STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

Opinion No. 5259 (S.C. Ct. App. filed 8/6/2014)

10-GS-40-1178, 1179

THE STATE,

RESPONDENT,

V.

VICTOR A. WHITE,

PETITIONER

APPELLATE CASE NO. 2014-002230

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 majority of the Court of Appeals erred by finding it was harmless error for the trial court not to make sufficient findings as to whether petitioner's statement was admissible under *Missouri v. Siebert* and *State v. Navy*, where there was evidence petitioner's statement acknowledging he was at the crime scene was obtained under the "question first" tactic of obtaining an exculpatory statement and then only giving *Miranda* warnings, as a remand is necessary, at a minimum, under these circumstances for necessary fact findings?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Richland County Grand Jury for the offenses of murder and armed robbery. His case was called to trial on October 3, 2011, before the Honorable Clifton Newman and a jury. Kathryn Campbell Hubbird and Meghan L. Walker were the solicitors. Courtney Ann Gibbes and Mark A. Sawyer, Jr. represented petitioner. R. 1.

At the conclusion of the trial on October 6, 2011, the jury found petitioner guilty. R. 476, ll. 15-23. Judge Newman sentenced petitioner to thirty five years imprisonment for murder, and twenty years imprisonment for armed robbery. R. 479, ll. 15-20.

The Court of Appeals affirmed in State v. White, 410 S.C. 56, 762 S.E.2d 726 (2014). App. 1-6. A petition for rehearing was filed August 21, 2014. App. 7-12. Rehearing was denied on September 18, 2014. App. 13. This petition for a writ of certiorari follows.

ARGUMENT

The majority of the Court of Appeals erred by finding it was harmless error for the trial court not to make sufficient findings as to whether petitioner's statement was admissible under *Missouri v. Siebert* and *State v. Navy*, where there was evidence petitioner's statement acknowledging he was at the crime scene was obtained under the "question first" tactic of obtaining an inculpatory statement and then only giving *Miranda* warnings, as a remand is necessary, at a minimum, under these circumstances for necessary fact findings.

Relevant Facts

Prior to trial a Jackson v. Denno, 378 U.S. 368 (1964) hearing was held on the admissibility of petitioner's statement. Investigator Kevin Reese of the Columbia Police Department became involved in the case of a man who was shot in the Kentucky Fried Chicken parking lot near Benedict College on February 3, 2010. R. 8, l. 12 – 9, l. 3.

Petitioner became a suspect in the shooting. By working with cell phone companies, and by electronic interception, the police learned petitioner could be in the Cayce, South Carolina area. They suspected petitioner was near Tree Street where a relative lived. R. 9, ll. 4-17.

A week later, on February 10, 2010, as the police were combing the Tree Street area and knocking on doors, petitioner came outside and stood in a yard. He was taken into custody at that point. R. 9, l. 4 – 11, l. 3.

Reese acknowledged he had "a generalized conversation" with petitioner after his arrest. Reese "assumed" petitioner was suspicious that he may be being investigated for a homicide. However, petitioner was not told of that fact. R. 12, ll. 21-24; 19, ll. 9-17.

Reese said the police wanted to hear petitioner's version of what transpired. R. 11, ll. 17-20. Reese claimed he read petitioner his Miranda[1] warnings and he started interviewing petitioner. R. 12, l. 25 – 16, l. 10.

However, Reese acknowledged that he had interviewed petitioner *prior to* taking his "formal statement." Reese called this **"a rough ride"** where the police wanted "to see what his story is going to be and what kind of reaction he's going to give us during the process." R. 16, l. 11 – 18, l. 12. After petitioner gave "his version of events" he was arrested for murder and armed robbery. R. 18, ll. 20-25.

Petitioner testified during the suppression hearing that he asked the police what he was charged with when he was arrested. The officer in the squad car told him he did not know the charge. Petitioner was taken to the police headquarters and he began talking with the investigators while in custody. Petitioner was shown a picture of the victim and asked if he recognized him. Petitioner said: "I told him yeah. That's when he asked me, did I know what happened because he showed me a picture of the car and asked me, do I know what happened that night. **And that's when I began to tell him what I knew.**" R. 21, l. 15 – 24, l. 3. (emphasis added).

Petitioner signed the Miranda warnings form "**after I made my first statement, yeah** . . . that's when they got the tape recorder and said they needed a video, I mean, an audio . . . I told them the same thing I told them the first." R. 23, l. 20 – 24, l. 19. (emphasis added).

Following petitioner's testimony, Defense Counsel Gibbes argued that petitioner's statement should be suppressed because his Miranda warnings were not properly read at the proper time. Petitioner had testified he gave a statement before he was given his Miranda warnings. R. 27, ll. 12-20.

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

The trial judge found that petitioner's statement was freely and voluntarily given, and he denied the motion to suppress. The judge did not address petitioner's testimony that he gave a statement before he was given Miranda warnings – or the fact that Reese's testimony seemed to corroborate that fact -- nor did he rule on the legal arguments of counsel. There were simply no findings of facts or conclusions of law made by the judge. R. 27, l. 11 – 28, l. 5.

Petitioner argued to the Court of Appeals:

> At a minimum, petitioner's case should be remanded for such fact findings and conclusions of law so this Court can properly review the evidence in the event it finds it fails to find petitioner's statement is inadmissible under the "question first," give Miranda warnings second, practice condemned in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) *citing* Missouri v. Seibert, 542 U.S. 600 (2004).

Final brief of appellant at 7.

Trial evidence

Petitioner's statement was played for the jury, and was reduced to a transcript. R. 481. Petitioner stated that he was present in the car with the victim to buy or steal his marijuana. Unexpectedly, his friend Reggie Miller, who sat in the back seat of the car during the marijuana buy or planned robbery, shot the victim in the back of the head.

The police initially believed petitioner, but Miller agreed to talk to the police after he was confronted with the fact he had been named by petitioner as the triggerman. Miller then blamed the shooting on petitioner.

Miller was from Massachusetts and he took special education classes in High School there. R. 79, ll. 10-22. Miller maintained he was living on campus at Benedict College, and going to

school there. Miller claimed that he had a "rocky" relationship at first with petitioner because petitioner had stolen money from him. R. 80, l. 15 – 82, l. 1.

Miller testified petitioner called him that February evening wanting him to participate in a robbery of marijuana from a prospective seller. Petitioner did not attend Benedict College, but Miller said petitioner was often around the dormitory. Miller said his understanding was that the men were going to "grab the marijuana and run." R. 83, ll. 9-14.

Miller repeated that he thought he was going to be involved in a robbery, but he claimed petitioner shot the victim in the head unexpectedly from the backseat, as he [Miller] sat in the front passenger seat. R. 87, ll. 6-19. Petitioner had earlier told the police that he was in the front seat when Miller, from the back seat, unexpectedly shot the drug dealing victim in the head. R. 88, ll. 1-12.

Jeremiah Henderson grew up in California and came to South Carolina to attend school. R. 132, ll. 1-4. On the night of the shooting he was in his dormitory room when petitioner, Reginald Miller and Demond Sanford came to his room. "They began to tell me about what had just happened." Henderson claimed petitioner admitted that he shot the victim that night. Henderson maintained that petitioner was "very nonchalant" about it. R. 136, l. 2 – 138, l. 2.

Henderson also claimed he saw petitioner with "a bag of weed and two cell phones and a gun" that night. R. 138, ll. 3-7. No gun was ever recovered in this case.

Henderson maintained that petitioner wanted one of the other men to return to the victim's car with him to steal the scales so they could weigh the marijuana. Henderson claimed Reggie Miller was "shaken up" at this time. R. 138, l. 21 – 140, l. 19.

Investigator Reese testified in the presence of the jury that petitioner seemed straightforward to him when he gave his statement. Reese did not think petitioner was being honest "about

everything," but Reese did find petitioner to be straightforward and not evasive. Seemingly contradicting himself, Reese offered: "I didn't believe he was telling - - he was fabricating 100 percent about Reggie Miller." Reese admitted that petitioner gave him enough information to constitute probable cause for him to arrest Reggie Miller. R. 361, l. 18 – 363, l. 13.

Reese testified that petitioner readily admitted that he knew the victim, and that petitioner admitted being present, but he told Reese that Reggie Miller was the shooter. R. 363, l. 20 – 364, l. 18. Resse was allowed to opine that after his investigation he concluded petitioner was the shooter, and not Miller.[2] R. 380, ll. 5-11.

Defense counsel told the jurors in her closing statement that the state's witnesses who claimed petitioner was the shooter were simply out to save themselves, that they were liars, and the jury should not believe them. R. 457, l. 12 – 458, l. 11.

Court of Appeals

The majority of the Court of Appeals held that "In the pre-trial Jackson v. Denno the trial court did not make an explicit finding as to whether White's statement was taken in violation of State v. Navy. Rather, the trial court simply found White's statement was `freely and voluntarily given and the jury will be able to hear the statement.' Because White already conceded the voluntariness of his statement, but challenged the timing of the Miranda warnings with the taking of his statement as a Navy violation, the trial court was charged with making a factual finding as to this issue, i.e., whether the interrogative procedure through which the statement was obtained comported with Navy. Therefore, the trial court erred by not making sufficient findings of fact as to the statement's admissibility." State v. White, 410 S.C. 56, 762 S.E.2d 726, 727, 728 (2014). App. 3.

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[2] This rank violation of the Rules of Evidence is presently not before this Court.

However, the majority found the error was harmless citing the testimony of Reggie Miller. As seen above, Miller implicated petitioner in the robbery-murder only after he learned petitioner had told the police that Miller unexpectedly shot the decedent. Miller then claimed petitioner unexpectedly shot the decedent. App. 4. The Court also noted Demond Sanford, the "lookout" for the crime, told the police that Miller, in an excited state told him that petitioner shot the decedent right after the shooting occurred. In addition, the Court relied on the fact that Jeremiah Henderson claimed petitioner boasted afterwards that he shot the decedent. App. 4-5.

Chief Judge Few in dissent wrote that: "From the trial court's conclusory statement, we cannot determine whether the court admitted the statement for the reason the court expressed—the statement was freely and voluntarily given, a point the defendant conceded—or the court actually ruled on the issue raised—whether the police violated the principles set forth in Missouri v. Seibert, 542 U.S. 600, 601–02, 124 S.Ct. 2601, 159 L.Ed.2d 643, and State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). In my opinion, however, if there was error in admitting the statement, the error was not harmless. I would remand for a hearing and require the trial court to make sufficient factual findings." App. 5-6.

Discussion

Petitioner respectfully submits that this Court should grant certiorari and, at a minimum his case should be remanded for specific fact findings on this *significant constitutional issue* as the dissent in the Court of Appeals urged, since a finding of harmless error as to his inculpatory statement without any findings of fact on this issue is improper.

However, in the alternative, petitioner submits that this record is adequate for this Court to grant certiorari and hold that a constitutional violation occurred here under State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) and Missouri v. Seibert, 542 U.S. 600 (2004). Navy and Seibert

expressly forbid the practice of obtaining an inculpatory statement from a defendant before reading him his Miranda warning, reading the Miranda warning, and re-eliciting the incriminating information. Until the Miranda warning is given, no evidence obtained as a result of custodial interrogation may be used against a defendant at trial. See Seibert, 542 U.S. at 617; Navy, 386 S.C. at 303-04, 688 S.E.2d at 842.

In State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), the Supreme Court granted certiorari to consider the opinion in State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (S.C. Ct. App. 2006). This opinion held that all three of petitioner's inculpatory statements to the police should have been suppressed pursuant to Missouri v. Seibert, 542 U.S. 600 (2004) which noted that giving Miranda warnings *after* the defendant had made an unwarned confession rendered the confession inadmissible at trial.

This Court in State v. Navy, supra, affirmed the reasoning of the Court of Appeals excluding the second and third statements since it was apparent the Columbia Police Department was following a nationally promoted interrogation process of obtaining an inculpatory statement from a defendant *before* reading him his Miranda warning. (The same Police Department was involved in this case). This Court found that the Court of Appeals correctly concluded the officer's actions violated Seibert and therefore Navy's second and third statements had to be suppressed.[3]

Here, it is apparent from petitioner's testimony that the Columbia Police Department engaged in the forbidden Seibert interview or interrogation "question first" practice in this case. Petitioner said the police questioned him and he admitted he knew the victim, that he was present

[3] The state's petition to the United States Supreme Court was denied. South Carolina v. Navy, 131 S. Ct. 141 (2010).

during the marijuana sale or robbery, and that Miller unexpectedly shot petitioner.

As seen, Investigator Reese found petitioner to be straightforward and he believed his statement sufficiently to arrest Miller. Miller refused to talk to the police but then accused petitioner of being the shooter when confronted with the fact that petitioner readily admitted his presence at the crime scene but named Miller as the shooter.

The statement of petitioner in this case was devastating because it allowed police to place petitioner at the crime scene. From there, the case became a swearing contest between the young men involved. Miller and Henderson both faced life sentences if they were convicted rather than petitioner.

In State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) this Court held for a defendant to be regarded as a participant in a homicide, where he did not actually commit the homicidal act, that he must have aided, abetted, assisted, encouraged, or advised the killer and acted with the intention of encouraging and abetting the commission of a homicide. For one to be guilty under the "hand of one is the hand of all" theory, the commission of the murder by the principal must be a reasonably foreseeable consequence of the defendant's actions. Id. 388 S.C. at 484, 697 S.E.2d at 586.

In this case, the trial judge did not make any findings of fact or conclusions of law despite petitioner's clear testimony, and the argument of defense counsel that petitioner's inculpatory statement should be suppressed because he was questioned and gave an inculpatory statement where his Miranda warnings were not timely given before his inculpatory statement.

Again, at a minimum, petitioner is entitled to a remand so that the trial court can make findings of fact and conclusions of law based upon the testimony of petitioner, and the argument of his attorney based on this testimony. The dissent in the Court of Appeals properly found a remand was necessary, and that alone is a reason for this Court to grant certiorari. See Rule 242 (b)(2),

SCACR. Further, a substantial constitutional issue was ignored at the trial court level given the error by the trial court in not making findings of fact and conclusions of law as the majority of Court of Appeals held. See Rule 242 (b)(4), SCACR.

The error in this case was not harmless. This is particularly true because Reese found petitioner's statement to be relatively straightforward, and if the jury believed petitioner's statement, and found Miller shooting the victim was not foreseeable, petitioner could not be convicted under the "hand of one is the hand of all" theory. See State v. Peterson, 287 S.C. 244, 246-247, 335 S.E.2d 801-802 (1985). The witnesses attending Benedict College were all friends, and petitioner was the outsider since he did not attend that school.

Although this Court does not weigh the credibility of the witnesses, the jury nonetheless had to weigh the testimony of the accomplices who had a great incentive to lie to save themselves. They chose to back Miller rather than petitioner, and that respectfully was not worth much when determining confidence in the result of the trial, given the constitutional error involved here.

CONCLUSION

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

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 30th day of October, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

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THE STATE,

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PETITIONER

APPELLATE CASE NO. 2014-002230

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 Donald J. Zelenka, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 30th day of October, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of October, 2014.
Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021