

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

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Opinion No. 2018-UP-081 (S.C. Ct. App. Filed February 14, 2018), S.C. SUPREME COURT

2014-GS-27-00312;602

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

PETITIONER

APPELLATE CASE NO 2018-000977

AMENDED PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 26, 2018.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in finding that the trial court did not err in admitting Petitioner's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the Miranda warnings, Petitioner thought he was required to speak with the police under the terms of his probation, and Petitioner was high on marijuana and drunk?

II. Whether the Court of Appeals erred in finding that the trial court did not err in admitting the DNA analyst's expert testimony regarding two items on which Petitioner could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because the results were of such weak statistical significance?

STATEMENT OF THE CASE

On September 25, 2014, the Jasper County Grand Jury indicted Petitioner Billy Phillips for the murder of Darius Woods (“Decedent”) and possession of a weapon during the commission of a violent crime. R. 650 – 653.

On January 11-14, 2016, Phillips proceeded to trial before the Honorable Michael G. Nettles and a jury. R. 1. Phillips was represented by Steven Plexico, and the State was represented by assistant solicitors Mary Jones and Lenore Masser. R. 1. The jury returned a verdict of guilty. R. 633 – 634. Judge Nettles sentenced Phillips to current terms of forty years for murder and five years for the weapons offense. R. 640.

A timely notice of intent to appeal was served on January 19, 2016, and the direct appeal perfected. In an unpublished opinion the South Carolina Court of Appeals affirmed the convictions and sentence. App. 1. A timely petition for rehearing was filed on March 1, 2018. App. 4. The petition for rehearing was denied by order filed on April 26, 2018. App. 20.

A petition for writ of certiorari and motion to exceed the page limit were filed on May 29, 2018. The motion to exceed the page limit was denied by order filed August 2, 2018, and counsel was ordered to file an amended petition within ten days.

This amended petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals erred in finding that the trial court did not err in admitting Petitioner's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the Miranda warnings, Petitioner thought he was required to speak with the police under the terms of his probation, and Petitioner was high on marijuana and drunk.

Introduction

Petitioner Phillips and Decedent were friends. R. 99, ll. 8-10. Decedent was known to sell marijuana from his home and carry large amounts of cash. R. 119, ll. 2-7; R. 119, ll. 20-24; R. 259, ll. 1-2; R. 305, ll. 8-25; R. 314, l. 2 – 315, l. 13; R. 320, ll. 14-15. On May 18, 2013, Decedent was shot twice with his own handgun, a .38 special, and died. R. 174, l. 22 – 176, l. 9; R. 518, l. 8 – 519, l. 4; R. 534, ll. 18-25. Despite the fact that Phillips was regularly employed, the prosecution theorized that Phillips murdered Decedent because he needed money and was upset that Decedent lied about Phillips' PlayStation having been stolen, when Decedent still had it at his house. R. 263, l. 8 – 264, l. 6; R. 557, l. 4 – 558, l. 9; R. 572, l. 16 – 575, l. 22.

In its effort to convict Phillips, the State used his involuntary statement and misleading and confusing DNA evidence, which it suggested came from Phillips despite population frequency statistics of only **one in two hundred** and **one in two**. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 16; R. 578, ll. 1-8. In addition to pointing out the flaws in evidence and logic in the State' case, the defense argued that the police conducted a poor investigation and blindly focused upon Phillips early on despite other viable suspects. Defense counsel suggested that the murder was committed by an unknown third party whose DNA was left behind on the grip of Decedent's gun and on six swabs taken from various places on Decedent's blue jeans – possibly Wrenshad Anderson. R. 585, l. 13 – 609, l. 9; see R. 458, l. 8 – 471, l. 5.

This Court should grant certiorari to review the issues raised herein pursuant to Rule 242(b), SCACR. This case involves a substantial constitutional issue with respect to Issue I on the voluntariness of Phillip's statement. The trial court in this case found that Phillips was not in custody based solely upon the fact that Phillips was not arrested and was eventually allowed to leave, ignoring the fact that his initial request to leave was denied. R. 93, ll. 12-17; R. 95, ll. 6-8. Whether the defendant was under arrest is just one of many factors that a trial judge *should* consider in determining whether an interrogation is custodial, and the lack of arrest is not dispositive. See State v. Williams, 405 S.C. 263, 276-77, 747 S.E.2d 194, 201 (Ct. App. 2013); United States v. Longbehn, 850 F.2d 450, 452 (8th Cir. 1988). In determining that Phillip's statement was otherwise voluntary, the trial court ignored the dilution of the Miranda¹ warnings and Phillips' false belief that his probationary status required him to speak with police. The trial court's additional finding that Phillips was not intoxicated was not supported by the evidence.

There is also a novel question of law presented with respect to Issue II on the admissibility of DNA evidence. In State v. Dinkins, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995), this Court held that DNA population frequency statistics are admissible but cautioned that "as with DNA test results, they are subject to attack for relevancy and prejudice." In Dinkins, the defendant objected to the admission of "the astronomical probability figure of one in 2.9 billion" as unfairly prejudicial "because the jury may have perceived this statistic as infallible." 319 S.C. at 418, 462 S.E.2d at 60. Here, the challenge to the DNA testimony as confusing, misleading, and burden-shifting rested on the fact that the population frequency statistics were so low. R. 37, l. 17 – 44, l. 24; 437 – 478; R. 641, l. 8 – 644, l. 12; R. 654 – 655. Once admitted into evidence, the solicitor did exactly as defense counsel predicted, and

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

misrepresented to the jury that the DNA found actually belonged to Phillips. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 16; R. 578, ll. 1-8. This Court should take this opportunity to clarify when a DNA probability is of such low statistical significance that any minimal probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. See Rule 403, SCRE.

Relevant Facts

As discussed more fully in Appellant’s brief filed below, though not under formal arrest, Phillips was the subject of a custodial interrogation when he was questioned by investigators in the wee hours of the morning. Phillips was walking to Waffle House when he was picked up by an officer before 2:30 a.m. and taken to the Ridgeland Police Department for questioning.² R. 62, ll. 19-22; R. 65, l. 25 – 67, l. 14; R. 86, l. 21 – 87, l. 17; R. 351, ll. 12-23; State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation, on file with this Court). At the suppression hearing, the trial judge heard testimony from Christopher McIntosh, an investigator with the Ridgeland Police Department, and from David Williams and Sean Harley, the South Carolina Law Enforcement Division (“SLED”) investigators who conducted Phillips’ interrogation. Phillips also testified. The trial judge also viewed a portion of the video of the interrogation.³ R. 9, l. 13 – 15, l. 6; R. 59, l. 13 – 91, l. 11.

² Officer Long, who actually made contact with Phillips on the street and transported him to the police station, did not testify at the suppression hearing or trial. R. 2 – 5; R. 65, l. 25 – 67, l. 5.

³ During his initial interrogation, Phillips told the officers that Woods was alive when Phillips left his home at 9:30 p.m. Approximately one week later, on May 24, 2013, Phillips spoke with officers again. He told them he was in the car smoking marijuana outside of Woods’ house on the night that Woods was killed. He saw three men approach the house. One went inside and he heard a gunshot. The men noticed Phillips in the car as they were leaving and called him by his nickname “Dee.” Phillips was scared and ran. It was because Phillips was scared of the real assailants that he lied to police initially. R. 261, ll. 12-19; R. 385, l. 1 – 391, l. 5; R. 392, l. 5 – 393, l. 3. Phillips does not challenge the admissibility of his May 24, 2013 statement on appeal.

The Miranda warnings read to Phillips were couched by telling him: **“This don’t mean you’re in trouble or under arrest or anything, okay. But before we talk to anybody about anything, any possible witness, we have to read this. Just, State makes us do it, okay.** State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation). Investigator McIntosh did not have Phillips sign a written waiver of rights before leaving him with the two SLED agents who conducted the interrogation. R. 60, l. 13 – 62, l. 6; R. 63, ll. 1-25.

Both SLED agents admitted knowing that Phillips smoked marijuana and drank alcohol in the hours before the interrogation, though they never asked him the exact amount that he consumed. The agents both claimed that Phillips did not seem impaired. Though the video of the interrogation does not show Phillips passing out drunk, he told the agents repeatedly that he had been smoking marijuana and drinking. R. 69, l. 24 – 70, l. 7; R. 74, ll. 9-18; R. 76, l. 15 – 77, l. 5; R. 81, l. 6 – 83, l. 1; State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation).

The agents began by building a rapport with Phillips and asking him about the timeline of the day. However, their questions turned accusatory. When Phillips asked if he was under arrest, the agents said no, but they never told him that he was free to leave. In fact, when Phillips indicated that he was going to leave to go to Waffle House since he was not under arrest, the agents told him that they were going to take him to his house to get his probation agent’s phone number first, as Phillips indicated that he would submit to a GSR test once he spoke to her. R. 71, ll. 2-7; State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation).

Prior to being picked up by the police, Phillips had consumed a few pints of alcohol and had smoked a total of seven or eight “blunts.”⁴ R. 84, 20 – 85, l. 1; R. 86, ll. 14-20. If he had

⁴ A “blunt” is a hollowed-out cigar filled with marijuana. State v. Odom, 376 S.C. 330, 333 n. 1, 656 S.E.2d 748, 750 n. 1 (Ct. App. 2007).

not been under the influence, Phillips testified that he would have requested a lawyer and not been so talkative. R. 86, ll. 14-20. Though Phillips admitted telling the agents that he was “good” and never said “I’m too high,” those actions were themselves the product of his intoxication. R. 89, l. 5 – 90, l. 11. Ultimately, Phillips testified that he spoke to the agents because he thought he was required to do so as a term of his probation. R. 86, ll. 2-5. Phillips repeatedly asked to speak to his probation officer or to go home and get her phone number but was not permitted to do so. State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation). He did not feel like he had the right to leave during their questioning. R. 87, ll. 18-24; R. 90, ll. 22-23.

After hearing the arguments of counsel, the trial court ruled that Phillip’s first statement was admissible. R. 91, l. 12 – 90, l. 11; R. 93, l. 12 – 95, l. 17. The trial court noted that Phillips was not under arrest and was free to leave, as he eventually did later on in the morning. It was on that basis *only* that the trial judge found that Phillips was not in custody. R. 93, ll. 12-17; R. 95, ll. 6-8. The trial court further found that, to the extent that there were implications of custody, Phillips was given Miranda warnings and waived them. R. 93, ll. 12-17. The court determined that the video did not reflect that Phillips was intoxicated and noted that Phillips was not of tender years, had prior contacts with law enforcement, and was not of low intelligence. R. 93, l. 18 – 94, l. 25. The court placed specific emphasis on the fact that Phillips’s probation required him to cooperate with law enforcement rather than his cooperation being an effect of intoxication. R. 94, ll. 9-18. The trial court further found that the interrogation was “only an hour-and-a-half,” Phillips was not denied food or breaks, and there were no threats made to him. R. 94, l. 25 – 95, l. 5. Thus, the court ruled that the statement was voluntary and admissible. R. 95, ll. 2-17.

Discussion

A. Custodial Interrogation

In finding that Phillips was not in custody, the trial court ignored the body of case law related to the multitude of factors to be considered in determining whether a suspect was in custody, only one of which is whether he was placed under arrest. *See, e.g., State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003) (upholding trial judge's suppression of the defendant's statement where the interview lasted three hours and officers challenged the defendant on the answers she gave such that she was in custody); *State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) (upholding trial judge's admission of the defendant's statement where it was "debatable" whether a reasonable person would have believed himself to be in custody). Under *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. "A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

"Law enforcement must state the *Miranda* warnings after a person has been taken into custody or otherwise deprived of his freedom of action in any way." *Evans*, 354 S.C. at 583, 582 S.E.2d at 410 (internal quotations omitted). Custody occurs either upon formal arrest or under *any other circumstances* where the suspect is deprived of his freedom of action in *any* significant way. *See Miranda*, 384 U.S. at 444; *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances," *Evans*, 354 S.C. at 583, 582 S.E.2d at 410.

In State v. Williams, 405 S.C. 263, 276-77, 747 S.E.2d 194, 201 (Ct. App. 2013), the Court provided a list of thirteen factors that courts have considered in determining whether an interrogation was “custodial,” including:

(1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person’s conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person’s freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation.

(emphasis added). The formality of arrest is not a prerequisite to a finding of custodial interrogation. United States v. Longbehn, 850 F.2d 450, 452 (8th Cir. 1988).

Here, the trial court failed to engage in a proper examination of the factors relevant to whether Phillips was in custody. Had he done so, it would not have been “debatable” whether Phillips was in custody. Phillips’ contact with law enforcement was initiated by the police, not by Phillips, as Phillips was walking to Waffle House. He was driven to the police department in the backseat of a locked patrol car. The officer let him out the car when they got to the station and escorted him back to Investigator McIntosh’s office to meet with the SLED investigators. R. 86, l. 21 – 87, l. 24; State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation).

While McIntosh told Phillips that he could exercise his rights “at any time,” the SLED agents did not honor Phillips’ request to leave made at approximately fifty minutes into the interrogation. At that point, McIntosh was no longer in the office where Phillips was being

interrogated. Phillips asked if he was under arrest and the officers said “nope.” Phillips said that he was going to go to the Waffle House right down the road because he was starving. Rather than let him leave, the SLED investigator responded: “We gonna to go the house first.”⁵ State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation). Thus, while Phillips was ultimately released because law enforcement did not have probable cause for an arrest, they did not honor his right to terminate the questioning.

The total active interrogation was conducted in the middle of the night, starting sometime between 2:30 and 3:00 a.m., and lasted approximately one and half to two hours. R. 70, ll. 8-10; R. 75, l. 23 – 76, l. 1; R. 78, ll. 9-10; R. 80, ll. 6-13; R. 85, l. 5. Further, if the first attempt to conduct a GSR test on Phillips occurred at 2:30 a.m. and the actual GSR test was not taken until 5:40 a.m.,⁶ then the total detention time was over three hours. R. 351, ll. 12-23; R. 509, ll. 2-12.

The interrogation started with three officers – one investigator from the Ridgeland Police Department and two SLED investigators. The majority of the interrogation was conducted by the two SLED agents, who dominated and controlled the course of the interrogation. While not a constitutional violation since it was not a request for an attorney, the denial of Phillips’ requests to contact his probation agent is also relevant to the custody analysis. State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation).

The investigators began by building a rapport with Phillips, but the agents’ attitude later turned both aggressive and accusatory and utilized common investigative techniques to pressure Phillips into making inculpatory statements. They invited him to say that he accidentally shot

⁵ Phillips was initially unwilling to submit to a gunshot residue (“GSR”) test until first speaking with his probation agent, whose phone number was in his cell phone at home. State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation).

⁶ The GSR kit for Phillips was not analyzed because it was taken outside of the six-hour window from the alleged time of the shooting. R. 506, l. 23 – 508, l. 13.

Decedent. Later they told him that he had “something heavy on [his] heart” and that he would submit to the GSR testing and polygraph examination if he was not the shooter. The investigators further pressured Phillips into writing a statement, telling him what to include after deciding what he initially wrote was insufficient. They then asked Phillips if he remembered seeing Decedent lying on the floor and eventually handed him a picture of Decedent’s dead body. State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation). Investigator Harley admitted that Phillips was horrified upon being shown the photograph of Decedent. R. 381, ll. 1-6. Based on these factors, Phillips was the subject of a custodial interrogation. The trial judges’ reliance on only the fact that Phillips was not under arrest was error.

B. Dilution of Miranda Warnings and Involuntariness of Waiver

The United States Supreme Court has articulated two dimensions to the waiver inquiry: (1) “waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and (2) “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Berghuis v. Thompkins, 560 U.S. 370, 382-83 (2010). “Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” Moran v. Burbine, 475 U.S. 412, 421 (1986).

i. Dilution of Miranda Warnings

The trial judge found that Phillips was advised of his Miranda rights. R. 93, l. 17; R. 95, ll. 2-4; R. 95, ll.10-11. At the beginning of the interrogation, Investigator McIntosh told Phillips that he was going to “read [him] something real quick before we start.” McIntosh then told Phillips he had the right to remain silent, but before reading the remainder of his rights said:

“This don’t mean you’re in trouble or under arrest or anything, okay. But before we talk to anybody about anything, any possible witness, we have to read this. Just, State makes us do it.” It was after that attempt to downplay the seriousness of their interaction and classification of Miranda as a mere formality that McIntosh read Phillips his Miranda rights. State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation).

“Courts have recognized a number of circumstances under which the police can impermissibly undermine the meaning or significance of the *Miranda* warnings and fail to reasonably convey their meaning, thus negating the validity of a suspect’s waiver of his *Miranda* rights.” State v. Meyer, 362 P.3d 745, 752 (Wash. 2015). Courts have held confessions inadmissible, for instance, in cases where the police “downplay the relevance of the warnings and their application to the current questioning.” Id. (quoting Doody v. Schriro, 548 F.3d 847, 862–63 (9th Cir.2008) (Doody I)); State v. Powell, 282 P.3d 845, 856 (Or. 2012) (upholding suppression of defendant’s statement where officer assured defendant “the *Miranda* warnings that they were just ‘a matter of housekeeping’ and just ‘a formality’”). Here, the Miranda warning was likewise undermined by the investigator’s statements to Phillips that he was not in any trouble and that this was just something that the state required them to do.

ii. Fifth Amendment Privilege Not Obviated by Probation

Additionally, Phillips testified that he spoke with the investigators because “[a]ccording to the stipulations of [his] probation, we have to cooperate with law enforcement if we get pulled over or if there is an investigation.” R. 86, ll. 3-5. The trial judge found that, rather than intoxication, it was Phillips’ condition of probation that caused him to speak to law enforcement. He further noted that Phillips asked to contact his probation officer several times throughout the interrogation. R. 94, ll. 10-18; State’s Ex. 58 (DVD of Phillip’s 5/19/13 Interrogation).

The Fifth Amendment guarantees that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V. In Minnesota v. Murphy, 465 U.S. 420, 425 (1984), the United States Supreme Court wrote:

A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Thus, a probationer does not forfeit his right against self-incrimination regarding an unrelated criminal investigation.

Here, the trial judge found that the probation condition was the determinative factor in Phillips' decision to speak with the investigators. Yet, he failed to properly weigh Phillips' inaccurate belief that his probation *required* his cooperation against the voluntariness of the statement. In reality, Phillips' probation could not have required him to speak with law enforcement regarding Decedent.

iii. Intoxication a Relevant Factor to Voluntariness

The trial judge further erred in finding that Phillips was not intoxicated during his interrogation because he was steady on his feet, his speech was not slurred, and he was able to provide rational answers to the investigators' questions. R. 93, l. 18 – 94, l. 3. Among the factors to consider in determining voluntariness of a waiver is the defendant's physical condition. Greenwald v. Wisconsin, 390 U.S. 519 (1968). The Court of Appeals cited State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973), which held that "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a

matter of law, unless the accused's intoxication was such that he did not realize what he was saying." However, even if Phillips' level of intoxication did not alone warrant the suppression of his statement, it was a relevant factor in determining voluntariness. See People v. Dale, 981 N.Y.S.2d 821, 823-24 (App. Div. 3d Dep't 2014) ("A defendant's intoxication at the time that he or she makes a statement while in police custody is one factor to be considered in determining voluntariness").

Here, the trial judge's finding that Phillips was not intoxicated was not supported by the evidence. The video of the interrogation reveals that Phillips told law enforcement several times that he had been smoking marijuana both with Decedent during the day and after he left the Decedent's house and that he drank Paul Masson liquor. The investigators made statements that the marijuana used by Phillips was "some good mix" and "Paul had you." Perhaps most telling was when one of the investigator told Phillips: "**You ain't drunk. You high.**" Phillips corrected him, saying: "**No, I am. It's Saturday.**" The investigator laughed while saying "**You puffin' and drinkin' at the same time.**" While Phillips said "I'm good though," he had explained that he was a happy drunk and said that he can walk down the street without staggering and keep to himself. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Thus, the video of the interrogation belied the investigators' testimony that they did not perceive Phillips as high and drunk. See R. 74, l. 12-18; R. 81, l. 6 – 83, l. 1. The trial judge's contrary finding was error.

In summary, while the Court of Appeals summarily considered Petitioner's intoxication, the Court of Appeals, like the trial court, failed to properly consider the fact that the officers' statements downplaying the seriousness of the interaction and characterizing the warning as a mere formality diluted the Miranda warnings. Additionally, the Court of Appeals, like the trial court, failed to properly consider the fact that Petitioner believed that a condition of his probation

required him to cooperate with law enforcement and provide a statement. Considering all of the circumstances surrounding the statement, the trial court erred in admitting Petitioner's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the Miranda warnings, Petitioner thought he was required to speak with the police under the terms of his probation, and Petitioner was high on marijuana and drunk. Phillips was prejudiced by the admission of his first statement because, in this entirely circumstantial case, the solicitor was able to argue that his inconsistent statements to police were evidence of guilt. See R. 578, l. 9.

II.

The Court of Appeals erred in finding that the trial court did not err in admitting the DNA analyst's expert testimony regarding two items on which Petitioner could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because the results were of such weak statistical significance.

Relevant Facts

Though investigators did not request a buccal swab from Phillips initially, they obtained one several months later. R. 234, ll. 18-23. Of the swabs submitted for DNA testing, Phillips could not be excluded as a contributor on two samples, Phillips was excluded as a contributor on all other samples, and two samples were not sufficient for testing. According to the SLED analyst, the statistical probability of finding an unrelated individual who could have contributed to the mixture on the gun, i.e the "random match probability," was **one in two hundred** on the swab from the handgun grip and **one in two** on the swab from Decedent's right front pants pocket. R. 445, l. 15 – 476, l. 8.

The defense argued that the DNA evidence should be excluded pursuant to Rule 403, SCRE, and because it would result in improper burden shifting. R. 37, l. 17 – 40, l. 2; R. 42, l. 5 – 43, l. 6; R. 43, ll. 15-25; R. 44, l. 12-17; R. 654 (Motion to Exclude DNA evidence). The solicitor argued that while it was "not a great probability," that was a matter for cross-examination. R. 40, l. 5 – 42, l. 3; R. 44, ll. 1-11; R. 44, ll. 18-20. The trial judge ruled that it went to weight rather admissibility and denied the motion to exclude the DNA evidence. R. 43, ll. 7-12; R. 44, ll. 21-24. Defense counsel did not object to SLED analyst Lilly Gallman's expert qualification, but he renewed his objection to the admissibility of the DNA evidence. R. 436, ll. 16-18; R. 438, ll. 7-9; R. 442, ll. 1-11.

Gallman tested two swabs from the handgun, eight swabs taken from Decedent's jeans, three swabs taken from the wall and flooring of Decedent's living room, and three swabs taken from the crime scene – two from socks and one from a piece of jewelry. All of the swabs were compared to known DNA standards, with the exception of one swab from the handgun and one swab from Decedent's left rear pocket that were insufficient for reliable interpretation. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – R. 471, l. 5; R. 475, l. 5 – R. 476, l. 8. Gallman had known DNA standards from Phillips, Davonte Freeman (brother of Wrenshad Anderson who “found” the body), Shontay McKeithan, Jason Blessing, Kevin Smith, Rhett Long, James Orr to use for comparison.⁷ R. 437, l. 16 – R. 440, l. 15; R. 442, l. 17 – 447, l. 19; R. 452, ll. 1-6.

Phillips could not be excluded as a contributor on only two of the swabs tested, one from the grip of the handgun and one from Decedent's right front pants pocket. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – 471, l. 5; R. 475, l. 5 – R. 476, l. 8. The DNA profile obtained from the swab of the handgun revealed a mixture of at least three individuals – the Decedent, Phillips, and Blessing could not be excluded. R. 446, l. 20 – 448, l. 25; R. 462, ll. 20-24.

Regarding the statistical significance of the finding related to Phillips, Gallman said:

Once I do the comparison, which is the very first step to determine whether the person can be included or excluded from a mixture, we are required to generate, give a statistical value to that particular mixture. We are required to tell you how often you would see this mixture in a population. So the next statement that's on my report is that the probability of randomly selecting an unrelated individual who could have contributed to this mixture is **approximately one in two hundred**. All the information is there, but based on our protocol some of the areas, out of the sixteen, could not be used to generate a statistic or give you a statistical value. So based on the information that I could use to generate a statistic, the value is one in two hundred.

⁷ Deputy Jason Blessing admitted that he contaminated the gun that was taken from the scene by picking it up with an inside-out pair of used gloves. R. 166, l. 25 – 168, l. 6; R. 234, ll. 10-22. Kevin Smith and Rhett Long also appear to be officers with the Ridgeland Police Department. See R. 66, ll. 4-17; R. 150, l. 6 – 151, l. 20. There was no explanation during the trial of who James Orr was or why his buccal swab was submitted for testing.

R. 449, ll. 1-17 (emphasis added); see also R. 478, ll. 1-3.

The DNA profile obtained from the swab of Decedent's right front pocket also revealed a mixture of at least three individuals – the Decedent and Phillips could not be excluded. R. 450, ll. 4-19; R. 452, ll. 7-22. Gallman testified: “[T]he next step is to give a statistical value to that mixture and the probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately **one in two.**” R. 452, l. 22 – 453, l. 1 (emphasis added); R. 453, ll. 13-24; R. 470, l. 6 – 471, l. 5.

Notably, the DNA reports on one of the swabs taken from the handgun and on six of the eight swabs from Decedent's pants pockets, including the right front pocket, found DNA not attributable to the standards tested, i.e. of an unidentified person. R. 462, l. 25 – 463, l. 5; R. 464, l. 13 – R. 471, l. 5. Gallman confirmed that she did not receive a buccal swab for Wrenshad Anderson to test as a standard, though she could have performed such testing within one week. R. 476, ll. 19-24. She also testified that exclusion of a person's brother as a contributor does not mean that the person would be excluded. R. 475, ll. 21-24.

Despite the low statistical significance and high random match probabilities, the solicitor argued to the jury that Phillips' DNA was found on the gun and the pocket. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 17; R. 578, ll. 1-8. The trial judge gave serious consideration to defense counsel's motion for new trial. The parties disputed whether the solicitor's arguments were based on the DNA analyst's actual testimony or the solicitor's “interpretation.” While the trial judge characterized the expert's testimony as “logically inconsistent,” he ultimately denied the motion. R. 641, l. 8 – 644, l. 12.

Discussion

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. In United State v. Graves, 465 F.Supp. 2d 450 (E.D. Pa. 2006), the defendant moved to exclude DNA evidence from his trial for armed bank robbery. The government sought to introduce DNA analysis from an umbrella allegedly used and discarded by the robber and a pair of sneakers taken from Grave’s girlfriend’s residence that purportedly matched shoe prints from the teller counter. 465 F.Supp. 2d at 452-53. Grave’s argued “because of the low statistical significance of the DNA evidence, its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues under Rule 403, FRE.” Id. at 457.

The government argued in Graves that the statistical significance went the weight of the evidence rather than its admissibility. Id. The DNA report regarding the sneakers indicated the presence of DNA from three or more individuals. Id. at 453-545. The probability of selecting an unrelated individual at random from the African American population who could be a potential contributor (“random match probability”) to the mixture of DNA detected was 1 in 2,900 for the left sneaker and 1 in 3,600 for the right sneaker. Id. at 454. For the umbrella, the DNA report indicated the presence of DNA of more than one individual and listed a random match probability of approximately 1 in 2. Id.

In ruling that the DNA evidence related to the sneakers was admissible but that the DNA evidence regarding the umbrella was inadmissible, the Graves Court noted the Third Circuit Court of Appeals’ recognition that “overtly probabilistic evidence is no less probative of legally

material facts than other types of evidence.” Id. at 457 (quoting United States v. Hannigan, 27 F.3d 890, 893 n. 3 (3rd Cir. 1994)). While the Graves Court recognized that some courts have admitted DNA evidence even when the statistical significance of the data was relatively low and the probability of a random match in the relevant population was rather high, it recognized the potential danger “for the jury to misconstrue the statistical significance of the DNA evidence.” Id. at 458-59. The Graves court ruled that the sneaker DNA evidence was admissible because it had a far greater random match probability and in light of the safeguards of cross-examination, proper explanations, and clarifying jury instructions. Id. at 459. However, the Court ruled that the umbrella evidence was inadmissible, writing: “In contrast, **even with appropriate safeguards, the minimal probative value of the umbrella DNA evidence-in which half of the relevant population cannot be excluded as a contributor to the DNA sample-is substantially outweighed by the danger of unfair prejudice and confusion of the issues.**” Id. (emphasis added).

In the present case, the random match probability for the handgun swab was 1 in 200 and for the pants pocket swab was 1 in 2. R. 449, ll. 1-17; R. 452, l. 22 – 453, l. 1; R. 453, ll. 13-24; R. 470, l. 6 – 471, l. 5. Thus, the random match probability for the handgun swab was far weaker than the sneakers in Graves of 1 in 2,900 and 1 in 3,600. The random match probability for the pants pocket swab was the same as the umbrella excluded in Graves. As such, the DNA evidence was likewise of low statistical significance and minimal probative value, though the jury could hardly have realized that from the solicitor’s heavy reliance upon it in her closing argument. Its value did not outweigh the danger of unfair prejudice, confusion of the issues and its admission improperly shifted the burden to the defense. The jury was ultimately misled.

Additionally, it is notable that there was DNA of an unknown person on both of those swabs as well as on six other swabs from Decedent's pants. R. 462, l. 25 – R. 471, l. 5. With respect to the handgun, Gallman testified that she could not exclude Decedent, who owned the gun; Blessing, who admitted to picking the gun up with an inside-out pair of used gloves; or Phillips from the mixture. However, there was also DNA not attributable to any of the standards. R. 446, l. 20 – 448, l. 25; R. 462, l. 25 – 463, l. 5. Gallman testified that she determined based on the evidence submitted that there were three contributors to DNA mixture. She specifically testified that her determination of the number of contributors was not based on the number of standards that she could not exclude. R. 460, l. 10 – 462, l. 7. Thus, it would stand to reason that, if the mixture was of only three people and includes unknown DNA, that only two of the three persons who could not be excluded could have actually contributed to the mixture on the handgun. This seems inconsistent with Gallman's testimony: "In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample." R. 478, ll. 1-3.

With the DNA evidence admitted, the solicitor relied heavily upon it in her closing, arguing to the jury: "**Somebody went through both of [Decedent's] pockets and that was the Defendant. Remember the scissors example. If you don't touch it, you're excluded. If you don't touch it, you're excluded. Defendant was not excluded.**" R. 561, ll. 9-13 (emphasis added). She further argued: "Anything linking to him that could possibly be on that gun? **Well, we have his DNA on that gun. We know he touched it** and we know it wasn't because he was playing police. That's a story that does not make sense." R. 571, ll. 10-13 (emphasis added). She continued:

I also want you to remember Lilly Gallman. She was the DNA expert. **And her testimony, while as streamlined as we tried to keep it, is confusing.** What I want you to remember though is, **I want you to remember the scissors analysis that Ms. Masser was able to talk to Ms. Gallman about. If you don't touch it, you are automatically excluded. One hundred percent excluded. If you do not touch it, you are excluded. If I don't touch this notepad, I am excluded, but if I touch it, I can't be excluded.** My cells have been left behind on this item. And why does it happen with the pockets of Darius' jeans that night? **The reason the Defendant cannot be excluded, his DNA cells are there is because he was going through them after he shot and killed him.**

R. 575, l. 23 – 576, l. 10 (emphasis added).

We also know that Defendant's DNA is on the murder weapon and inside Darius' pocket. Had his DNA not been there, he would have been excluded. If I don't touch this, my DNA is excluded. My DNA is not there. If I touch it. I cannot be excluded. **Had he not touched the gun or the pocket, his DNA would not be there. And we know he touched the gun when he shot and killed Darius and we know he touched the pocket when he robbed him of his cash.**

R. 578, ll. 1-8 (emphasis added).

The trial judge erred in failing to exclude the DNA evidence with respect to the gun and the pants pocket. Defense counsel predicted that the evidence would be confusing and misleading to the jury, and it was. No counter-expert testimony was necessary for the judge to rule on the Rule 403 objection. Further, even if the evidentiary rules only required exclusion of the pants pocket swab with a one in two random match probability, the error in its admission was prejudicial to Phillips. He had provided the investigators with an explanation of why his DNA could have been on Decedent's gun – he touched it while visiting Decedent earlier in the day – but there was no innocent explanation for how his DNA would have gotten on the pocket of Decedent's pants.

In affirming the conviction, the Court of Appeals quoted State v. Primus, 349 S.C. 576, 588, 564 S.E.2d 103, 109 (2002), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005): “[W]hile [a one in 174] probability is not nearly as definitive as that

which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of [defendant's] guilt.” App. 2. The reliance on Primus is misplaced. There was no issue raised in Primus regarding the admissibility of DNA evidence. Rather, the issues before the Primus Court were related to subject matter jurisdiction and the propriety and harmlessness of the solicitor’s comment in his closing argument regarding Primus’ failure to present an alibi witness. 349 S.C. at 579, 564 S.E.2d at 104. The Primus Court found that the solicitor’s comment was improper. Id. at 584, 564 S.E.2d at 107-08. It was in the harmless error analysis that the Court wrote:

It is undisputed the victim was attacked and beaten. The question was the identity of the perpetrator. Relying solely on the “de minimus” DNA evidence, the Court of Appeals determined there was not overwhelming evidence that Primus was the assailant.

We conclude there was overwhelming evidence of Primus’ guilt. His fingerprint was found on the doorknob of the abandoned home. Two days after the assault, he had scratches on his face and chest which were consistent with the victim's assertion she had scratched Primus on the face and chest with a stick. Finally, the victim’s blood was positively identified as being on the wooden stick she used to fend off her attacker; DNA tests determined Primus could have left the blood on the other end of the same wooden stick. According to the serologist, examining the population at random, only 1 of 174 people would match the DNA profile of the blood located on the stick. While this probability is not nearly as definitive as that which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of Primus' guilt. Accordingly, the assistant solicitor's comment, while improper, was harmless beyond a reasonable doubt.

Id. at 587-88, 564 S.E.2d at 109. There is no indication that Primus’ attorney objected to the admissibility of the serology results, such that this case has little, if any, bearing on the instant case. Here, Petitioner objected to the admissibility of the DNA results because the danger of unfair prejudice, confusion of the issues and misleading the jury outweighed any probative value because the results were of such a weak statistical significance. The trial judge erred in admitting the DNA evidence.

CONCLUSION

Based on the foregoing, Petitioner Billy Phillips respectfully requests that this Court grant the petition for writ of certiorari and direct further briefing of the issues raised herein. If this Court does not allow further briefing, Petitioner requests that this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of August, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
AUG 07 2018
S.C. SUPREME COURT

Certiorari to Jasper County
Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 2018-UP-081 (S.C. Ct. App. filed 2/14/2018)
2014-GS-27-00312;602

THE STATE,

RESPONDENT,

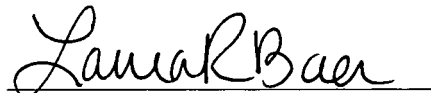
V.

BILLY PHILLIPS,

PETITIONER

CERTIFICATE OF SERVICE

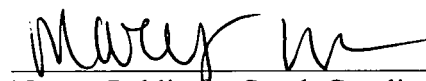
I certify that a copy of the Amended Petition for Writ of Certiorari in this case has been served on Don Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Billy Phillips, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of August, 2018.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of August, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027