STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MARSHELL HILL,

APPELLANT

APPELLATE CASE NO 2016-000868

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in finding that Appellant was not in custody when he made an oral inculpatory statement, without the benefit of *Miranda* warnings, during a two hour interrogation at the law enforcement center when the police officers went to Appellant's house and drove him to the law enforcement center for the interrogation, the officers knew Appellant had been drinking and a reasonable person in Appellant's position would have thought that he was in custody and not free to leave?

2. Did the trial judge err in admitting Appellant's video recorded inculpatory custodial statement made following *Miranda* warnings but in violation of Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), when the police initially interrogated Appellant, while in custody, without the benefit of *Miranda* warnings, for two hours, and when the police finally obtained an incriminating statement, the same police officers administered *Miranda* warnings and immediately continued the interrogation without a break?

## STATEMENT OF THE CASE

In March of 2014, the Greenville County Grand Jury indicted Appellant Hill for murder, indictment #2014-GS-23-2209. On April 11, 2016, Appellant proceeded to jury trial before the Honorable Perry H. Gravely. Amanda Wicker and Teal Johnson represented Appellant at trial. Howard Steinberg prosecuted the case. The jury found Appellant guilty of the lesser included offense of voluntary manslaughter. Judge Gravely sentenced Appellant to twenty-two (22) years in prison. A timely notice of intent to appeal was served on April 21, 2016. This appeal follows.

## STATEMENT OF FACTS

On the morning of August 14, 2013, Appellant found the deceased, Billy Patterson, in Appellant's backyard. The deceased appeared to be dead and Appellant asked his roommate, Michael Barksdale to call 911. (R. p. 188, lines 8-25). Officers Brandon Napolitano and Michael Dowey were some of the first officers who arrived on the scene and spoke with Appellant. (R. pp. 208-223). Two deputy coroners, Jeff Fowler and Mike Ellis also spoke with Appellant at the scene. (R. pp. 199-207). The investigators involved in the case, Michael Fortner and Antonio Bailey did not interview Appellant at the scene on August 14, 2013, because he was extremely intoxicated. (R. p. 351, lines 17-21; p. 311, lines 11-17). Appellant and the deceased were drinking buddies. (R. p. 9, lines 19-25).

The next day, August 15, 2013, Investigators Fortner and Bailey attended the autopsy of the deceased and learned that the deceased had been struck with a cylindrical type object similar to a broom or cane. (R. p. 312, line 8 – p. 313, lines 1-3; p. 352, line 25 – p. 353, lines 1-19). The investigators executed a search warrant of Appellant's house and seized a walking stick from Appellant's bedroom. (R. p. 312, lines 5-19; p. 354, line 1 – p. 355, 356, lines 1-6). The investigators drove Appellant from his house to the law enforcement center for an interview. (R. pp. 356-359; pp. 326-332). Investigators Fortner and Bailey admitted that Appellant told them that he had been drinking on August 15th when the officers took him to the law enforcement center for the interview. (R. p. 380, lines 16-20; p. 345, lines 18-24). Investigator Fortner typed Appellant's statements from the interview and labeled it as a victim/witness statement. (R. p. 332, lines 13-23).

After the statement was typed the two investigators stepped out of the room to discuss discrepancies between Appellant's statement and statements made by Barksdale, Appellant's roommate. (R. p. 360, lines 14-22; p. 333, lines 13-16). Barksdale told Investigator Bailey that Appellant was afraid of the deceased stealing from him. (R. p. 346, lines 14-22). The investigators returned to the room and Investigator Fortner asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television. (R. p. 361, lines 18-20). According to Investigator Bailey, Appellant stated that he became angry when he saw the deceased with the television under his arm. (R. p. 333, lines 20-24). According to Investigator Fortner, Appellant admitted that, "I tapped him twice." (R. p. 361, lines 24-25). At this point the investigators moved Appellant to the City interview room across the hall and advised Appellant, for the first time, of his *Miranda* rights. (R. p. 338, line 3 – p. 339, 340, lines 1-23; p. 366, line 13 – pp. 367-370). According to Investigator Bailey, Appellant agreed to talk with the investigators but refused to sign the waiver of rights form. (R. p. 340, line 16 – p. 341, 342, lines 1-14). The interview was video recorded and admitted in evidence, over objection, at trial. (R. p. 375, line 12 – p. 376, line 1). Appellant challenges the admission of the oral statements made prior to *Miranda* in issue one and the admission of the video recorded statements made post *Miranda* in issue two.

## ARGUMENTS

1. The trial judge erred in finding that Appellant was not in custody when he made an oral inculpatory statement, without the benefit of *Miranda* warnings, during a two hour interrogation at the law enforcement center when the police officers went to Appellant's house and drove him to the law enforcement center for the interrogation, the officers knew Appellant had been drinking and a reasonable person in Appellant's position would have thought that he was in custody and not free to leave.

Prior to trial the judge held a Jackson v. Denno hearing in regard to several statements made by Appellant. (R. pp. 7-69; pp. 133-200). Counsel for Appellant moved to suppress the statements made to law enforcement prior to *Miranda* warnings and moved to suppress the video recorded statements made after *Miranda* warnings pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) and State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). (R. pp. 147-163). The video recorded statement is addressed in issue two below. As to the statements made prior to *Miranda* warnings, the trial judge refers to a typed victim/witness statement, State's Exhibit #3, as statement number three and stated:

> All right. As to statement number three. I have reviewed State's Exhibit 3 and I don't believe that *Missouri v. Seibert* applies. For one thing, he does not really incriminate himself. He doesn't go, 'well I killed him' or something like that. I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, after he gave the statement the officers got together and said 'there's some inconsistencies here.' And that's when they turned it into a custodial interrogation. So I think statement number three was merely a witness statement, that he was not in custody and I'm going to allow that one in.

(R. p. 163, line 18 – p. 164, lines 1-9). The trial judge erred.

First, the trial judge did not allow the typed victim/witness statement in evidence.[1] (R. p. 362, lines 17-24). Appellant submits that this statement was made while in custody and despite the statement not being admitted in evidence, the State should not have been allowed to reference the statement in the State's case in chief. The critical statement, however, that should have been suppressed was the statement attributed to Appellant when the investigators returned to the room. After State's exhibit #3 was typed investigators Fortner and Bailey stepped out of the room to discuss discrepancies between Appellant's statement and statements made by Barksdale, Appellant's roommate. (R. p. 360, lines 14-22; p. 333, lines 13-16). The investigators returned to the room and Investigator Fortner asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television. (R. p. 361, lines 18-20). According to Investigator Fortner, Appellant admitted that, "I tapped him twice." (R. p. 361, lines 24-25). At this point the investigators moved Appellant to the City interview room and advised Appellant, for the first time, of his *Miranda* rights. (R. p. 338, line 3 – p. 339, 340, lines 1-23; p. 366, line 13 – pp. 367-370). The interview became a custodial interrogation when Investigator Fortner asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television. At this point in time the officers had attended the autopsy of the deceased and knew that the fatal injuries had been caused by a symmetrical object, possibly a broom or cane, they had executed a search warrant at Appellant's home and seized a walking stick from Appellant's bedroom and Appellant had given a statement inconsistent with the statement of the roommate. Appellant was not free to leave at this point.

[1] The transcript incorrectly notes that State's Exhibit #3, the victim/witness statement was admitted in evidence. (Tr. p. 3).

During the trial Appellant renewed the objection to the statement. (R. p. 313, lines 7-8). At this point the judge expressed some concern about the admission of the statement. The judge stated:

> I'm having some real concerns here because now the facts have come out a little bit different I guess than I recognized before. In that all of the statements were given after, you know, specifically statement number three, there was no *Miranda* warning given. Is that correct?

(R. p. 313, lines 18-25). After the prosecutor affirmed that *Miranda* warnings were not given prior to the "non-recorded statement" at the County, which consisted of both the typed statement and the oral statements, the judge stated:

> You know, and I guess – and during lunch I read the *State v. Navy* case. I mean, what I have a concern here is you have – somebody's seen the autopsy. They see a stick they seized from the Defendant's room, which they assume is the murder weapon.

(R. p. 314, lines 5-11). After hearing arguments from both sides the Judge ruled stating, "No, I think, I mean, I thought it was a –I think it's a very close call but I think *State v. Williams* does sway me that –the fact that it was not a custodial statement, so I'm going to stand by my previous ruling." (R. p. 327, lines 16-21). Appellant renewed the objection during Investigator Bailey's testimony (R. p. 328, lines 18-20) and during Investigator Fortner's testimony. (R. p. 356, lines 14-15; p. 361, lines 5-6). Appellant renewed the objection at the directed verdict stage and post-trial. (R. p. 387, lines 18-21; p. 432, lines 17-19). Appellant additionally renewed the object after the jury returned the verdict. (R. p. 514, lines 7-9).

The trial judge's finding that Appellant was not in custody when the investigators returned to the room and asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television is not supported by the record. Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported

by the record. State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct.App.1996) aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997).

In State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409–10 (2003), the South Carolina Supreme Court wrote:

> The purpose of the *Miranda* warnings is to apprise the defendant of her constitutional privilege to not incriminate herself while in the custody of law enforcement. Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. Law enforcement must state the *Miranda* warnings "after a person has been taken into custody or otherwise deprived of his freedom of action in any way." *Id.* To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); United States v. Helmel, 769 F.2d 1306, 1320 (8th Cir.1985); Robert Kaupp v. Texas, 538U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814, 2003 WL 2010974 (2003). The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody. Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493–494 (1994); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct.App.1996).

Viewing the totality of the circumstances, the investigators placed Appellant in a custodial interrogation setting warranting *Miranda* warnings. The failure to provide *Miranda* warnings required suppression of the statement, "I tapped him twice." In fact the judge noted earlier, "I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, **after** he gave the statement the officers got together and said 'there's some inconsistencies here.' **And that's when they turned it into a custodial interrogation.**" (R. p. 134, line 24 – p. 135, lines 1-6) (emphasis added).

As to the factors, the interrogation took place at the law enforcement center. The investigators drove Appellant from his house to the law enforcement center for an interview. (R. pp. 319-322; pp. 292-295). During the suppression hearing Investigator Fortner testified that he did not mirandize Appellant "because he was not in custody and I was interviewing him more as

a witness, as somebody that might be able to provide some information as to what had taken place." (R. p. 41, line 24 – p. 42, lines 1-3). The purpose of the interview, however, changed when Investigator Fortner returned to the room and questioned Appellant about hitting the deceased. At this point in time the interview became a custodial interrogation. Appellant had been in a room at the law enforcement center with two investigators for approximately two hours. (R. p. 119, lines 1-11). Appellant was not free to leave. A reasonable person would have concluded that he was in police custody.

In State v. Navy, 386 S.C. 294, 298–99, 688 S.E.2d 838, 840 (2010), the South Carolina Court wrote:

> After he gave this first statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in follow-up questioning, asking specifically how respondent had comforted the crying child. At 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. In response to these follow-up questions, respondent told the officers he had "popped" the child on the back rather than simply patted him, and that he may have "patted" the child on its mouth to stop the crying.

Navy was then mirandized and provided two additional written statements. The South Carolina Supreme Court found the second and third statements should have been suppressed pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). Appellant's post *Miranda* warnings video recorded statement, addressed in issue two, is analogous to the second and third statements the Court found should have been suppressed in Navy. Appellant's statement, "I tapped him twice," is analogous to Navy's statement that he had "popped" the child on the back and that he may have "patted" the child on its mouth to stop the crying. Investigator Fortner asking Appellant if he hit the deceased because the deceased tried to steal Appellant's

television began an unwarned custodial interrogation designed to elicit incriminating information.

The present case is distinguished from State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (2013). In Williams the South Carolina Court of Appeals found that Williams was not in custody at the time he provided a statement to police prior to *Miranda* warnings. The Court in Williams noted:

> The trial court determined that based on "the method of arrival, the voluntary arrival, the agreement to participate, the accidental explanations, [and] the officer's testimony that the Defendant was free to leave," the oral statement was admissible because Williams was not in custody and therefore *Miranda* warnings were not required. The court noted it was making that decision based on an objective standard and not just the officer's subjective testimony that Williams was free to leave. The trial court found that "a reasonable person arriving voluntarily in a private vehicle, never requests any help, not under the influence, cooperating with the officers, wanting to clear it up, that a reasonable person would believe they were free to leave."

405 S.C. at 270–71, 747 S.E.2d at 198. In contrast, Appellant was picked up at his home and taken to the law enforcement center. Appellant advised the investigators that he had been drinking on August 15th when the officers picked him up and took him to the law enforcement center for the interview. There is no indication in the record that Appellant expressed an intention of "clearing things up" as Williams had. In the present case a reasonable person would have believed that he was in custody and not free to leave. The trial judge erred in finding that Appellant was not in custody. The statement, "I tapped him twice," should have been suppressed.

2. The trial judge erred in admitting Appellant's video recorded inculpatory custodial statement made following *Miranda* warnings but in violation of Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), when the police initially interrogated Appellant, while in custody, without the benefit of *Miranda* warnings, for two hours, and when the police finally obtained an incriminating statement, the same police officers provided *Miranda* warnings and continued the interrogation without a break?

As discussed above, Counsel for Appellant moved to suppress the statements made to law enforcement prior to *Miranda* warnings and moved to suppress the video recorded statements made after *Miranda* warnings pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) and State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). (R. pp. 147-163). Based on the trial judge's ruling that Appellant was not in custody prior to *Miranda* warnings (although he stated that "I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, **after** he gave the statement the officers got together and said 'there's some inconsistencies here.' **And that's when they turned it into a custodial interrogation.**" (R. p. 163, line 24 – p. 164, lines 1-6)(emphasis added)), the trial judge found that Seibert did not apply. Appellant additionally argued that the video recorded statement, referred to by the trial judge as statement number four, State's Exhibit #81, should be suppressed because investigators knew Appellant had been drinking and Appellant refused to sign the waiver of rights form. (R. p. 158, lines 1-7). The trial judge refused to suppress the video recorded statement on these grounds as well. (R. p. 164, line 10 – p. 194, lines 1-4). The video recorded statement, State's Exhibit #81, should have been suppressed because it was obtained in violation of the rule announced in Seibert and Navy.

Appellant renewed the objection to the video recorded statement in the middle of the trial after the judge revisited his earlier ruling. (R. p. 328, lines 18-20). Appellant renewed the objection during Investigator Fortner's testimony. (R. p. 370, lines 17-18; p. 375, lines 23-25). Appellant renewed the objection at the directed verdict stage and post- trial. (R. p. 387, lines

18-21; p. 432, lines 17-19). Appellant additionally renewed the objection after the jury returned the verdict. (R. p. 477, lines 7-9).

In State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841–42 (2010) the South Carolina Supreme Court wrote:

> In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the *Seibert* plurality opinion, are:
>
> 1) the completeness and detail of the question and answers in the first round of interrogation;
> 2) the timing and setting of the first questioning and the second;
> 3) the continuity of police personnel; and
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

The Court in Navy found that the officer's actions violated Seibert writing:

> The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having smothered him. Once those incriminating answers were given—i.e. after respondent admitted he had popped the child on the back and "patted" his mouth—respondent was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately. Thus the four elements outlined in *Seibert* were met here. Moreover, none of the curative measures suggested by Justice Kennedy, i.e. an additional warning that the answers given after the first statement but before the administration of *Miranda* warnings may not be admissible,[4] a substantial break in time, or change of circumstances, occurred here.

386 S.C. at 303, 688 S.E.2d at 842.

In the present case Investigators questioned Appellant until incriminating information was elicited. Investigators then administered *Miranda* warnings and again questioned Appellant about the incriminating information. Investigator Fortner began an unwarned custodial

interrogation when he asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television. The investigator asked the question knowing that a walking stick consistent with the murder weapon had been seized from Appellant's bedroom. Additionally, the investigators learned from Appellant's roommate that Appellant was afraid the deceased was stealing from him. (R. p. 346, lines 14-22). After Appellant admitted that he "tapped him twice" he was taken to a different room, mirandized and then re-interrogated immediately by the same investigators, Fortner and Bailey. There were no additional warnings. There was not a break in time or change of circumstance. As in Navy, the investigator's actions in the present case violate Seibert. The trial judge erred in refusing to suppress the video recorded statement, State's Exhibit #81. The error was not harmless.

## CONCLUSION

Based on the above arguments, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final 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."

August 14th, 2017

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