STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY MAURICE WISE,

APPELLANT

APPELLATE CASE NO 2017-001263

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to instruct the jury that as part of its determination regarding the voluntariness of Appellant's statement to police, the jury must consider whether law enforcement complied with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966)?

STATEMENT OF THE CASE

On December 5, 2016, a Newberry County grand jury indicted Appellant for kidnapping (2016-GS-36-706), burglary in the first degree (2016-GS-36-709), and armed robbery. R. 734-735; R. 737-738. On May 12, 2017, a grand jury indicted Appellant for assault and battery in the first degree (2017-GS-36-201). R. 740-741. On May 15-18, 2017, the state, represented by Dale Scott and Taylor Daniel, called the case to trial before the Honorable Donald B. Hocker and a jury. R. 1. Charles Verner represented Appellant. R. 1. The jury found Appellant guilty of kidnapping, burglary in the first degree, and assault and battery in the first degree. R. 722, ll. 4-16. The jury acquitted Appellant of armed robbery. R. 722, ll. 8-10. Judge Hocker sentenced Appellant to ten years imprisonment for the assault and battery conviction. R. 731, ll. 24-25; R. 742. He also sentenced Appellant to twenty-two years imprisonment for burglary and kidnapping. R. 732, l. 1; R. 736; 739. He ordered all sentences to be served concurrently. R. 732, ll. 2-3; R. 736; R. 739; R. 742.

On May 26, 2017, Appellant served his notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to instruct the jury that as part of its determination regarding the voluntariness of Appellant's statement to police, the jury must consider whether law enforcement complied with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Relevant facts

On September 21, 2016, Benzena Wicker arrived home between 5:40 p.m. and 6 p.m. R. 158, ll. 9-10. When she opened the door to her truck, a person lunged at her, hitting her in the chest. R. 159, ll. 20-22. The person was wearing a white mask, gloves, and a red shirt with a black hood. R. 159, ll. 22-23; R. 162, ll. 17-24. Wicker fought back, but the person dragged her into her house. R. 159, l. 25 – R. 160, l. 7; R. 164, ll. 1-4. Although Wicker could not see her assailant's face, she claimed she saw black skin on the arm and dreadlocks hanging on his shoulder. R. 164, ll. 18-25. Prior to trial, Wicker never mentioned anything about the person's hair color, but at the trial, she claimed there was "coloring on the dreadlocks." R. 165, ll. 3-9; R. 305, ll. 8-10. According to Wicker, the person bound her and took her outside. R. 170, ll. 4-22. There, the person placed her in the backseat of her truck with a pillowcase over her head. R. 171, ll. 4-24. The person drove her to an ATM machine where the person used her debit card and her PIN to withdraw money. R. 176, ll. 13-21.

Upon returning to Wicker's home, the person placed her in the house and applied more tape to her bindings. R. 177, ll. 18-19; R. 183, ll. 2-8; R. 183, l. 23 – R. 184, l. 8. When Wicker was certain the person had left, she removed the pillowcase from her head and pulled some of the tape from her arms and legs. R. 184, l. 4 - R. 185, l. 16. Wicker ran across the street to her neighbor, Kathy Tapia's house. R. 185, ll. 19-21. Wicker's car, a Cadillac, was missing from her yard. R. 200, ll. 18-25.

Wicker gave the police a description of her attacker and stated she believed it was someone from her neighborhood based upon some statements made during the incident. R. 191, l. 8 - R. 192, l. 23. Based upon the description Wicker gave and her belief the assailant was a neighbor, the police used a law enforcement database to create a list of suspects. R. 299, l. 17 – R. 300, l. 15; R. 321, l. 14 – R. 323, l. 16; R. 377, l. 1 – R. 378, l. 2. Using OnStar, the police recovered Wicker's Cadillac approximately four miles away. R. 301, l. 11 - R. 303, l. 23; R. 325, ll. 1-15; R. 378, ll. 5-21.

Appellant was ambushed by police investigators on September 22, 2016, when he went to report to his probation officer. R. 382, l. 25 – R. 23; R. 584, l. 7 – R. 585, l. 11. The police took photographs of him, requested information from him, and informed him that he was a suspect in serious crimes. R. 585, l. 12 – R. 590, l. 9. One of the most important pieces of information the police obtained was a cell phone number to which Appellant had access. R. 383, l. 17 – R. 384, l. 13. Using this phone number, the police claimed a SLED agent obtained Appellant's telephone records and was able to put the phone at the locations of the ATM, where the Cadillac was abandoned, and Wicker's home. R. 333, ll. 12-23; R. 426, l. 1-24; R. 428, ll. 13-21; R. 431, ll. 9-22; R. 434, l. 21 – R. 435, l. 21. The police were forced to admit that it was not unusual for Appellant or his phone to be near Wicker's home because Appellant lived on the same street as Wicker and his girlfriend lived nearby. R. 334, ll. 13-22. Further, the police were forced to admit that it was a short distance between Appellant's girlfriend's home, where he frequently visited, and where the Cadillac was found. R. 388, ll. 15-21.

The following day, September 23, 2016, Appellant returned to see his probation officer in order to comply with a drug test. R. 592, ll. 1-4. As soon as Appellant and his girlfriend, Laswan Anderson, stepped out of their cab, the police arrested them. R. 593, ll. 8-23. While

Appellant was in the car with police, the officers were "talking trash," but failed to advise him of his rights. R. 594, l. 22 – R. 595, l. 22. However, the officers claimed Appellant was advised of his rights, but could provide no written advisement or waiver. R. 329, ll. 15-20; R. 358, ll. 18-19. The investigators took him to police department, where he was interrogated. R. 596, ll. 4-17. Appellant's statement to police was audio recorded. R. 338, ll. 18-21; State's Exhibit #58. Portions of the audio-recorded statement were admitted into evidence. R. 272, ll. 14-15; State's Exhibit #58. During the interrogation and at his trial, Appellant denied any involvement in the crimes against the complaining witness. R. 600, ll. 5-10; State's Exhibit #58. However, the police and the state challenged Appellant's claims that he was elsewhere by stating he had no corroboration. R. 335, ll. 19-21; State's Exhibit #58.

After the police obtained a recording of Appellant's voice, an officer met with Wicker to determine if she could identify the voice. R. 345, ll. 12-24. Wicker told the police the voice on the recording was the voice of her attacker. R. 345, ll. 24-25.

The state presented no physical evidence against Appellant. Although the police recovered numerous latent prints from the Cadillac, none of the prints were identified to Appellant. R. 361, ll. 1-24.

Toward the end of the trial, the lawyers engaged in a charge conference with the judge in chambers. R. 545, ll. 20-22. Trial counsel explained that his understanding of the law was that advisement of Miranda warnings was "a hard requirement, before you interrogate a custodial suspect." R. 546, ll. 17-19. Therefore, he wanted the judge to instruct the jury: "you must find that he was provided his Miranda rights before you can find that he gave a voluntary statement." R. 546, ll. 19-21. Counsel understood the judge's position that "Miranda is really more of a rule of admissibility and that the jury does not separately have to find Miranda being given." R. 547,

ll. 10-14. Counsel disagreed, arguing "the jury evaluates the law under the same standard that the Court would. And that the Court, the jury has the same right to find that Miranda was factually given as the Court would." R. 547, ll. 14-18. Judge Hocker refused, stating he would "not charge the jury that the must find whether or not Miranda was given." R. 547, ll. 20-22.

During the jury charge, Judge Hocker instructed the jury as follows concerning consideration of Appellant's statement to law enforcement:

> Now, it is alleged that the Defendant made a statement and that this statement has been admitted into evidence in this case. Now while the Court has determined that the statement is admissible I instruct you, ladies and gentlemen, that you make the ultimate decision whether or not the Defendant made the statement. If the defendant did make a statement you must determine whether the statement was made by the Defendant voluntarily and of his own free will. This means that the statement was not caused by pressure, force, fear, threats, coercion or intimidation or by hope or a promise of leniency of a reward of any kind. In determining whether the statement was voluntary you should consider both the characteristics of the Defendant and the details of the questioning. Some of the factors that you may consider are the age of the Defendant; the Defendant's education or lack of education; the Defendant's mental ability or capacity; the Defendant's I.Q. or intelligence; the Defendant's background and environment; the place and length of detention; the nature of the questioning; and the advice or lack thereof to the Defendant of his constitutional rights including, but not limited to the right to remain silent; that any statement could be used against him in a court of law; the right to have a lawyer present; that if he could not afford a lawyer a lawyer would be appointed to represent him without any cost; and that he could stop making a statement at any time. You must carefully consider all of the surrounding circumstances before you give any weight to an alleged statement. The state has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary. If you determine it was, you may give the statement any further consideration that you deem proper and necessary. You must decide what weight, if any, should be given to the statement. If you determine the statement was not the free and voluntary statement of the defendant you should not consider it at all.

R. 712, l. 13 – R. 713, l. 24.

Discussion

In 1966, the United State Supreme Court issued its landmark decision Miranda v. Arizona, 384 U.S. 436 (1966). As explained by the Court in Duckworth v. Eagan, 492 U.S. 195, 201 (1989),

Miranda established "certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." In Miranda, the Court delineated four specific warnings: "(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants." Miranda, 384 U.S. at 479. Concerned that the circumstances surrounding a custodial interrogation can quickly overbear one's will, the Court held advising an individual of his right to consult with a lawyer and to have the lawyer present during interrogation was "an absolute prerequisite to interrogation." Id. at 471.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "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." To introduce a statement produced during custodial interrogation, the prosecution 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. 436 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any

> advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

In State v. Adams, 277 S.C. 115, 123, 283 S.E.2d 582, 586 (1981), the South Carolina Supreme Court cautioned trial courts "to impress upon the jury that no confession may be considered by it unless found beyond [a] reasonable doubt to have been given freely and voluntarily under the totality of the circumstances" and where the defendant "was in custody at the time of his alleged confession, the jury must be convinced that he received and understood his Fifth and Sixth Amendment rights, as mandated by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." However, more than a decade later, the Court changed course. State v. Davis, 309 S.C. 326, 342, 422 S.E.2d 133, 143-144 (1992). The Court acknowledged that its "holding in Adams appears to submit to the jury not only the question of voluntariness, but also the separate issue as to whether law enforcement's actions conformed to the requirements of Miranda." Id. at 342, 422 S.E.2d at 143. To explain this about-face, the Court asserted that "[r]equiring a jury to make a separate finding on the Miranda issue is against the weight of both federal and state authority." Id. According to the Court, "[t]he question whether law enforcement complied with the requirements of Miranda is for the court, not the jury. Once the court determines that a defendant received and understood his rights, the court allows a confession into evidence. It then is for the jury ultimately to decide whether the confession was voluntary." Id. (internal citation omitted).

Appellant urges this Court to reconsider its ruling in Davis. Specifically, Appellant asks this Court to hold that the trial judge must instruct the jury to consider whether law enforcement complied with the requirements of Miranda when deciding whether the state proved beyond a

reasonable doubt that the defendant's statement was voluntary. In Davis, the Supreme Court approved the following instruction to the jury:

> While the court generally determines the admissibility of evidence, I instruct you that as regards any alleged statement made by this defendant that you members of the jury make the ultimate determination of whether, or not, the defendant made the said statement. And if he did make the statement, whether the statement was made voluntarily and of his own free will and accord. And finally, just what weight, if any, should be given to any alleged statement. I charge you that you must determine if the alleged statement was a product of an essentially free and unconstrained choice by its maker. If you determine it was, and the burden is upon the state to prove this fact as all other facts beyond a reasonable doubt, then you may give the statement such further consideration as you deem proper. If you determine the alleged statement was not the free and voluntary willed express of the defendant, then you should not consider the statement at all. In determining whether a defendant's will was overcome in obtaining a statement, you should consider both the characteristics of the accused and the details of the interrogation, which is referred to in the law as the totality of the circumstances. Some of the factors that you must consider are: The age of the accused; his education, or lack thereof, his mental ability, or capacity; his I.Q. or intelligent; his background or environment; the advice, or lack thereof to the accused of his constitutional rights, including but not limited to the procedural safeguards known as the Miranda warnings, concerning the right to remain silent; that a statement could be used against him in a court of law; the right to have a lawyer present; if an indigent, that is he could not afford a lawyer, then a lawyer would be appointed to represent him without any cost; and that he could stop making a statement at any time. Other factors to consider are the place and length of the detention and the nature of the questioning. You, the jury, must carefully scrutinize all of the surrounding circumstances before you give any weight to an alleged statement. You must be satisfied beyond a reasonable doubt that the statement was made by the accused, uninfluenced by promise of reward, threat of injury, or diminution of his rights.

Davis, 309 S.C. at 341-342, 422 S.E.2d at 143. The Davis Court held the instruction "properly explained to the jury that it should determine the voluntariness of Davis's confession under the totality of the circumstances, and that Davis's receipt of his Miranda warnings and ability to understand those warnings were appropriate factors to consider in deciding whether the confession was freely given. Id. at 343, 422 S.E.2d at 144.

Under the current status of the law, the state need only show by a preponderance of the evidence that the police complied with the strictures of Miranda in order to use a statement against an accused. There is no requirement that *anyone* find beyond a reasonable doubt that law enforcement advised the accused of his constitutional rights and obtained a knowing and voluntary waiver of those rights. The jury's finding is limited to whether the statement obtained by police was voluntarily given. While the current law permits the jury to consider whether the accused was advised of his rights, this consideration is merely part of a lengthy list of factors for the jury to consider. In essence, a jury could convict an individual of a crime based upon the individual's statement, and some other evidence that the crime occurred forming the *corpus delicti* of the crime, where there was only a preponderance of the evidence that the police complied with the Supreme Court's mandate to advise individuals of their rights during custodial interrogations and obtain voluntary and knowing waivers of those rights prior to interrogating the individual. This anomaly in the law unconstitutionally dilutes the state's burden. Where there is custodial interrogation, the state must prove to the jury beyond a reasonable doubt that the police complied with the requirements of Miranda. Appellant respectfully requests this Court overrule Davis.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY MAURICE WISE,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Maurice Wise 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 Judge Donald B. Hocker, which was held on May 15-18, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Anthony Maurice Wise.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 20th day of February, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Entire trial transcript;
(2) State's Exhibit #58 (audio of statement);
(3) True-billed indictments; and
(4) Sentence sheets

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

February 20, 2018

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

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

February 20, 2018.

Susan B. Hackett

Susan B. Hackett
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ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Anthony Maurice Wise, 372713, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20th day of February, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of February, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.