STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Bamberg County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HOMER ARTHUR JAMES,

APPELLANT

APPELLATE CASE NO. 2016-002046

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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STATEMENT OF ISSUE ON APPEAL

Whether, in violation of the Fifth and Sixth Amendments, the trial court erred in admitting appellant's highly incriminating statements to police, given after a three-day chase through the woods in a field surrounded by heavily armed police officers, dogs, and a helicopter, where it was undisputed appellant never received Miranda[1] warnings, ruling his statements were supposedly not the product of interrogation but "casual conversation?"

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

STATEMENT OF THE CASE

On October 20, 2014, a Bamberg County grand jury indicted appellant Homer Arthur James for armed robbery. R. 747. Appellant's case was called for trial on August 8, 2016, before the Honorable R. Lawton McIntosh and a jury. R. 1. David Miller, Bill Weeks, and Michael Emer represented the State. R. 1. Wallis Alves represented appellant. R. 1. The jury convicted appellant. R. 677, l. 16 – 678, l. 8. Pursuant to South Carolina's recidivist law, Judge McIntosh sentenced appellant to life imprisonment without the possibility of parole. R. 681, ll. 8 – 24. This appeal follows.

ARGUMENT

In violation of the Fifth and Sixth Amendments, the trial court erred in admitting appellant's highly incriminating statements to police, given after a three-day chase through the woods in a field surrounded by heavily armed police officers, dogs, and a helicopter, where it was undisputed appellant never received *Miranda* warnings, ruling his statements were supposedly not the product of interrogation but "casual conversation."

As if reciting a mantra, a twelve-year veteran of law enforcement and SLED agent testified over and over again that appellant's incriminating statements were the result of "casual conversation." R. 18, l. 11 ("casual conversation"). R. 18, ll. 23 – 24 ("casual conversation"). R. 27, ll. 23 – 24 ("casual conversation"). R. 29, l. 21 ("casual conversation"). R. 30, l. 4 ("casual conversation"). R. 30, ll. 17 – 18. R. 33, l. 5 ("casual conversation"). R. 509, l. 10 ("casual conversation"). R. 509, l. 16 ("casual conversation". R. 513, l. 11 ("casual conversation"). R. 521, l. 7 ("casual conversation"). R. 522, l. 2 ("casual conversation"). R. 525, l. 1 ("casual conversation"). Another sixteen-year veteran SLED agent denied asking any questions designed to elicit incriminating information. R. 50, ll. 1 – 3. R. 65, ll. 5 – 23. He testified he did not remember what comments by the nine officers during their "conversation" may have prompted appellant's statements. R. 65, ll. 21 – 25. R. 66, ll. 1 – 8. R. 69, ll. 6 – 8.

The officers seized appellant in a remote field after a three-day bloodhound and helicopter chase prompted by a bank robbery in Denmark, South Carolina. R. 545, l. 24 – 559, l. 8. On June 5, 2014, two masked men robbed the Enterprise Bank in Denmark with a BB gun. R. 168, l. 23 – 173, l. 17. R. 245, ll. 18 – 22. A concerned citizen passing by the bank saw men run into the bank from a "silver or grayish Grand Am." R. 159, ll. 5 – 17. She drove back to the bank. R. 160, ll. 9 – 18. The Grand Am was no longer there. R. 160, ll. 19 – 23. She waited.

R. 160, l. 24 – 161, l. 1. After a few minutes, the witness saw men running quickly from the bank. R. 161, ll. 2 – 7. She could not identify the men and never saw the driver of the Grand Am. R. 161, l. 19 – 162, l. 7.

The Olar Chief of Police heard a call on the radio to watch for a silver Pontiac Grand Am. R. 214, l. 17 – 215, l. 2. He saw a car matching the description and followed it. R. 215, ll. 10 – 22. The car ran a stop sign and the chief turned on his blue lights. R. 216, ll. 1 – 10. The Grand Am accelerated and the chief gave chase. R. 216, ll. 11 – 218, l. 7. The Grand Am crashed into some trees on a dead end road. R. 218, ll. 1 – 23. The chief saw a black male run into the woods from the rear passenger side door of the car. R. 218, ll. 15 – 23. He only saw one person flee. R. 228, ll. 18 – 19. The chief could not tell how many people were in the car. R. 221, ll. 14 – 17. He could not identify the person who fled. R. 229, ll. 23 – 25.

The police recovered currency from the bank and other items from the abandoned Grand Am, including several state-issued ID cards. R. 248, ll. 17 – 24. R. 244, l. 20 – 245, l. 17. R. 247, ll. 1 – 6. R. 247, ll. 15 – 21. One of the ID cards belong to appellant's codefendant, Leon James, who was not related to appellant. R. 245, ll. 14 – 17. R. 6, ll. 2 – 6. Another ID card, a North Carolina commercial driver's license, belonged to Darryl Lamont Lassiter. R. 246, ll. 1 – 6. Lassiter, who had an alibi for the robbery, testified that he mistakenly threw away his CDL with an old wallet at Bike Week in Myrtle Beach after buying a new wallet at Levi's. R. 436, l. 16 – 437, l. 9. The police also found appellant's ID card along with Lassiter's and Leon James' cards. R. 247, ll. 15 – 20. A DMV employee testified that appellant applied for a new ID card, submitting "an affidavit of lost or stolen or surrendered identification" a month before the robbery. R. 582, l. 15 – 588, l. 14. Also found in the car was a pair of panties SLED tested for DNA. R. 377, l. 8 – 380, l. 10. Using only 8/16 sites on the Y chromosome, the SLED expert

claimed the DNA matched appellant. R. 342, ll. 3 – 15. She opined the probability of the match was 1 / 3,800, which Judge McIntosh called "a mighty low number." R. 355, ll. 12 – 20. R. 258, ll. 3 – 4.

The police used a bloodhound team to begin tracking the suspects from the abandoned vehicle car. R. 545, l. 24 – 546, l. 14. Because of bad weather and tired dogs, the police abandoned the search. R. 546, l. 15 – 548, l. 21. The next day, a police officer responded to a call about suspicious people. R. 296, ll. 5 – 20. He went to a mobile home near the Govan Fire Department, but found no one. R. 296, l. 25 – 298, l. 14. He left and stopped to speak to the firemen at the station. R. 298, ll. 19 – 25. The firemen told the police officer about a nearby vacant mobile home they used for training. R. 322, l. 4 – 323, l. 7.

The officer went to the "old mobile home" and shined his lights on the front door. R. 299, l. 8 – 300, l. 16. A man the officer identified as appellant walked out of the house. R. 300, l. 11 – 302, l. 2. The man was "flailing his arms" and told the police officer, "this is my house, I don't have anything." R. 301, ll. 2 – 6. The officer drew his gun. R. 301, ll. 7 – 9. The man ran. R. 301, ll. 7 – 9.

The dog team went to the trailer and picked up a track. R. 495, l. 23 – 496, l. 15. They captured co-defendant Leon James. R. 496, ll. 12 – 15. Then they captured co-defendant Lewis Garvin. R. 497, ll. 16 – 498, l. 2. After tracking through the woods all night, the police discovered appellant in a wooded area near a hayfield. R. 498, ll. 3 – 15. Appellant "just popped up" between members of the dog team. R. 558, ll. 1 – 6. He had on no shirt, was covered in dirt, and was soaking wet. R. 559, ll. 2 – 8. He needed water. R. 508, ll. 4 – 8. The police brought him out of the woods in handcuffs. R. 508, ll. 9 – 11.

Before trial, the court held a Denno[2] hearing. Pretrial Hearing Tr. 13, ll. 4 – 9. The State called only two of the potentially nine officers who were present for appellant's alleged statements. R. 13, ll. 4 – 9. R. 486, ll. 3 – 8. During the Denno hearing, SLED agent Jeff Croft testified that there were "at least three" officers surrounding appellant when he made his statements. R. 27, ll. 6 – 8. However, during the middle of trial, the other SLED agent, Chip Steppe, remembered some photographs that were never produced to the defense. R. 441, l. 7 – 442, l. 16. Included in the pictures was a shot of the officers surrounding appellant in the field and, noting the contradiction of the testimony at the Denno hearing, defense counsel argued "there were a lot more than just four officers sitting around being casual." R. 462, l. 21 – 463, l. 11. State's Ex. 80. From looking at the picture, Agent Steppe admitted "at least eight or nine people" surrounded appellant. Tr. 398, ll. 3 – 20. When asked why he failed to mention all of these people's presence during the Denno hearing, Agent Steppe replied, "I didn't—I didn't think it was necessary." R. 486, ll. 19 – 21. Agent Steppe's recently found footage also included a photograph of a shoeprint the State desperately sought to admit into evidence. R. 441, l. 7 – 489, l. 7.

At the Denno hearing, the police readily admitted they never gave appellant Miranda warnings. R. 17, ll. 9 – 11. The police admitted appellant was in custody. R. 17, ll. 7 – 8. But the police denied questioning appellant, instead repeatedly describing the interaction of the heavily armed police officers, dogs, and helicopter pilots with the dehydrated, shirtless appellant as "casual conversation." R. 17, l. 21 – 19, l. 17. State's Ex. 80.

Agent Steppe described how appellant made incriminating statements:

> We—he—he was tired, kind of like us. We offered him water, took the handcuffs off him, we're getting water, talking, **we're basically, you know, commending**

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

> **him on how long he's lasted in the woods and how well he did. . . . we had already had a conversation with him about how long he'd lasted in the woods, what kind of fitness level he was at. You know, he made –we made the statement that these woods are nasty, man.** And I think he made statements to the extent **that there were snakes everywhere, I seen snakes everywhere**, and then that the—the offhand comment about the gun not being real or whatever it was came up.

R. 64, l. 20 – 65, l. 20 (emphasis added). Agent Steppe also told appellant during this casual conversation that appellant was "in the top five of the guys I've ever run like that before." R. 49, ll. 21 – 23. Appellant responded that he used to be a boxer. R. 49, ll. 23 – 25. Appellant then supposedly volunteered that "it wasn't a real gun." R. 50, ll. 4 – 11. Agent Croft admitted that he previously asked him his age and how he stayed in shape. R. 18, ll. 1 – 11. Tr. 20, ll. 5 – 14. Agent Croft remembered appellant saying "it was the stupidest thing he'd ever done in his life." R. 20, ll. 5 – 14.

Appellant argued his statements were inadmissible because of the officers' failure to administer Miranda warnings. R. 70, l. 19 – 71, l. 7. The trial judge agreed no dispute existed that appellant was in custody and no Miranda warnings were given. R. 71, ll. 9 – 11. R. 76, ll. 9 – 11. The State's argument and the trial judge's questioning centered on whether appellant's statements were the product of interrogation. R. 70, l. 17 – 97, l. 4.

The trial judge then questioned the solicitors about whether asking appellant how he stayed in shape and commenting about how hard he was to track was interrogation designed to elicit admissions about flight, which is evidence of guilt. R. 86, ll. 19 – 24. The State admitted it intended to argue flight was evidence of appellant's guilt. R. 87, ll. 8 – 25. The solicitor then argued, "But I just don't feel like it reaches that level." R. 87, ll. 17 – 25.

The solicitor characterized the SLED agent's questions about appellant's stamina during the three-day chase in the woods as "giving him props" and claimed not to know what kind of

response such questions would elicit. R. 91, ll. 1 – 121. Appellant argued that the questions about flight led to the incriminating comments about the gun and the "stupidest thing," and was therefore interrogation. R. 94, l. 19 – 97, l. 4. The trial judge then ruled the statements were admissible because they were not made in response to interrogation. R. 97, ll. 5 – 19. Appellant renewed his objections with contemporaneous objections when the State introduced the statements before the jury. R. 509, ll. 17 – 21. R. 513, ll. 8 – 17. R. 560, l. 22 – 561, l. 3. Appellant also filed a motion for new trial and again argued the suppression issue, which was denied. R. 737 – 743. R. 686 – 735.

The trial judge erred in admitting appellant's statements because they were the product of custodial interrogation in violation of Miranda. U.S. Const. amends. V, VI. No dispute existed that appellant was in custody; therefore Miranda warnings were required. Miranda, 384 U.S. at 478-79. As the trial judge recognized, flight is evidence of guilt. State v. Pagan, 369 S.C. 201, 208-09, 631 S.E.2d 262, 266 (2006). "The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." Id. "It is sufficient that circumstances justify an inference that the defendant's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." Id. "Flight or evasion of arrest is a circumstance to go to the jury." Id.

In this case, the State's theory was that appellant's flight began immediately after the robbery when the Olar police chief gave chase and ended three days later after continuously using bloodhounds and a helicopter. In its closing argument, the State directly linked appellant's statements to his flight:

> "It wasn't even a real gun." I don't know if Agent Croft even knew that it was a BB gun at that time. "It was the stupidest thing I'd ever done." Well, that could

> mean a lot of things. "Big rattlesnakes." Y'all have been chasing me a while. That's what I would think if somebody had talked about the rattlesnakes; **it's acknowledgement he's been chased for a while. Why? Why?**
>
> The reason why is simple: **He's being chased because he's running; he's running because he's guilty and he knows it.** He isn't running out there in the woods so he can see if he can sneak in between the first guy in the chase team and the second guy in the chase team and miss the dog.

R. 640, ll. 6 – 19 (emphasis added). These statements to the jury make the solicitor's earlier argument during the Denno hearing that the police were not interested in eliciting any incriminating information ring hollow.

In State v. Medley, this Court brushed aside the State's argument that police officers' questions were not designed to elicit incriminating information. State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016). "Interrogation" is defined as including "words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." Id. at 25, 787 S.E.2d at 851, quoting State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996). This Court recognized that interrogations are not only formal events that take place at police stations, but frequently happen immediately after taking a suspect into custody. Id. at 26-27, 787 S.E.2d at 852.

In Rhode Island v. Innis, the United States Supreme Court stated that Miranda should not be interpreted narrowly. Rhode Island v. Innis, 446 U.S. 291, 299 (1980). The Court stated that an "interrogation environment" that subjugated the suspect's will and undermined the Fifth Amendment privilege was its concern. Id. The Court stated that "express questioning" was not required to trigger Miranda and police actions that contrive situations leading to incriminating statements qualify. Id.

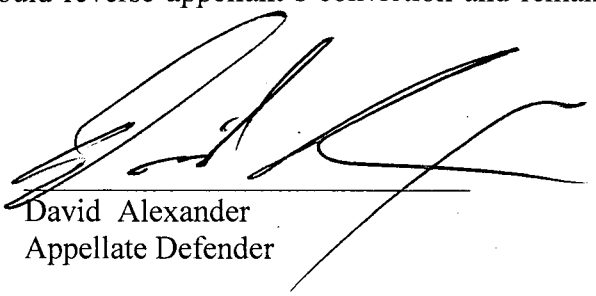
The police officers here took advantage of appellant's depleted state and made comments and asked questions about appellant's supposed flight, which were directly relevant to guilt. The questioning here is similar to the questions in State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). In Easler, the police responded to an accident and saw a man fitting the description at a convenience store. Easler at 125-26, 489 S.E.2d at 620. The police asked the man if he had been involved in an accident and if he had left the scene. Id. Disagreeing with the Court of Appeals, the Supreme Court held these questions, including about leaving the scene, were interrogation for purposes of Miranda because they were "likely to elicit incriminating responses." Id.

Just like the defendant's leaving the scene in Easler, questions about appellant's flight could only elicit an incriminating response. Beginning interrogation triggered Miranda; therefore, appellant's statements were inadmissible. Especially given that the State has the burden of proving compliance with Miranda and the admissibility of the statements, the officers' lack of memory regarding what other comments or questions were made by the multiple officers at the scene further weighs against admissibility.

Without the questions about flight, the State's case that appellant was the person who fled would be weakened. R. 630, l. 19 – 632, l. 7. Appellant's alleged statement about seeing rattlesnakes all night lent credence to the State's argument that appellant was, indeed, the person the police had been tracking for days. The trial judge recognized the importance of flight to the case, yet inexplicably still ruled the statements admissible. Appellant's statements were the product of interrogation, not "casual conversation." This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.



David Alexander
Appellate Defender

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This 21st day of March, 2018.

CERTIFICATE OF COUNSEL

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

March 21, 2018.

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