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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2017-002306

State of South Carolina, Appellant,

vs.

Leon L. Barksdale, Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

I. The circuit court erred in suppressing all of Respondent's statements when they were not the result of custodial interrogation requiring Miranda warnings to be given, but instead were the result of routine investigation into an accident and a DUI.

STATEMENT OF THE CASE

Leon Barksdale, Respondent, was arrested on October 21, 2013, on charges of felony driving under the influence, driving under suspension, and having an open container of alcohol. (Uniform Traffic Tickets 64141 GM, 64142 GM, and 64143 GM; R.___). On October 21, 2016, the Laurens County Grand Jury indicted Respondent on charges of felony driving under the influence resulting in great bodily injury. (True-billed Indictment; R.___). He proceeded to trial before the Honorable Donald B. Hocker. After a pre-trial hearing On October 23 and 24, 2017, Judge Hocker suppressed all statements made at the scene of the accident by Respondent. (T.103-105; 111-112; R.___). The State served and filed its Notice of Appeal on November 1, 2017, because the trial judge's oral ruling significantly impairs the prosecution of this case, affects a substantial right, and prevents a judgment from which an appeal might be taken. This Brief of Appellant follows.

STATEMENT OF FACTS

On October 21, 2013, Respondent was involved in an automobile accident in Laurens County. (T.53; R.___). Officer Craven arrived at the scene and it is clear other officers and EMS are already at the scene of the accident. (Video of Incident Site at 21:11:57; T.51; R.___). He immediately saw an individual lying in the middle of the roadway and the wrecked motorcycle. (T.51; R.___). Upon walking up to the scene, Officer Craven speaks to another officer who indicates he does not even know who was driving the vehicle involved in the accident. (Video of Incident Site at 21:13:35). Officer Craven asks the people around the accident who was driving the car and Respondent answered that he was driving. (Video of Incident Site at 21:13:40-21:13:45). Officer Craven asked: "What happened?" Respondent explained his version of how the accident took place and Officer Craven followed up to understand his explanation. (Video of Incident Site at 21:13:45-21:14:45). After discussing the fact gas had leaked from the vehicles in the wreck and the need to prevent any cigarettes being lit, Officer Craven asks Respondent for his license, registration, and insurance. (Video of Incident Site at 21:15:58).

Respondent walks off to locate his registration and other information and Officer Craven notes to another officer on scene that he believes Respondent has been drinking. (Video of Incident Site at 21:16:10; T.53; R.___). After verifying that Respondent did not want to see EMS, Officer Craven asks him: "Mr. Barksdale, let me ask you a question. How much you had to drink tonight?" He then tells Respondent he could smell the alcohol so he had to ask. Respondent acknowledges he drank a "forty." (Video of Incident Site at 21:17:00-21:18-00). EMS then indicates the need to check Respondent out. (Video of Incident Site at 21:18:05).

Officer Craven found an empty bottle on the ground which matched an unopened bottle remaining in Respondent's vehicle. (Video of Incident Site at 21:18:40-21:18:50; T.54; R.___).

At that point, Officer Craven decided to have Respondent perform field sobriety tests. (Video of Incident Site at 21:18:56; T.54-55; R.___). Officer Craven discussed the situation with other officers, while Respondent was being checked out by EMS. At this point, Respondent was not under arrest, and Officer Craven had not concluded Respondent was driving under the influence. (T.55; R.___).

Officer Craven then learned from another officer on the scene that Respondent, immediately after the accident, tried to back up and leave the scene. (Video of Incident Site at 21:19:36-21:19:45). Immediately after learning Respondent had previously tried to leave the scene and right before Officer Craven went to move his vehicle so he could record Respondent performing field sobriety tests, he tells another officer to not let Respondent walk off. (Video of Incident Site at 21:20:09-21:20:12). This occurs while Respondent is not with Officer Craven, but is instead being examined by EMS, and there is no indication on the video or in testimony that Respondent heard this statement.

After moving his vehicle to an open parking lot, Officer Craven's dash camera clearly shows the scene of the accident with numerous EMS and other personnel around. (21:21:00-21:21:05). Office Craven reestablished contact with Respondent, who had been sitting in his vehicle speaking with and EMS worker. (21:22:00-21:22:35). Officer Craven tells Respondent he is not under arrest and asks if he is willing to go through field sobriety tests. (Video of Incident Site at 21:22:42-21:22:51). Respondent is then asked to perform the HGN, heel-to-toe walk and turn test, one-leg stand, convergence test, estimate 30 second test, (Video of Incident Site at 21:22:55-21: 21:29:25; T.54-55; R.___). Immediately upon completing the field sobriety tests, Officer Craven asks Respondent: "On a scale of zero to ten, zero being the soberest you have ever been, ten being the drunkest you've ever been . . . what number would you put

yourself at?" Respondent answers that he would not say he is drunk, but admits he could feel the effects of the alcohol and put himself at a 5. (Video of Incident Site at 21:29:26-21:29:55; T.55-56; R.___).

Officer Craven then placed Respondent under arrest for driving under the influence. ((Video of Incident Site at 21:30:00-21:30:12; T.56; R.___). Respondent is surprised by being placed under arrest believing he had passed the field sobriety tests. (Video of Incident Site at 21:30:12-21:30:16). Officer Craven then read Respondent his Miranda warnings. ((Video of Incident Site at 21:30:30-21:30:45; T.56; R.___). At the time of Respondent's arrest, EMS was still on the scene and Officer Craven verified with EMS that they no longer needed anything from Respondent. ((Video of Incident Site at 21:30:50-21:31:05). After being read his Miranda warnings, Respondent admitted the open container found beside his car belonged to him and he threw it out to avoid an open container charge. (T.56-57; R.___). He admitted drinking the "forty" Bud Ice found beside his car. ((Video of Incident Site at 21:35:35-21:35:57). Officer Craven then transported Respondent to the Johnson Detention Center for a breath sample to be collected. (T.57-58; R.___).

At trial, Respondent moved to suppress statements, arguing Miranda should have been read prior to any statements being given. His counsel acknowledged some of the statements at the beginning regarding whether Respondent had been drinking and how much he had to drink were "early on in his investigation for his DUI." (T.85; R.___). Counsel for Respondent also acknowledged Officer Craven was "questioning the accident." (T.85; R.___). After significant argument by both parties, the trial court ultimately concludes because it is an accident investigation, Officer Craven smells alcohol on Respondent at the outset, Officer Craven tells another officer not to let Respondent leave, and the fact Officer Craven said he was not under

arrest but never said he was not in custody, Miranda warnings were necessary and Respondent's statements should be suppressed "from start to finish." (T.104; R.___).

After the State presented additional case law for the trial court's consideration, both parties made additional arguments. The trial court recessed for the morning and when the hearing restarted, the court explained as soon as Officer Craven smelled alcohol on Respondent, Respondent would not have been allowed to leave. (T.111; R.___). The trial court concluded: "I think at the very outset Officer Craven would not have allowed the Defendant to leave. Therefore, I find that he was in custody and Miranda should be given." (T.112; R.___). As a result, he maintains his prior ruling suppressing all statements made by Respondent from the beginning of the encounter with Officer Craven. (T.112; R.___).

ARGUMENT

I. The circuit court erred in suppressing all of Respondent's statements when they were not the result of custodial interrogation requiring Miranda warnings to be given, but instead were the result of routine investigation into an accident and a DUI.

The circuit court erred in finding Respondent was in custody at the outset of questioning by Officer Craven. There is no evidence in the record to support the trial court's determination Respondent was in custody at any point prior to being placed under arrest. Further, the trial court committed an error by utilizing an incorrect definition of "custody" to determine whether Miranda[1] warnings were required. Finally, the trial court improperly relied on the subjective intentions of Officer Craven in determining whether Respondent was in custody.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. Appellate review of whether a person is in custody for Miranda purposes is limited to a determination of whether the trial judge's ruling is supported by the record. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003).

The Fifth Amendment to the United States Constitution provides: "No person ... shall be compelled in any criminal case to be a witness against himself . . . ." The United States Supreme Court (USSC) held "the prosecution may not use statements, whether exculpatory or inculpatory,

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S.at 444. "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." State v. Saltz, 346 S.C. 114, 135–36, 551 S.E.2d 240, 252 (2001) (citing Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)). "The purpose of Miranda warnings is to apprise a defendant of the constitutional privilege not to incriminate oneself while in the custody of law enforcement." State v. Medley, 417 S.C. 18, 24, 787 S.E.2d 847, 850 (Ct. App. 2016). "Requiring Miranda warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right." New York v. Quarles, 467 U.S. 649, 654 (1984).

Miranda warnings are only required when a person is in custody. Oregon v. Mathiason, 429 U.S. 492, 494 (1977). "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S., at 444.

In the instant case, the question to be determined was whether Respondent was in "custody" at any time he was being interrogated by Officer Craven. The USSC has explained: "Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323 (1994). "In determining whether a suspect is 'in custody,' the totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place and length of the questioning must be considered." State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997).

The USSC has stated what is required to be in custody: "[T]the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983). The USSC has explained: "the freedom-of-movement test identifies only a necessary and not a sufficient condition for Miranda custody. We have declined to accord it 'talismanic power,' because Miranda is to be enforced 'only in those types of situations in which the concerns that powered the decision are implicated.'" Maryland v. Shatzer, 559 U.S. 98, 112 (2010).

"[P]olice officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because . . . the questioned person is one whom the police suspect." Oregon v. Mathiason, 429 U.S. 492, 495 (1977). "The threat to a citizen's Fifth Amendment rights that Miranda was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." Stansbury, 511 U.S. at 324-25 (internal quotation marks omitted). As the USSC articulated: "Our cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of Miranda." Id. at 326. "Miranda warnings were 'not intended to hamper the traditional function of police officers investigating a crime.'" Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (citing Berkemer v. McCarty, 468 U.S. 420, 436 (1984)).

The trial court in this case clearly utilized an incorrect standard of determining whether Respondent is in custody. Instead of focusing on whether Respondent is subjected to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest" the court is focused on the subjective intentions and knowledge of the officer. He placed emphasis on the fact the officer smelled alcohol when he first approached Respondent, the fact Officer

Craven tells another officer to not let Respondent walk away—something that was never actually communicated to Respondent, and because Officer Craven never specifically states he was not in custody—though he stated numerous times he was not under arrest and on the video even told Respondent he was not under arrest prior to performing the field sobriety tests. The trial court viewed the determination from the subjective intent and knowledge of the officer and not from what a reasonable person being questioned would have understood. This was clear error.

Several cases and their relevant facts are very similar to the instant case and demonstrate why the trial court's rulings were in error. In Berkemer, the USSC concluded the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda." Id. at 440. The Supreme Court "decided that the motorist was not in custody for purposes of Miranda even though the traffic officer 'apparently decided as soon as [the motorist] stepped out of his car that [the motorist] would be taken into custody and charged with a traffic offense.'" Stansbury v. California, 511 U.S. at 323 (citing Berkemer, 468 U.S., at 442). According to the USSC: "The reason, we explained, was that the officer 'never communicated his intention to' the motorist during the relevant questioning." Id. This factual scenario is significant because it directly refutes the trial court's reliance on Officer Craven's statement to other officers that he smelled alcohol. Whether Officer Craven immediately entertained the belief Respondent was driving under the influence and would ultimately be arrested is inconsequential because he never expressed that belief to Respondent until he was ultimately arrested and Miranda warnings given.

The USSC reiterated its ruling in Berkemer in the case of Pennsylvania v. Bruder, 488 U.S. 9 (1988). In Bruder, an officer stopped Bruder's vehicle, and **after smelling alcohol on Bruder**, administered field sobriety tests, including asking Bruder to recite the alphabet. The

officer also **inquired about alcohol**. Bruder answered he had been drinking and was returning home. At trial, Bruder's conduct and statements during the field sobriety tests were admitted. Id. at 9-10. The Court found Bruder was not in custody for purposes of Miranda, held Miranda warnings were not required, and concluded the statements and conduct were properly admitted. Id. at 11. See also, State v. Peele, 298 S.C. 63, 378 S.E.2d 254 (1989) (the South Carolina Supreme Court held that a roadside field sobriety test did not constitute detainment sufficient to rise to the level of custodial interrogation); State v. Clute, 324 S.C. 584, 480 S.E.2d 85 (Ct. App. 1996), cert. denied, (May 27, 1997), and cert. denied, 522 U.S. 982, 118 S.Ct. 442, 139 L.Ed.2d 379 (1997)(defendant not "in custody" for the purposes of Miranda during the administration of field sobriety tests). Again, the USSC's holdings demonstrate the error of law committed by the trial court in relying on the impressions of the officer and not the objective belief of a reasonable person being questioned.

Additionally, it should be noted that the USSC has found that the clear seizure of an individual as part of a traffic stop is insufficient to constitute "custody" for Miranda purposes. The demonstrated act of authority at a traffic stop, where an officer pulls behind a driver, turns his blue lights on, and pulls them to the side of the road is significantly greater than what was found at this accident scene. Also, these cases demonstrate the trial court's reliance on the fact it is a criminal violation to leave the scene of an accident by the trial court was a clear error of law in light of the reasoning and explicit holding of Berkemer. The USSC, while acknowledging a traffic stop imposes a restriction on the liberty of the driver as well as recognizing in "most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission," concluded the traffic stop was more akin to a

"Terry[2] stop" and an individual stopped was not in custody for purposes of Miranda. Id. at 436-440. Accordingly, the fact that Respondent was not free to leave the scene of an accident without penalty is insufficient to render him in custody and should not have been considered by the trial court.

"An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." Stansbury, 511 U.S. at 325. The trial court relies upon Officer Craven's statement to another officer not to let Respondent leave. Most significantly, there is nothing in this record to support a finding that Respondent actually heard this statement or was ever told he was not entitled to leave. Instead, the trial court focuses solely on Officer Craven's subjective belief Respondent was in violation of the law and his intention not to allow Respondent to leave to find custody existed. The reliance on the Officer's statement, never communicated to Respondent, is in direct contravention of the requirement that subjective intentions not play a role in determining custody and the trial court focus solely on the reasonable understanding of the person being questioned.

Further, the trial court places great emphasis on the fact Officer Craven never testifies that Respondent was not in custody; instead, Officer Craven testifies he was not under arrest. The court's reliance on this distinction is misplaced. As discussed above, "custody" for purposes of Miranda is defined as "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Beheler, 463 U.S. 1121, 1125. As such, the Officer's testimony is directly relevant to the determination. Additionally, Officer Craven expressly stated Respondent was not under arrest and asks if Respondent is willing to go through field sobriety tests. (Video of Incident Site at 21:22:42-21:22:51). The uncontradicted testimony of Officer

[2] Terry v. Ohio, 392 U.S. 1 (1968)

Craven that Respondent was not under arrest until he was formally placed under arrest for DUI is significant and does not inure to the benefit of Respondent as found by the trial court, especially in light of the correct definition of "custody" established by the USSC.

Significantly, the South Carolina Supreme Court "has previously held that Miranda warnings are not required for statements made at the scene of a traffic accident if the defendant is not in custody or significantly deprived of his freedom." State v. Kerr, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998) (citing State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984)). This Court noted in that when "a traffic accident had just occurred and the statements made by the defendant were made during the course of a routine investigation into the cause" there was no requirement of Miranda. Id.

The sequence of facts recounted by this Court in Kerr are remarkably similar to the facts at hand:

> A local police officer came on the scene first and had appellant sit in the police vehicle. State Trooper Jonathan Hyman responded to a call for the accident and, after making sure the roadway was clear, requested the officer bring appellant over to him. Hyman questioned appellant as to whether he was injured and, at that time, **noticed appellant had a strong odor of alcohol** about him. Hyman asked appellant if he had been drinking, and appellant responded that he'd had several drinks. Hyman then offered appellant field sobriety tests, which appellant was unable to successfully complete. . . . Hyman determined that appellant was driving under the influence and placed him under arrest. Hyman then read appellant his Miranda rights and transported him to the county jail.

Kerr, 330 S.C. at 139, 498 S.E.2d at 215 (emphasis added). This Court found the questioning was part of a routine accident investigation, just like the questioning which occurred in this case. Even considering the fact the officer noticed the strong odor of alcohol, this Court still concluded

the appellant was not in custody and Miranda was not required prior to his statement that he had been drinking. This Court found:

> The subjective views harbored by either Hyman or the appellant are irrelevant. Rather, it is the objective circumstances of the interrogation that are to be considered in determining whether appellant was in custody at the time. The facts of this case are similar to those of Morgan. Hyman was performing a routine investigation into the cause of a traffic accident when appellant stated to the officer that he had been drinking. Accordingly, we find Miranda warnings were not required and the statements were properly admitted.

Kerr, 330 S.C. at 146, 498 S.E.2d at 219. This Court also noted the DUI investigation, such as having the defendant perform field sobriety tests, did not require the reading of Miranda warnings. Id. at 146 n.2, 498 S.E.2d at 219 n.2 (citing Peele, 298 S.C. 63, 378 S.E.2d 254 (1989)). The finding in Kerr demonstrates the errors committed by the trial court in the instant case.

In addition, the facts of this case simply do not support the determination by the trial court. As the video recording clearly demonstrates, Officer Craven came upon an accident in which EMS and others were already on scene. Officer Craven immediately began trying to determine the drivers of the vehicles and what took place to cause the accident. Respondent is allowed to walk off on his own to obtain his registration and insurance and other information. Officer Craven's actions are clearly those of someone conducting a routine accident investigation.

While Officer Craven clearly suspects Respondent of having been drinking, and may have even harbored the belief he was intoxicated while driving; he did not relay this information to Respondent. Just as the officer did in Kerr, Officer Craven asked Respondent about drinking. Respondent voluntarily responded he drank a forty ounce beer. Officer Craven determines the

need to perform field sobriety tests, again part of a routine DUI investigation, and something that both the USSC and the South Carolina Supreme Court have found to not place someone in custody for purposes of Miranda.

Prior to conducting the field sobriety tests, Officer Craven had to move his vehicle. Officer Craven spoke with other officers while Respondent was being checked out by EMS. During the discussion he learned Respondent attempted to leave the scene immediately after the accident and told the officer not to let Respondent leave. Importantly, there is no indication on the video or in the transcript that Respondent heard this statement.

Officer Craven moves his vehicle and Respondent is clearly seen still sitting in his vehicle talking with EMS. Officer Craven approaches and asks to speak with him. Officer Craven expressly states Respondent is not under arrest. He then asks to conduct field sobriety tests and Respondent agrees. Again, no indication Respondent's freedom has been restrained or that he has been placed under arrest. After Officer Craven determined Respondent failed the offered field sobriety tests, he did not impart this information to Respondent. Instead, Officer Craven asks again about Respondent's drinking and the impact of the alcohol. It is only after he is placed under arrest that Officer Craven even indicates Respondent failed the field sobriety tests, a fact Respondent challenges believing he passed them.[3] Accordingly, up until the time Officer Craven places Respondent under arrest for DUI, there are no facts supporting the trial court's determination he was in custody from the very beginning of the encounter. See Evans, 354 S.C. at 583, 582 S.E.2d at 409 ("Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record.").

[3] The fact Respondent believes he has passed the field sobriety tests and is very surprised about being placed under arrest significantly demonstrates he did not reasonably believe he was previously in custody.

As a result, the trial court's ruling suppressing all statements by Respondent "from start to finish" should be reversed because it is without any evidentiary support and based on clear errors of law.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court suppressing all statements by Respondent should be reversed and this case remanded for trial.

Respectfully submitted,

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Initial Brief of Appellant and Designation of Matter on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
South Carolina Commission on Indigent Defense,
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 13th day of April, 2018.

Anne Mueller

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RE: State v. Leon L. Barksdale
Appellate Case Tracking No. 2017-002306

Dear Mr. Alexander:

I am enclosing two (2) copies of the Initial Brief of Appellant and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
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S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services