STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY CATOE,

APPELLANT

APPELLATE CASE NO 2016-000104

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting appellant's statements into evidence because the police violated appellant's Fifth and Sixth Amendment rights by using the "question first" strategy condemned in Missouri v. Siebert, 542 U.S. 600 (2004)?

STATEMENT OF THE CASE

On June 7, 2012, a Lancaster County grand jury indicted appellant for murder. R. ___. On January 4, 2015, appellant was tried before the Honorable Brian M. Gibbons and a jury. R. 1. Randy Newman and Lisa Collins represented the State. R. 1. Tyree Lee and Justin Jones represented appellant. R. 1. The jury convicted appellant. R. 511, l. 12 – 512, l. 6. Judge Gibbons sentenced appellant to life imprisonment. R. 518, ll. 2 – 13. This appeal follows.

ARGUMENT

The trial court erred in admitting appellant's statements into evidence because the police violated appellant's Fifth and Sixth Amendment rights by using the "question first" strategy condemned in *Missouri v. Siebert*, 542 U.S. 600 (2004).[1]

Before trial, the court conducted a lengthy hearing regarding the admissibility of appellant's statements pursuant to Jackson v. Denno, 378 U.S. 368 (1964). R. 5, l. 17 – 94, l. 14. The police suspected appellant was involved in the death of Linda Massey Gaymon ("Gaymon"). R. 35, l. 12 – 36, l. 7. Officer Frederick Thompson ("Thompson") called appellant and asked him to come to the sheriff's department. R. 11, l. 24 – 12, l. 1. Appellant's sister brought appellant. R. 12, ll. 5 – 7.

Officer Thompson spoke with appellant in an office at the sheriff's department with two other officers, Danny Bennett ("Bennett") and Clark Crump ("Crump"). R. 12, l. 18 – 13, l. 4. R. 19, ll. 22 – 25. Officer Thompson was wearing his pistol. R. 13, ll. 8 – 9. The time of the interview was 2:23 PM. R. 19, ll. 18 – 21. He candidly admitted they did not give appellant his warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). R. 13, ll. 13 – 16. Officer Thompson claimed that appellant was not in custody and was free to leave. R. 13, ll. 17 – 21.

Officer Thompson typed his questions and appellant's answers during this initial, unwarned interrogation. R. 14, ll. 3 – 22. During this first interview, appellant admitted that he saw Gaymon and successfully propositioned her for sex in exchange for fifteen dollars. R. 16,

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[1] In conducting its review pursuant to Anders v. California, 386 U.S. 738 (1967), this Court may wish to consider whether to apply plain error to the trial judge's charge that the jury could infer malice from the use of a deadly weapon when appellant also received the mitigating charges of voluntary manslaughter and involuntary manslaughter, in violation of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). R. 454, l. 1 – 455, l. 16. R. 466, l. 23 – 467, l. 3. R. 504, l. 20 – 505, l. 4.

ll. 15 – 20. They went into an abandoned house and had sex. R. 16, l. 20 – 17, l. 15. Appellant denied that the sex was uncomfortable or hurt Gaymon. R. 17, l. 3 – 16. When appellant left, he saw Gaymon talking to a woman appellant knew as "Sherry." R. 17, l. 15 – 18, l. 5. Appellant guessed he encountered Gaymon between 8:00 PM and 9:00 PM R. 18, ll. 7 – 12. The police had appellant initial and sign the statement they typed. R. 19, ll. 14 – 17.

Officer Thompson testified that after getting appellant to sign this first statement, "we advised him that there was some inconsistencies so we advised him – we actually read him his Miranda warning." R. 20, ll. 19 – 24. Appellant signed a written Miranda waiver. R. 20, l. 25 – 23, l. 2. The time on this waiver was 3:28 PM. R. 23, ll. 6 – 13. The officers claimed appellant continued to answer their questions voluntarily. R. 24, l. 11 – 26, l. 4. R. 52, l. 8 – 53, l. 22.

The officers interrogated appellant about why he did not mention that Gaymon was wearing a wig in his first statement and about the time he saw Gaymon. R. 28, l. 13 – 33, l. 5. Appellant then supposedly admitting buying and using cocaine. R. 28, l. 13 – 33, l. 5. He stated that he moved a couch inside the abandoned house to hide his bicycle while he had sex with Gaymon. R. 28, l. 13 – 33, l. 5. Appellant reiterated that Gaymon did not become agitated during their sexual encounter and denied killing her. R. 28, l. 13 – 33, l. 5. The police asked if appellant would be willing to take a polygraph examination and appellant stated he did not wish to continue speaking with the officers. R. 28, l. 13 – 33, l. 5. Appellant refused to sign a statement. R. 26, l. 5 – 27, l. 24.

At this point, the police arrested appellant for solicitation of prostitution and placed him in the jail. R. 33, ll. 10 – 15. R. 60, ll. 1 – 5. The next day, Officer Crump went to the jail to serve the solicitation arrest warrant on appellant. R. 60, ll. 1 – 5. According to Officer Crump, appellant asked him multiple questions trying to find out information about "What's going on?"

R. 60, ll. 6 – 20. Officer Crump read appellant his Miranda warnings. R. 60, ll. 6 – 23. While appellant was in the cell, Officer Crump asked him if he was involved in Gaymon's death and appellant "said that he was." R. 61, ll. 10 – 20.

Officer Crump took appellant to an investigator's office and had appellant sign a written Miranda waiver. R. 61, l. 21 – 62, l. 24. The police claimed that appellant then gave a more detailed statement in which he admitted choking Gaymon because she wanted to have "hard core sex." R. 68, l. 24 – 71, l. 17. After they finished having sex, appellant realized that "the damage was already done," got scared, and left. R. 68, l. 24 – 71, l. 17. Appellant supposedly apologized. R. 68, l. 24 – 71, l. 17.

After the testimony at the Denno hearing concluded, trial counsel objected to the admission of appellant's statements. R. 93, ll. 3 – 6. Judge Gibbons considered the question over the lunch recess and, upon returning, ruled the statements were admissible. R. 93, l. 24 – 94, l. 9. Appellant preserved his pretrial argument with contemporaneous objections throughout the trial. R. 352, ll. 19 – 24. R. 360, l. 22 – 361, l. 3. R. 366, ll. 8 – 12. R. 387, l. 14 – 388, l. 14. R. 402, l. 24 – 403, l. 4. R. 408, ll. 21 – 25.

The trial court erred in admitting appellant's statements because the police intentionally circumvented Miranda when they did not give appellant warnings during their first interrogation. Missouri v. Siebert, 542 U.S. 600 (2004). State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). This intentional police strategy is called "question first" and the United States Supreme Court condemned this practice in Siebert. Siebert at 610-12 and n.2. The Court cited the Police Law Institute's manual which instructed officers to use a "two-stage interrogation" and not to give Miranda warnings until after arrestees have confessed. Id. at 610. The Court listed multiple

sources advising officers on how to obtain confessions and then curing the failure to give Miranda warnings. Id. at 610 n.2.

The Court rejected the notion that the subsequent giving of Miranda warnings could transmute these confessions into admissible evidence. Id. at 610-13. "By any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Id. at 613. "After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset." Id. "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." Id.

South Carolina recognized the impact of Siebert in Navy. Kenneth Navy was convicted of suffocating his two year old son. Id. at 296, 688 S.E.2d at 838. EMS responded to Navy's house and found him giving the child CPR. Id. at 297, 688 S.E.2d at 838. Navy gave an unsatisfactory statement to the police at the hospital that night. Id. The police subsequently met with the pathologist who told them that the child died from suffocation. Id.

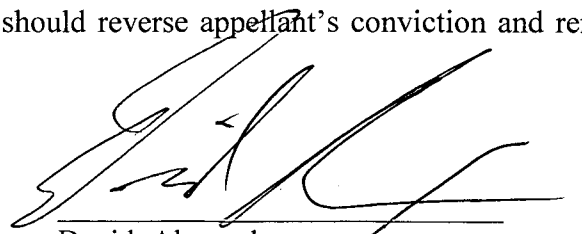
With this knowledge in hand, the police took Navy from his house to the police station. Id. He was not formally under arrest. He gave a statement that was not incriminating. Id. at 298, 688 S.E.2d at 839. Questioning continued and police confronted Navy with information from the autopsy. Id. at 298, 688 S.E.2d at 839-40. The Court found that "[a]t this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." Id. Without giving Miranda

warnings, the police ultimately obtained a confession from Navy which they memorialized after having him sign a Miranda waiver. The Court ruled these statements violated Siebert and were inadmissible. Id. at 301-04, 688 S.E.2d at 841-43.

The police strategy in this case is the same as in Siebert and Navy. Appellant was a suspect in a murder, in a room with three police officers when the initial questioning took place, and therefore was in custody, triggering the requirement to give Miranda warnings. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). By not giving the warnings, the police were able to get appellant to admit that he had sex with Gaymon. They used this initial admission to arrest him for solicitation of prostitution that led to his later, damning statements. These later statements are not admissible even though Miranda warnings were given because of the rule in Siebert and Navy. The trial judge erred in admitting these statements and, but for their admission, appellant would not have been convicted. This Court should reverse and remand this case for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand this case for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of November, 2016.

STATE OF SOUTH CAROLINA

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terry Catoe states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before the Honorable Brian M. Gibbons, which was held on January 4-6, 2016 (Trial and motions), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Terry Catoe.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 16th day of November, 2016.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s):
(2) Trial Transcript,
(3) State's Exhibits: 1-5,
(4) Defendant's Exhibits: 1-3.

I certify that this designation contains no matter which is irrelevant to this appeal.

November 16, 2016

David Alexander
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 16, 2016.

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