 18 – 25, l. 17. (emphasis added).

On re-direct examination, Lail said that the statement of co-defendant Antonio McClary was the basis for her arrest warrants for petitioner and her son. R. 28, ll. 2-19.

Defense counsel Barr argued that petitioner had been threatened "at least twice" during the interrogation. He noted that petitioner was threatened if she did come straight that accessory charges would be upgraded. Defense counsel argued at the point petitioner was threatened "the statement took a different turn at that point." R. 30, l. 11 – 31, l. 11.

The solicitor argued that the penalty for being an accessory before the fact of murder was the same as the penalty for murder and that petitioner could read and write. The solicitor continued to stubbornly deny that petitioner had been threatened into confessing. R. 31, l. 12 – 32, l. 11. Defense counsel Barr responded that petitioner was threatened, and that petitioner gave her confession out of the fear of the threat. R. 32, l. 14 – 33, l. 7.

After hearing the evidence, and listening to the arguments of counsel, Judge Newman ruled petitioner had been given her Miranda rights and ruled by a preponderance of the evidence that petitioner's statements were made freely and voluntarily tendered. R. 33, l. 12 – 37, l. 9. It was a rather normal ruling despite the fact that the concurring Judge in State v. Tawanda Allen, 2014-UP-304 (filed July 30, 2014) thought trial counsel and appellate counsel should have taken the judge to task for not specifically addressing the obvious fact that petitioner was threatened into giving her confession. App. 5-6.

The trial

The decedent's mother, Annette Dorsey Bradshaw, testified Kenyon was seventeen-years-old when he died. R. 42, l. 14 - 43, l. 19. Bradshaw and Kenyon were the only people living in their house at the time of the murder. Bradshaw knew petitioner's son, Ronald Mack. R. 43, ll. 15-25.

Kenyon and Mack had been friends. However, Bradshaw said she became angry when she learned Mack had stayed at her house one night while she was working. She worked the

night shift and she did not like others besides Kenyon in her house when she was not home. R. 44, l. 1 – 46, l. 16.

Bradshaw had allowed her daughter to borrow her car on the night of the murders. The inference was that the robbers or murderers probably did not think she was at home. She remember Kenyon came home about 1:30 a.m. on the night of the shooting.

Bradshaw testified that she woke up because she heard a noise that sounded like firecrackers at about 2:20 a.m. She yelled two or three times for Kenyon. However, he did not respond. Bradshaw testified she could hear people running from the house. She noticed blood on Kenyon, and she ran out the back door to her mother's next door house telling them: "Somebody just shot Kenyon." R. 54, l. 6 – 56, l. 25.

When Bradshaw ran outside, she looked back and saw a dark colored SUV or "some kind of small sport truck" speeding away. R. 65, l. 4 – 66, l. 1.

Pamela Lail testified about her interrogation of petitioner at trial. Lail went to the murder scene on April 15, 2009. R. 295, ll. 1-7. Lail said after the murder they did not know that petitioner's son, Ronald Mack, "had a prior problem" with the decedent. However, the police did know from the GSR report that Mack had washed his hands with bleach recently. R. 299, l. 4 – 300, l. 3.

Lail said she learned through her investigation that Mack was no longer a student at Kingstree High School. He was now attending school in Maryland. R. 298, l. 1 – 310, l. 15.

Eventually arrest warrants were issued for petitioner, her boyfriend, Kelvin Bowen, her son Ronald Mack, and Antonio McClary. R. 311, ll. 18-22. Petitioner's son, Mack, pled guilty. R. 312, ll. 1-7.

Lail interrogated petitioner on May 28, 2009 beginning at 10:30 a.m. R. 313, ll. 17-23. Her testimony was largely consistent with that of the suppression hearing. The Miranda warnings and confession were admitted over objection. The solicitor told the judge before the tape was admitted that "It is not until Page 24 when she really starts to come clean and tell the police about her involvement with the planning and carrying out of the crime." R. 318, l. 1 – 331, l. 4. The record in this case is clear that once petitioner was threatened with a murder charge (App. **500 – 51) her story quickly changed.**

On cross-examination Lail acknowledged petitioner, at the time of the interrogation, had not been charged with murder but rather accessory before and after the fact of murder. R. 354, l. 22 – 355, l. 14. Lail stuck with her position: "There were no threats involved." R. 356, ll. 6-9. That is simply not true as the record shows. App. 500=-511.

On the redirect-examination Lail said there was no difference between the penalty for accessory before the fact of murder and murder. On re-cross examination Lail admitted a normal person would not know the penalties for the crimes. Barr asked Lail to admit "the officers *actually told her that unless you come straight with us we're gonna charge you with murder.*" Lail now answered: "That's not exactly what they said, no, sir." R. 367, l. 17 – 368, l. 9. Lail admitted that the police department did work jointly with the solicitor's office and did get advice on what the "proper charges" were. R. 370, l. 23 – 372, l. 11.

Ronald Mack

Petitioner's son, Ronald Mack, testified he felt betrayed by the decedent because during their drug dealings with the Bloods that the decedent kept coming up short with money on the drug deals that were being done in Maryland. Mack related that he "was tired" of having to "take up the slack" for the decedent's failures in drug deals. R. 375, l. 5 – 387, l. 13. The two

got in a fist fight two weeks before the shooting, and Mack believed Kenyon was responsible for a later incident where Mack was shot at by an unknown person. R. 377, l. 11 – 378, l. 25.

Mack also testified prior to the shooting he only discussed it with co-defendant Bowen. He denied that anyone that he and his mother had a plan to kill the decedent. R. 382, l. 10 – 385, l. 24. Mack insisted on cross-examination by the solicitor that although petitioner was outside the house, she did not know what was going inside the house. R. 390, l. 19 – 391, l. 13.

In his closing argument defense counsel told the police threatened petitioner and she was scared when she gave her inculpatory statement. "Now a layperson doesn't know whether or not you're gonna get 5 years, 10 years, or 20 years for a crime. She afraid, so they get the detectives to tell her, look, thus far you're just being charged with accessory but now if you're not forthcoming we're gonna charge you with murder. Now I think that's a threat . . ." R. 427, ll. 4-25.

The Court of Appeals and rehearing

The Court of Appeals held that there was evidence petitioner's will was not overborne, and stated there was a "lack of discernable change in Allen's speech before and after Collins's statement." App. 3. Petitioner argued on rehearing that

> "This case is not distinguishable from State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990) in any material way. Osborne was told she would be charged with "withholding evidence" if she did not make an honest statement. The Sheriff admitted that Osborne was told if she withheld information she could be charged with a crime. The Sheriff also acknowledged Osborne was told that fact from the beginning of the interrogation. He also did not consider it a threat. Again, and as discussed at oral argument the **conclusory** statements of law enforcement about whether a statement was a threat or a promise should not carry the day.
>
> With respect to the concurrence, trial counsel argued that the statement should not be admitted because it was given as the result

> of a threat. It therefore was not given freely and voluntarily. That is what petitioner continues to argue on appeal. The judge's bottom line ruling was that the statement was given freely and voluntarily.
>
> The fact trial counsel or appellate counsel could have further taken issue with a part of the judge's ruling that was also incorrect within his ultimate ruling is, respectfully, not a valid application of a procedural bar. The defense arguments on the involuntariness of petitioner's statement given the threat were fully and correctly made to the trial judge. Counsel argued the obvious – the threat changed and **controlled** the voluntariness analysis. The judge heard all of the correct arguments about the threat, and he still ruled the statement was voluntarily tendered. For the concurrence to consider the issue procedurally barred because all of the judge's ruling was not attacked at trial and on appeal -- where the judge failed to apply the law to the facts – is, respectfully, playing a game of "gotcha" that this Court has stated it would not engage in to harm litigants. State v. Haygood, Op. No. 5247, Shearouse's Adv. Sh. #26 at p. 156-157 (June 30, 2014).

Petition for rehearing at 3-4. App. 9-10.

Discussion

Petitioner argued in his brief, at oral argument, and on rehearing that this case was controlled by this Court's opinion in State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990), Osborne was told she would be charged with "withholding evidence" if she did not make an honest statement. The Sheriff admitted that Osborne was told if she withheld information she could be charged with a crime. As in this case, the sheriff testified he was not threatening Osborne.

This Court found Osborne was clearly distinguishable from State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990), where the polygraph examiner told the defendant it would be in his best interest to tell the truth. Osborne was given a new trial because her statement should have been suppressed because it was the result of a threat.

Coercive police activity is a necessary predicate in finding a statement is not voluntary. Colorado v. Connelly, 479 U.S. 157 (1986). Coercion is determined from the perspective of the suspect. Illinois v. Perkins, 496 U.S. 292 (1990). A statement extracted by any sort of threat or promises, however slight, or improper influence is a coerced statement. See Hutto v. Ross, 429 U.S. 28 (1976).

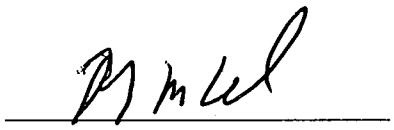
Here, Lail admitted that it was not reasonable for petitioner to know that the punishment for accessory before the fact to murder was the same as that of murder. Further, petitioner submits many people believe the death penalty is an available punishment for any murder.

If the threat in State v. Osborne rendered the confession inadmissible -- and it did – then the confession here based on the threat of being charged with murder if petitioner did not "come straight" was likewise inadmissible. If a law enforcement officer delivers a threat in normal voice it can be every bit as intimidating as a screaming out-of-control detective whom a suspect may think is merely playing the bad cop role. "Don't let us have to change your charge to murder, so you need to tell us exactly what happened . . . so let's start on the 4th which was the Saturday that Kenyon got killed that night." App. 500, l. 8 – 501, l. Since the opinion in this case conflicts with this Court's opinion in State v. Osborne certiorari should be granted. See Rule 242 (b)(3), SCACR.

CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari should be granted to allow full briefing on this significant issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 27th day of October, 2014

STATE OF SOUTH CAROLINA

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THE STATE,

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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 Alphonso Simon, Jr., Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 27th day of October, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of October, 2014.

Rhonda Denise Ingram (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021