STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5259 (S.C. Ct. App. filed 8/06/2014)
10-GS-40-1178, 1179

THE STATE,

RESPONDENT,

V.

VICTOR A. WHITE,

PETITIONER

APPELLATE CASE NO. 2014002230

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Victor A. White, Appellant.

Appellate Case No. 2011-201286

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5259
Heard May 6, 2014 – Filed August 6, 2014

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

GEATHERS, J.: Victor White was convicted of murder and armed robbery stemming from a shooting during an arranged marijuana purchase. The incident took place inside of the victim's vehicle at an empty Kentucky Fried Chicken (KFC) parking lot. White appeals his convictions, arguing the trial court erred in admitting his recorded statement because the statement was the direct product of

the impermissible tactic of "question first, give *Miranda*[1] rights later," which has been expressly forbidden by the Supreme Court in *Missouri v. Seibert*, 542 U.S. 600 (2004), and our supreme court in *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). We affirm.

1. Voluntariness and Admissibility of White's Statement

In both *Seibert* and *Navy*, the courts emphasized that *Miranda*'s warnings requirement cannot be skirted by interrogative tactics that undermine the very purpose of *Miranda*, i.e., unless and until such warnings and waiver are given, no evidence obtained as a result of interrogation can be used against a defendant at trial. *See Miranda*, 384 U.S. at 478–79; *Seibert*, 542 U.S. at 617; *Navy*, 386 S.C. at 303–04, 688 S.E.2d at 842.

Here, there is conflicting evidence as to whether White's statement was taken in violation of our supreme court's holding in *Navy*. By White's testimony, alone, he presents evidence that *Navy*'s forbidden "question-first, give *Miranda* warnings later" tactic was employed in his interrogation. On the other hand, the State points to the testimony of two investigators who stressed they did not elicit any information from White prior to his signing of the *Miranda* rights waiver form. The State argues the investigators' testimony is further corroborated by the waiver form, which indicates White voluntarily waived his rights prior to answering any questions.[2]

Because there is conflicting evidence, the trial court was charged with making a finding that White received *Miranda* warnings and intelligently waived his right to silence prior to making a statement. *See State v. Silver*, 307 S.C. 326, 330, 414 S.E.2d 813, 815 (Ct. App. 1992) ("Where there is conflicting evidence regarding the statements, the court must make a finding as to their validity."). White concedes his statement was given "voluntarily." However, he contests the timing of the *Miranda* warnings, which necessarily implicates *State v. Navy* and the issue of whether he intelligently and voluntarily *waived* his right to remain silent prior to making a statement. *See State v. Miller*, 375 S.C. 370, 380, 652 S.E.2d 444, 449

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

[2] The State also cites both White's and the investigators' testimony stating the initial questioning did not begin until "around midnight," which coincides with the timing listed on the signed *Miranda* rights waiver form (11:55 P.M.).

(Ct. App. 2007) (finding the "intelligent waiver mandate" is in addition to the voluntariness requirement of *Miranda*).

In the pre-trial *Jackson v. Denno*[3] hearing, 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.

2. Harmless Error

Even if, as White argues, his statement was admitted in violation of *Navy*, we believe any error in its admission was harmless beyond a reasonable doubt.

In *State v. Creech*, 314 S.C. 76, 441 S.E.2d 635 (Ct. App. 1993), this court reiterated the Supreme Court of the United States' holding in *Chapman v. California*[4] that error of even constitutional magnitude may be deemed harmless if, "considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." *Id.* at 86, 441 S.E.2d at 640 (citing *Chapman v. California*, 386 U.S. 18 (1967)); *see also Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993). Similarly, in *State v. Easler*, our supreme court intimated that any error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis. 327 S.C. 121, 129, 489 S.E.2d 617, 621–22 (1997); *see also State v. Newell*, 303 S.C. 471, 477, 401 S.E.2d 420, 424 (Ct. App. 1991) (finding failure to suppress evidence for *Miranda* violation harmless where record contained overwhelming evidence of guilt); *State v. Lynch*, 375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct. App. 2007) ("The failure to suppress evidence for possible *Miranda* violations is harmless if the record contains sufficient evidence to prove guilt

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[3] 378 U.S. 368 (1964) (outlining the procedure for a pre-trial hearing to determine the voluntariness and admissibility of a defendant's contested statement).
[4] 386 U.S. 18 (1967).

beyond a reasonable doubt.").[5] Harmless error rules, even in dealing with constitutional errors, "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22.

Here, considering the entire record on appeal, we conclude beyond a reasonable doubt that any alleged error in admitting White's statement was harmless. White's appellate counsel insists the admission of White's statement was "devastating" because it allowed police to place White at the crime scene. However, notwithstanding White's statement, cell phone evidence clearly placed Victim and White together at the time and place of the murder. With information "pinged" from Victim's and White's cell phones to nearby cell towers, investigators were able to triangulate Victim's and White's positions and movements leading up to the murder. The data confirmed Victim and White were near the KFC and within close proximity of each other at the time of the murder. Furthermore, the data also revealed that Victim's last answered phone communication was an incoming call from White placed immediately before the estimated time of the murder.

Furthermore, the testimony presented at trial also placed White at the crime scene and overwhelmingly established White's guilt. Reggie Miller, an accomplice, testified he and White agreed to participate in a robbery, under the guise of a marijuana purchase, on the night of the murder. Miller recalled White made a phone call to Victim and arranged a meeting in the KFC parking lot near Benedict College in Columbia, South Carolina. Miller testified that after he and White walked to KFC, Victim pulled into the parking lot in his vehicle.[6] Miller stressed White got in the back seat of Victim's vehicle and he sat in the front passenger seat. Miller testified that seconds after getting into the vehicle, White shot Victim in the back of the head from the back seat. After the murder, Miller claimed White was laughing about it, and White admitted to others that he killed Victim.

In line with Miller's testimony, Demond Sanford, the other accomplice, testified about the details of the murder. Sanford admitted he stood on the street corner and served as "a lookout" during the robbery. Sanford recalled White and Miller got in Victim's vehicle after it pulled into the KFC parking lot, and shortly thereafter

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[5] *Cf. Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (holding the erroneous admission of an involuntary confession is subject to a harmless error analysis when the defendant's guilt is established beyond a reasonable doubt).

[6] The KFC was closed for the night.

"[he] heard a loud pop." Sanford further testified that immediately after Miller walked away from the scene, Miller, in a panicked state, told him that White shot Victim. Conversely, Sanford testified White appeared calm. Once Miller, White, and Sanford regrouped in the dorm room after the shooting, White enlisted Sanford's help to go back to Victim's car to find a scale with which to weigh the stolen marijuana. Sanford testified he took the scale from Victim's side, who was not moving when they returned to the vehicle. When questioned on the stand, Sanford denied White admitted shooting Victim. However, the State impeached Sanford's testimony with a prior statement given to police in which he told investigators White admitted shooting Victim.

Still, other testimony from the trial established White's overwhelming guilt. Jeremiah Henderson—a friend who let White, Miller, and Sanford into his Benedict College dorm room after the murder—testified that White laughed about the incident and repeatedly boasted, "I shot that man [in the robbery]" and "I can't believe [Victim] let me sit behind him." Henderson also testified he saw White with a gun that night. Finally, Nathaniel Jones—roommate of Henderson and an "ear" witness who pretended to be asleep in the dorm room[7]—testified he overheard White brag and laugh about killing somebody.

CONCLUSION

Even though the trial court's *Denno* finding was insufficient, we find the entire record on appeal establishes beyond a reasonable doubt that any error in the admission of White's statement did not contribute to the verdict obtained. Accordingly, the decision of the trial court is

AFFIRMED.

SHORT, J., concurs.

FEW, C.J., dissenting: I agree with the majority that the trial court failed to make sufficient factual findings. 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

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[7] According to Jones, he was awoken when White, Miller, Sanford, and Henderson came into his room around 2:00 A.M., but he pretended to be asleep because he did not want to become involved.

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, 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.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

VICTOR A. WHITE,

APPELLANT

APPELLATE CASE NO. 2011-201286

Appeal from Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5259

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, appellant requests rehearing because the majority of this Court may have overlooked the fact that the error of the trial court in not making specific findings of fact regarding his statement being taken in violation of State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) cannot be harmless. Appellant respectfully submits at a minimum his case should be remanded for specific fact findings on this *significant constitutional issue* as the dissent urged, since a finding of harmless error as to his inculpatory statement without any findings of fact on this issue is improper.

The Court should find that the record establishes a constitutional violation 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.

Here, it is apparent from the appellant's testimony that the Columbia Police Department engaged in impermissible "question first, give Miranda rights later" interrogation tactics. Appellant testified during the suppression hearing that he begin talking to investigators while in custody. Appellant was shown a picture of the decedent and asked if he recognized him. Appellant 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.

Appellant said he 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).

Investigator Reese acknowledged interviewing appellant before taking his "formal statement." Reese called this a "rough ride" where 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.

Following appellant's testimony, Defense Counsel Gibbes argued appellant's testimony should be suppressed because the Miranda warnings were not read at the proper time. R. 27. The trial court denied the motion to suppress. Under Navy and Seibert, this ruling was error, because a pre-warning inculpatory statement given in response to interrogation is not admissible at trial even if

it is re-elicited after the Miranda warnings are given. See Seibert, 542 U.S. at 617; Navy, 386 S.C. at 303-04, 688 S.E.2d at 842.

In addition, the trial court erred by failing to make sufficient factual findings in the pre-trial Jackson v. Denno hearing on the admissibility of appellant's statement. Appellant argued to suppress the statement on grounds that Miranda was not read at the proper time. R. 27. Appellant based this argument on appellant's testimony that he gave a statement before being read his Miranda warnings. R. 27. The appellant conceded that his statement was voluntary. R. 27. The trial judge found that appellant's statement was freely and voluntarily given and denied the motion to suppress[1] R. 28.

The trial judge's ruling did not address counsel's argument or the appellant's testimony, since he found the statement was freely and voluntarily given—a point appellant conceded. Also, from the trial judge's conclusory ruling, it is not possible to determine whether the court admitted the statement for the reason expressed—that the statement was freely and voluntarily given—or whether the court actually ruled on the issue raised: whether the police violated the principles set forth in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) and Missouri v. Seibert, 542 U.S. 600 (2004).

For this reason, the court should, at minimum, remand for a hearing to require the trial court to make sufficient factual findings and conclusions of law to allow this Court to properly review the evidence and determine whether the appellant's statement is admissible under the "question first, give Miranda warnings second" practice condemned in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010).

[1] In ruling, the trial judge stated: "I find that the statement was freely and voluntarily given and the jury will be able to hear the statement. I deny the motion to suppress."

The trial court's error in admitting the statement was, respectfully, not harmless.. Appellant's statement was played for the jury and reduced to a transcript. R. 345, 381. In the statement, appellant stated he was present in the car with the victim to buy or steal his marijuana and, 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. R. 345, 493-500. Investigator Reese thought appellant was straightforward and believed the statement sufficiently to arrest Miller. Miller agreed to talk to the police after being told that appellant named him as the triggerman. Miller blamed the shooting on the appellant. Specifically, he claimed that he thought they were going to be involved in a robbery, but that appellant unexpectedly shot the victim in the head from the backseat while Miller sat in the front seat. R. 87.

The error is not harmless, because the appellant's statement was devastating. It allowed police to place appellant at the crime scene. From there, the case became a swearing match between the young men involved. Miller and Henderson both had great incentive to lie, since they faced life sentences if they were convicted rather than the appellant.

Moreover, if the jury believed appellant's statement—as Investigator Reese did— and found that Miller shooting the victim was not foreseeable, then the appellant could not be convicted under the "hand of one is the hand of all theory." See State v. Mattison, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (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).

The Court's opinion should be changed on rehearing because it fails to suppress the appellant's statement taken in violation of Navy and Seibert and treats the trial court's failure to

make sufficient factual findings and conclusions of law in the suppression hearing as harmless error despite the devastating effect on the defendant and the serious constitutional nature of the error.

Respectfully, a defendant on trial for murder is entitled to a judge ruling on his specific cogent Constitutional argument as to why his statement should be suppressed. Appellant submits it is apparent from the record that appellant's statement was taken in violation of Siebert and Navy, and that rehearing should be granted. However, if this Court is not willing to change its result on rehearing, then appellant requests that this Court grant rehearing and follow the recommendation of the dissent that the case be remanded for further fact findings by the trial court so the issue can be properly addressed on appeal – meaningful appellate review.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

This 21st day of August, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VICTOR A. WHITE,

APPELLANT

APPELLATE CASE NO. 2011-201286

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of August, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 21st day
of August, 2014.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Victor A. White, Appellant.

Appellate Case No. 2011-201286

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and, therefore, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire