STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 5511 (S.C. Ct. App. Filed 8/23/2017)

14-GS-32-00603

THE STATE,

RESPONDENT,

V.

LANCE L. MILES,

PETITIONER.

APPELLATE CASE NO. 2015-000308

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 19, 2017.

QUESTIONS PRESENTED

I. The Court of Appeals erred in affirming the trial court's supplemental charge to the jury that the State did not need to prove that Petitioner knew the drugs in the package he possessed were oxycodone; rather, for Petitioner to be guilty of trafficking, the State only needed to prove that Petitioner knew the package contained any illegal drugs.

II. The Court of Appeals erred in affirming the trial court's admission of three statements of Petitioner to police because Petitioner's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution was violated by the introduction of his statements to police where the first statement was the product of an interrogation by officers who failed to advise Petitioner of his *Miranda*[1] rights and his subsequent statements were tainted by the initial violation and the product of an involuntary waiver.

A. The Court of Appeals erred in affirming the trial court's admission of statements made by Petitioner prior to officers advising Petitioner of his *Miranda* rights and obtaining a valid waiver of those rights where Petitioner clearly was in custody based upon the totality of the circumstances.

B. The Court of Appeals erred in affirming the trial court's admission of statements made by Petitioner subsequent to the officer advising him of his *Miranda* rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officer questioned Petitioner in the same location with no temporal break between the post-advisement interrogation and the prior, unwarned interrogation.

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

STATEMENT OF THE CASE

On March 10, 2014, the Lexington County Grand Jury indicted Petitioner Lance L. Miles for one count of trafficking in illegal drugs. R. 326 – 327.

On February 11-12, 2015, Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury. Robert "Theo" Williams represented Petitioner, and Assistant Solicitors Micah Caskey and Casey Rankin represented the State.

The jury found Petitioner guilty as charged. R. 314, ll. 2-13. The trial court sentenced Petitioner to twenty-five years imprisonment. R. 321, ll. 1-8.

Petitioner filed a notice of appeal which was perfected by the Division of Appellate Defense in the Commission on Indigent Defense. On August 23. 2017 the Court of Appeals issued an opinion affirming Petitioner Miles' conviction and sentence. State v. Miles, Op. No. 5511 (Ct. App. August 23, 2017).

Appellate Counsel filed a petition for rehearing which was denied by the Court of Appeals on October 19, 2017. This petition for a writ of certiorari follows.

STATEMENT OF FACTS

On the morning of September 13, 2013, Agent Doug Edmonson of the Lexington County Sheriff's Department was at a FedEx warehouse near the Columbia Metropolitan Airport looking at arriving packages in an effort to determine if they contained drugs. R. 65, ll. 6 – 67, ll. 13. Edmonson would allege that one particular package had "indicators of maybe containing some type of illegal narcotic." R. 8, ll. 12-19.

According to Edmonson the package was suspicious because: (1) it was "excessively" taped, (2) it was being sent overnight from California, (3) the sender paid in cash; and (4) the sender waived the signature requirement for the recipient. R. 44, ll. 6-23. Edmonson noted the recipient, the address and released the package for delivery. *Id.* He then ran the name of the recipient through a law enforcement database. The name did not match the delivery address. R. 50, ll. 18 – 51, ll. 23.

Based on this information, Edmonson decided to conduct surveillance of the delivery address. Edmonson enlisted the help of Lexington City Police Officer Marc Miramontes and Lexington County Deputy Travis Bass. Miramontes, sitting in an undercover vehicle, observed the package being delivered and witnessed a never-identified black female, who was talking on a cell phone, step out of the apartment where the package was delivered. R. 31, ll. 3 – 32, ll. 14.

The unknown female looked at the package briefly, then went back inside the apartment. Shortly thereafter, Miramontes saw Petitioner walk up to the apartment and pick-up the package. *Id.* Petitioner then began to walk towards the back of the apartment complex. Edmonson and Bass drove into the complex's parking lot to intercept Petitioner. R. 19, ll. 1 – 21, ll. 19.

Both officers exited their vehicles with guns drawn and ordered Petitioner "to the ground." R. 37, ll. 1 – 38, ll. 13. When Petitioner failed to immediately do so, the officers forced him to the

ground and handcuffed him. Edmonson interrogated Petitioner.[2] *Id.* Without administering *Miranda* warnings, Edmonson demanded Petitioner explain what he was doing with the package and what Miles thought was in it. R. 10, ll. 4-25.

Petitioner initially denied knowing what was in the package. *Id.* Edmonson posited that he believed the package contained narcotics. *Id.* Still handcuffed, Petitioner conceded that the package might contain drugs. *Id.* At trial Edmonson would recall, ***"[a]fter he told me that it might have drugs in it, then I Mirandized."*** *Id.* at ll. 22-25 (*emphasis added*). Edmonson then told Petitioner "I said 'we need to talk about this . . . I want to talk about this. I want you to tell me everything you know about this." R. 12, ll. 19-24. Edmonson alleged that Petitioner still wanted to talk about the package.

Having extracted a confession from the recently tackled and handcuffed Petitioner without administering *Miranda* warnings, Edmonson then reiterated his initial questions asking Petitioner again what did he believe was in the package. R. 11, ll. 10 – 12, ll. 24. Petitioner repeated that he believed the package probably contained drugs. *Id.* Crucially, Petitioner did not know what kind of drugs were in the package. *Id.* There was no evidence that Edmonson explained to Petitioner that his *pre-Miranda* statements were very likely inadmissible.

According to Edmonson, Petitioner then gave permission for police to open the package. However, because he "has no problem going the extra mile," Edmonson requested that a K-9 unit inspect the package. R. 21, ll. 21 – 22, ll. 21. Once deployed the dog gave a "positive alert" indicating that there may be narcotics in the package. *Id.*

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[2] During trial, the assistant solicitor joked with Edmonson that he must be "the largest physicist in the world," referencing Edmonson's undergraduate degree. R. 81, ll. 10-11. Edmonson agreed, adding that he was "one of the strongest ones in the world. That's a fact." *Id.* at ll. 12-13.

Then, rather than opening the package, Edmonson called Deputy Dennis Tracy who completed a pre-formatted search warrant and presented it to a magistrate. R. 125, ll. 1 –126, ll. 12. The magistrate signed the search warrant and Edmonson finally opened the package. Inside the package were a tee-shirt, a teddy bear, and a wax candle. R. 131, ll. 8 -24; R. 136, ll. 16-24. Police broke open the wax candle and discovered three hundred tablets of oxycodone, with total drug weight amounting to nine grams of oxycodone. R. 251, ll. 8 – 252, ll. 12.

Approximately, thirty to forty-five minutes after he was seized and interrogated without being given *Miranda* warnings, law enforcement had Petitioner provide written answers to a series of questions regarding the package. R. 176, ll. 8-18; R. 195, ll. 6-15. Edmonson would recall ordering Petitioner, for a third time, to "tell me everything that you know about this and write it down for me." R. 12, ll. 19-24. Petitioner was then belatedly *Mirandized* for a second time. *Id.* Petitioner's written statement indicated that he believed there were drugs in the package, but did not know what kind of drugs they were. R. 13, ll. 3 – 15, ll. 12.

At law enforcement's prompting, Petitioner admitted that he had retrieved packages on three different occasions. R. 25, ll. 8-14. Further, Petitioner stated that he did not know the legal name of the drug dealer that directed him to pick up the package. R. 107, ll. 2-13. In addition, police never asked him where he delivered packages on prior occasions and did not ask him where he was to deliver the package at issue.

Law enforcement never identified the black female located in the apartment and never attempted to contact California law enforcement to determine where the package had been sent from. R. 119, ll. 5 – 121, ll. 4. Police ended their investigation once Petitioner was arrested. *Id.*

Petitioner moved pre-trial to suppress the oral and written statements he made to police at the time of his arrest. The State conceded that Petitioner's pre-*Miranda* oral statements made during custodial interrogation were inadmissible. R. 7, ll. 1-10. However, the State argued that the written statement, which was substantially similar to Petitioner's pre-*Miranda* statements, was freely and voluntarily given. R. 41, ll. 4-19.

In a *Jackson v. Denno*[3] hearing, Edmonson, Miramontes, and Bass all testified. The officers agreed that Petitioner gave his written statement approximately thirty to forty-five minutes after he was tackled and handcuffed by law enforcement. R. 176, ll. 8-18; R. 195, ll. 6-9. Edmonson was the only officer able to provide a complete timeline of Petitioner's seizure and interrogation.

He conceded that he first interrogated Petitioner without giving *Miranda* warnings. R. 19, ll. 16 – 21, ll. 19. Edmonson testified that he only *Mirandized* Petitioner after Petitioner stated, in response to Edmonson's questioning, that he believed that the package likely contained drugs. Edmonson then had Petitioner repeat his confession post-*Miranda*. *Id.* Then for a second time Edmonson belatedly re-*Mirandized* Petitioner prior to having him provide written responses to a series of questions - which were virtually identical to his pre-*Miranda* questions. R. 12, ll. 19 – 15, ll. 12.

The trial court ruled that the written statement was "entered into freely and voluntarily without coercion" and that Petitioner had been adequately advised of his rights. R. 42, ll. 16-23. However, the court also ruled that Petitioner's statements regarding other occasions when he had previously picked-up packages must be redacted from the statement before it was submitted to the jury. *Id.*

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[3] *Jackson v. Denno*, 378 U.S. 368 (1964).

At trial, Edmonson, Miramontes, and Bass all testified for the State. Deputy Ted Xanthakis also testified to the positive alert by the drug dog.[4] R. 8, ll. 12 – 9, ll. 7.

Trial Testimony of Doug Edmonson

Edmonson was the State's first and most important witness. Edmonson testified as to the factors that made the package suspicious and how he assembled several other police officers to begin surveillance of the delivery address. R. 88, ll. 7-21. Edmonson recalled that after he was notified that Petitioner had taken the package, he and Bass drove up to Petitioner, exited their cars with guns drawn, and "secured" him by forcing him to the ground and handcuffing him. R. 94, ll. 3-19.

Edmonson claimed that he believed Petitioner was going to run and that Petitioner had attempted to discard the package once he saw police. R. 95, ll. 3-13. Edmonson testified that Petitioner confessed that he knew "narcotics" were in the package and that he gave permission for Edmonson to open it. R. 95, ll. 1-19. Edmonson then explained the "extra-mile" that he went to have a dog inspect the package and to call in a search warrant. *Id.*

Over the renewed objection of defense counsel, the State introduced Petitioner's written statement. R. 102, ll. 4 – 106, ll. 16. When reviewing the statement with Edmonson, the State stressed that Petitioner admitted he knew the package contained drugs. R. 106, ll. 24 – 110, ll. 11. However, Petitioner's statement never indicated that Petitioner knew the drugs were oxycodone. *Id.* In fact, Edmonson conceded on cross-examination that even he believed the package contained marijuana. R. 126, ll. 13 – 127, ll. 4. During cross-examination, Edmonson testified that Petitioner initially denied knowing what was in the package. R. 123, ll. 1-12.

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[4] Curiously, Xanthakis testified that the dog was never tested on its ability to identify oxycodone. R. 228, ll. 3-8.

Additional *Voir Dire* Testimony on Petitioner's Pre-*Miranda* Statements

During a break in questioning, the State argued that the defense had opened the door to all of Petitioner's pre-*Miranda* statements by asking Edmonson if Petitioner had initially denied knowing the contents of the package. R. 146, ll. 3-21. The State now claimed that Petitioner had apparently made additional, lengthy pre-*Miranda* statements going beyond simply denying knowledge of the package's contents and then conceding that the package likely contained drugs. *Id.*

Specifically, the State sought to introduce previously undisclosed pre-*Miranda* statements by Petitioner that he was acting as a "mule" to support his family, that he handled packages before, that he had just been released from prison, and that he could not find a job. R. 149, ll. 20 – 150, ll. 6. On *voir dire*, Edmonson reiterated that Petitioner did not know what types of drugs were in the package. R. 156, ll. 7-12.

The State claimed that they had not disclosed these statements because they had conceded that the all pre-*Miranda* statement were inadmissible. R. 158, ll. 2-8. However, now that the defense had opened the door on cross-examination, the statements provided proof of trafficking by conspiracy. R. 154, ll. 15 – 155, ll. 25. The trial court voiced concerns that the State could not prove that the other instances were sufficiently close in time to be admissible under the common scheme or plan exception. R. 160, ll. 13 – 161, ll. 7.

Conveniently, Edmonson claimed - for the first time - that Petitioner had told him pre-*Miranda* that he had picked-up other packages "within that year." R. 161, ll. 18-25. Edmonson helpfully added, also for the first time, that when he interrogates people he always tries to get a timeline "so it won't be so vague." *Id.* Edmonson further alleged, again for the first time, that Petitioner confessed pre-*Miranda* to having done pick-ups between three and seven times in the past year, rather than the three times recorded in the written statement. R. 162, ll. 2-13.

A surprised defense counsel noted ruefully "that's the first time we have heard this discussion . . . . It's getting better." R. 162, ll. 14-17. Ultimately, the trial court ruled that the prejudicial impact of Petitioner's alleged admission that he had previously picked-up packages outweighed its probative value. R. 163, ll. 4-13. The court did allow Edmonson to testify that Petitioner told him he knew he was being paid to pick-up a package containing drugs. *Id.*

Jury Instructions

Defense counsel argued that Petitioner was entitled to an instruction that "before you commit a crime, you must have criminal intent to commit the crime, meaning you must have knowledge." R. 273, ll. 23 – 295, ll. 3. The court disagreed, believing that the trafficking statute did not require an accused "to intend to possession oxycodone." R. 274, ll. 4-15. Instead, the court determined that trafficking only required Petitioner to know that there are illegal drugs in the package. *Id.* at ll. 23-24.

Unsurprisingly, the State agreed with the court's reasoning. The assistant solicitor averred - without citing to any supporting legal authority - that, "the law is clear, as long as [Petitioner] knows they are illegal drugs, we have satisfied that element." R. 276, ll. 12-17.

During its deliberation the jury submitted a two-part question: "[d]oes the State have to prove that the defendant knowingly brought into the State four grams or more of oxycodone or just any amount of illegal drugs in order to consider this trafficking?" R. 317, ll. 1-6. In response the court suggested:

> [T]he State does not have to prove that the defendant knowingly brought into the state this particular drug, just that the statute requires knowing that it was illegal drugs. . . . [Petitioner] [d]oes not have to know the particular drug that is in question. Simply that he knew they were illegal drugs. . . . My proposed response would be that the State does not have to prove that the Defendant knew the drugs were oxycodone, just that the package contained illegal drugs.

R. 317, ll. 7 - 318, ll. 4.

Defense counsel argued that the legislature created the trafficking statute, with its enhanced penalties, to punish individuals who knowingly possess a large amount of a certain drug; meaning that the defendant must know what drug they are possessing. R. 321, ll. 9-14.

Defense counsel, looking to the trafficking statute, argued that the statute clearly required that the defendant "knowingly sells, et. cetera, then it says four grams or more of morphine." R. 323 5-15. Defense counsel noted that interpreting the statute in order to fit the facts of the case was improper and that straightforward reading of the trafficking statute evidenced that the legislature intended to require the State to prove that a defendant accused of trafficking, knowingly committed any of the enumerated acts with a specific drugs. R. 320, ll. 5-11; R. 323, ll. 5-15; S.C. Code Ann. § 44-53-370(e)(1)-(8).

The court ultimately decided that because § 44-53-370(e)(3), the statute under which Petitioner was indicted, was titled "Trafficking in Illegal Drugs" that the State need only prove that the Petitioner knew that the package contained illegal drugs, not that it contained oxycodone. R. 323, ll. 16-22; R. 326, ll. 16 - 327, ll. 16. Focusing on the facts of Petitioner's case, the court concluded that, "[y]ou also have to assume that the legislature didn't draft statutes that are meaningless." R. 324, ll. 11-13.

In summary the court noted that, "the burden of proof on the state just has to prove they were illegal drugs." R. 326, ll. 21-25. The court then instructed the jury: "the law in South Carolina is the State does not have to prove that the Defendant knew that the drugs in the package were oxycodone, just that he knew that the package contained illegal drugs." R. 329, ll. 21-25.

ARGUMENTS

I.

The Court of Appeals erred in affirming the trial court's supplemental charge to the jury that the State did not need to prove that Petitioner knew the drugs in the package he possessed were oxycodone; rather, for Petitioner to be guilty of trafficking, the State only needed to prove that Petitioner knew the package contained any illegal drugs.

Defense counsel argued that in order to be guilty of trafficking the State had to prove Petitioner knew that the package contained oxycodone. R. 318, ll. 5 – 328, ll. 22. The trial court disagreed, specifically noting that § 44-53-370(e)(3) defined an offense known as "trafficking in illegal drugs" and reasoning that adopting the defense's argument would render trafficking cases "unprosecutable." *Id.* Thus, the court instructed the jury that "the State does not have to prove that the Defendant knew that the drugs in the package were Oxycodone, just that he knew that the package contained illegal drugs." R. 329, ll. 22-25.

The trial court erred reversibly by instructing the jury that the State did not need to prove that Petitioner knew the drugs in the package he possessed were oxycodone for Petitioner to be guilty of trafficking. The court's instructions inaccurately stated the law and were based on a forced interpretation of § 44-53-370(e)(3), as well as South Carolina's other trafficking statutes. The clear legislative intent of the trafficking statutes is to ***severely punish individuals who knowingly undertake a broad variety of activities involving certain amounts of specific drugs***. *State v. Taylor*, 323 S.C. 162, 164-166, 473 S.E.2d 817 (Ct. App. 1996) (court's erroneous instruction that defendant could be convicted of trafficking in crank if she acted with criminal negligence was not harmless where the trafficking statute specifically required that a defendant act "knowingly" and the main

issue before jury was whether defendant was merely present but not participating in drug transaction or whether she was an active participant) (*emphasis added*).

The Court of Appeals found, in determining legislative intent, that by using "knowingly" in subsection (e), the Legislature did not intend to require the state to prove that a defendant knew the specific type of illegal drug he was trafficking. The Court wrote that when a statute can be read in its ordinary sense, then courts cannot engineer an extraordinary one. The Court ruled that because the Legislature titled subsection (e) as "trafficking in illegal drugs," That affirmed the Court of Appeals' decision that a defendant need not know the precise identity of the controlled substance to be guilty.

The Court of Appeals misapprehended the issue.

The Narcotics and Controlled Substances Act ("The Act") is a comprehensive statutory scheme regulating the all aspects of the use and prohibition of controlled substances. In § 44-53-110, the Act defines number of relevant terms. For instance, the Act defines "controlled substance" as a drug, substance, or immediate precursor in Schedules I through V in Sections 44-53-190, 44-53-210, 44-53-230, 44-53-250, and 44-53-270." § 44-53-110(6). The Act also defines specific drugs and narcotics such as marijuana, cocaine base, methamphetamine, and opium. § 44-53-110 (9), (27)-(30).

The Act criminalizes the possession of "a controlled substance." Possession encompasses a broad range of conduct:

> Except as authorized by this article it shall be unlawful for any person:
>
> (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase **a controlled substance** or a controlled substance analogue;

> (2) to create, distribute, dispense, deliver, or purchase, or aid, abet, attempt, or conspire to create, distribute, dispense, deliver, or purchase, or possess with intent to distribute, dispense, deliver, or purchase a counterfeit substance.

§ 44-53-370(a) (*emphasis added*). Notably, possession of a controlled substance does not require the State to prove a defendant "knowingly" possessed a "controlled substance." *State v. Ferguson*, 302 S.C. 269, 395 S.E.2d 182 (1990) (holding that defendant must be at least criminally negligent when he or she manufactured, distributed, or dispensed a controlled substance under § 44-53-370(a)). The punishment for unauthorized possession of a "controlled substance," "counterfeit substance," or "controlled substance analogue" varies depending on the which schedule the "controlled substance" falls into. § 44-53-370(b).

Turning to § 44-53-370(e)(3), the structure of this subsection different from that of § 44-53-370(a) and § 44-53-370(c). The trafficking statute does not use the word "**controlled substance.**" Rather, South Carolina's trafficking offenses are divided by drug type and then further divided by the amount of the specific drug with sentencing ranges also determined based, in part, on the number of the defendant's prior offenses. § 44-53-370(e)(1)-(8). This structure, when read in a straightforward manner, makes clear that the legislature intended to punish individuals who are "knowingly in actual or constructive possession" of four grams or more of "any morphine, opium, salt, isomer, or salt of an isomer thereof."

Our Supreme Court has held that "knowledge" can be equated with a defendant having a "**firm belief" or awareness of a particular element or fact.**" *State v. White*, 311 S.C. 276, 44 S.E.2d 741 (1947) (former receipt of stolen goods statute required that State to prove that defendant knew he was receiving stolen goods). It will often be proved by circumstantial evidence. *Id.* Our courts have rejected a definition of "knowledge" that encompasses "willful blindness" as it would

improperly "broaden the meaning of knowledge.'" *Ducworth v. Neely*, 319 S.C. 158, 456 S.E.2d 896 (Ct. App. 1995). Requiring knowledge of the specific drug being trafficked makes sense given the harsh penalties for trafficking and the lesser penalties for the two possession offenses.

In issuing its opinion, this Court of Appeals failed to consider that § 44-53-370(e) is not the only trafficking statute. Additional standalone trafficking offenses are found in § 44-53-375(c) covering trafficking in methamphetamine and crack cocaine. This statute is worded identically to the trafficking offenses found in § 44-53-370(e):

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" and, upon conviction, must be punished as follows if the quantity involved is:

§ 44-53-375(c).

A plain reading of the § 44-53-370(e)(3) requires the State to prove that Petitioner knew he was possessing oxycodone. This Court of Appeals' opinion inserted the term "controlled substance" into § 44-53-370(e). Injecting the word "controlled substance" into § 44-53-370(e)(3) would create two arbitrary classes of trafficking offenses. Under § 44-53-370(e), a defendant could be guilty of trafficking in one of the enumerated drugs, by virtue of there being evidence that he knew he was dealing with a controlled substance. By contrast, to be guilty of trafficking under § 44-53-375(c), the State would have to prove that a defendant specifically knew he was trafficking in methamphetamine or crack cocaine. This inconsistent outcome among similarly situated defendants could not have been the intent of the legislature.

Jury Instructions and Rules of Statutory Construction

A trial judge must narrowly tailor his or her response to the specific question asked by the jury. *State v. Smith*, 304 S.C. 129, 132, 403 S.E.2d, 162, 164 (Ct. App 1991). The answer provided by a trial judge must not mislead the jury as to an element charged in the indictment or improperly suggest the answer to a question of fact. *Id.* at 131, 403 S.E.2d at 163. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21 (2009).

The trial court has the responsibility to answer the jury's question correctly and in a way that clarifies the issues for the jury. *State v. Huckabee*, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010). In answering a question from the jury, the trial court must also keep in mind the juror's reliance on the court to instruct them on the applicable law and the great weight that jurors give to the judge's pronouncements. *State v. Campbell*, 297 S.C. 24, 26, 374 S.E.2d 668, 669 (1988).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (*citing State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999) *cert. denied as improvidently granted, State v. Hudson*, 346 S.C. 139, 551 S.E.2d 253 (2001).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan* at 366, 574 S.E.2d 203, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.*

Courts should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson*, 336 S.C. 237, 519 S.E.2d 577.

Finally, penal statutes must be strictly construed against the State and in favor of the defendant. *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991). Any doubt as to the proper construction should be resolved in favor of the citizen against the state. *State v. Cutler*, 374 S.C. 376, 264 S.E.2d 420 (1980).

The structure of § 44-53-370(e)(3) makes clear that the legislature intended to punish individuals who are "knowingly in actual or constructive possession" of four grams or more of "any morphine, opium, salt, isomer, or salt of an isomer thereof." South Carolina's trafficking offenses are divided by drug type and then further divided by the amount of the specific drug with sentencing ranges also determined based, in part, on the number of the defendant's prior offenses. § 44-53-370(e)(1)-(8). A plain reading of the § 44-53-370(e)(3) requires the State to prove that Petitioner knew he was possessing oxycodone.

Applying the court's interpretation to the other seven drug specific sub-sections of § 44-53-370(e) demonstrates that the legislature clearly intended the "knowingly" requirement to encompass not only the criminal act, but a defendant's knowledge of the specific drug being trafficked. For example, § 44-53-370(e)(1) defines "trafficking in marijuana;" § 44-53-370(e)(2) defines "trafficking in cocaine" 3-370(e)(8) defines "trafficking in MDMA;" and so on.

Moreover, the South Carolina Judicial Department's suggested jury charges support this consistent interpretation of § 44-53-370(e): "[t]he Defendant is charged with trafficking in

_____ [*drug*]. The State must prove beyond a reasonable doubt that the Defendant knowingly sold . . . was knowingly in actual or constructive possession, [or] knowingly attempted to become in actual or constructive possession of _____ [*drug*]." *Suggested Jury Instructions - Criminal*, South Carolina Judicial Department (November 4, 2015), http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf.

In contrast, the trial court's interpretation of § 44-53-370(e) would require the State to prove a defendant knew the specific drug at issue in every trafficking case, ***except when a defendant is accused of trafficking under § 44-53-370(e)(3)***. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (courts must reject an interpretation which leads to an absurd result that could not have been intended by the legislature) (*emphasis added*).

This inconsistent outcome could not have been the intent of the legislature. The specific drugs identified in § 44-53-370(e)(3) show that "trafficking in illegal drugs" is more accurately described as trafficking in heroin or opiates, or its derivatives. Heroin was among the first drugs - along with marijuana, cocaine, LSD, and crack cocaine, included in the trafficking statute. McAninch, Fairey & Coggiola, *The Criminal Law of South Carolina* 447 (5th ed. 2007).

Over the years, the General Assembly has revised the trafficking statute to increase the number of prohibited acts and to include new drugs such as GHB and MDMA. *Id.* The evolution and expansion of § 44-53-370(e) strongly suggests that the "trafficking in illegal drugs" title of § 44-53-370(e)(3) is simply ill-conceived and out-of-date. *State v. Sweat*, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008) ("language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose").

720 Ill. Comp. Stat. Ann. § 570/401.1(a) (*emphasis added*).

Accordingly, the trial court committed reversible error by instructing the jury that the State did not need to prove beyond a reasonable that Petitioner knowingly possessed oxycodone, rather the State needed only to prove that the Petitioner knowingly possessed a controlled substance. This response was a misstatement of the applicable law and based on an improper construction of § 44-53-370(e) and § 44-53-370(e)(3).

II.

The Court of Appeals erred in affirming the trial court's admission of three statements of Petitioner to police because Petitioner's right against self-incrimination as guaranteed by the Fifth and the Fourteenth Amendments to the U.S. Constitution was violated by the introduction of his statements to police where the first statement was the product of an interrogation by officers who failed to advise Petitioner of his *Mirandi** rights and his subsequent statements were tainted by the initial violation and the product of an involuntary waiver.

The Court of Appeals held that at trial, the state conceded that Agent Edmonson's immediate questioning of Miles upon arrest was a custodial interrogation that triggered *Miranda.* The state had agreed not to present evidence of Miles' first two statements. Later during a bench conference, Miles agreed to the admissibility of the two statements. The court ruled that the issue of the third statement violating *Seibert* and *Navy* was not preserved for review but even so, the court found no prejudice to Miles.

Discussion

A. The court erred in admitting statements made by Petitioner prior to officers advising Petitioner of his *Miranda* rights and obtaining a valid waiver of those rights where Petitioner clearly was in custody based upon the totality of the circumstances.

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. The Fourteenth Amendment secures against state invasion of the same privilege that the Fifth Amendment guarantees against federal infringement. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *see also* U.S. Const. amend. XIV.

"[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." *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

Determining whether a defendant is in custodial interrogation is an objective assessment of the facts and circumstances surrounding the questioning:

Clearly, Petitioner was in custody when Edmonson interrogated him. Bass and Edmonson (the self-described largest and strongest physicist/police officer in the world) exited their vehicles with guns drawn and ordered Petitioner to the ground. R. 37, ll. 1 – 38, ll. 13. Petitioner was physically forced to the ground and handcuffed. *Id.* Edmonson's interrogation started immediately thereafter. Accordingly, the court erred in permitting the introduction of any portion of Petitioner's pre-*Miranda* statements due to the officer's failure to inform Petitioner of his rights prior to subjecting Petitioner to a custodial interrogation.

B. The trial court erred in admitting statements made by Petitioner subsequent to the officer advising him of his *Miranda* rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officer questioned Petitioner in the same location with no temporal break between the post-advisement interrogation and the prior, unwarned interrogation.

The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the United States Supreme Court confronted a case very similar to the present case. Officers awakened Seibert at 3 a.m. and transported her to the police station. There, an officer questioned Seibert for thirty to forty minutes without giving her *Miranda* warnings and obtained an admission from Seibert that she knew a mentally-ill teenager living with her family was meant to die in a house fire, which was started to cover up the death of Seibert's own disabled child. The officer then gave Seibert a twenty-minute break. *Id.* at 604-605.

When the interrogation resumed, the officer turned on a tape recorder and gave Seibert the *Miranda* warnings. He also obtained a written waiver from her. The officer restarted questioning by confronting Seibert with her pre-warning statements. Again, the officer obtained the desired answer – that Seibert knew the teenager was supposed to die in the fire. *Id.* at 605.

At trial, the judge suppressed Seibert's pre-warning statements, but admitted the post-warning statements. *Id.* at 606. The United States Supreme Court held this was in error because "[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 611. The Court held "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Id.* at 613-614 (quoting *Moran*, 475 U.S. at 424).

The facts presented in Seibert were that the unwarned interrogation was conducted in the police station, and "the questioning was systematic, exhaustive, and managed with psychological skill." *Id.* at 602. Officers paused only for twenty minutes before resuming questioning after administering the warnings and "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited." *Id.* at 617.

Our Supreme Court confronted this issue in *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of his son, Navy gave a statement to police at the hospital. Officers later learned that the cause of death was smothering or suffocation. *Id.* at 297, 688 S.E.2d at 839. The next day, Navy was driven by police to the station and gave a statement in which he described the child having breathing problems and his ensuing panic. *Id.* at 297-298, 688 S.E.2d at 839.

Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy was told he was not under arrest. The officers then asked follow-up questioning. "At this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this second statement, Navy admitted to popping the child on the back and possibly patting the child on the mouth. *Id.* at 298-299, 688 S.E.2d at 840.

After a short break, officers then advised Navy of his *Miranda* warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first adding only that Navy admitted to placing his hand over the child's mouth to stop the crying multiple times and to "popping" the child on the back. *Id.* at 299-300, 688 S.E.2d at 840. Officers contacted the pathologist who stated the actions detailed in Navy's second statement could not have caused the child's death. In response, officers obtained a third written statement from Navy admitting that he could have held his hand over the child's nose and mouth for longer than he first said. *Id.* at 300, 688 S.E.2d at 840-841.

The Court held the first statement at the hospital was admissible because there was evidence to support the trial judge's finding that Navy was not in custody. However, the second and third statements were inadmissible as they were obtained in violation of *Seibert*. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (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. *Navy*, 386 S.C. at 302, 688 S.E.2d at 841-842.

The Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. *Id.* at 303, 688 S.E.2d at 842. Once Navy was at the police station, officers "began an unwarned custodial interrogation designed to elicit incriminating information." *Id.* After receiving incriminating statements, officers permitted Navy a break, and then administered *Miranda* warnings.

The interrogation resumed with the same officers, who made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four *Seibert* factors were satisfied. *Navy*, 386 S.C. at 303, 688 S.E.2d at 842.

The interrogation of Petitioner presents a similar factual scenario as in *Seibert* and *Navy*. Officers interrogated Petitioner for an extended period of time prior to advising him of his rights. At the onset of the pre-advisement interrogation, Petitioner initially denied knowing the contents of the package. R. 10, ll. 4-25. Unsatisfied with this answer, Agent Edmonson continued to probe Petitioner, telling him that he believed there were drugs in the package. *Id.*

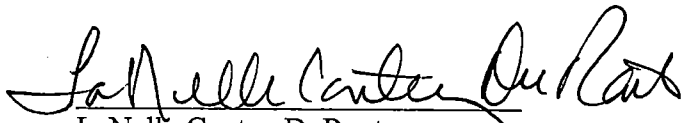
Petitioner eventually conceded that there were very likely drugs in the package. *Id.* In response to continued questioning, Petitioner also allegedly admitted that he had previously picked-up other packages in the past year, and that he did so because he could not find other employment to support his family. R. 149, ll. 20 – 150, ll. 6.

What is clear is that after obtaining a written waiver of Petitioner's rights, the same officer, Edmonson, continued to ask Petitioner the same questions and received the same answers.. Moreover, there was no break whatsoever between the unwarned statements and the warned statements as Petitioner made his written statement only thirty to forty-five minutes after being tackled and handcuffed by police. R. 176, ll. 8-18; R. 195, ll. 6-15. .

CONCLUSION

Based on the foregoing arguments, Petitioner Lance L. Miles respectfully requests that this Court grant certiorari; reverse the Court of Appeals' decision; reverse Petitioner's conviction and remand this case on Issues I and III, and issue an Order of acquittal on Issue II.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 5511 (S.C. Ct. App. filed 8/23/2017)
14-GS-32-00603

THE STATE,

RESPONDENT,

V.

LANCE L. MILES,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Lance L. Miles, #299857, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 14th day of November, 2017.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 14th day of November, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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November 14, 2017

Megan Harrigan Jameson, Esquire
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Re: The State v. Lance L. Miles

Dear Ms. Jameson:

Enclosed are two copies of the Petition for Writ of Certiorari and the Appendix in the above case that I have filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

LaNelle Cantey DuRant
Appellate Defender

LCD/cp

Enclosures

cc: Court of Appeals