

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

RECEIVED

JUN 05 2012

SC COURT OF APPEALS

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF ISSUE ON APPEAL..... 3

STATEMENT OF THE CASE..... 4

ARGUMENT

The trial court reversibly erred by failing to suppress Appellant’s statement to law enforcement where Appellant was told during interrogation that it would be better to cooperate, and where Appellant testified that he was promised leniency regarding his bond and the charge, and that his inquiry regarding an attorney was dismissed by law enforcement. 5

CONCLUSION..... 15

PETITION TO BE RELIEVED AS COUNSEL 16

CERTIFICATE OF COUNSEL..... 17

TABLE OF AUTHORITIES

Cases

<u>Berghuis v. Thompkins</u> , ___ U.S. ___, 130 S.Ct. 2250, 2260 (2010).....	9
<u>Dickerson v. United States</u> , 530 U.S. 428, 120 S.Ct. 2326 (2000).....	10
<u>Edwards v. Arizona</u> , 451 U.S. 477, 101 S.Ct. 1880 (1981)	12
<u>Lego v. Twomey</u> , 404 U.S. 477, 92 S.Ct. 619 (1972)	9
<u>Mincey v. Arizona</u> , 437 U.S. 385, 98 S.Ct. 2408 (1978).....	10
<u>State v. Broome</u> , 268 S.C. 99, 232 S.E.2d 324 (1977).....	10
<u>State v. Kennedy</u> , 333 S.C. 426, 510 S.E.2d 714 (1998)	12
<u>State v. Miller</u> , 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007)	9
<u>State v. Peake</u> , 291 S.C. 138, 352 S.E.2d 487 (1987).....	10
<u>State v. Quattlebaum</u> , 338 S.C. 441, 527, S.E.2d 105 (2000)	13
<u>State v. Wannamaker</u> , 346 S.C. 495, 552 S.E.2d 284 (2001)	12
<u>Withrow v. Williams</u> , 507 U.S. 680, 113 S.Ct. 1745 (1993)	10

Constitutional Provisions

U.S. Const. amend XIV	12
U.S. Const. amend. V	12

STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to suppress Appellant's statement to law enforcement where Appellant was told during interrogation that it would be better to cooperate, and where Appellant testified that he was promised leniency regarding his bond and the charge, and that his inquiry regarding an attorney was dismissed by law enforcement?

STATEMENT OF THE CASE

Appellant Marvin Bowens Green (a.k.a. Marvin Lamar Bowens) was indicted by the Charleston County Grand jury on July 7, 2009, for armed robbery. R. 17, ll. 1-8; R. 25, ll. 1-13; R. 520 (Indictment). Appellant's case proceeded to trial before the Honorable R. Markley Dennis, Jr., and a jury from June 22 through 24, 2011. Rodney Davis (Counsel) represented Appellant, while Michael Sahn and Rutledge Durant represented the State. R. 1. The jury found Appellant guilty as charged, and the trial court imposed a sentence of twenty years incarceration. R. 503, ll. 1-7; R. 517, ll. 4-7.

ARGUMENT

The trial court reversibly erred by failing to suppress Appellant's statement to law enforcement where Appellant was told during interrogation that it would be better to cooperate, and where Appellant testified that he was promised leniency regarding his bond and the charge, and that his inquiry regarding an attorney was dismissed by law enforcement.

A pretrial hearing was held pursuant to Jackson v. Denno¹ to determine whether the written statement Appellant made to Detective Charles Lawrence (Lawrence) while at the Charleston County Sheriff's Office was voluntary. R. 63, ln. 11—R. 120, ln. 9. At the Denno hearing, Lawrence testified that he took Appellant in his police cruiser from the Exxon gas station in Jacksonboro, Colleton County, to the Charleston County Police Station in North Charleston the morning that Appellant was arrested on December 20, 2008. R. 65, ll. 2-10; R. 89, ln. 16—R. 90, ln. 10. Appellant was immediately taken to the eight-foot by five-foot interrogation room, which was on the second-floor the police station and contained a two to three chairs, a table, and a wall air-conditioning unit.² R. 65, ln. 22—R. 66, ln. 5. Appellant was handcuffed while in the interrogation room;³ in Lawrence's words, Appellant "definitely wasn't free to leave." R. 88, ll. 3-7; R. 67, ll. 5-7.

Lawrence, who was 6 feet 1 inches tall and weighed 245 pounds, sat with Appellant in this congested environment and claimed he read Appellant's Miranda rights from a form, which Appellant then initialed and signed. R. 67, ll. 14-24; R. 69, ll. 11-25;

¹ 378 U.S. 368, 84 S.Ct. 1774 (1964).

² Lawrence later testified before the jury that a monitor was also inside the room, and that there was only one door to enter or exit.

³ Later trial testimony revealed that Appellant was chained by his left hand, while authorities kept his right hand free to write. Tr. 297, ll. 14-22.

R. 72, ll. 11-21; , R. 87, 22-24. The interrogation began at approximately 11:58 am, and ended at approximately 1:00 to 1:30 pm. R. 70, ll. 7 -18 ; R. 85, ll. 1-3. According to Lawrence, Appellant never asked for an attorney. R. 74, ll. 11-15.

Although Lawrence denied making any promises to defendant regarding help with his bond to try and get him home for Christmas, he acknowledged discussing his own son of a similar age with Appellant. R. 93, ll. 11-20; R. 96, ln. 5—R. 98, ln. 1. Lawrence further acknowledged that he told Appellant that it would be better to cooperate; however, Lawrence admitted that “[t]here’s no benefit, really.” R. 93, ln. 25—R. 94, ln. 20.

Appellant also testified that the Denno hearing. He confirmed that he was taken by Lawrence in unmarked silver police cruiser from the Exxon in Jacksonboro to the interrogation room at the police station. R. 100, ll. 14-24. Appellant was 17 years old at the time, and possessed only a 7th grade education. R. 108, ll. 4-6; R. 109, ll. 13-20. He was 5 approximately feet 7 inches tall, and weighed approximately 140 pounds. R. 105, ln. 18—R. 16, ln. 7. While Appellant acknowledged that Lawrence handed him the Miranda form, Appellant maintained that he never read the form itself, and that Lawrence never read the Miranda rights aloud; rather, Lawrence said to “sign, sign, and initial,” so Appellant “just signed, signed, and initialed [the statement].” R. 101, ll. 4-20; R. 113, ll. 1-8.

Appellant also indicated that Lawrence told him that he and Lawrence’s son were the same age, and the holidays were coming up. He then testified that Lawrence said the following to him:

You cooperate with me and let me know what happened . .
. and I’ll make sure you get a low bond when its time to

deal with the charges, all healthy deal with them. I might even see if they can't disappear, so you can be out before the holidays and with your family again. I know you want to be with her family.

R. 12, ll. 1-16. Appellant indicated he ultimately gave and signed the written statement based on Lawrence's promises of a low bond and help dealing with the charges in the time came. R. 10 ll. 16-17; R. 114, ll. 14-18.

Additionally, Appellant testified that he inquired about an attorney when Lawrence was discussing the matter of Appellants bond. Appellant stated that he asked, "what about the lawyer?" to which Lawrence responded, "Well, they just make things complicated and cost money and a waste of time." R. 104, ll. 8-13. In essence, Appellant indicated that Lawrence shrugged off Appellant's inquiry about an attorney's involvement, and further said that a lawyer "can't really do much more for you than I can do for you. They're a waste of time and cost money." R. 107, ll. 7-10.

At the close of the Denno hearing, Counsel argued that Appellant's statement was inadmissible based upon the location of the interrogation, the differences in size between the parties, and upon the promises made. Counsel further asserted that Appellant requested the assistance of an attorney in the issue of bond was discussed, if that request was dismissed. R. 15, ll. 15—R. 116, ll. 8.

The trial court held that Appellant's statement was given "consistent with the underlying Miranda warnings." R. 118, ll. 1-2. Also, the court determined that Appellant's statement was freely and voluntarily made "based on the documents themselves and the testimony that [the trial court] heard, by a preponderance of the evidence." R. 117, ll. 16-20. The trial court further opined about the statement as follows:

But by the preponderance of the evidence there is no question in my mind that it's his statement. He certainly has its denied anything in it either. Which clearly the statement itself is a matter of law. . . . It sets out—it's clearly and concisely the hand of one is the hand of all. It couldn't be said any more clearly that he is guilty of this, if the jury believes it.

R. 118, lines 14-24; R. 523 (State's Exhibit No. 2, Statement of Defendant).

Finally, after taking a brief recess, the court referred to a pretrial plea offer from the state to Appellant, and indicated that “insofar as if the officer made that statement, I considered that. It's manifested through you in submitting that very generous offer which was declined.” As such, the trial court stated that “if there was a commitment,” the plea offer reflected Lawrence's alleged commitment to Appellant by saying “it's better for you if you cooperate.” R. 119, ln. 8—R. 120, ln. 8; R. 527 (Court's exhibit No. 1, State's Offer for Plea).

The state later introduced Appellant's statement during trial, at which time counsel contemporaneously objected. R. 273, ll. 14-19. Further, State utilized Appellant's statement in both its opening and closing arguments to the jury in support of its theory for convicting Appellant, which was entirely based upon the principle of the hand-of-one, hand-of-all. R. 135, ln. 23—R. 136, ln. 25; R. 139, ll. 1-18; R. 440, ln. 8—R. 443, ln. 12; R. 136, ln. 15—R. 437, ln. 11.

“[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.” Denno, 378 U.S. at 378, 84 S.Ct. at 1781. This fundamental principle applies “even though there is ample evidence aside from the confession to support the conviction.” Id. Additionally, “[e]ven absent the accused's invocation of the right to

remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [Miranda] rights when making the statement." Moses, 390 S.C. at 513, 702 S.E.2d at 400. Therefore, "[i]n order to introduce a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. (1966)." Id. 390 S.C. at 512, 702 S.E.2d at 400; see also Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 627 (1972) ("[T]he prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.").

The United States Supreme Court specified two distinct dimensions of inquiry regarding the waiver of Miranda rights: (1) that the waiver was "voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception; and (2) that the waiver was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Id. 390 S.C. at 513, 702 S.E.2d at 401 (quoting Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250, 2260 (2010)). Whether these dimensions of inquiry are satisfied is distilled to the test of whether the defendant's will was overborne by the totality of the circumstances surrounding the confession. Id.

"The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the given [statement]. The due process test takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." State v. Miller, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007) (quoting Dickerson v. United States, 530 U.S. 428, 434,

120 S.Ct. 2326 (2000) (internal quotation marks omitted)). The potential circumstances to consider include, “the crucial element of police coercion,” location and length of interrogation, its continuity, as well as the defendant’s maturity, education, physical condition, and mental health. Id. 375 S.C. at 385, 652 S.E.2d at 452 (quoting Withrow v. Williams, 507 U.S. 680, 693-94, 113 S.Ct. 1745 (1993)).

Although “[c]oercive police activity is a necessary predicate to finding a statement is not voluntary,” it is “determined from the perspective of the suspect.” Miller, 375 S.C. at 386, 652 S.E.2d at 452. Moreover, “the blood of the accused is not the only hallmark of an unconstitutional inquisition.” Mincey v. Arizona, 437 U.S. 385, 401, 98 S.Ct. 2408, 2418 (1978) (internal quotations and citations omitted). Rather, “[d]etermination of whether a statement is involuntary requires more than a mere color-matching of cases. It requires a careful evaluation of all the circumstances of the interrogation.” Id. (internal quotations and citations omitted). For example, “[a] statement may not be extracted by any sort of threats or violence, *or obtained by any direct or indirect promises*, however slight, or obtained by the exertion of improper influence.” Miller, 375 S.C. at 386, 652 S.E.2d at 452 (internal quotations omitted) (emphasis added). Further, “[a] statement induced by a promise of leniency is involuntary only if it is so connected with the inducement as to be a consequence of the promise.” State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (citing State v. Broome, 268 S.C. 99, 232 S.E.2d 324 (1977)).

Given the totality of the circumstances in the case at bar, Appellant’s confession was obtained under circumstances of direct or indirect promises. First, Appellant was interrogated in extremely congested interrogation room at the police station. He was chained with one arm to the chair by law-enforcement specifically so his right arm would be

free to write a confession. Under these physical circumstances, Appellant was confronted for approximately one and a half hours by Lawrence, who was approximately 5 inches taller and 100 pounds heavier than Appellant.

Moreover, Lawrence undisputedly raised discussion in comparison between his own teenage son and Appellant. Under these circumstances, Appellant's factual assertion is, in all likelihood, correct that Lawrence made promises of help get a low bond so that he could be home with his family for the Christmas holiday in exchange for his statement; simply stated, there would be no other reason for Lawrence to draw the comparison between Appellant and his own teenage son other than to pressure Appellant into giving a statement and be home for Christmas. Such a promise of leniency regarding Appellant's bond in exchange for his statement constitutes an improper inducement, thus rendering the statement involuntary. See, e.g., Peake, 291 S.C. at 139, 352 S.E.2d at 488; Miller, 375 S.C. at 386, 652 S.E.2d at 452.

Second, while Lawrence is statement to Appellant that, "it would probably be better if he cooperated" might not in and of itself be coercive in a vacuum, coercive police activity is "determined from the perspective of the suspect" in light of the circumstances of the interrogation. Miller, 375 S.C. at 386, 652 S.E.2d at 452. Here, where Appellant was chained with his non-writing hand to the chair, and provided the inducement by Lawrence regarding a low bond and help on the charges, Lawrence's statement to Appellant that "it would probably be better if he cooperated" would very likely be coercive to Appellant. This is especially so given Lawrence's candid acknowledgment that "[t]here's no benefit, really." R. 93, ln. 25—R. 94, ln. 20. Moreover, trial court's reference to the pretrial plea offer from the state to Appellant does not alter the fact that Appellant's written statement

was gained under circumstances rendering it involuntary; indeed, if anything, the court's recognition of the plea offer reflecting Lawrence's alleged commitment to Appellant by saying "it's better for you if you cooperate" instead indicates an acknowledgment that such a statement was made, and that Appellant's statement was induced by Lawrence's promises of leniency. Accordingly, under these circumstances, Lawrence's statement to Appellant that "it would probably be better if he cooperated" likewise constitutes an improper inducement rendering Appellant's written statement involuntary. See, e.g., Peake, 291 S.C. at 139, 352 S.E.2d at 488; Miller, 375 S.C. at 386, 652 S.E.2d at 452.

Third, Appellants basic Miranda rights were violated as well when he inquired about the presence of an attorney, yet was denied by Lawrence. "Miranda . . . declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883 (1981); see also U.S. Const. amend. V; State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). Furthermore, "when an accused has invoked the right to have his counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards, 451 U.S. at 484, 101 S.Ct. at 1884-85. Thus, "[o]nce an accused requests counsel, police interrogation must cease unless the accused himself 'initiates further communication, exchanges, or conversations with the police.'" State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (holding defendant's statement, "I think I need a lawyer," constituted an unambiguous invocation of the right to counsel); see also Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1885.

In the present case, Appellant asserted that he stated to Lawrence, “what about the lawyer?” to which Lawrence responded, “Well, they just make things complicated and cost money and a waste of time.” R. 104, ll. 8-13. Appellant indicated that Lawrence shrugged off his inquiry regarding an attorney, and further that Lawrence further said a lawyer “can’t really do much more for you than I can do for you. They’re a waste of time and cost money.” R. 107, ll. 7-10. Under such circumstances, Appellant’s request should be deemed an invocation of the right to counsel, and his statement to law enforcement taken after this invocation should have been suppressed.

Moreover, the trial court improperly considered actual content of Appellant’s written statement when deciding whether it was involuntarily made and whether Appellant’s testimony regarding invocation of his right to attorney was credible. R. 118, lines 14-24. The proper inquiry Court is whether a statement is voluntary and taken in compliance with Miranda, not whether the statement taken is true. Denno, 378 U.S. at 378, 84 S.Ct. at 1781. The trial court’s finding regarding Appellant’s lack of credibility on the issue was clearly erroneous, as it was based at least in part on the veracity of the statement itself. See, e.g., State v. Quattlebaum, 338 S.C. 441, 452, 527, S.E.2d 105, 112 (2000) (stating the appellate court “is bound by the trial court’s factual findings unless they are clearly erroneous.”).

Finally, Appellant was prejudiced by the trial court’s failure to suppress his written statement. “[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.” Denno, 378 U.S. at 378, 84 S.Ct. at 1781. This

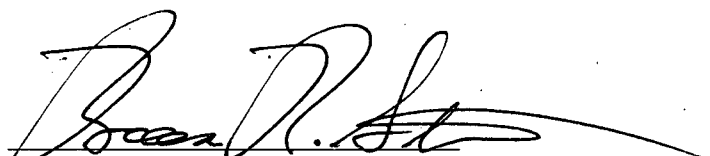
fundamental principle applies “even though there is ample evidence aside from the confession to support the conviction.” Id.

As previously indicated, Appellant’s written statement was taken under circumstances rendering the confession involuntary. Additionally, from opening statements through closing arguments the statement was utilized by the State throughout Appellant’s trial in order to gain Appellant’s conviction under the principle of hand-of-one, hand-of-all. Indeed, as the trial court itself stated, Appellant’s written statement “sets out—it’s clearly and concisely the hand of one is the hand of all. It couldn’t be said any more clearly that he is guilty of this, if the jury believes it.” R. 118, lines 14-24. Accordingly, Appellant was prejudiced by the trial court’s erroneous admission of the statement.

CONCLUSION

For the foregoing reasons, Appellant Marvin Bowens Green respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Green R. Stevens", with a long horizontal flourish extending to the right.

Green Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of June, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marvin Bowens Green states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. He has reviewed the record of Appellant's trial before Judge R. Markley Dennis, Jr., which was held on June 24, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Marvin Bowens Green.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 5, 2012

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

Breen R. Stevens
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

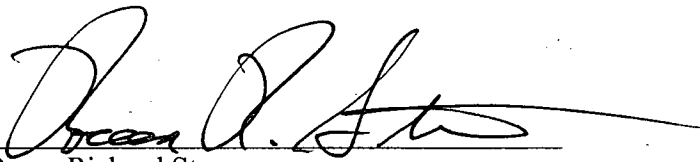
V.

MARVIN BOWENS GREEN,

APPELLANT

CERTIFICATE OF SERVICE

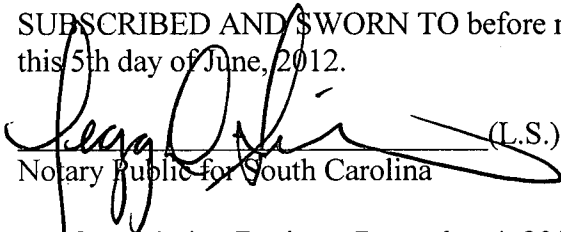
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and on Marvin Bowens Green, #346650 at Lee Correctional Institution, this 5th day of June, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of June, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017