STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Perry H. Gravely, Circuit Court Judge

The State of South Carolina,

Respondent,

vs.

Marshell Hill,

Appellant.

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SC Court of Appeals

Appellate Case No. 2016-000868

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a rehearing on the following points that this Court may have overlooked or misapprehended. In so doing, the State maintains all its prior arguments as set out in its brief of respondent.

I.

The primary question in this case is whether Judge Graveley's finding that Hill was not in custody when he admitted to "tapping" Billy is supported by **any** evidence. If the answer is yes, then the statements were properly admitted. This Court found the trial court erred in admitting Hill's pre-Miranda statement because he was in custody and the subsequent Mirandized statement because it was taken in violation of Missouri v. Seibert, 542 U.S. 600 (2004).

However, this Court failed to apply the proper standard of review and give proper deference to the trial court that was able to observe the witnesses, including Hill, as he testified in two different pre-trial hearings and before the jury.

In the second paragraph of section II of its opinion, this Court cited State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003) to acknowledge it must determine if the trial court's ruling is supported by the record. This Court concluded with its holding: "**From our perspective**, however, the trial court's rulings find **insufficient** support in the record." Hill, supra (emphasis added). This ignores the trial court's superior position to determine the witness's demeanor and credibility than this Court could from the cold record. See Von Moltke v. Fillies, 332 U.S. 708, 740 (1948) ("The aid to the ascertainment of the truth to be derived from the trial court's impartial observation of the witnesses should not be dissipated in the process of review. His appraisal of the living record is entitled to proportionately more, rather than less, reliance the further the reviewing court is removed from the scene of the trial."). Further, the determination is not whether evidence is *sufficient* to support the trial court's ruling but whether **any evidence** that supports the trial court's ruling.

"When reviewing a trial [court's] ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of evidence, but simply determines whether the trial [court's] ruling is supported **by any evidence**." State v. Miller, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007) (emphasis added); State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 6119, 622 (Ct. App. 2008) (same); State v. McClure, 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (Ct. App. 1994) (noting the question of the voluntariness of a confession can come down to a question of credibility, which the trial court

may resolve in favor of the officers); see State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) ("In our opinion, **it is debatable** whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record.").

This Court further failed to give proper deference to the trial court's ability to observe witnesses. Gavin v. State, 473 So.2d 952, 955 (1985) ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire") (cited with approval, Clemmons v. Mississippi, 494 U.S. 738, 766, 110 S.Ct. 1441 (1990) (Blackmun, J., dissenting)). For instance, this Court surmises that in the video, Hill's sobriety is questionable. However, the trial court, unlike this Court, had the ability to observe Hill testify in two pretrial hearings and compare it to Hill's demeanor in the video. Further, both interviewing officers testified Hill was not intoxicated, and they already saw him the day before when he was actually intoxicated. R. p. 40, p. 60, pp. 117-18; p. 129. The trial court noted their testimony in his ruling. After watching the video **and** seeing Hill testify, the trial court found the video did not indicate he was intoxicated. R. p. 164.

Evidence supports the trial court's determination that Hill was not in custody when he admitted to "tapping" Billy during the unwarned interview. In addition to ample evidence supporting the trial court's determination Hill was not intoxicated, the investigators testified that when they picked Hill up from his house, he was not under arrest. He agreed to go to the station

after being promised a return trip. Their intention at the time was to bring him back home. Tr. pp. 40-41; pp. 107-08. Investigator Fortner testified he did not give Miranda warnings because Hill was not in custody and he was interviewed as a witness, someone "that might be able to provide some information as to what had taken place." R. p. 41, line 24 – p. 42, line 3. During the suppression hearing, Hill agreed he voluntarily gave his statement to officers at Investigator Fortner's desk. R. p. 140, lines 17-23. Hill agreed during trial that the officers treated him fairly during the interview. R. pp. 419-20.

This Court noted Investigator Bailey's comment during the videotaped interview, "we didn't' tell you you couldn't go home; we told you we could not make that decision until we find out what you have to tell us." This Court concluded it was a reference to a pre-Miranda conversation. Undoubtedly it was, but it most likely was a reference to a conversation that occurred **after** the investigators ceased questioning when he admitted to "tapping" Billy. This court concludes, "From this statement alone, it can be inferred a reasonable person would have concluded he was not free to leave." Hill, supra. Certainly Hill was not free to leave **after** admitting he tapped Billy twice, but there is no evidence this conversation occurred before Hill's admission. Evidence of this prior conversation, without more information about when it actually might have occurred, is not dispositive as this Court suggests. This Court made its own finding of fact, despite the requirement of reviewing courts to give deference to the trial court.

This Court cites LaFave's criminal procedure treatise for the proposition that if a police officer's invitation is conditioned on the police escorting the defendant to the police station, it is more likely the setting is custodial. However, while law enforcement asked Hill if they could bring him to the police station, no evidence supports that the invitation was "conditioned" on the

investigators accompanying Hill. No evidence supports a belief that Hill could not choose to use his own means to go to the police station. Further, the investigators agreed to provide him transportation back home when he asked. Hill admitted the reason he agreed to the interview is he did not want to be rude or disappoint the investigators. This testimony establishes he understood he could choose to decline the investigators' request. See generally INS v. Delgado, 466 U.S. 210, 216 (1984) (Noting in review of a fourth amendment issue that: "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.").

As this Court notes, not all questioning at a police station, even if the person is a suspect, is custodial. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013) (citing State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) ("Rather the fact that appellant voluntarily agreed to accompany the investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation.")); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (finding warnings are not required merely because questioning takes place at the station house or because the person questioned is the one police suspect). Note the trial court relied on Williams in its ruling. R. p. 364. Also note that in Doby, the Supreme Court observed the interrogation occurred during normal business hours and "[t]he actual oral confession was made in only two hours." Doby, at 709, 258 S.E.2d at 899.

In the instant case, the trial court could reasonably believe the pre-warned statement was not custodial as two investigators testified Hill was not intoxicated, they testified he was not in custody, and they agreed to his request for a ride back from the station after the interview. Further, Hill admitted the reason he agreed to the interview was he did not want to disappoint the

investigators. That suggests Hill was aware or believed he could turn down the investigators and further establishes the non-custodial nature of the interview.

This Court also found that the investigators changed their "purpose" and "technique" when they returned to the interview room after discussing inconsistencies between what they were told by Hill and another witness, Barksdale. However, there was no testimony or evidence the investigators changed their "purpose" or "technique." The purpose, determining what happened to Billy, had not changed. They still did not know what happened to Billy and were trying to find out from a witness with possible knowledge who gave information different from another witness with knowledge. Further, there was no intricate "technique" involved. Investigator Fortner merely asked a question based on a hunch and not actual evidence. This is an important distinction between this case and Navy. In Navy, the upset and crying defendant was confronted with evidence. Hill was not confronted with any evidence. Indeed, Hill made calculated attempts during the interview to discover the investigator's evidence and his laid back demeanor in the video stands in sharp contrast to the facts of Navy. Therefore, the trial court did not err in concluding, after careful consideration, that the instant case bore more similarity to Williams than Navy, especially after the trial court had the opportunity to determine the demeanor and credibility of the witnesses before him.

This Court should grant the rehearing because evidence supports the trial court's ruling finding the statement was not custodial.

II.

Further, even if Hill was considered to be in custody at some point prior to being provided Miranda warnings, the recitation of Miranda warnings remained sufficient to

accomplish their objective. Siebert found the "question-first" procedure employed by the police in Seibert constitutionally infirm because the "midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement." Missouri v. Seibert, 542 U.S. 600, 604 (2004). In reaching this conclusion, the Court pointed out the following relevant factors that bear upon whether "midstream" Miranda warnings could be effective enough to accomplish their objective:

> (1) The completeness and detail of the questions and answers in the first round of interrogation;
>
> (2) The overlapping content of the two statements;
>
> (3) The timing and setting of the first and the second rounds of interrogation;
>
> (4) The continuity of police personnel; and
>
> (5) The degree to which the interrogator's questions treated the second round as continuous with the first.

Siebert, at 615.

In the instant case, Hill provided a narrative recited by the investigators in State's Exhibit Three. They left Hill to discuss the discrepancies between Hill and Barksdale's accounts. They returned, and the record reflects only one question was asked – whether he might have hit Billy because Billy tried to take his television set. Hill answered that he may have popped him twice. This Court elevates a reasonable business practice – not just a law enforcement practice – of asking follow-up questions to the status of a special law enforcement technique. The trial court was not required to assume a surreptitious intent by the investigators when they sought to sort out discrepancies between two witnesses.

Further, due to the absence of any detail, there is little overlap between the statements.

The setting changed as well. After being questioned in an open office with no recording devices, Hill was taken to a designated interview room where his interview was recorded. The interrogation in the interview room did occur close in time to the first interview and involved the same personnel, but importantly, the investigators treated the second interview much differently, evidenced by using a witness form for the first interview and an advisement of rights form to conduct the second interview.

The Eighth Circuit noted that in Siebert, the plurality opinion written by Justice Souter "described the controlling question as whether 'a reasonable person in the suspect's shoes' would have understood the Miranda warnings as conveying a message that the suspect retained a genuine choice about continuing to talk." United States v. Terry, 400 F.3d 575 (8th Cir. 2005) (quoting Seibert at 602.).

In the instant case, Hill agreed he understood his rights, the investigators were polite with him, and they advised him he could end the interview at any time and they were not allowed to pressure him. R. pp. 419-20. Hill's testimony also shows his prior unwarned statement did not have the effect of making him feel obligated or trapped into providing further post-Miranda statements because Hill testified he did not recall the exact question about the television and did not recall whether he told the investigators he tapped Billy during his unwarned interview in the investigators' office. R. pp. 418-19. His inability to recall these specifics of his interview in the investigators' office shows that the admission was not memorable and played no role in his decision to continue cooperating with law enforcement after he was provided Miranda warnings.

Instead, Hill's own testimony indicates he adamantly desired to speak with the investigators and he realized the decision to speak was his own decision. R. p. 143; lines 6-20; p.

144, lines 7-24. Therefore, even assuming the first statement was custodial, the trial court did not err in admitting the subsequent warned statement into evidence because the investigators' and Hill's testimony shows that Hill believed he retained a genuine choice about continuing to talk. Terry, supra; Seibert, supra.

III.

This Court did not conduct a harmless error analysis in its opinion although the State argued in its brief that any error in admitting the statements would be harmless. Hill testified at trial and effectively admitted on cross-examination to hitting Billy in anger and admitted his fear was not totally justified, but was tainted by alcohol and reefer. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (explaining the elements of self-defense, including the third element: if a defendant's self-defense claim is based upon his belief of imminent danger, evidence must show a reasonably prudent man of ordinary firmness and courage would have entertained the same belief). Further, the injuries make clear that this was not a self-defense case, as the injuries prove that the force used was too excessive to be justified by self-defense. State v. Wood, 1 S.C.L. 351 (1794) ("[T]he degree of resistance ought to be in proportion to the nature of the injury offered; that it be sufficient to ward off such injury, and no more. For the moment a man disarms or puts it out of the power of the aggressor from doing further injury, he ought to desist from using further violence; and if he does commit any further outrage, he, in his turn, then becomes the aggressor.").

Accordingly, any error is harmless beyond a reasonable doubt. The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705

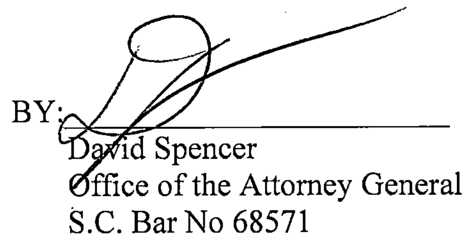
(2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

WHEREFORE, the State requests this Court to grant the petition for rehearing and affirm the convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General



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December 13, 2018

STATE OF SOUTH CAROLINA

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THE STATE, Respondent,

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MARSHELL HILL, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within State's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 13th day of December, 2018.

Anne A. Mueller
Legal Assistant

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ALAN WILSON
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December 13, 2018

Kathrine H. Hudgins, Esquire
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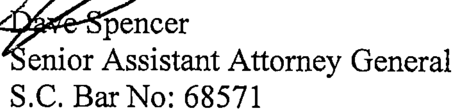
RE: The State v. Marshell Hill
Appellate Case No: **2016-000868**

Dear Ms. Hudgins:

Enclosed please find two copies of the State's Petition for Rehearing in the above-referenced case.

Sincerely,



Dave Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and six (6) copies)
Victim Advocacy Division

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