STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRANCE SEABROOK,

APPELLANT

APPELLATE CASE NO. 2012-212388

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by denying Appellant's motion to suppress his statements to law enforcement when the coercive techniques used by the officers, such as pitting Appellant against his codefendant and the use of a polygraph, rendered Appellant's statements involuntary and inadmissible?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant at the December 16, 2010 term of General Sessions for armed robbery and kidnapping. R. 502-506. On February 3, 2012, the state filed a Notice of Intent to Seek a Life Imprisonment Sentence pursuant to S.C. Code Ann. § 17-25-45(A). R. 280, ll. 16-22. His case was called to trial on February 27, 2012 before the Honorable Roger M. Young, Sr., and a jury. However, on February 28, 2012, Judge Young granted Appellant's motion for a continuance after the state unexpectedly offered his codefendant immunity in exchange for his testimony against Appellant. R. 7, l. 23 – 8, l. 7.

Appellant's case was again called to trial on March 19, 2012 before the Honorable Carmen T. Mullen, and a jury. R. 10. Assistant Solicitor James M. Bannon represented the state, and Larry W. Weidner represented Appellant. R. 11. On March 21, 2012, the jury acquitted Appellant of kidnapping, but found him guilty of armed robbery. R. 279, ll. 17-23. Judge Mullen sentenced him to life without parole pursuant to S.C. Code Ann. § 17-25-45(A. R. 282, ll. 4-12

On April 5, 2012, a hearing was held before Judge Mullen on Appellant's post-trial motion for a new trial. R. 284. At the conclusion of this hearing, Judge Mullen orally denied Appellant's motion. A subsequent written order was filed on April 27, 2012. R. 496.

On May 4, 2012, Appellant timely filed a Notice of Intent to Appeal. Upon receipt of the appointment to represent Appellant, the Office of Appellate Defense (OAD) requested the trial transcript. OAD received an incomplete transcript. Specifically, OAD only received the transcript of the third day of trial, March 21, 2012, which contained closing arguments, jury instructions, the verdict, and sentencing.

On May 2, 2014, Appellant filed a motion with this Court requesting his case be remanded to the circuit court to reconstruct the record. By order filed June 11, 2014, this Court granted Appellant's motion and remanded the case.

On January 26, 2015, a hearing was held in Beaufort County before Judge Mullen. Deborah Everett, the court reporter who was present at Appellant's trial, was subpoenaed to appear and bring all of her records and recordings from trial. Ms. Everett turned over several compact discs containing her records to the court. Judge Mullen gave these compact discs to Wanda Rowe, a certified court reporter with Court Administration. Ms. Rowe transcribed the proceedings that occurred on March 20, 2012, which included opening statements and all of the trial testimony, from the records of Deborah Everett. R. 224. However, there were numerous "inaudible" portions that appeared throughout the March 20, 2012 transcript. See R. 49-223.

Additionally, Ms. Rowe determined that she was the original court reporter who was present and recorded the *voir dire* and jury selection during Appellant's trial on the morning of March 19, 2012. Ms. Rowe also transcribed these proceedings. R. 38.

On April 15, 2015, a hearing was held in Beaufort County before Judge Mullen to reconstruct the remaining portions of Appellant's trial, which included all of the proceedings that took place on the afternoon of March 19, 2012, specifically all the pretrial motions and a Jackson v. Denno[1] hearing.[2] R. 294. Assistant Solicitor Lynorr Musser represented the state, and Appellate Defender Lara M. Caudy represented Appellant. R. 295.

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[1] 378 U.S. 368 (1964).

[2] There is conflicting information in the record regarding whether a Jackson v. Denno hearing was heard by Judge Young on February 27, 2012, or on some other date, and Judge Mullen subsequently adopted Judge Young's prior ruling or whether the Jackson v. Denno hearing was first heard by Judge Mullen on March 19, 2012. Either way, the parties attempted to reconstruct the Jackson v. Denno hearing at the April 15, 2015 hearing.

At the conclusion of the hearing, Judge Mullen ruled the record had been sufficiently reconstructed to allow for meaningful appellate review. R. 491, l. 25 – 493, l. 18. On April 23, 2015, Appellant filed a Notice of Intent to Appeal from Judge Mullen's oral ruling. Judge Mullen subsequently filed a written order adopting her oral findings on August 12, 2015. R. 499.

By order filed August 21, 2015, this Court granted Appellant's motion to hold the appeal of his conviction and sentence in abeyance pending resolution of his appeal from the order reconstructing the record. Appellant filed an initial brief of appellant and designation of matter on December 14, 2015 challenging the trial court's finding that the record of Appellant's trial had been sufficiently reconstructed to allow for meaningful appellate review. The state filed an initial brief of respondent and designation of matter on March 15, 2016. By opinion filed April 19, 2017, this Court affirmed the trial court's finding. State v. Seabrook, Op. No. 2017-UP-164 (S.C. Ct. App. filed April 19, 2017).

This appeal from Appellant's conviction and sentence follows.

STATEMENT OF THE FACTS

The state alleged at trial that on the evening of October 4, 2010, Appellant robbed an Exxon Station located on Sea Island Parkway on St. Helena Island while armed with a handgun.[3] R. 59, l. 21 – 62, l. 13.

Sean Kirkpatrick, the only employee working at the convenience store that evening, testified that while he was squatting down outside the front door of the store smoking a cigarette, a black male wearing "a Scream Halloween mask" "walked up, put a gun under [his] chin, and said to get inside." Kirkpatrick claimed the man forced him inside the store and demanded he open the cash register. After Kirkpatrick opened the register, the man took all of the cash out of the drawer, ordered Kirkpatrick "to get face down on the ground," and then left. Kirkpatrick said he "waited a few seconds" then got up off the floor, "flicked his cigarette outside," which he had held throughout the robbery, and "phoned [d]ispatch to send out the police." R. 75, ll. 6-24. However, he later clarified that he first called his boss to inform him the store had been robbed then locked the front door at his boss's direction and called 911. R. 85, ll. 16-25.

According to Kirkpatrick, the armed robber was a black male, approximately five feet, four inches to five feet, eight inches tall with a "slender" build. R. 73, l. 24 – 74, l. 1.

Surveillance cameras at the convenience store captured the armed robbery. This footage was played for the jury. R. 76, l. 20 – 78, l. 11.

Shatike Shabazz, whose "given name" is Walter Jenkins, claimed he and Appellant went to the Exxon Station on the evening of October 4, 2010 to meet a "guy named Sub" about a telephone. Shabazz drove a blue Ford Explorer that was registered to a Shawn Boyd to the store and Appellant allegedly rode in the front passenger seat. R. 105, l. 16 –107 l. 2. Shabazz testified that while the

[3] The Exxon Station is also referred to as "Russ's Store" throughout the record.

two were waiting for Sub, who never showed, he went into the store and purchased a couple of items then returned to the car. Shabazz eventually got tired of waiting for Sub and left the store in Boyd's Explorer. However, he claimed that before he left, Appellant got out of the car and decided to remain at the store, presumably to continue to wait for Sub.[4] R. 108, l. 12 – 109, l. 8. According to Shabazz, he never saw Appellant again that evening.

Shabazz testified that he watched the recording of the armed robbery from the surveillance cameras numerous times and that, in his opinion, Appellant was not the armed robber. He explained, "The person's really not built like Terrance [Appellant]. The person had broader . . . shoulders. Terrance [Appellant] is real skinny. Terrance['s] shoulders don't sit that high." R. 121, l. 13 – 122, l. 3. While Shabazz again stated Appellant was the individual who got out of the front passenger seat of the Ford Explorer he was driving that evening, he maintained that the man who robbed the store "[d]oesn't look like Terrance [Appellant]." R. 123, ll. 9-12. Moreover, when Shabazz was first interviewed by law enforcement, he said Appellant was wearing dark green pants and a "dingy" white golf shirt that evening, not a blue and white striped shirt. R. 120, ll. 17-25.

Master Sergeant Brian Chapman of the Beaufort County Sheriff's Office interviewed Appellant shortly after his arrest on November 2, 2010. Chapman claimed he read Appellant his Miranda[5] rights and that Appellant agreed to waive his rights and speak with Chapman. However,

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[4] The surveillance footage from the convenience store shows a blue Ford Explorer pull into the parking lot that evening. Shabazz is seen entering the store and making a purchase. Shortly after Shabazz returned to vehicle, the Ford Explorer is seen leaving the parking lot. Before the vehicle pulled away, the front seat passenger got out of the car and walked to the side of the building were the restrooms were located. This man was wearing a blue and white striped shirt, dark pants, and white shoes. He went off camera and was never seen getting back into the Explorer before it left. The armed robber, who later appeared from the side of the building, is likewise wearing a blue and white striped shirt, dark pants, and white shoes. R. 114, ll. 14-15.

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

according to Chapman, Appellant was unable to sign the waiver of rights form because his hands were handcuffed behind his back. R. 168, l. 23 – 169, l. 3. This interview was audio recorded. R. 174, ll. 14-22. See State's Exhibit No. 28.

Appellant was also interviewed the next day, November 3, 2010, by Lieutenant Brian Baird. Baird likewise claimed he read Appellant his Miranda rights and that Appellant subsequently signed the waiver of rights form and agreed to talk. R. 149, l. 2 – 152, l. 12. However, shortly after the interview began, Chapman entered the room and took over the interrogation because Appellant was allegedly referring to individuals by their "street names" and Baird was unfamiliar with these names. R. 153, ll. 7-23. This second interview was audio recorded as soon as Chapman entered the room.[6] R. 154, ll. 5-8; R. 174, ll. 5-13; See State's Exhibit No. 29.

During both interviews, Appellant denied any involvement in the robbery, but he allegedly "changed his story multiple times" and his statements were inconsistent with each other. R. 179, l. 10 – 180, l. 14; R. 191, ll. 10-21. The audio recordings of these interviews were admitted into evidence and published to the jury over Appellant's objection. R. 174, l. 18 – 175, l. 8; R. 178, ll. 4-21. It is uncertain from the record at trial exactly what Appellant's objection was to the recorded statements because the court simply admitted the exhibits "[s]ubject to prior" objection without defense counsel specifying the grounds for his objection. R. 175, ll. 1-3; R. 178, ll. 13-15.

On remand, the parties attempted to reconstruct the record of the specific arguments defense counsel made pretrial as to why Appellant's statements should be suppressed. Trial counsel Larry Weidner testified that he objected to the admissibility of Appellant's statements based on the following reasons: (1) the coercive nature of the interrogation techniques used by the officers, including pitting witnesses, the use of a polygraph, and "good cop/bad cop," (2) the statements were

[6] The portion of the interview where Baird allegedly advised Appellant of his Miranda rights was not recorded.

inadmissible hearsay because they were not an admission under Rule 801(d)(2), and (3) any probative value of the statements was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. R. 352, l. 2 – 366, l. 14.

Lastly, the state presented three recorded telephone calls Appellant allegedly made to his mother and brother while he was incarcerated at the Beaufort County Detention Center awaiting trial. These recordings were admitted through the testimony of Sergeant Jeff Vortisch, an employee of the detention center, and published to the jury over Appellant's objection. The dates of these telephone calls are February 8, 2011, March 26, 2011, and April 28, 2011. R. 208, l. 17 – 210, l. 21; See State's Exhibit Nos. 37-38. Again, it is unclear from the record exactly what Appellant's objection was to the recorded telephone calls because the court simply admitted these exhibits "[s]ubject to prior" objection without defense counsel specifying the grounds for his objection. R. 209, ll. 12-16. On remand, the parties likewise attempted to reconstruct the record of the specific arguments defense counsel made pretrial as to why the recorded telephone calls should be suppressed.

There was no physical or forensic evidence connecting Appellant to this armed robbery. The state relied solely on the surveillance footage from the convenience store and the testimony of Shatike Shabazz, who, after being offered immunity, claimed Appellant was the front seat passenger who got out of the blue Ford Explorer at the Exxon Station on the evening of October 4, 2010. See R. 198, ll. 10-22.

Defense counsel argued during closing that Sean Kirkpatrick, the clerk at the convenience store that evening, was involved in the armed robbery. The surveillance footage of the robbery shows the man in the "Scream Halloween mask" come around the side of the building while Kirkpatrick is outside smoking a cigarette. Kirkpatrick looked at the man, but showed no reaction.

A car then pulled into the parking lot and the man in the mask retreated behind the side of the building. After these customers left, Kirkpatrick continued to smoke a cigarette outside and the man in the mask approached again from around the side of the building. Kirkpatrick showed little to no reaction to the masked man as he approached, continued to hold his cigarette throughout the entire robbery, and remained completely calm. After the armed robber left, Kirkpatrick calmly finished his cigarette before locking the door to the store and calling his boss and then finally the police. R. 255, l. 1 – 257, l. 25.

Specifically, counsel argued, "The fellow sticks him up with the gun. This is a mighty polite armed robbery because he [Kirkpatrick] holds the door for the fellow with the gun. He goes like this and he holds the door for him. You go first. No, no, no, you go ahead." Counsel later continued:

> He [the armed robber] gets all the money out of the till and the clerk [Kirkpatrick] - - don't forget there's money underneath the tray. Do you see that? The clerk is the one who pulls the tray out for him - - don't forget the money there. He's [Kirkpatrick is] still smoking his cigarette and gets down on the ground. Got to make this look good. He [the robber] grabs a couple of Kools [cigarettes].
>
> The clerk is going to finish his cigarette. He just got robbed. The guy [the robber] leaves now, and he [Kirkpatrick] picks up the phone to call law enforcement or call somebody. He finishes his cigarette. Gives his partner time to get down the road.
>
> He's still enjoying the cigarette. Now he's going to close the [door] up and go throw his cigarette out. He calls his boss first to let him know they've been robbed. Then he got around to calling the cops.
>
> What he's doing is he's buying time. Right?

R. 256, l. 14 – 257, l. 16.

Counsel argued that based on this evidence, at most, a larceny occurred because if Kirkpatrick was involved in the robbery or helped plan the robbery and was a participant then there could be no actual or real "threats or use of force or violence," which is an essential element of

armed robbery. R. 257, ll. 18-25. Specifically, counsel argued, "If we are in cahoots, [then] you know I'm not going to do anything, and there [are] no threats or use of force or violence. What you just saw [on the recording from the surveillance cameras] was a larceny by whoever it was who just stole from the store." R. 257, ll. 22-25.

The jury ultimately acquitted Appellant of kidnapping, but found him guilty of armed robbery. R. 279, ll. 17-23. Because the state had served Appellant before trial with a notice of intent to seek a life sentence, Judge Mullen had no discretion during sentencing and sentenced Appellant to life without parole.[7] R. 282, ll. 4-12.

[7] Interestingly, at the April 15, 2015 hearing, Judge Mullen mentioned her surprise that the state had served Appellant with notice of intent to seek a life sentence suggesting that she did not believe the sentence was justified. She stated, "I had no idea that the State had served him [Appellant] with life without parole . . . [T]here was no choice but to sentence him to life without parole, because they had noticed it." However, she explained that during the trial, "Mr. Seabrook [Appellant] was just like he is now. He seems to have a very nice demeanor." But ultimately, Judge Mullen stated that she "understand[s] his record is what it is." R. 482, l. 9 – 483, l. 8.

ARGUMENT

The trial judge erred by denying Appellant's motion to suppress his statements to law enforcement when the coercive techniques used by the officers, such as pitting Appellant against his codefendant and the use of a polygraph, rendered Appellant's statements involuntary and inadmissible.

Appellant's statements to law enforcement were involuntarily given due to the coercive environment and interrogation techniques used by law enforcement, including pitting Appellant against Shatike Shabazz and pressuring Appellant to take a polygraph, which ultimately caused Appellant's will to be overborne. Appellant was denied due process when the trial judge erroneously admitted his involuntary statements. Respectfully, this Court should reverse the ruling of the trial judge and grant Appellant a new trial.

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." State v. Parker, 381 S.C. 68, 75, 671 S.E.2d 619, 622 (Ct. App. 2008) (quoting State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007)); See Jackson v. Denno, 378 U.S. 368, 377 (1964). "The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence." Id. at 74, 671 S.E.2d at 622 (citing State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007)). "If admitted, the jury must then determine whether the statement was given freely and voluntarily beyond a reasonable doubt." Id. (citing State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988)).

"A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under Miranda v. Arizona, 384 U.S. 436, 498-499 (1966). If a suspect is advised of his Miranda rights, but chooses to make a

statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." State v. Arrowood, 375 S.C. 359, 366-367, 652 S.E.2d 438, 442 (Ct. App. 2007) (internal citations omitted).

In determining whether a statement was given voluntarily, this Court must consider the totality of the circumstances surrounding the defendant giving the statement. Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). "As the United States Supreme Court has instructed, the totality of the circumstances includes 'the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.'" Id. (quoting Schneckloth v. Bustamonte, 412 U.S. at 226).

Both the United States Supreme Court and the South Carolina Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible. The pertinent inquiry is whether the defendant's will was overborne. State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) (citing State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996)).

In this case, the coercive environment combined with law enforcement's use of numerous interrogation techniques rendered Appellant's statements involuntary. It is undisputed that Appellant was in custody at the time he was interviewed. He was brought over to the sheriff's office from the local detention center in handcuffs on both occasions. He was interviewed in a small room by multiple officers, including Brian Chapman, Christine Wilson, and Brian Baird, who each played different roles during the interrogation. After the officers were dissatisfied with the statement Appellant gave on November 2, 2010, they convinced him to partake in a

polygraph examination the following morning to allegedly discern whether he was being truthful. This put further pressure on Appellant.

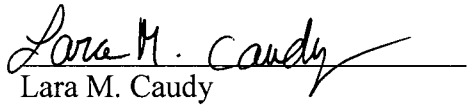
During the interviews, the officers repeatedly acted as if they knew more than they actually did about the armed robbery. R. 186, l. 25 – 187, l. 3. Master Sergeant Chapman told Appellant that Shatike Shabazz had implicated him in the armed robbery when this was not true and began to pit Shabazz against Appellant in an effort to get Appellant to confess. Tr. 187, l. 4 – 189, l. 2. Appellant's will was eventually overborne by these interrogation techniques and his statements were involuntarily given as a result. Consequently, the trial judge erred by denying Appellant's motion to suppress his statements.

Respectfully, this Court should reverse Appellant's conviction and sentence and remand for a new trial.

CONCLUSION

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

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of August, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRANCE SEABROOK,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terrance Seabrook states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before the Honorable Carmen T. Mullen, which was held on March 19-21, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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, she asks the Court to relieve her as counsel for Terrance Seabrook.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of August, 2017.

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."

August 31, 2017.

Lara M. Caudy

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