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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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OCT 14 2015

SC Court of Appeals

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY L. HAYES,

APPELLANT

APPELLATE CASE NO. 2015-000149

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to suppress Appellant's oral statements to Corporal Daniel Eckert where Appellant, who was in custody, unambiguously invoked his Fifth Amendment right to remain silent and where the officer admitted he understood Appellant had invoked his rights but continued to question him?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant at the September 9, 2013 term of General Sessions for two counts of armed robbery. R. *. His case was called to trial on January 12, 2015 before the Honorable Roger M. Young, Sr., and a jury. Tr. 1. Assistant Solicitors Alexander Ziegler and Andrew Evans represented the state, and Richard N. Buchanan and Edward Hawkins represented Appellant. Tr. 1.

On January 15, 2015, the jury found Appellant guilty. Tr. 518, ll. 16-23. Judge Young sentenced him to thirty years imprisonment on one count of armed robbery and fifteen years concurrent on the second count. Tr. 534, ll. 2-6; R. * (Sentence Sheets).

This appeal follows.

ARGUMENT

The court erred by refusing to suppress Appellant's oral statements to Corporal Daniel Eckert where Appellant, who was in custody, unambiguously invoked his Fifth Amendment right to remain silent and where the officer admitted he understood Appellant had invoked his rights but continued to question him.

Relevant Facts

Around midnight on May 6, 2013, three black men approached Shane Burnett and Glenn McElhenney as they were walking home down Coleman Boulevard from Art's Bar and Grill in Mount Pleasant. Two of the men approached Burnett and McElhenney from the front and the third from the back preventing Burnett and McElhenney from running. One of the two men in the front put a gun to McElhenney's stomach and yelled, "Give me whatever you got." After McElhenney threw his cell phone and wallet onto the ground, the armed man turned the gun on Burnett, stuck it in his stomach, and again demanded, "Give me whatever you got." When Burnett told the man he did not have anything, the man pointed the gun at Burnett's head and Burnett eventually threw his cell phone, wallet, loose change, pocket knife, and pack of cigars onto the ground. Tr. 136, l. 22 – 141, l. 6; Tr. 162, l. 22 – 166, l. 13.

As the robbers were collecting Burnett and McElhenney's possessions from the ground, Officer Alex Gillespie of the Mount Pleasant Police Department, who happened to witness part of the robbery as he was conducting a property check at a nearby business, ran towards the group with his weapon drawn and yelled, "Hey!" The three black men immediately took off running and Gillespie gave a chase. Gillespie followed the men as they fled into a nearby neighborhood called Old Village, but he eventually lost sight of the

men and decided to return to Coleman Boulevard where Burnett and McElhenney were located. Tr. 182, l. 13 – 186, l. 8. Gillespie notified dispatch of the armed robbery and a search began for the three black men.

Detective David Ivey, who heard Officer Gillespie inform dispatch that an armed robbery had just occurred, began patrolling the Old Village neighborhood for the robbers. The only description of the suspects Ivey was given was three black males in dark clothing. Tr. 208, l. 10 – 209, l. 15. Shortly after beginning his search, Ivey encountered Appellant walking down King Street about three blocks from where the armed robbery had occurred. Appellant supposedly "hollered at" Ivey, "put his hand up . . . as if to flag [Ivey] down" and began to walk towards Ivey's patrol car. Tr. 210, l. 13 – 211, l. 12. Ivey, who stopped and got out of his vehicle, immediately thought Appellant was likely involved in the armed robbery, and thus ensured Appellant was not armed before speaking with him. Tr. 211, ll. 13-24.

Appellant, who was out of breath and supposedly had dark clothing on, allegedly told Ivey "that two individuals had just pointed a gun at him and tried to shoot him . . . and that he was running from them." Tr. 212, ll. 10-24. Ivey asked Appellant numerous questions and Appellant allegedly said he was either coming from or going to his cousin Doug's house when two men pointed a gun at him while he was walking through "a cut" in the woods. Tr. 213, ll. 3-23. Appellant was eventually arrested and taken into custody on an unrelated matter.

About fifteen minutes later, Ivey, who continued to look for the armed robbery suspects in the Old Village neighborhood, discovered a man hiding under a large dump truck about two hundred yards from where he encountered Appellant. This man, who was

identified as Randi Parks, was lying under the truck on the "drive axle." After Parks came out from under the truck, Ivey discovered two wallets on his person. One wallet belonged to Parks and the other wallet had an identification card inside belonging to Glenn McElhenney. Parks was immediately arrested and transported to the Mount Pleasant Police Department. Tr. 216, l. 21 – 217, l. 21; Tr. 221, l. 25 – 222, l. 25.

After Appellant and Parks were arrested, law enforcement continued to search the area on foot for the third suspect. After searching for forty-five minutes, the officers decided to leave the area and "broaden [their] perimeter." As Officer Gillespie was leaving the Old Village neighborhood in his patrol car, a green Jeep driven by a black male drove past him at a high rate of speed. Gillespie immediately got behind the Jeep and initiated a traffic stop on the vehicle. The driver, and only occupant of the car, was identified as Darren Belt. Belt was also arrested and charged with this armed robbery based on information law enforcement learned during its investigation. Tr. 191, l. 5 – 195, l. 11.

Appellant and Parks were both transported to the Mount Pleasant Police Department during the early hours of May 7, 2013. Corporal Daniel Eckert, who was the lead detective assigned to the case, interviewed both men. Appellant, who invoked his Fifth Amendment right to remain silent, refused to give a statement. Despite invoking his rights, Eckert continued to question Appellant and Appellant allegedly gave a similar statement to the one he gave Detective Ivey when he was apprehended. Specifically, Appellant allegedly said "he encountered three people when he was coming through an area that he called the cut" and that he was walking from a female companion's house to his cousin Doug's house. Tr. 362, l. 14 – 367, l. 7.

After interviewing Appellant, Eckert spoke to Parks. Parks waived his Miranda[1] rights and agreed to speak with Eckert. Tr. 368, l. 18 – 369, l. 7. He gave a statement implicating Appellant and Belt in the armed robbery, but minimized his own involvement. Based on Parks' statement, Appellant, Belt, and Parks were all charged with two counts of armed robbery. Tr. 375, l. 13 – 376, l. 2; Tr. 376, l. 23 – 377, l. 1.

On the day after the armed robbery, investigators returned to the Old Village neighborhood to search for evidence related to the robbery. Detective Diana Lapp located a firearm at the bottom of a fence within feet of where Parks was apprehended under the dump truck. Tr. 331, l. 8 – 332, l. 21. Parks identified this firearm as the weapon used during the armed robbery. Tr. 281, l. 20 – 282, l. 5.

On May 8, 2013, Corporal Eckert interviewed Parks a second time. Parks again waived his Miranda rights and agreed to speak with Eckert. Parks was slightly more forthcoming during this interview, but continued to minimize his own involvement in the armed robbery. Tr. 377, l. 2 – 378, l. 10. When Eckert was returning Parks to the detention center after this second interview, Parks attempted to flee and was charged with escape as a result. However, this escape charge was dismissed by the prosecutor before Appellant's trial. Tr. 379, l. 22 – 385, l. 1; Tr. 313, ll. 19-24.

Parks was interviewed for a third time on November 14, 2013 at the Ninth Circuit Solicitor's Office. Corporal Eckert, the assistant solicitor, and Parks' attorney were all present during this interview. Parks finally admitted during this third statement that he was the gunman who had held the revolver, pointed it at Burnett and McElhenney during the

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

robbery, and demanded they turn over their possessions. He also continued to claim Appellant and Belt were involved. Tr. 385, ll. 2-24.

Additionally, Parks testified against Appellant at trial. Parks had already pled guilty to both counts of armed robbery, but his sentencing was deferred until after he testified against Appellant and presumably Belt, who was tried separately. Parks was impeached with his extensive criminal record that included multiple counts of second degree burglary, grand larceny, and numerous drug offenses. Tr. 258, l. 16 – 259, l. 16; Tr. 315, l. 8 – 316, l. 9. Appellant's counsel extensively cross-examined Parks, who admitted he lied during all three of his statements to law enforcement. Tr. 313, ll. 6-8. As a result, by the end of his testimony, Parks had little credibility.

After deliberating for over two hours, the jury convicted Appellant of both counts of armed robbery and Judge Young sentenced him to thirty years imprisonment. Tr. 518, ll. 16-23; Tr. 534, ll. 2-6.

Jackson v. Denno[2] Hearing and Motion to Suppress

Appellant's counsel moved pretrial to suppress the oral statement Appellant gave to Corporal Eckert during the early morning hours of May 7, 2013 at the Mount Pleasant Police Department on grounds that Appellant had unambiguously invoked his Fifth Amendment right to remain silent.

Corporal Eckert admitted during the Jackson v. Denno hearing that Appellant was in custody at the time of the interview. After Eckert advised Appellant of his Miranda rights using a standard waiver of rights form, Appellant signed the form indicating he understood his rights. Tr. 35, l. 8 – 36, l. 22. However, Eckert testified that Appellant refused to sign

[2] 378 U.S. 368 (1964)

the waiver of rights section at the bottom of the form and said he was not going to give Eckert a statement. Tr. 36, l. 23 – 37, l. 3. Eckert admitted that he interpreted Appellant's refusal to sign the waiver of rights form as an invocation of his right to remain silent. He further agreed with Appellant's counsel that Appellant made it clear he was not going to waive his Miranda rights and instead was choosing to invoke his right to remain silent. Tr. 40, l. 19 – 41, l. 3. Eckert even wrote at the bottom of the waiver of rights form, "Invoke Miranda." Tr. 41, l. 4-5.

Despite understanding Appellant to have invoked his Miranda rights, Eckert continued to ask Appellant some "basic questions." Tr. 41, ll. 15-18. He claimed he asked Appellant these questions because Appellant made "some statements saying that he would talk to me," but "he wasn't going to provide me a statement, and he wasn't going to sign my form." Tr. 40, ll. 19-24. Eckert explained that he asked Appellant, "Where he was coming from specifically, . . . where he had been, who his cousin was . . ." in an effort to determine if he was involved in the armed robbery. Tr. 41, l. 19 – 42, l. 1. The officer testified that after Appellant answered these questions, he "decided to end it [the interview]" because Appellant had "invoked his rights." Tr. 42, l. 11 – 43, l. 5.

After the attorneys had finished asking Corporal Eckert questions, Judge Young followed up with his own questions:

> The Court: You said on this statement you have, you state here, Hayes [Appellant] advised that he would speak with me; however, he wasn't going to waive his rights and he wasn't going to sign the form. I then signed the form and showed that Hayes invoked Miranda?
>
> The Witness: Correct
>
> The Court: **So in your mind he had invoked Miranda?**

The Witness: **At that point, yes.**

Tr. 49, l. 16 – 50, l. 1 (emphasis added).

At the completion of the testimony, defense counsel argued that Appellant had clearly invoked his Miranda rights and that Corporal Eckert had understood Appellant to have invoked his rights, thus the interview should have immediately stopped. Tr. 53, ll. 9-13. Counsel maintained that any statements Appellant made after he invoked his right to remain silent should be suppressed. Tr. 53, l. 14 – 54, l. 1. The assistant solicitor argued in response that Appellant's invocation of his right to remain silent "was not a clear indication" and that "the case law states any invocation of your right to remain silent has to be clear and unambiguous." Tr. 54, ll. 2-9. He continued, "I submit it's very ambiguous to say, I waive my right to remain silent [sic], but I'm also going to talk to you." Tr. 54, ll. 10-11. The solicitor cited Berghuis v. Thompkins, 560 U.S. 370 (2010), which he argued holds "questioning can go on unless the suspect at some point explicitly and without ambiguity invokes the right to remain silent." Tr. 54, l. 12 – 55, l. 7.

As a follow up, defense counsel argued "that the detective's own writing, the words 'invoke Miranda' are completely unambiguous, and again, he [Eckert] testified honestly. It was clear to him that he [Appellant] was invoking Miranda." Tr. 55, l. 22 – 56, l. 1.

The court originally responded, "[A]t first glance it seems to me that the officer saying that the witness invoked Miranda in writing now on the form ought to be dispositive of it." However, he indicated that he wanted to "refamiliarize" himself with the holding in Thompkins before ruling. Tr. 56, l. 8-16. Judge Young ultimately ruled Appellant's oral statements to Corporal Eckert were admissible because he believed Appellant "did not unequivocally invoke Miranda." The court stated, "[B]y saying, I'm not going to sign that

form, but I will speak to you, he's talking out of both sides of his mouth, and that is equivocating." Tr. 60, l. 13 – 62, l. 6. Thus, the court denied Appellant's motion to suppress.

During trial, defense counsel contemporaneously objected when Corporal Eckert testified about Appellant's oral statements before the jury and the court overruled the objection pursuant to its pretrial ruling. Tr. 365, ll. 20-24.

Discussion

The court erred by failing to suppress Appellant's oral statements to Corporal Eckert on the morning of his arrest where it was clear Appellant had unambiguously invoked his Fifth Amendment right to remain silent.

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 v. Arizona, 384 U.S. 436 (1966).

In Miranda, the United States Supreme Court held that "[i]f [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. ... [A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Miranda, 384 U.S. at 473-474.

If a suspect invokes his right to remain silent, the exercise of the right must "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 103 (1975); State v. Benjamin, 345 S.C. 470, 476, 549 S.E.2d 258, 261 (2001). A suspect invokes his right to silence by clearly articulating his desire to end the interrogation and must do so "unambiguously." Thompkins, 560 U.S. at 381-382; Davis v. United States, 512 U.S. 452, 459 (1994); State v. Reed, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998).

In State v. Aleksey, 343 S.C. 20, 31, 538 S.E.2d 248, 253-254 (2000), our Supreme Court held that Aleksey's statement of "'That's all I've got to say'" at the conclusion of an interrogation with law enforcement was not an unequivocal invocation of his right to discontinue questioning. The Court found the statement ambiguous in its context because it indicated either a desire to discontinue questioning or simply the end of his story. Id.

Here, Appellant told Corporal Eckert he would not sign the waiver of rights form and he was not going to give a statement. Eckert admitted he interpreted Appellant's actions as an invocation of his right to remain silent and wrote on the waiver of rights form, "Invoke Miranda." Tr. 40, l. 19 – 41, l. 5; Tr. 49, l. 16 – 50, l. 1; See R. * (Court's Exhibit No. 1). However, despite this unambiguous invocation of his right to remain silent, Eckert continued to question Appellant to determine whether he was involved in the armed robbery. It was only after Eckert determined Appellant was not going to be cooperative that he decided to end the interview "because he [Appellant] invoked his rights." Tr. 42, l. 23 – 43, l. 2.

Appellant's invocation of his right to remain silent could not have been clearer. Unlike the defendant in Aleksey, Appellant explicitly stated he was not going to sign the waiver of rights form and he was not going to give a statement. Because Corporal Eckert

continued to question Appellant after he had unequivocally invoked his right to remain silent, the trial court erred by failing to suppress the oral statements Appellant made to Eckert in response to Eckert's continued questioning. Based on this error, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of October, 2015.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of October, 2015.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of October, 2015.

Pala McKay (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.