STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES ALLEN JOHNSON,

Appellant.

APPELLATE CASE NO. 2013-001314

Opinion No. 2015-UP-378

RETURN TO PETITION FOR REHEARING

On July 29, 2015, this Court affirmed Appellant's conviction for homicide by child abuse. Appellant submitted a Petition for Rehearing on August 12, 2015, arguing this Court overlooked or misapprehended several points. To the contrary, this Court properly affirmed Appellant's conviction for the reasons discussed below.

I.

In his Petition for Rehearing, Appellant contends that this Court misinterpreted the trial court's ruling following the Jackson v. Denno[1] hearing as failing to preserve the issue for review. Regarding this error preservation, Appellant offers the same arguments

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1 378 U.S. 368 (1964)

presented in his Final Brief. Essentially, he argues the issue was preserved solely because the trial judge conducted and ruled upon a Jackson v. Denno hearing. At trial Appellant's counsel simply stated that a motion pursuant to Jackson v. Denno needed to be heard, without stating particular grounds for the hearing. In fact, the cross-examination and evidence Appellant presented at this hearing focused on his alleged gross intoxication on the day of questioning, indicating the basis for the hearing was to determine whether Appellant made a voluntary waiver of his Miranda[2] rights. However, Appellant did not articulate with any specificity the nature of his objection to the admission of the statement at trial, nor did Appellant request to be heard when the trial court ruled without argument. Moreover, the objections offered when the evidence was introduced during the case in chief provided no specific grounds, only referring nebulously back to the Jackson v. Denno hearing. Finally, no additional objection was made when the officer began relating the incriminating verbal portion of Appellant's statement. (Tr. p. 463-468.)

While a party need not use the exact name of a legal doctrine in the trial court in order to preserve it for appellate review, it must be clear that an argument has been made on such ground. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). Trial counsel again failed to put on the record that Appellant's statements were inadmissible due to a violation of Miranda or Seibert.[3] The trial court's general ruling clearly did not address this argument. Thus, the Court properly concluded the argument was not preserved for Appellate review.

II.

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2 384 U.S. 436 (1966)
3 542 U.S. 600 (2004)

Appellant also argues the Court overlooked the similarity of this case to State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) and State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003), which he contends are "guiding precedent" applicable to his appeal. However, inasmuch as the Appellant argues Navy and Evans control the merits of the appeal, he fails to acknowledge the distinction between those cases and the case before this Court.

In Navy, the accused provided a statement at the hospital on the day the child was hospitalized. A few days later, the accused was picked up from home and transported to the police station around 9:00 am. Navy gave his first oral statement at 9:50 am, a statement largely consistent with the first story he gave at the hospital. Officers then informed Navy the child died from suffocation and broken ribs. They followed this revelation with detailed questioning, "asking specifically how respondent had comforted the crying child." Navy at 298, 688 S.E.2d at 840. As a result of the follow-up questions, officers elicited "that he had 'popped' the child on the back" and "that he may have 'patted' the child on its mouth to stop the crying." Id at 299, 688 S.E.2d at 840. Only after this targeted questioning was Navy given Miranda warnings at 11:35 am. Navy then provided a written statement at 11:40 am. In this statement, officers continued asking questions targeted at eliciting further details about how Navy harmed the child. Police then consulted the pathologist with the details provided in Navy's second statement. Id. Upon being told that Navy's story could not have caused the child's death because he would have had to hold his hand over the child's mouth for at least a minute, officers returned for a third statement at 12:25 pm. Id. at 300, 688 S.E.2d at 840. In this third statement, officers asked specific questions about how long Navy had his hand over the child's mouth and nose. Id. The Court found that evidence supported the trial court's

ruling that the first statement was admissible. In suppressing the second and third statements, the Court found the officers began the questioning with the intention of eliciting a confession. The officers sprang the autopsy reports on the suspect and began an unwarned custodial interrogation designed to elicit incriminating information. Id at 303, 688 S.E.2d at 842.

Where officers in Navy conducted questioning aimed at a confession, the officers here did not. Though aware of the autopsy findings, there is no evidence that these findings were shared with Appellant. Further, where in Navy, officers followed the "sprung" information of how the child died with follow up questions regarding Navy's conduct, in the present case Appellant responded to information that the child's mother now claimed he was in the room by "bending over in his chair" and "sobbing a little bit" and the words, "accidents happen sometimes." (R. p. 427.) When the officer asked what he meant by that, Appellant told his story. There is no evidence of ongoing, pointed questions which would indicate interrogation in this case as there was in Navy. Because the child's mother was an equally attractive perpetrator of the crime, police were not aware of Appellant's likelihood of offering an incriminating response. When he did, the officer ceased the interview and provided Miranda rights immediately. (R. p. 53.) The officers in Navy, by contrast, continued to press Navy about his actions even after he made an admission which could incriminate him and pressed him on his conduct before Mirandizing him.

In Evans, 354 S.C. 579, after an extensive three-hour unwarned interview in which agents repeatedly told Evans they did not believe her various explanations, Evans was reduced to sobbing, asking agents to "get her some help." Evans, at 581, 582 S.E.2d at 409. At that point agents "determined that the interview was bearing fruit" and decided

to have another agent, a female, come in to talk to Evans. Id. at 581, 582 S.E.2d at 409. The agent then interviewed Evans for an additional forty-five minutes to an hour, sympathizing with Evans on topics such as "female problems," her deceased mother, and religion. Id. at 581-582, 582 S.E.2d at 409. Evans was escorted to the restroom by the female agent twice. Evans finally told the female agent that she started the fire in her home, at which point the original interviewing agents returned to the room, and Evans repeated the statement three more times before it was written on a "voluntary statement form." Id. at 582, 582 S.E.2d at 409. Evans' cousin's three requests to see her during the interview were denied. Id. Significantly, at no point was Evans read her Miranda rights. Id.

Appellant's case is distinguishable from Evans. While officers did escort Appellant to the restroom, it was because he was taken to the more convenient employee restroom which was in a controlled area. In such a case, it would be unreasonable for Appellant to expect that he would be allowed to roam freely in a restricted area of the police station. See Howes v. Fields, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012) (respondent, an inmate in prison, was not allowed to leave conference room by himself to return to cell but under no circumstances could he have reasonably expected to roam freely). The evidence regarding the officers' purpose in Appellant's case is also much different. Here, the officer had a potential alternative suspect to Appellant, whereas in Evans, the agents were solely focused on the mother. The officer's single sympathetic response was followed by Appellant's confession in a brief time frame; there was no coordinated effort to elicit a confession. The officer's short, "tell me what you're talking about," in no way compares to the Evans agent's lengthy, far-ranging sympathetic discussion. In contrast to the several hours Evans was interviewed, Appellant was

interviewed for an hour and a half or two hours before giving his statement (less than half the time of Evans' interview). Further, while the interview was conducted in an office in the police station, this fact alone is not determinative. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013), reh'g denied (Sept. 19, 2013). Finally, the officer here read Appellant his Miranda rights as soon as he realized he was making incriminating statements. The agents in Evans never attempted to Mirandize their suspect.

In sum, the police interview with Appellant did not constitute a custodial interrogation, and the police were under no obligation to give Appellant his Miranda warnings until Appellant's incriminating statements led police to place him in custody. Accordingly, even if this Court found the issue was preserved for review, the Court would find Navy and Evans distinguishable from the case at hand, and therefore non-controlling. This Court correctly found the trial court judge committed no reversible error and affirmed Appellant's conviction and sentence for homicide by child abuse.

CONCLUSION

This Court did not misapprehend or overlook any issues of fact or law. Therefore, Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

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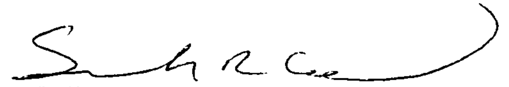
By: 

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August 20, 2015

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RE: State v. James Allen Johnson
Appellate Case No. 2013-001314

Dear Mr. Alexander:

I am enclosing two (2) copies of the Return to Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

Susannah R. Cole
Staff Attorney
Bar # 68282

SRC/am
Enclosures

cc: Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services