STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Fairfield County

Honorable Daniel D. Hall, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LARRY CORNISH

APPELLANT

APPELLATE CASE NO. 2017-001866

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting appellant's alleged statement that he put the gun in a glove compartment, since the earlier Miranda warning shown on the body camera were very rapidly given through an open window in a police cruiser since no reasonable person would have understood them, appellant did not say he understood them, and appellant's subsequent inculpatory statement therefore should have been suppressed?

STATEMENT OF THE CASE

Appellant was indicted by the Fairfield County Grand Jury for the offenses of attempted murder, possession of a weapon during the commission of a violent crime, and unlawful possession of a firearm by a person convicted of a violent crime. R. 480 – 485. Appellant's case was called to trial on August 29, 2017, before the Honorable Daniel D. Hall, and a jury. Amy Zmroczek represented appellant. Croom Hunter was the assistant solicitor. R. 1.

On August 31, 2017, the jury found appellant guilty on all three charges. R. 461, l. 20 – 468, l. 12. Judge Hall sentenced appellant to thirty years imprisonment for attempted murder, and imposed two consecutive prison sentences on the weapons charges. R. 477, l. 13 – 478, l. 6.

This appeal follows.

STANDARD OF REVIEW

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse a trial judge's ruling on the voluntariness of the confession when the ruling is "so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

ARGUMENT

The court erred by admitting appellant's alleged statement that he put the gun in a glove compartment, since the earlier Miranda warning shown on the body camera were very rapidly given through an open window in a police cruiser since no reasonable person would have understood them, appellant did not say he understood them, and appellant's subsequent inculpatory statement therefore should have been suppressed.

Relevant Facts

This case involves the alleged shooting by appellant Larry Cornish of his live-in girlfriend. Appellant allegedly shot his girlfriend in the face in Fairfield County, and she drove herself to the hospital. She was then airlifted to Palmetto Richland Hospital in Columbia where she received treatment for her injuries.

A Jackson v. Denno[1] hearing was held prior to trial. Lieutenant Mike Carrell of the Winnsboro Police Department testified he was involved in the search for appellant on July 28, 2016, the day after the shooting. R. 86, ll. 8-22.

Carrell remembered that the police "went to several different locations and ultimately ended up locating Mr. Cornish at a residence off of North Main in Columbia." R. 87, ll. 1-3. SLED and the Richland County Sherriff's Department were already present, the streets were blocked, and the SWAT team was making commands for appellant to come out of the house. Carrell recalled: "Mr. Cornish was located hiding in a closet area in the back right hand of the residence. R. 87, l. 19 – 88, l. 11.

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[1] 378 U.S. 368 (1964).

Appellant was in the back seat of a police vehicle when "I [Carrell] walked up to the window, I read him his Miranda[2] rights as he was within the vehicle. At that point in time while the scene was still chaotic he didn't say too much to me." R. 88, ll. 12-20. Carrell remembered he was wearing his uniform and "a tactical vest" at the time.

The reading of Miranda warnings was captured on the body camera, and it is now on file with this Court. As this Court will see, the Miranda warnings were given very rapidly through an open back door window on a police cruiser. There was no individual or collection response from appellant that he understood his Miranda rights, and it is apparent appellant never said he understood his rights.

In fact, appellant apparently did not respond to the lieutenant, or said something "smart" to him, and the lieutenant responded, "So, you want to go down that road." R. 95, l. 2 – 96, l. 3. See Court's Exhibit 2, State's Exhibit 50 on file with this Court showing the Miranda warnings.

Carrell also testified that he told appellant the police were worried if he threw the gun out somewhere that someone could find the gun and get hurt with it. Carrell told appellant: "It would be beneficial for us to help not let some kid end up with that gun if he had left it somewhere." R. 92, ll. 2-7.

On cross-examination, Carrell said after this initial exchange with appellant, after he read him the Miranda warning, appellant was transferred into Carrell's police vehicle. Carrell claimed during the pre-trial hearing that appellant subsequently told him that "he left the weapon in the glove box of a white vehicle located in the back yard of the residence. The offender also stated when he went back to look for it the next morning [and] that it was missing. The conversation took place while waiting on the homeowner of the residence to come and secure the

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[2] Miranda v. Arizona, 384 U.S. 436, 476 (1966).

home." It was undisputed that appellant was not read his Miranda warnings again, and that his alleged statement was not captured on Carrell's body cameral. Carrell also admitted this alleged admission by appellant of putting the gun in the glove compartment was not contained in his supplemental report either. R. 98, l. 19 – 99, l. 21.

Winnsboro police officer David Ferguson also testified he was at the scene when appellant was arrested. Ferguson remembered Carrell reading appellant his Miranda warnings as shown on the body camera before this Court. R. 101, l. 7 – 103, l. 13.

Although appellant did not answer Carrell after being read his Miranda warnings, Ferguson claimed that fifteen to twenty minutes later, appellant made the statement about putting the gun in a glove compartment in a car that was in the back yard. R. 103, ll. 4-24. Ferguson said appellant made the statement while in Carrell's police cruiser after they had "switched cars." R. 103, l. 25 – 104, l. 4.

Defense counsel argued there was no question that appellant was in custody -- while in the back seat of the police cruiser -- when his Miranda warnings were rapidly given to him. Allegedly, fifteen to twenty to thirty minutes later, appellant made the statement about putting the gun in the glove compartment. "The body cams aren't on. I don't know why they're not on at this time. But there was clear testimony that there was no second Miranda warning given." R. 105, l. 22 – 107, l. 10.

Defense Counsel noted that after the Miranda warnings were given there was no response from appellant on the body camera, and Lieutenant Carrell said, "So, it's going to go down that road." Counsel argued that the alleged statement was not heard on a body camera and it was not even contained in a supplemental report. Counsel said that pursuant to Rhode Island v. Innis, 446 U.S. 291 (1980) and State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989), that appellant's

statement should be suppressed because it was given after express questioning or its functional equivalent after ineffective, improper Miranda warnings. R. 108, ll. 1-24.

The solicitor argued that appellant had been given Miranda warnings, and there was no reason he should have been given his Miranda warnings again before making the inculpatory statement. The solicitor argued that by a preponderance of the evidence the Miranda warnings were properly given prior to appellant making his inculpatory statement. R. 109, l. 1 – 111, l. 7. The judge ruled appellant's inculpatory statement was admissible. R. 110, l. 8 – 111, l. 7.

During the trial, appellant's girlfriend's ten-year-old son remembered on the day of the shooting that his mother was arguing with appellant. Appellant forced his mother to drive him from their home in her car, and when she stopped the car, appellant shot her in the face. R. 154, l. 5 – 156, l. 16.

The victim similarly testified that appellant threatened to shoot her, and when she stopped the vehicle because of traffic, "he turned around and shot me." The victim was able to drive herself to the hospital and she said, "I had a fractured jaw, missing eight teeth; four on each side of my mouth." R. 320, l. 2 – 322, l. 18.

Lieutenant Mike Carrell testified consistently with his Jackson v. Denno hearing testimony in the presence of the jury. R. 261, l. 19 – 266, l. 25. Carrell admitted his body camera should have been on so it would have captured the inculpatory statement Carrell claimed appellant made. R. 265, l. 20 – 266, l. 25.

In his closing argument, the solicitor urged the jury that if the police were going to make up a statement they would have "made up a statement . . . he told us he shot her." R. 419, l. 14 – 420, l. 1.

After the jury found appellant guilty, defense counsel moved for a new trial on the basis of appellant's alleged statement being admitted into evidence. R. 466, ll. 1-7. That motion was also denied. R. 466, ll. 8-13.

Discussion

The prosecution may not use an inculpatory statement from the accused stemming from custodial interrogation unless it demonstrates the procedural Miranda warnings were given. See Miranda v. Arizona, 384 U.S. 436, 444 (1966).

It was undisputed in this case that appellant was in custody after the SWAT team secured him, and he was placed in the back seat of the police cruiser. This was an inherently coercive custodial circumstance, and appellant's statement should not have been admitted unless the court found appellant was specifically and effectively informed of his Miranda warnings, and freely and voluntarily decided to waive those rights. See New York v. Quarles, 467 U.S. 649, 654 (1984).

The Miranda warnings in this case were given in such a rapid fashion that it certainly is not an overstatement to say that the Miranda warnings were given merely for the sake of saying that they were given. The state in this case did not show that Miranda was meaningfully complied with, and it also did not prove that appellant's alleged statement about the gun being in the glove compartment was a voluntary statement given after knowingly waiving his rights under Miranda. See State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986).

Appellant's alleged statement about the gun being in the glove compartment was the result of express questioning according to Lieutenant Carrell, where he asked appellant where the gun was located, and contemporaneously urged appellant that a child could come upon the gun

and harm himself. Defense counsel correctly cited Rhode Island v. Innis, 466 U.S. 291, 298 (1980), in arguing that appellant's statement should be suppressed.[3]

Miranda warnings can be given in such a manner that they are intended to skirt those warnings through improper investigative tactics. See State v. Navy, 386 S.C. 294, 303-04, 688 S.E.2d 838, 842 (2010); Miranda v. Arizona, 384 U.S. at 478-79; Missouri v. Seibert, 542 U.S. 600, 617 (2004). An inspection of the body camera, which was played for the trial judge, shows the Miranda warnings were not given in any meaningful fashion in this case. Appellant does not assert that the only effective Miranda warnings are when the warnings are slowly read to the suspect, and where he initials the Miranda waiver form as to each right he is waiving.

However, to accept the Miranda warnings in this case as meaningfully intending to inform appellant of his rights would turn Miranda warnings into form over any substance. That was clearly not intended by the United States Supreme Court or our state Supreme Court. Appellant's statement should have been suppressed, and given its highly inculpatory nature, appellant should be granted a new trial.

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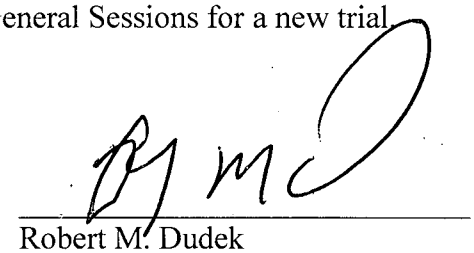
[3] In Rhode Island v. Innis, the United States Supreme Court ultimately found that the defendant's statement was admissible. However, the pertinent point is that statements from police – "a child may find the gun and get hurt" can become the functional equivalent of questioning depending on the circumstances. Here, it appears undisputed that Carrell expressly questioned appellant about the location of the gun, thereby prompting appellant's alleged statement after improper and ineffective Miranda warnings. See Court's exhibit 2; state's exhibit 50 on file with this Court.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Fairfield County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

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LARRY CORNISH,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Larry Cornish states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Daniel D. Hall, which was held on August 28 - 31, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Larry Cornish.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 23rd day of August, 2018.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True-billed indictments:
(2) Entire trial transcript;
(3) Court's exhibit 2; State's exhibit 50 (reading of Miranda warnings).

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

August 23, 2018

Robert M. Dudek
Chief Appellate Defender

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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

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

August 23, 2018.

Robert M. Dudek
Chief Appellate Defender

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APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Larry Cornish, #294218, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23rd day of August, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of August, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.