ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Tanya A. Gee, Circuit Court Judge

DONNIE R. THIGPEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002280

PETITION FOR WRIT OF CERTIORARI

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did trial counsel provide ineffective assistance in derogation of Petitioner's Sixth and Fourteenth Amendment rights by failing to move to suppress Petitioner's incriminating statement to law enforcement based on the totality of the circumstances, including his level of intoxication?

STATEMENT

On June 20, 2009, there was a triathlon that crossed into parts of Richland and Kershaw Counties. App. 201, l. 20 – App. 202, l. 202. During the biking portion, one of the participants noticed a vehicle off the roadway. App. 202, ll. 3-5. When the police officers assisting with the race examined the car, they found an individual in the passenger's seat. App. 202, ll. 6-10. Those officers contacted the Kershaw County authorities, who responded to the scene around 9:30 in the morning. App. 202, ll. 15-21; App. 207, ll. 10-21. The South Carolina Highway Patrol responded as well. App. 202, ll. 18-25. An officer checked the individual, later identified as Melvin Wright, for a pulse, but found none. App. 218, ll. 1-3.[1] Although no autopsy was performed, a paramedic opined Wright's death was the result of a motor vehicle accident. App. 244, ll. 5-8; App. 274, ll. 11-22.[2]

The police soon learned that the car was registered to Petitioner and that his address was approximately a half-mile away from the scene of the accident. App. 209, ll. 6-20. Several officers then went to Petitioner's home. App. 213, ll. 10-12. Petitioner met with the officers on his porch. App. 213, ll. 10-21. John Slaten, formerly an officer with the Kershaw County Sheriff's Office, claimed he advised Petitioner of his Miranda[3] rights. App. 214, ll. 8-9; App. 292, ll. 4-5. Thereafter, the police questioned Petitioner about the car accident. App. 214, ll. 10-11; App. 292, ll. 5-6. During this interrogation, Petitioner was clearly intoxicated – he "had an odor of alcohol about him, his ability to stand and his speech appeared to be somewhat slurred."

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[1] A paramedic pronounced the individual "dead on arrival." App. 243, ll. 9-10.

[2] The coroner went to the accident scene and determined Melvin Wright was deceased. App. 647, ll. 16-24. Although the coroner had no medical training and did not request an autopsy, the coroner told the jury he concluded that Wright died as a result of a "closed head injury." App. 648, l. 18 – App. 649, l. 9.

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

App. 214, ll. 18-21; see also, App. 289, l. 19 – App. 290, l. 17; App. 291, l. 10; App. 313, ll. 7-8 (one officer testifying that Petitioner was "obviously intoxicated"); App. 329, ll. 7-15 (one officer testifying that Petitioner "fit all those brackets" because he had a strong odor of alcohol coming from his person, had bloodshot eyes, and slurred speech). Petitioner's eyes were "slightly bloodshot" and he "just had the overall appearance of being intoxicated." App. 291, ll. 10-12; App. 346, ll. 1-3. The officers also observed some injuries to Petitioner's arm and a cut over his eye. App. 214, ll. 21-24; App. 287, l. 17 – App. 288, l. 5; App. 315, ll. 19-24; App. 330, ll. 5-9 (describing the injuries to Petitioner's arm as consistent with airbag burns); App. 426, ll. 2-23. Although Petitioner denied driving the car, the police arrested him at 11:29 a.m., charging him with felony DUI. App. 219, ll. 6-9; App. 292, ll. 6-9; App. 293, ll. 15-22; App. 334, ll. 24-25.

Initially, the officers took Petitioner to the scene of the crash. App. 295, ll. 22-23. Then, at 12:40 p.m., the police took Petitioner to the hospital for blood and urine samples. App. 296, ll. 1-2; App. 332, ll. 9-12; App. 335, ll. 3-7; App. 336, ll. 11-12; App. 378, l. 25 – App. 379, l. 23. Days later, on June 25, 2009, a toxicologist examined Petitioner's blood and determined his blood alcohol level was 0.218. App. 658, ll. 13-15; App. 671, ll. 1-4. According to the toxicologist, a 150-pound male would need to drink eleven beers in one hour to reach .218 blood alcohol level. App. 671, ll. 5-13. He opined that over a five-hour period, that individual would need to consume 16 drinks to reach that level. App. 672, ll. 3-25. Further, he explained if the blood were taken more than seven hours after the person quit drinking and the level were at .218, then the person would have to consume over twenty alcoholic beverages. App. 673, ll. 1-21. The toxicologist further explained that even after a person stops consuming alcohol, between thirty and ninety minutes after that last drink, the blood alcohol level continues to increase until

it reaches its peak and then goes down as it is eliminated from the body. App. 684, l. 21 – App. 686, l. 3.

Upon leaving the hospital, the police took Petitioner to the jail for administration of the DataMaster at 1:42 p.m. App. 336, ll. 15-17; App. 339, ll. 17-19.[4] Next, the police took Petitioner to the jail where three officers interrogated him for approximately one hour. App. 298, l. 17 – App. 300, l. 2; App. 320, ll. 14-17; App. 427, ll. 20-25. The interrogation was audio recorded. App. 428, ll. 7-21. Perhaps unsurprisingly, Petitioner still smelled of alcohol. App. 501, ll. 18-20. After the police advised him of his rights, Petitioner agreed to speak with them. App. 436, ll. 5-8. During the interrogation, Petitioner repeatedly denied driving the car. App. 437, ll. 2-10. However, the police officers "felt … he was holding something back." App. 437, ll. 11-12; App. 445, ll. 4-9. One officer explained the feeling as akin to a saying from his grandfather – "that dog just doesn't hunt." App. 437, ll. 12-13. At one point during the interrogation, an officer told Petitioner it was time for him to help himself. App. 44, ll. 11-21. Approximately forty-two minutes into the interrogation at the jail, Petitioner said "it was a mistake." App. 448, ll. 14-17; App. 505, ll. 21-23.

Additionally, the police executed a search warrant on his home and seized articles of clothing that Petitioner had been wearing the night before his arrest. App. 296, l. 7 – App. 298, l. 13; App. 413, ll. 11-19; App. 417, ll. 3-17. Unsurprisingly, the police found Petitioner's DNA in the car. Petitioner's DNA was found on the headliner and the airbag. App. 551, ll. 8-16.[5]

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[4] The breath test measured Petitioner's alcohol level at 0.19. However, the judge ruled the breath test results were not admissible in light of the test occurring beyond the statutory two-hour period. App. 153, l. 13 – App. 155, l. 23.

[5] Petitioner explained that the headliner hung down and regularly touched his forehead. App. 793, l. 22 – App. 794, l. 1.

Testing revealed the presence of DNA from an unidentified male on the airbag as well. App. 551, ll. 16-19.

On March 14, 2012, a Kershaw County grand jury indicted Petitioner for felony driving under the influence (DUI) involving death and leaving the scene of an accident involving death. App. 1140-1141; App. 1143-1144. On March 19-23, 2012, the state, represented by Brett Perry and Ron Moak, called the case for trial before the Honorable Thomas G. Cooper, Jr., and a jury. App. 1. Alex Postic and Derek Chiarenza represented Petitioner. App. 1.

After the state presented its evidence to the jury, Petitioner put up his defense. Sharla Overton, Petitioner's friend, recalled seeing Petitioner during the early morning hours of June 20, 2009, at a bar called Track Side on Two Notch Road in Columbia. App. 716, l. 14 – App. 717, l. 22. When Overton saw Petitioner, it was obvious he had been in a fight and she inquired about it. App. 718, ll. 4-7. He told her he was beat up by B.J. App. 718, ll. 2-3. When Overton and her husband were leaving Track Side, they saw Petitioner, Wright, and another person at Petitioner's car. App. 719, ll. 2-13; App. 720, ll. 2-23; App. 721, ll. 1-4. It appeared that Wright and the third person were helping Petitioner get into the car. App. 721, ll. 8-11. She was unable to say who got into the driver's seat, however. App. 721, ll. 13-14. She did notice another car following Petitioner's car. App. 721, ll. 17-18.

Tina Moore also saw Petitioner at Track Side. App. 732, ll. 14-18. She recalled Petitioner was intoxicated and got into a fight with another person at the bar. App. 733, ll. 2-5. She and her boyfriend persuaded Petitioner to leave, but he insisted on driving his car. App. 733, ll. 5-7. Finally, when Wright agreed to drive, Petitioner succumbed to his friends' requests that he not drive. App. 733, ll. 7-9. Moore and her boyfriend followed them. App. 733, ll. 10-11. When Wright and Petitioner stopped at a nearby store, Moore and her boyfriend did as well.

App. 733, ll. 11-13. Moore recalled that Wright purchased an 18-pack of Ice House beer. App. 733, ll. 14-15. They all left the store again with Moore following Wright and Petitioner. App. 733, ll. 17-18. When they were less than ten minutes from Petitioner's home, Moore and her boyfriend stopped following them so that they could check on their farm animals. App. 733, ll. 18-23. Approximately thirty minutes later, Moore and her boyfriend left the farm and went to Petitioner's home to check on him. App. 734, ll. 6-8. However, when they knocked on the door, no one answered and there was no car in the driveway. App. 734, ll. 6-13.

William "B.J." Lehman vividly remembered fighting Petitioner at Track Side on June 20, 2009. App. 739, l. 17 – App. 740, l. 5. Petitioner got "very mouthy" with Lehman and the two fought on the porch, just outside the bar. App. 740, ll. 4-12. Petitioner landed no punches, but Lehman hit him with his left hand just above his right eye. App. 740, ll. 13-19. The punch cut Petitioner's face. App. 740, ll. 19-20. Petitioner fell down, but continued to try to fight. App. 741, ll. 3-6. Finally, Petitioner's friend pulled him away, and Lehman walked to another bar not far away. App. 741, l. 15 – App. 742, l. 18.

On June 19, 2009, Petitioner got off from work at 11:30 p.m. App. 773, ll. 7-10. When he left work, he went home to tend to his dog before heading out for the night. App. 773, ll. 15-18. First, Petitioner went to Brixx, where his friend, Wright, worked. App. 773, ll. 18-21; App. 774, ll. 8-11. Although he did not eat there, he had several drinks. App 773, l. 22 – App. 774, l. 4. As Petitioner was leaving, he and Wright agreed to meet up later in the night. App. 774, ll. 12-20.

Petitioner next went to Friends, a bar on Decker Boulevard. App. 774, ll. 21-25. He had more drinks there. App. 775, ll. 17-21. Then, Petitioner went to Track Side because Wright had called him asking to meet there. App. 775, l. 25 – App. 776, l. 15. Petitioner also recalled the

fight with Lehman. App. 776, l. 21 – App. 777, l. 11. Lehman hit Petitioner, knocking him to the ground, which was covered in gravel. App. 778, ll. 1-6. Petitioner was stumbling around, as was his friend, Wright. App. 778, ll. 7-10. Between 5 a.m. and 6 a.m., Petitioner decided to leave. App. 778, ll. 21-24.

When Petitioner tried to drive, his friends persuaded him that he was too intoxicated. App. 779, ll. 15-19. Eventually, Petitioner left Track Side with Wright driving his car. App. 779, ll. 23-25. When Petitioner and Wright arrived at Petitioner's home, Wright asked to borrow his car. App. 780, ll. 16-20. Petitioner readily agreed. App. 780, ll. 23-25. Petitioner then went into his home where he played with his dog before going to sleep. App. 781, l. 24 – App. 783, l. 6.

Sometime later, the police arrived at Petitioner's door. App. 784, ll. 4-8. At that time, Petitioner was "still very intoxicated," and at the time of trial, he had only vague memories of speaking to them. App. 784, ll. 16-21. He had no recollection of the police advising him of his rights at his home. App. 787, ll. 14-19. Petitioner was "shocked" when the police told him that his car had been involved in a wreck. App. 784, l. 22 – App. 785, l. 2. After the police arrested him and began the interrogation at the jail, Petitioner was scared and "still pretty drunk." App. 789, l. 4; App. 789, l. 24 – App. 790, l. 1. Petitioner "felt threatened" and "confused." App. 790, ll. 14-15. Despite his protestations, the three officers repeatedly told him he was driving the car when his friend died. App. 790, ll. 16-22; App. 791, ll. 21-25. Petitioner believed that the only way to stop the interrogation was "[b]y telling them what they wanted to hear" – that he was the driver. App. 791, ll. 11-14; App. 795, l. 23 – App. 796, l. 3.

At the conclusion of the trial, the jury found Petitioner guilty as charged. App. 941, ll. 7-17. Judge Cooper explained that he believed Petitioner "didn't intend for this to happen." App.

960, ll. 23-24. However, the judge found "some intent" because Petitioner "put himself in a position to allow this to happen." App. 960, l. 24 – App. 961, l. 1. Judge Cooper also noted Petitioner's sincere remorse. App. 961, ll. 19-20. He sentenced Petitioner to ten years' imprisonment on each charge and a fine of $10,100. App. 962, ll. 5-8; App. 1142; App. 1145. He ordered the sentences to be served concurrently. App. 962, l. 9; App. 1142; App. 1145.

Petitioner filed a direct appeal, which was perfected by Tommy A. Thomas. App. 964-978. Petitioner raised two issues on appeal. The first concerned whether the trial court erred in allowing evidence and testimony of the DataMaster process and video after determining that the test was given beyond the statutory two hour limitation. App. 964-978. The second issue argued that Petitioner's audio-recorded statement should have been suppressed. App. 964-978. In its responsive brief, the state argued both issues were not preserved for appellate review. App. 979-1104. On November 5, 2014, the Court of Appeals held the issues were unpreserved. State v. Thigpen, 2014-UP-386 (S.C. Ct. App. filed Nov. 5, 2014); App. 1011-1012. Remittitur was sent on November 21, 2014. App. 1013.

On December 30, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 1014-1020. The state, represented by J. Clayton Mitchell, filed a return on June 4, 2015. App. 1021-1025. Through counsel, Tommy A. Thomas, Petitioner amended his PCR application on August 19, 2015. App. 1026-1027. The matter proceeded to an evidentiary hearing on August 25, 2015 before the Honorable Tanya A. Gee. App. 1028. Thomas represented Petitioner, and Mitchell represented the state. App. 1028.[6] Petitioner and Postic were the only witnesses. At the conclusion of the hearing, Judge Gee announced her ruling – she was denying Petitioner relief. App. 1121, l. 13 – App. 1128, l. 23. By an order dated October 15, 2015, Judge

[6] At the beginning of the PCR hearing, Petitioner waived any claims of ineffective assistance of appellate counsel, particularly in light of the fact that appellate counsel was representing him as PCR counsel. App. 1035, l. 18 – App. 1036, l. 21.

Gee formalized her ruling denying Petitioner relief from his convictions and sentences. App. 1130-1139.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance in derogation of Petitioner's Sixth and Fourteenth Amendment rights by failing to move to suppress Petitioner's incriminating statement to law enforcement based on the totality of the circumstances, including his level of intoxication.

Relevant facts

Trial

Immediately prior to trial, defense counsel moved to exclude Petitioner's audio-recorded statement to law enforcement. App. 85, ll. 23-24. After noting the police had advised Petitioner of his rights in the patrol car, trial counsel explained that one question before the court would be whether that advisement "controls all the way through to this final interview." App. 88, l. 23 – App. 89, l. 3. Additionally, trial counsel explained that Petitioner was "at the time severely intoxicated to the point of having a blood alcohol level at almost a .23 an hour after the initial Miranda, so we would say he would be too intoxicated to understand his rights at that point[]." App. 89, ll. 4-9. Trial counsel recognized "cases that say that the defendant must be almost knocked out to give an involuntary statement, which just doesn't make any sense." App. 89, ll. 17-21. However, looking at the "totality and the way this whole situation unfolded," with an unsophisticated defendant, and a six-hour time window, trial counsel argued the statement should be suppressed. App. 89, l. 22 – App. 90, l. 11. The judge ordered a hearing on the motion to suppress. App. 91, ll. 6-7.

Former Kershaw County Sheriff's Deputy John Slaten arrived at Petitioner's home to find him wearing a towel. App. 93, ll. 12-25. Slaten smelled "an odor of alcoholic beverage bout his person" and observed that Petitioner "had the appearance of an intoxicated person."

App. 94, ll. 15-18; see also, App. 100, ll. 15-25. Using a card, Slaten advised Petitioner of his rights. App. 94, ll. 19-25.

State Trooper Patrick McKenzie arrested Petitioner while Slaten was questioning him. App. 102, ll. 12-21. McKenzie also advised Petitioner of his rights. App. 104, ll. 4-15. McKenzie agreed that Petitioner appeared heavily intoxicated. App. 105, ll. 2-6. McKenzie transported Petitioner to the hospital for a blood sample. App. 105, ll. 15-23. Then, McKenzie took Petitioner to jail where he conducted the DataMaster test, which was completed at 2:05 p.m. App. 106, ll. 3-12; App. 107, ll. 2-3.

After Petitioner was booked into the jail, Sergeant Monty Coats, Corporal O'Donnell and Sergeant Borowski interrogated him. App. 110, ll. 3-13. As part of the interrogation process, Coats advised Petitioner of his rights. App. 110, ll. 14-16. This interrogation was audio-recorded. App. 110, ll. 20-21. According to Coats, he could "smell the alcohol on him or coming from him." App. 111, ll. 22-23. Despite Petitioner's intoxication, Coats believed Petitioner "was coherent enough or able to respond to questions." App. 111, ll. 23-24. Coats and his team interrogated Petitioner for one hour and twenty minutes, ending at 5:20 p.m. App. 113, l. 20 – App. 114, l. 1. At the end of the grueling interrogation, Petitioner admitted to driving the car. App. 114, ll. 2-8. Coats explained that he used an interrogation technique with Petitioner during which Coats was initially very friendly with Petitioner, but then progressed to a much more forceful and aggressive interrogator. App. 117, ll. 5-19. In fact, Coats repeatedly told Petitioner that the police knew he was the driver in response to Petitioner's repeated protestations. App. 118, ll. 15-19.

Thomas Borowski, another state trooper, recalled that Petitioner "had an odor of alcohol about his person" when the police arrived at his home. App. 126, ll. 16-19. Based on his

twenty-eight years of law enforcement experience, Borowski was confident that Appellant was intoxicated. App. 126, l. 24 – App. 127, l. 9. However, Borowski believed Appellant's condition had improved later in the day when he and Coats interrogated him at the jail. App. 127, ll. 10-20; App. 131, ll. 2-8. Borowski opined that Petitioner understood his rights when they were explained to him at his home. App. 129, l. 23 – App. 130, l. 8.

Trial counsel argued that the advisement of rights given to Petitioner at the jail when he was the most cognizant of his rights were inadequate because the officer failed to advise Petitioner of the fifth prong of Miranda – that he can stop the interrogation at any time – pursuant to State v. Kennedy, 333 S.C. 426, 510 S.E.2d 714 (1998) *affirming* 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1997). App. 133, ll. 11-22. According to trial counsel, when Petitioner was interrogated at the jail, "his blood alcohol ha[d] gone down. His ability to comprehend ha[d] gone up." App. 134, ll. 12-15. Trial counsel noted the "marked difference" in the way Petitioner spoke and answered questions during the interrogation in the afternoon versus the interrogation earlier in the day. App. 134, l. 20 – App. 135, l. 11. Trial counsel argued Petitioner's confession was involuntary as a result of the officer's failure to advise Petitioner of the fifth prong. App. 135, ll. 23-24; App. 145, l. 12 – App. 146, l. 3.

The state argued Florida v. Powell, 559 U.S. 50 (2010) controlled the issue. App. 140, ll. 17-19; App. 141, ll. 8-14. According to the prosecutor, the United States Supreme Court held that as long as the police "substantially advise" a suspect of "those four rights," the warning was adequate and that "exact words" were unnecessary. App. 144, ll. 6-25. Thus, the prosecutor argued the warnings provided by Coats were adequate. App. 145, ll. 1-3.

The judge rejected trial counsel's argument on several grounds. First, the judge held that Petitioner had waived his rights earlier in the day and such waiver controlled the later

interrogation. App. 136, l. 20 – App. 137, l. 7; App. 143, ll. 4-17. The judge explained that provision of the warnings in the afternoon was "a futile act." App. 129, l. 8. Additionally, the judge held the later warning was in compliance with the Supreme Court jurisprudence governing Miranda and the fifth prong was unnecessary. App. 146, ll. 11-19.

In accordance with the trial court's ruling, the state introduced Petitioner's in-custody statement to law enforcement during the trial. App. 428, l. 7 – App. 429, l. 16. Initially, when the state moved to admit the recording, trial counsel did not object. App. 428, l. 22. However, shortly thereafter, trial counsel "place[d] on the record [his] objection to the confession, to the statement." App. 429, ll. 19-21. He stated he "just wanted to renew [his] objection as foundation." App. 429, ll. 21-22. Thereafter, the judge told the jurors that "[v]oluntariness [was] an issue in this case." App. 429, l. 25 – App. 430, l. 1; App. 434, ll. 5-10. He, then, overruled the objection. App. 430, l. 1. During questioning of Coats, the state played the audio and asked Coats clarifying questions concerning what the recording contained. App. 436, l. 16 – App. 438, l. 23; App. 442, l. 11 – App. 450, l. 17.

During the state's closing, purportedly when the solicitor was opening on the law, the solicitor argued to the jury that Petitioner's statement provided proof of his guilt. App. 848, l. 9 – App. 852, l. 8.[7] The state argued to the jury that Petitioner's "confession" was voluntary and that the police had advised him of his rights properly. App. 856, l. 2 – App. 859, l. 25. He told the jurors that the police did not have to use the "exact word[s]" when advising a suspect of his or her rights. App. 857, l. 22 – App. 858, l. 3. The solicitor told the jurors to examine the video from the DataMaster testing and compare it with the audio from the interrogation at the jail. App. 858, l. 23 – App. 859, l. 1. According to the solicitor, "[y]ou can tell there is a difference,

[7] Despite the judge's admonition for the solicitor to contain his "opening on the law" to the law and refrain from argument, the solicitor repeatedly argued the facts in the case and trial counsel repeatedly objected. App. 852, l. 9 – App. 853, l. 17; App. 860, ll. 1-5.

almost like two different people there, okay, and you have to look at this in the totality of the circumstances." App. 859, ll. 1-4. The solicitor acknowledged he could not argue that Petitioner "wasn't quite still drunk at five o'clock that day," but he told the jury the question was "whether or not he knew what he was doing." App. 859, ll. 4-8.

During the portion of his closing argument which he was permitted to argue the facts, the solicitor encouraged the jurors to listen to the audio recorded interrogation as many times as they desired. App. 899, ll. 10-12; App. 920, l. 20. Again, the solicitor admitted Petitioner was "under the influence" at the time of the interrogation. App. 899, l. 19. However, the solicitor discounted any suggestion that he was under the influence such that he could not "follow what's going on, doesn't know anything." App. 899, ll. 19-22. Additionally, the solicitor discounted trial counsel's argument concerning Petitioner's education – he dropped out of school in the eleventh grade – as impacting his ability to waive his rights and voluntarily speak to the police. App. 916, ll. 14-24. The solicitor argued that Petitioner's statement was not a "[f]alse confession"; rather, it was "the guilt coming out." App. 919, ll. 19-24. The solicitor closed by using Petitioner's words from the interrogation – "'I panicked and I ran." App. 921, ll. 1-6.

Direct appeal

Petitioner appealed the admissibility of his statement. In his brief, Petitioner noted that trial counsel moved to suppress his statement in a pre-trial hearing. App. 974. The brief also explained that trial counsel renewed his objection during the testimony of the two interrogating officers. App. 976. On appeal, Petitioner argued "[t]he totality of the circumstances in this case show that he was intoxicated at the time of the statement. The statement was not properly given, no were his rights voluntarily waived." App. 977.

The state argued this issue was not preserved for review. App. 998. According to the state, the argument at trial was that Petitioner's statement should be suppressed due to the officers' failure to comply with Miranda. App. 998. The state claimed defense counsel "never argued" that Petitioner "was too intoxicated to give a voluntary confession." App. 998. As the state put it, "defense counsel effectively conceded that [Petitioner] was sober enough to give a voluntary statement" at the time of the interrogation. App. 998. The state asked the Court of Appeals to dismiss "on error preservation grounds." App. 999.

Agreeing with the state, the Court of Appeals held Petitioner's second issue concerning the admissibility of his statement to law enforcement was not preserved for review. State v. Thigpen, 2014-UP-386 (S.C. Ct. App. filed Nov. 5, 2014); App. 1012. The Court also noted that the ground raised in the appeal was different from the basis of the objection at trial. State v. Thigpen, 2014-UP-386 (S.C. Ct. App. filed Nov. 5, 2014); App. 1012.

PCR hearing

At the start of the hearing, PCR counsel explained that the two main issues for the PCR were those raised in the direct appeal, which the Court of Appeals held were not preserved. App. 1038, ll. 1-4. Petitioner testified that he was arrested at 11:20 a.m. App. 1049, ll. 6-11. Thereafter, the police took him to Camden Hospital, where the staff drew his blood at 12:40 p.m. App. 1049, ll. 14-20. At that time, Petitioner's blood alcohol level was .219. App. 1049, ll. 21-23. After leaving the hospital, the police took Petitioner to jail, where they administered a breathalyzer test. App. 1050, ll. 1-12. His blood alcohol level was .19 at 1:42 p.m. App. 1050, ll. 13-17. After the breathalyzer results were obtained, the police began interrogating Petitioner, including advising him of his rights. App. 1054, ll. 1-23. However, Petitioner was unable to understand his rights due to his level of intoxication. App. 1055, ll. 2-3; App. 1057, ll. 3-5; App.

1083, ll. 8-24. Unsurprisingly, he was still highly intoxicated during this interrogation. App. 1054, ll. 21-23. At the end of the interrogation, Petitioner "confessed" to driving the car. App. 1056, ll. 5-20. Petitioner became clear headed the next day. App. 1057, ll. 14-17. However, the damage was done.

Petitioner explained that trial counsel objected to the introduction of this statement, but noted the trial judge overruled the objection. App. 1062, ll. 4-8. Petitioner appealed the admission of his statement based on the totality of the circumstances, primarily his intoxication, but he Court of Appeals held the issue was not preserved for review. App. 1063, l. 9 – App. 1063, l. 14.

According to trial counsel, Petitioner's "confession" was the "toughest part of the case." App. 1091, ll. 8-10. Trial counsel "thought it was a win-able case without that confession. Very much so." App. 1110, ll. 1-2. As a result, he did everything he could to keep the confession out of the evidence. App. 1110, ll. 2-3.

Trial counsel indicated that he argued about Petitioner's intoxication level at the time of the alleged confession to the jury. App. 1092, l. 24 – App. 1093, l. 1; App. 1109, ll. 2-9. Trial counsel noted State v. Saxon, 261 S.C. 523, 201 S.E.2d 113 (1973), "basically says if you're unconscious that's the only way it can't be voluntary" concerning statements to law enforcement and intoxication. App. 1092, ll. 22-24; see also, App. 1109, ll. 13-22. Trial counsel admitted there "was an argument" to be made to suppress Petitioner's statement based on his level of intoxication. App. 1094, ll. 18-21. Trial counsel was aware that the Court of Appeals ruled any objection to the admission of the statement based on involuntariness due to intoxication was not preserved for review. App. 1096, ll. 5-7.

PCR counsel argued Petitioner was entitled to relief due to trial counsel's failure to object to the voluntariness of his confession based on the totality of the circumstances, primarily his intoxication, rendering it involuntary. The state essentially conceded trial counsel was deficient in not preserving the issue, but argued Petitioner suffered no prejudice because the confession would not have been ruled inadmissible. App. 1117, l. 22 – App. 1118, l. 3. Citing Saxon, supra, the state argued "the proof of intoxication short of rendering the accused unconscious of what he is saying goes to the weight and credibility to be accorded the confession." App. 1118, ll. 4-7. Thus, the state argued, the confession would not have been excluded. App. 1118, ll. 7-12.

From the bench, Judge Gee found that trial counsel's failure to object specifically to the voluntariness of the confession based on Petitioner's high level of intoxication at the time the statement was given was not ineffective assistance. App. 1124, ll. 3-10. According to the judge, Petitioner's intoxication "really goes to the weight of the testimony, not the admissibility." App. 1124, ll. 8-9. Again, citing Saxon, supra, the judge explained that "when someone's intoxicated unless they're unconscious when the supposedly gave the statement that is just an issue for the jury to consider." App. 1124, ll. 11-15. The PCR judge noted that trial counsel elicited testimony showing that Petitioner was highly intoxicated when he gave the statements and argued this fact to the jury. App. 1124, ll. 16-20.

Order denying relief

In the written order denying relief, initially, the PCR judge explained Petitioner's claim for relief was that trial counsel failed to object to the admissibility of his statement "because the totality of the circumstances shows that he was deeply intoxicated at the time it was given." App. 1135. The PCR judge noted that trial counsel "did object" to the admissibility of

Petitioner's statement to police, but the basis of the objection was "that the investigators did not properly Mirandize" Petitioner. App. 1135. The court concluded that Petitioner "failed to meet his burden of proof." Citing State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 113, 117 (1973) for the proposition that "'[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words,'" the judge found it was reasonable for trial counsel to not object under these grounds. App. 1135. The PCR judge found "a motion to suppress [Petitioner]'s statement on the grounds that he was intoxicated would have been futile." App. 1135. According to the judge, the statement was given around 6:00 p.m., and Petitioner had stopped drinking early that morning around 5:30 a.m. App. 1135. From these facts, the judge concluded that Petitioner "had sobered up." App. 1135. The judge concluded the statement "was properly admitted." App. 1135.

The judge discounted Petitioner's argument that had the issue been preserved, Petitioner would have been successful on appeal. App. 1136. According to the PCR judge, the trial court's ruling that Petitioner's statement was given voluntarily would not have been disturbed on appeal because there was "ample evidence in the record to support that finding; particularly that [Petitioner]'s level of intoxication had waned in the previous hours." App. 1136.

Discussion

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

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. 426 (1966). 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). In South Carolina, a 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).

> 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).

Both trial counsel and the PCR judge cited Saxon, supra, to insist that trial counsel's failure to object to the admission of Petitioner's audio-recorded statement to law enforcement was not deficient performance prejudicial to Petitioner. Reliance upon Saxon is misplaced. A shooting occurred just after midnight on October 26, 1972. Saxon, 261 S.C. at 529, 201 S.E.2d at 117. The shooting was precipitated by "an afternoon and night of beer and wine drinking" by Saxon and the deceased. Id. Saxon was arrested shortly after the shooting and made an incriminating statement while be transported to the jail. Id. The sole argument for excluding the statement was that Saxon "was intoxicated at the time it was made" and his "state of extreme intoxication prevented him from having the mental capacity necessary for a free and voluntary statement." Id. This Court held "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." Id. As a result, this Court further held that "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." Id. In *dicta*, this Court stated that "[p]roof of intoxication, short of rendering the accused unconscious of what he is saying, goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence." Id. According to this Court, the record supported the trial judge's decision that Saxon's statement was freely and voluntarily made with a full understanding of his rights based on a totality of the circumstances. Id.

In short, this Court held that intoxication alone, unless the level of intoxication rendered a person unconscious of what he was saying, would not render a statement inadmissible. Saxon simply stands for the unremarkable point that a court must consider the totality of the circumstances when deciding upon the admissibility of a defendant's statement. There can be no question that the

influence of alcohol is a factor that must be considered in determining whether the confession was voluntary. See generally Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968)(finding a defendant's statement involuntary because of the defendant's extreme intoxication evidenced by his staggering, smelling strongly of alcohol, dilated pupils, slurred speech, and difficulty changing his shirt); United States v. Cellemme, 431 F.Supp. 731 (D. Mass 1977)(holding a defendant's confession was involuntary where the defendant consumed large amounts of alcohol at his friend's wedding reception on the evening of his arrest, approximately three hours prior to his statement to police); United States ex rel. Wakeley v. Russell, 309 F.Supp. 68 (E.D. Pa. 1970)(holding a statement involuntary where the evidence indicated that defendant was intoxicated and not alert, having been drinking alcohol the day and evening preceding his arrest, the police had difficulty waking him in order to arrest him, and the interrogating officer agreed the defendant was drunk); State v. Young, 875 P.2d 1119 (N.M. Ct. App. 1994)(remanding a case for the trial court to consider the defendant's intoxication when evaluating the admissibility of his statement and noting the difficulty in reconciling evidence from witnesses concerning the defendant's extreme intoxication and evidence from those same witnesses that the defendant was speaking coherently and in control of his faculties); State v. Williams, 208 So.2d 172 (Miss. 1968)(finding a confession involuntary where it was made three to four hours after the defendant was arrested for public drunkenness and evidence in the record showed the defendant was unable to recognize people who knew, was unable to make an intelligent statement to others, and was in an extreme state of intoxication); State v. Anderson, 78 N.W.2d 320 (Minn. 1956)(holding an admission made by a defendant shortly after he was hospitalized for treatment of injuries he sustained in an automobile accident was not voluntarily made in light of the fact that his blood alcohol level was 0.31%, a level that was conceded by the

state's expert to have been sufficient to have rendered the defendant incoherent and semi-conscious).

Turning to a claim of ineffective assistance of counsel related to a failure to challenge a defendant's statement as involuntary, in Dupree v. State, 305 S.C. 285, 287, 408 S.E.2d 215, 216 (1991), this Court found counsel's failure to pursue the issue of alleged threats made to the defendant during the interrogation to suppress the defendant's statement was deficient performance. The defendant's statement implicated him in the crime of receiving stolen goods. Prior to trial, counsel moved to suppress the statement and a hearing on the matter ensued. The interrogating officer testified that no threats were made, but he admitted the defendant refused to sign an acknowledgement his statement was voluntary. At the PCR hearing, counsel admitted the defendant told him about the threats. This Court found counsel's failure to pursue the issue in light of the defendant's claims and the evidence that he refused to sign the form was deficient performance. Id. As the defendant's statement contained the only evidence about his guilty knowledge, counsel's deficient performance prejudiced Petitioner. Id. at 287-288, 408 S.E.2d at 217.

Trial counsel's failure to move to suppress Petitioner's audio-recorded statement as involuntary based on the totality of the circumstances, including his extreme intoxication was deficient performance prejudicial to Petitioner. The most damaging evidence in the case – as admitted by trial counsel – was Petitioner's audio-recorded statement. Thus, trial counsel's efforts should have been focused on doing everything possible to suppress the statement. Although he moved to suppress, he did so using an argument in direct opposition of controlling Supreme Court case law. However, had trial counsel argued for suppression based on the totality of the

circumstances, including Petitioner's extreme intoxication, there is a reasonable probability the result of his trial would have been different.

Although the police recited Petitioner's rights numerous times on June 20, 2009, there could be no doubt that Petitioner's ability to understand his rights was compromised by his level of intoxication. Additionally, Petitioner's condition indicated he suffered a head injury shortly before the interrogation and was severely sleep-deprived. Prior to the audio-recorded statement, Petitioner was in police custody for at least six hours. During that time, the police misrepresented their evidence by repeatedly telling Petitioner they could prove he was the driver. Had trial counsel properly moved to suppress the audio-recorded statement, there is a reasonable probability that the statement would have been suppressed and the ultimate result of the trial would have been different.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the decision of the PCR court, finding trial counsel was ineffective, and remand for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County

Tanya A. Gee, Circuit Court Judge

DONNIE R. THIGPEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002280

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Jessica Kinard, Esquire at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Donnie R. Thigpen, #350243, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 4th day of August, 2016.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of August, 2016.

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