STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2014-UP-399 (S.C. Ct. App. filed 11/12/2014)

10-GS-04-00069-00072

THE STATE,

RESPONDENT,

V.

MATTHEW FULLBRIGHT,

PETITIONER

Appellate Case No. 2012-207553

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER.

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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 December 17, 2014. App. 4-21.

QUESTIONS PRESENTED

I. The Court of Appeals erred in finding the admission Petitioner's video-recorded statements at his arraignment hearing to be harmless error where the statements were obtained through questioning by the brother of the deceased, Petitioner neither received advisement of his right against self-incrimination nor voluntarily waived his right, and the prosecution relied upon the video-recorded statements to prove its case violating Petitioner's right against self-incrimination pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution.

II. The Court of Appeals erred in affirming the trial judge's admission of the video-recorded statements by Petitioner at his arraignment, in which he responded to specific questions from the brother of the deceased concerning the crime by asking for forgiveness and essentially admitting his guilt, where the danger of unfair prejudice substantially outweighed the probative value.

III. The Court of Appeals erred in affirming the trial judge's admission of Petitioner's statements to police where the statements were obtained in violation of Petitioner's right pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution due to Petitioner's inability to waive his rights knowingly and voluntarily in light of his drug use and medical condition, and the lengthy interrogation employed by the police.

STATEMENT OF THE CASE

An Anderson County grand jury indicted Petitioner for two counts of murder (2010-GS-04-00069, -00070) and two counts of armed robbery (2010-GS-04-00071, -00072) on January 19, 2010. R. 701. Petitioner was tried before the Honorable R. Lawton McIntosh and a jury during the week of January 23, 2012. Chrissy Adams and Catherine Huey represented the state, and Scott Robinson represented Petitioner. R. 1. The jury found Petitioner guilty as charged. R. 685, lines 5-23. Judge McIntosh sentenced Petitioner to life imprisonment on each of the murder charges and to thirty years' imprisonment on each of the armed robbery charges. He ordered the sentences to run consecutively. R. 686, lines 1-6; R. 703.

Petitioner filed a timely notice of appeal, which was perfected. After oral argument on September 10, 2014, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Fullbright, 2014-UP-399 (filed Nov. 12, 2014); App. 1-3. Petitioner filed a petition for rehearing on December 1, 2014. App. 4-19. The Court of Appeals denied rehearing by order dated December 17, 2014. App. 20-21.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

I. The Court of Appeals erred in finding the admission Petitioner's video-recorded statements at his arraignment hearing to be harmless error where the statements were obtained through questioning by the brother of the deceased, Petitioner neither received advisement of his right against self-incrimination nor voluntarily waived his right, and the prosecution relied upon the video-recorded statements to prove its case violating Petitioner's right against self-incrimination pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution.

Relevant facts

On October 24, 2009, police officers responded to a call concerning an abandoned vehicle. Officers observed blood inside the car, and later determined the car belonged to Homer (Husband) and Joann (Wife) Staton. On October 25, 2009, officers discovered Husband's body. Over the course of the investigation, Petitioner became law enforcement's primary suspect. R. 200, line 2- R. 204, line 5. On October 28, 2009, officers interviewed Petitioner, who allegedly provided numerous inculpatory statements and led officers to the body of Wife. Thereafter, Petitioner was charged with two counts of murder and two counts of armed robbery relating to the deaths of Husband and Wife. R. 204, lines 15-24; R. 206, lines 1-4; R. 221, line 5 – R. 225, line 7.

On November 4, 2009, Petitioner appeared at an arraignment hearing after being charged with conspiracy relating to the murders of Husband and Wife. R. 54, lines 13-16; R. 187, lines 18-21.[1] The arraignment was conducted using video conferencing: Petitioner, dressed in prison garb, remained at the jail while appearing before the judge, who was in a separate area along with Husband's brother (Brother) and the victim's advocate. During the arraignment, Brother interrogated Petitioner - asking why he killed Husband and Wife in the manner in which the prosecution alleged. Petitioner responded that people make certain decisions when they are caught

[1] Petitioner stood trial for two counts of murder and two counts of armed robbery concerning Husband and Wife. The prosecution did not call the conspiracy count for trial.

up in a lifestyle, that he did not justify it, and did not expect the family's forgiveness. Petitioner then narrated the Biblical story of King David having Bathsheba's husband killed so that he may wed her and of God's forgiveness of David. State's Exhibit #15.[2] A local television station attended the arraignment and videotaped the exchange between Brother and Petitioner. The prosecution wanted to admit the video recorded by the local news channel as no official recording of the proceeding existed. R. 151, lines 18-19; R. 152, lines 11-12; State's Exhibit #15.

Petitioner moved to exclude the video. R. 139, line 17 – R. 140, line 24; R. 141, line 13 – R. 142, line 3. Judge McIntosh insisted the issue involved Miranda – whether Petitioner knowingly and intelligently waived his rights. After determining the case was controlled by State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008) and was "a Miranda question," the judge ruled the video was admissible. R. 142, lines 17-24. According to the judge, the scenario did not involve custodial interrogation and therefore, there was no requirement that Petitioner be advised of his rights pursuant to Miranda. R. 185, lines 3-11; R. 391, line 20 – R. 393, line 5.

At the conclusion of the state's case, the prosecutor played the arraignment video for the jury. R. 540, lines 3-8. Additionally, the prosecutor played the arraignment video for the jury at the conclusion of her closing argument. She explained to the jury that it had Petitioner's "written words" and "his spoken words" to use to convict him. She left the jury with Petitioner's "spoken words." R. 684, lines 4-5.

Discussion

In its opinion, the Court of Appeals cited three cases to explain its affirmance. The parentheticals regarding the three cases referred to errors found to be harmless. Thus, the Court of Appeals determined the admission of the video was erroneous, but that such error was harmless. In

[2] State's Exhibit #15 is on file with the Court.

light of this holding, which was not challenged by the state in a petition for rehearing, Petitioner will discuss briefly the Fifth Amendment right against self-incrimination involved in the present case and then discuss how the error was not harmless.

The Fifth Amendment provides: "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment proscribes self-incrimination obtained by compulsion of testimony. Michigan v. Tucker, 417 U.S. 433, 440 (1974); see also Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). "The essence of this basic constitutional principle is 'the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" Estelle v. Smith, 451 U.S. 454, 462 (1981)(quoting Culombe v. Connecticut, 367 U.S. 568, 581-582 (1961)). "[T]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure it invites." In re Gault, 387 U.S. 1, 49 (1967); Miranda v. Arizona, 384 U.S. 436, 467 (1966)(stating "the privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves"). The Fifth Amendment privilege is violated by officially coerced self-accusation. United States v. Washington, 431 U.S. 181, 187 (1977). Thus, the Fifth Amendment's protections extend to statements or acts that are (1) compelled; (2) testimonial; and (3) incriminating of the person in a criminal proceeding. United States v. Hubbell, 530 U.S. 27, 34-37 (2000).

Without question, Petitioner's statements made during the arraignment hearing were self-incriminating and testimonial. See Hoffman v. United States, 341 U.S. 479, 486 (1968); Marchetti v. United States, 390 U.S. 39, 53 (1968); Doe v. United States, 487 U.S. 201, 210 n. 9 (1988). The

test to determine compulsion is whether, considering the totality of the circumstances, the free will of the witness was overborne. Rogers v. Richmond, 365 U.S. 534, 544 (1961). Thus, courts look at the circumstances surrounding the incriminating statements to determine whether the environment was such as would compel a defendant to give self-incriminating testimony. Here, the record supports the Court of Appeals' finding that Petitioner's statements at the arraignment were compelled.

The United States Supreme Court held that the admission of incriminating statements made during the course of a court-ordered psychiatric examination violated the Fifth Amendment because the statements were not "given freely and voluntarily without any compelling influences." Estelle, 451 U.S. at 468-469. "The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination." Id. at 467. The questioner was immaterial to the Court's decision. Id. When the psychiatrist went beyond reporting on the issuance of competence, "his role changed and became essentially like that of an agent of the state recounting unwarned statements made in a post-arrest custodial setting." Id.

Numerous federal circuit courts of appeal have found situations analogous to the present one as creating environments in which the defendant was compelled to give testimony against himself. See Sher v. U.S. Dep't of Veterans Affairs, 488 F.3d 489, 502 (1st Cir. 2007)(finding a defendant was compelled to incriminate himself by threat of job termination if he did not answer investigators' questions); United States v. Rivera, 201 F.3d 99, 101-102 (2nd Cir. 1999)(finding a defendant's refusal to cooperate with the government and the resulting five-year sentence increase violated the Fifth Amendment because the penalty was for his silence); United States v. Pavelko, 992 F.2d 32, 34 (3rd Cir. 1993)(finding a Fifth Amendment violation where the prosecutor used a defendant's financial affidavit, prepared to obtain court-appointed counsel, against the defendant at trial because

preparation of the affidavit created a conflict between the defendant's Fifth and Sixth amendment rights); United States v. Kennedy, 372 F.3d 686, 691-692 (4th Cir. 2004)(finding a violation of the Fifth Amendment when the defendant was compelled to provide grand jury testimony relating to a drug conviction because the government misadvised him that refusal to answer was subject to perjury charges though conviction under appeal); United States v. Aguirre, 605 F.3d 351, 358 (6th Cir. 2010); United States v. Hardwell, 80 F.3d 1471, 1484 (10th Cir. 1996)(finding violation of the Fifth Amendment when financial documents defendant was required to prepare to receive court-appointed counsel were admitted at trial).

The South Carolina Court of Appeals held that a probationer's statements to his probation agent that he had been using cocaine the night for an automobile accident were inadmissible where there was no indication the probationer had been warned that his statements may be used against him in a pending matter unrelated to his probation. The Court was persuaded by the fact that the probationer was in jail at the time of the agent's interrogation resulting in the creation of an environment in which the probationer felt compelled to answer. State v. Hook, 348 S.C. 401, 412-414, 559 S.E.2d 856, 861-862 (Ct. App. 2002); see also Minnesota v. Murphy, 465 U.S. 420, 427 (1984).

In State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008), Kirton was advised of his Miranda rights, including that he had the right to remain silent and that anything he said could be used against him during his bond hearing. The magistrate then asked Kirton if he would like to address the court. When Kirton responded that he needed help, the magistrate inquired what kind of help, to which Kirton responded "I need mental help." Id. at 22, 671 S.E.2d at 114. The Court held Kirton was not subjected to custodial interrogation. Although he was in custody, "[t]here [was] no evidence that he was subjected to questioning by law enforcement or any other interrogation such

that the requirement to provide Miranda warnings attached." Id. at 39, 671 S.E.2d at 123. The Court emphasized that Kirton was asked a single question by a magistrate presiding over his bond hearing, which related solely to the setting of bond and was not intended to illicit an incriminating response. Id. at 41, 671 S.E.2d at 124. Thus, there was no requirement to advise him of his Miranda rights and no requirement that a waiver of those rights be obtained. The Court concluded that a bond hearing was not an inherently coercive. The Court examined the specific circumstances surrounding Kirton's statements and determined the single question by the magistrate unrelated to the crime was not of the kind that would make a defendant feel compelled to give incriminating evidence. Thus, the magistrate had no duty to warn Kirton of his rights or obtain a waiver of those rights. Id.[3]

Perhaps the most widely known area of application of the Fifth Amendment is in the context of custodial interrogations. Due to the concerns about police coercion resulting in compulsion of self-incriminating statements, the Miranda Court determined custodial interrogations were inherently coercive. As a result, the Court required a person subjected to custodial interrogations be advised of his rights prior to the interrogation. State v. Lynch, 375 S.C. 628, 635, 654 S.E.2d 292, 296 (Ct. App. 2007)(citing Illinois v. Perkins, 496 U.S. 292, 296 (1990)). "[T]he concern of the Court in Miranda was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and there by undermine the privilege against compulsory self-incrimination." Rhode Island v. Innis, 446 U.S. 291, 299 (1980). However, custodial interrogations are only one area in which the Fifth Amendment protects a person against self-incrimination, as demonstrated. The question is whether the accused was

[3] The Court's alternative holding was that Kirton had been advised of his rights and voluntarily waived those rights. Kirton, 381 S.C. at 42, 671 S.E.2d at 125.

deprived of his free choice to admit, to deny, or to refuse to answer. Lisenba v. California, 314 U.S. 219, 241 (1941).

The Court of Appeals held Petitioner's video recorded statements were the product of compulsion and Petitioner had not waived his right not to testify. This holding is supported by controlling case law as Petitioner's arraignment presented all of the hallmarks of a coercive environment. Petitioner was required to be present for his arraignment.[4] Additionally, South Carolina law also provides for the attendance of victims at judicial proceedings.[5] The specific nature of Petitioner's arraignment hearing required the presiding judge warn him of his right against self-incrimination and obtain a waiver of those rights prior to any questioning of Petitioner. In light of the failure to warn Petitioner and obtain a waiver, the admission of those statements during the trial violated Petitioner's right against self-incrimination as the Court of Appeals determined.

The error in admitting the video was not harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967); see also State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621-22 (1997); Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993). In order for constitutional error to be deemed harmless, it must be determined beyond a reasonable doubt the error did not contribute to the verdict. Chapman, 386 U.S. at 24; see also, State v. Henson, 407 S.C. 154, 166-167, 754 S.E.2d 508, 515 (2014)(holding the admission of a non-testifying co-

[4] "The arraignment of a prisoner ... is for the purpose of obtaining from him his answer to the indictment. It consists of reading the indictment to him, and requiring him to say in open court whether or not he is guilty of what is therein charged against him." State v. Stewart, 26 S.C. 125, 1 S.E. 468 (1887).

[5] Victims of crime have the right to be present and heard during the criminal proceedings. S.C. Code Ann. § 16-3-1545(A)(6); S.C. Code Ann. § 16-3-1550(F); S.C. Code Ann. § 16-3-1550 (I); see also S.C. Const. Art. I, § 24(A)(5); Ex parte Littlefield, 343 S.C. 212, 217, 540 S.E.2d 81, 84 (2000).

defendant's statement, although redacted, was not harmless where the only other evidence against the defendant was the testimony of two co-defendants who had a motive to incriminate the defendant); State v. Smith, 309 S.C. 442, 447, 424 S.E.2d 496, 499 (1992)(admitting testimony about the defendant's prior drug use was not harmless where credibility was crucial to the jury's determination of the facts); State v. McIntosh, 358 S.C. 432, 447-448, 595 S.E.2d 484, 492 (2004)(finding a prosecutor's comment on a defendant's post-arrest silence was not harmless where the prosecutor questioned the defendant thoroughly about his silence, tied the silence to the alibi defense, the defendant's defense was not totally implausible, and the evidence against the defendant consisted primarily of the testimony of two witnesses); State v. Jackson, 410 S.C. 584, ___, 765 S.E.2d 841, 854 (Ct. App. 2014)(finding redacted statements by the non-testifying co-defendant were not harmless where the statements were the only direct evidence against the defendant, the state emphasized the statements, no limiting instruction was given, and the remaining evidence was purely circumstantial).

The video of Petitioner's statements to Brother contributed to the verdict. There was little physical evidence connecting Petitioner to the crimes. Although the prosecution presented statements allegedly made by Petitioner, those statements cast blame on another person. Further, there was considerable evidence for Petitioner to argue that the statements were not the product of a voluntary waiver of his rights and had been coerced from a man who was intoxicated and sick. The video showed Petitioner give a statement in his own words in direct response to an emotional appeal by Brother. The video was emphasized throughout the trial, most prominently in the state's closing argument. The last image the jury had and the last words heard were of Petitioner on the video.

II. The Court of Appeals erred in affirming the trial judge's admission of the video-recorded statements by Petitioner at his arraignment, in which he responded to specific questions from the brother of the deceased concerning the crime by asking for forgiveness and essentially admitting his guilt where the danger of unfair prejudice substantially outweighed the probative value.

Relevant facts

Petitioner incorporates the relevant facts and case law described in Issue I, supra. In addition to the arguments based on the Fifth Amendment, Petitioner argued the video should be excluded on the basis that the danger of unfair prejudice outweighed the probative effect of the video. Judge McIntosh found the video was relevant "because the conversation purports to be what would sound like an admission of the allegations." Pursuant to Rule 403, SCRE, he held the prejudice did not "substantially outweigh[]" the probative value. R. 142, line 25 – R. 143, line 2; R. 162, line 24 – R. 163, line 1; R. 163, lines 5-14; R. 163, line 22 – R. 164, line 1; R. 165, lines 1-13; R. 189, lines 13-25; R. 194, lines 7-18.

Discussion

Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The video statement provided probative evidence of the crimes with which Petitioner was charged. As the judge indicated, in the video, Petitioner essentially admits his guilt to the murders. Thus, the video statements were probative as to who committed the crimes. However, the probative value was low as Petitioner's statements addressed his remorse and potential motivation, which were not elements of the charges requiring proof by the state.

Admission of the video into evidence presented a high level of danger of unfair prejudice. Evidence is unfairly prejudicial when it has a "'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Martucci, 380 S.C. 232, 250, 669

S.E.2d 598, 607 (Ct. App. 2008); see also State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009); State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001); State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995). The video presented evidence encouraging, if not demanding, the jury base its decision on emotion. Brother appeared in the video comparing Husband to Petitioner in size, age, and health. Brother expressed dismay and extreme loss at the passing of Husband and Wife. Victim impact testimony of this nature is not admissible during the guilt phase of a criminal trial because it encourages the jury to base its decision on emotion, rather than the evidence.

Additionally, Petitioner appeared in prison garb in the video. The Supreme Court held the prosecution may not compel a defendant to wear jail clothing during his trial. Estelle v. Williams, 425 U.S. 501, 512 (1976). The Court explained the potential negative effects of presenting an accused before the jury in prison attire were obvious in light of the almost universal holdings throughout the country that an accused should not be compelled to go to trial in jail clothing because of the possible impairment of the presumption of innocence. Id. at 504. The Court held a defendant appearing in prison attire serves as a "constant reminder of the accused's condition implicit in such distinctive, identifiable attire [that] may affect a juror's judgment." Id. at 504-505. According to the Court, "[t]he defendant's clothing is so likely to be a continuing influence throughout the trial that ... an unacceptable risk is presented of impermissible factors coming into play." Id. at 505. Compelling a defendant to wear jail clothing furthers no essential state policy. Id. In addition, typically defendants wearing prison clothing are the poor because those who can post bail are not subjected to the condition, which offends the concept of equal justice embodied in the criminal

justice system. Id. at 505-506.[6] Due to the video conferencing aspect, Petitioner was not even in the same room with the judge and other participants. This reinforced the appearance that Petitioner was dangerous and must be kept far away from the public. Petitioner's appearance was in sharp contrast to his interrogator, Brother. The obvious inference drawn by the jury was Petitioner was guilty and was dangerous.

Balancing the probative value and the danger of unfair prejudice in this case clearly demonstrated that the unfair prejudice substantially outweighed the probative value. As expressed, the probative value was low in light of the state's burden of proof and the elements it was required to prove for murder and armed robbery. The danger of unfair prejudice was extremely high due to the statements made by Petitioner and Brother, the nature of the video conferencing placing Petitioner separate from others, and Petitioner's appearance in a prison garb.

Finally, Judge McIntosh abused his discretion in determining the danger of unfair prejudice did not substantially outweigh the probative value. According to Judge McIntosh, "[i]t [was] simply a video of the statements made by [Petitioner]." R. 194, lines 7-18. One look at the video demonstrates the judge was well wide of the mark. The judge looked at the video as one accustomed to seeing individuals dressed in prison jumpsuits, accustomed to hearing the emotional pleas of victims' family members, accustomed to police officers providing generalized courtroom security, and with the knowledge that the video conferencing was for judicial efficiency and

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[6] In Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), the defendant wore a prison jumpsuit, shackles, and a prison identification bracelet during his trial. Id. at 334, 548 S.E.2d at 863. The only issue before this Court in Humbert was whether trial counsel rendered deficient performance in permitting the defendant to proceed to trial in the prison jumpsuit because the issues concerning shackling and the identification bracelet were not preserved for review. Id. at 337, 548 S.E.2d at 865. This Court determined trial counsel was deficient in allowing the defendant to proceed to trial dressed in prison clothing. Id. This Court explained "it [is] generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing." Id.

economy. He did not observe Petitioner in the video as a juror would – a dangerous man dressed in prison clothing, evoking fear and loathing, and not even permitted in the same room as other members of society. He did not observe Brother in the video as a juror would - a grief-stricken brother confused at the loss of his loved ones and crying out for justice and answers.

III. The Court of Appeals erred in affirming the trial judge's admission of Petitioner's statement to police where the statement was obtained in violation of Petitioner's right pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution due to Petitioner's inability to waive his rights knowingly and voluntarily in light of his drug use and medical condition, and the lengthy interrogation employed by the police.

Relevant facts

On November 17, 2011, Judge McIntosh convened a hearing concerning the prosecution's motion to present evidence of several statements allegedly given by Petitioner to police. R. 1. Chris Beusee and Robert Gebing, employees of the Anderson County Sheriff's Office, testified that they advised Petitioner of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 478-479 (1966) at 6:35 p.m. in a small interview room at the Sheriff's Office. Petitioner was in handcuffs during the entirety of the interview. Beusee and Gebing claimed Petitioner could have used the bathroom and obtained food if he wanted. The officers insisted that Petitioner had several smoke breaks during the interview. R. 6, line 3 – R. 9, line 1; R. 38, line 5 – R. 39, line 14; R. 687. Beusse asked Petitioner for biographical information and completed the top portion. He then asked Petitioner to read the first two lines and initial those on the advisement form. Then, Beusse read the remainder of the form to Petitioner. Petitioner signed the form. R. 9, line 2 – R. 10, line 10; R. 39, line 18 – R. 40, line 12; R. 687. Thereafter, Beusse read the waiver of rights portion of the form to Petitioner. Petitioner signed the waiver of rights portion of the form as well. R. 11, line 2 – R. 12, line 12; R. 40, lines 223-25; R. 687. Petitioner did not appear to be under the influence of drugs or alcohol, and officers made no threats or promises and officers did not act to intimidate. Petitioner was emotional throughout the interview. R. 10, lines 14-24; R. 39, lines 15-17; R. 40, lines 16-20; R. 42, lines 3-11.

Beusse showed Petitioner photographs of Husband and Wife, explaining he was investigating Husband's death and Wife's disappearance. He and Gebing then interviewed Petitioner for "the next several hours." Beusse asked questions while Gebing took notes. R. 12, line 13 – R. 13, line 3. According to Beusse, Petitioner

> began to come to a breaking point in the interview. He was looking down at the floor, wouldn't make eye contact, started taking deep breaths. Then he started to act as if he was going to throw up and proceeded to fall out of the chair onto the floor as if he was passed out.

R. 13, lines 16-25; see also R. 42, lines 12-13. Beusse notified EMS, who responded. Beusse claimed Petitioner did not require medical treatment, however. R. 14, lines 7-8. Gebing attempted to evaluate Petitioner, including calling his name, shaking him, opening his eyes, and administering a "sternum rub." R. 42, line 15 – R. 43, line 12. After EMS attended to Petitioner, the Sheriff knelt down to Petitioner, who remained lying on the floor, and told Petitioner it was time to tell the police where Wife was. R. 14, lines 14-25; R. 44, lines 8-15.

Thereafter, Beusse and Gebing placed Petitioner in a police car. Petitioner allegedly gave them directions to locate Wife's body. During the drive, Petitioner sobbed and indicated he did not want to talk to the police. R. 15, lines 1-21; R. 44, line 19 – R. 45, line 4. Officers searched the area indicated by Petitioner and found Wife's body. Beusse, Gebing, and Petitioner returned to the Sheriff's Office, stopping by Taco Bell to pick up dinner for the three. R. 16, lines 8-16; R. 45, line 23 – R. 46, line 10. After eating, officers began working on a written statement around 12:30 a.m. or 1 a.m. while sitting in Beusse's office. R. 17, lines 1-21; R. 46, lines 11-15. Beusse typed the statement as Petitioner relayed it to him. R. 17, line 22 – R. 18, line 2.

Beusse read the statement to Petitioner, who acknowledged it was his statement, but complained that it was not in the correct order. Petitioner refused to sign the statement because the

order was not correct and he was tired. R. 18, line 3 – R. 19, line 16; R. 41, line 19 – R. 42, line 2; R. 47, lines 8-15. Thereafter, Petitioner was booked at the jail at 4:35 a.m. R. 18, line 21 – R. 19, line 2. This initial interview lasted over ten hours. R. 20, line 1.

The following afternoon, Beusse and Gebing met with Petitioner again. Beusse again advised Petitioner of his rights at 2:20 p.m. on October 29, 2009, and Petitioner waived those rights. Beusse, Gebing, and Danny Barton interviewed Petitioner in an old storage room, which was converted into an interview room, at the detention center. R. 21, line 9 – R. 21, line 12; R. 23, line 19; R. 48, line 21 – R. 50, line 23; R. 51, lines 7-9; R. 696. Again, officers testified that Petitioner did not appear to be under the influence of drugs or alcohol and appeared more rested than the night before. Beusse was unaware of Petitioner receiving any medication. Beusse testified no threats or promises were made to Petitioner. R. 22, lines 13-24. Gebing typed the statement as Petitioner narrated. R. 23, lines 20-24; R. 51, lines 10-23. After Gebing completed the statement, Petitioner indicated it was his statement and placed his initials at the beginning and the end and by signing at the end. R. 24, lines 3-7; R. 52, lines 1-5; R. 697.

Additionally, officers reviewed the statement from the previous night with Petitioner. Petitioner agreed that the first five pages were accurate and he initialed and signed those pages. R. 24, lines 10-22; R. 52, line 5 – R. 53, line 16.

Beusse denied that Petitioner's initials on the advisement of rights form only as to the first two rights indicated that Petitioner requested representation by counsel. R. 25, line 24 – R. 26, line 6. On cross-examination Beusse admitted that the signatures on the advisory of rights and waiver of rights forms and statements appeared different. R. 32, line 17 – R. 34, line 9.

William Henderson, an employee with Medshore Ambulance Service testified that he responded to the sheriff's office on October 29, 2009 in reference to a "nonresponsive patient." R.

56, lines 14-21. He arrived at 9:45 p.m. R. 57, lines 3-5. He observed Petitioner, who was awake and alert, lying supine on the floor of the interview room. R, lines 8-13. Petitioner complained of "right-sided abdominal discomfort." Henderson observed an abrasion to Petitioner's chest and both of his hands. R. 58, lines 13-20. Henderson stated the chest abrasion may have been caused by a "sternum rub." R. 58, line 21 – R. 59, line 2. Henderson testified Petitioner exhibited none of the usual signs associated with intoxication; however, Petitioner had ingested Oxycontin, Lortab, and Darvocet within the last seventy-two hours. R. 62, lines 8-14; R. 63, line 25 – R. 64, line 3. Although Henderson determined Petitioner did not require medical attention, he admitted that EMS remained at the scene for over forty minutes, when the normal medical contact should last no longer than twenty-five minutes. R. 64, lines 6-12. Henderson claimed Petitioner refused to be transported for additional medical treatment. R. 64, lines 13-23. On cross-examination, Henderson admitted that the drug combination described by Petitioner would result in a "drunken stupor." R. 68, lines 4-12.

Petitioner's father, Marshall Fullbright, testified that he could recognize Petitioner's handwriting as to his signature and initials. R. 95, line 11 – R. 96, line 2. He agreed that the signature and initials appearing on State's Exhibit #1 were written by Petitioner. However, he testified the initials and signatures on State's Exhibits #2, #3, and #4 were not written by Petitioner. R. 96, line 3 – R. 97, line 20.

At the conclusion of the pretrial hearing, Judge McIntosh found the statements allegedly given on the night of October 28th and into the morning of October 29th and later during the afternoon of October 29th were admissible. Petitioner was obviously in police custody and officers engaged in interrogating him; therefore, the law required Petitioner be advised of his rights prior to questioning. Judge McIntosh found the officers advised Petitioner correctly of his rights on the

night of his initial interrogation and on the second day of the interrogation. He further found Petitioner knowingly, intelligently, freely, and voluntarily waived his rights under Miranda, supra. Concerning the circumstances of the interrogations, Judge McIntosh found there was no police coercion despite the "fairly lengthy initial interrogation." He noted Petitioner "was given multiple smoke breaks," "allowed to use the restroom," and provided with dinner. The only comfort denied Petitioner, according to Judge McIntosh, was that he was handcuffed in the front of his body, which the judge found was not unduly coercive under the circumstances. R. 102, lines 13-21. Judge McIntosh considered "the fact that the interrogation did take place at the Sheriff's office," "the continuity of the interrogation," and the "significant passage of time between the first interrogation and the second interrogation on the next day," including the change of location between the first statement and the second statement. R. 102, line 22 – R. 103, line 5; R. 104, lines 17-21.

He considered Petitioner's age, which was either twenty-nine or thirty, so that "he should have been mature." During the interview, Petitioner "fell out on the floor ... complaining of right-side abdominal pain and right-sided pain." He was checked by a police officer with medical training and by emergency medical personnel who were called to examine Petitioner. Judge McIntosh considered that EMS found Petitioner was "okay" and refused medical treatment. During the examination, Petitioner "appeared to be alert, awake and oriented and not under the influence of any medications or drugs." The judge acknowledged the testimony that Petitioner informed EMS that he had taken prescription pain killers within the previous seventy-two hours; however, the judge was persuaded by the EMS technician's testimony that Petitioner did not believe him to be under the influence. Noteworthy, Judge McIntosh concluded Petitioner's drug use and medical condition went to the weight of the evidence and not to its admissibility. R. 103, line 6 – R. 104, line 6.

Judge McIntosh found no police misrepresentations during the interrogations, no threats of violence, no intimidation, and no promises of leniency. R. 104, lines 12-17. Judge McIntosh determined the dissimilarities among the signatures and initials on the advisement of rights forms, waiver of rights forms, and statements were not factors for consideration as to admissibility; rather, the obvious and clear dissimilarities among the various signatures and initials were to be considered by the jury. R. 104, line 22 – R. 105, line 3. Thus, Judge McIntosh concluded state's proposed exhibits #1-4 were admissible as long as the prosecution laid the proper foundation. R. 101, line 2 – R. 102, line 12; R. 105, lines 3-5; R.687-697.

Immediately prior to the trial, Judge McIntosh allowed the prosecution to present additional evidence concerning statements allegedly made by Petitioner. Danny Barton, an employee with the Anderson County Sherriff's office, testified that he assisted Beusse with the interview of Petitioner on October 29, 2009. R. 112, lines 10-18. Barton claimed he witnessed Petitioner sign the advisory of rights from marked as State's Exhibit #3. R. 113, lines 2-23. Barton additionally testified that Petitioner drew a picture of a hammer at Beusse's direction as part of his statement. He claimed he witnessed Petitioner initial the hammer sketch. R. 114, line 1 – R. 115, line 18; R. 699.

Barton and Beusse then escorted Petitioner to several locations in Anderson County looking for evidence to connect Petitioner to the crimes, but found none. R. 117, line 10 – R. 119, line 7. The following day, October 30, 2009, Barton and John Williams escorted Petitioner looking for evidence. Barton testified that he advised Petitioner of his rights, and Petitioner waived those rights. R. 119, lines 18 – R. 123, line 7; R. 700. They were unable to find any evidence in the areas indicated by Petitioner. R. 123, line 21 – R. 126, line 18.

Judge McIntosh found the hammer sketch admissible as the result of a free and voluntary statement given by Petitioner after waiving his rights. R. 116, lines 11-17. Additionally, Judge

McIntosh found the advisory of rights and waiver conducted by Barton admissible. R. 123, line 14. He went on to reiterate his ruling from pre-trial hearing. He added that Barton's testimony regarding Petitioner directing him where to go to find evidence was admissible as it was the product of Petitioner freely and voluntarily waiving his rights. R. 138, line 12 – R. 139, line 7.

Discussion

The Fifth Amendment's privilege against self-incrimination provides an individual who has been accused of a crime the right to consult with an attorney and to have an attorney present during custodial interrogation. Miranda, 384 U.S. at 478-479.

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. See State v. Pittman, 373 S.C. 527, 656, 647 S.E.2d 144, 164 (2007); State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); 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. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver 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); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986).

The 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); see also Withrow v. Williams, 507 U.S. 680, 693 (1993).

> 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.

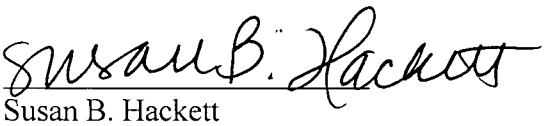
Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted). Consideration of a person's mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974)(citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)).

An examination of the totality of the circumstances demonstrates Petitioner's alleged waiver was unknowing and involuntary. Petitioner admitted to taking dangerous narcotic medications, which were not prescribed for him, within seventy-two hours of the interrogation. Petitioner suffered a medical emergency during the interrogation requiring the services of emergency medical personnel. He complained of severe abdominal pain. As admitted by the officers, the initial interrogation continued for over ten hours. The totality of the circumstances required exclusion of Petitioner's statements to police officers.

CONCLUSION

Petitioner respectfully requests this Court order full briefing on the issues presented.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 16th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2014-UP-399 (S.C. Ct. App. filed 11/12/2014)
10-GS- -0400069-0400072

THE STATE,

RESPONDENT,

V.

MATTHEW FULLBRIGHT,

PETITIONER

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 J. Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Matthew Fullbright #349468, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472 and the S.C. Court of Appeals this 16th day of January, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of January, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022