

State of South Carolina
IN the South Carolina Supreme Court

Certiorari to Bamberg County

Honorable R. Lawton McIntosh, Circuit Judge

unpublished opinion No. 2019-UP-037
Submitted Nov. 1, 2018, Filed Jan. 23, 2019

The State, Respondent,

v.

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Homer Arthur James, Petitioner, S.C. SUPREME COURT

Petition for writ of Certiorari
To the South Carolina Supreme Court

x February 12, 2019

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 12th DAY OF February

2019

Ludrean Bryant

NOTARY PUBLIC
STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES May 26, 2020

~~HOMER ARTHUR JAMES~~ James # 234214

Homer Arthur James # 234214

Petitioner (Pro Se)

Lieber C.T. WD-270

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Table of Authorities

Cases

Jackson v DENNO 378 U.S. 368 (1964) _____ passim

Miranda v ARIZONA 384 U.S. 436 (1966) _____ passim

Rhode Island v INNIS 446 U.S. 291 (1980) _____ 14

State v. Easter 327 S.C. 121, 489 S.E.2d 617 (1997) - 15

State v Kennedy 325 S.C. 295,
479 S.E.2d 838 (Ct. App 1996) _____ 14

State v. Medley 417 S.C. 18,
787 S.E.2d 847 (Ct. App 2016) _____ 14, 15

State v Pagen 369 S.C. 201, 631 S.E.2d 262 (2006) - 12, 13

Constitutional Provisions

U.S. Const. Amend. V, _____ 11, 12

U.S. Const. Amend. VI, _____ 11

Statement of Issue on Appeal

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

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

Statement of the Case

On October 20, 2014, a Bamberg County grand jury indicted Petitioner Homer Arthur James for armed robbery. Petitioner's case was called for trial on August 8, 2016, before the Honorable R. Lawton McIntosh and a jury. Pretrial Hearings Tr. I. David Miller, Bill Weeks, and Michael Emer represented the State. Pretrial Hearings Tr. I. Wallis Alves represented Petitioner. Pretrial Hearings Tr. I. The jury convicted Petitioner. Tr. 589, 1. 16-590, 1. 8. Pursuant to South Carolina's recidivist law, Judge McIntosh sentenced Petitioner to Life Imprisonment without the possibility of parole. Tr. 593, 11. 8-24. This appeal follows.

Argument

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

As if reciting a mantra, a twelve-year of law enforcement and Sled agent testified over and over again that Petitioner's incriminating statements were the result of "casual conversation". Pretrial Hearings Tr. 18, 1. 11 ("casual conversation"). Pretrial Hearings Tr. 18, 11. 23-24 ("casual conversation"). Pretrial Hearings Tr. 30, 11. 17-18. Pretrial Hearings Tr. 33, 1. 5 ("casual conversation"). Tr. 421, 1. 10 ("casual conversation"). Tr. 421, 1. 16 ("casual conversation"). Tr. 425, 1. 11 ("casual conversation"). Tr. 433, 1. 7 ("casual conversation"). Tr. 434, 1. 2 ("casual conversation"). Tr. 437, 1. 1 ("casual conversation"). Another six-teen year veteran Sled agent denied asking any questions designed to elicit incriminating information. Pretrial Hearings Tr. 50, 11. 1-3. Pretrial Hearings

Tr. 65, 11. 5-23. He testified he did not remember what comments by the nine during their "conversation" may have prompted Petitioner's statements. Pretrial Hearing Tr. 65, 11. 21-25. Pretrial Hearing Tr. 66, 11. 1-8. Pretrial Hearing Tr. 69, 11. 6-8.

The officers seized Petitioner in a remote field after a three-day bloodhound and helicopter chase prompted by a bank robbery in Denmark, South Carolina.

Tr. 457, 1. 24 - 471, 1. 8. On June 5, 2014, two masked men robbed the Enterprise bank in Denmark with a BB gun. Tr. 80, 1. 23-85, 1. 17. Tr. 157, 11. 18-22. A concerned citizen passing by the bank saw men run into the bank from a "silver or grayish Grand Am" Tr. 71, 11. 5-17. She drove back to the bank Tr. 72 11. 9-18. The Grand Am was no longer there. Tr. 72, 11. 19-23. She waited Tr. 72, 1. 24, 73, 1. 1. After a few minutes, the witness saw men running quickly from the bank Tr. 73, 11. 2-7. She could not identify the men and never saw the driver of the Grand Am. Tr. 73, 1. 19, 74, 1. 7.

The Olar Chief of Police heard a call on the radio to watch for a silver Pontiac Grand Am Tr. 126, 1. 17 - 73, 1. 1. He saw a car matching this description and followed it. Tr. 127, 11. 10-22. The car ran a stop sign and the Chief turned on his blue lights. Tr. 128, 11. 1-10

The Grand Am accelerated and the Chief gave chase. Tr. 128, 11. 11-130, 1. 7. The Grand Am crashed into some trees on a dead end road. Tr. 130, 11. 1-23. The Chief saw a black male run into the woods from the rear passenger side door of the car. Tr. 130, 11. 15-23. He only saw one person flee Tr. 140, 11. 18-19. The Chief could not tell how many people were in the car Tr. 133, 11. 14-17. He could not identify the person who fled. Tr. 141, 11. 23-25.

The police recovered currency from the bank and other items from the abandoned Grand Am, including several state-issued Id cards Tr. 160, 11. 17-24. Tr. 156, 1. 20-157, 1. 17. Tr. 159, 11. 1-6. Tr. 159, 11. 15-21. One of the Id cards belong to Petitioner's co-defendant, Leon James, who was not related to Petitioner. Tr. 157, 11. 14-17. Pretrial Hearing Tr. 6, 11. 2-6.

Another Id card, a North Carolina commercial drivers license, belonged to Darryl Lamont Lassiter. Tr. 158, 11. 1-6. Lassiter, who had an alibi for the robbery, testified that he mistakenly threw away his C.D.L. with an old wallet at Bike Week in Myrtle Beach after buying a new wallet at Levi's. Tr. 348, 1. 16-349, 1. 9.

The police also found Petitioner's Id. card along with Lassiter's and Leon James' cards. Tr. 159, 11. 15-20. A D.M.V. employee testified that Petitioner applied for a new Id card, submitting "an affidavit of lost or stolen

or surrendered identification" a month before the robbery. Tr. 494, 1.15 - 500, 1.14. Also found in the car was a pair of panties Sled tested for D.N.A. Tr. 289, 1.8. - 292, 1.10. using only 8/16 sites on the Y chromosome, the Sled expert claimed the D.N.A. matched Petitioner. Tr. 254, 11.3-15. She opined the probability of the match was 1/3,800, which Judge Mcintosh called "a mighty low number" Tr. 267, 11.12-20 Tr. 170, 11.3-4.

The police used blood hounds to begin tracking the suspects from the abandoned car. Tr. 457, 1.24 - 458, 1.14. Because of bad weather and tired dogs, the police abandoned the search. Tr. 458, 1.14 - 460, 1.21. The next day, a police officer responded to a call about suspicious people. Tr. 208, 1.25-20. He went to a mobile home near the Govan Fire Department, but found no one. Tr. 208, 1.25 - 210, 1.14. He left and stopped to speak to the fireman at the station. Tr. 210, 11.19-25. The fireman told the police officer about a nearby vacant mobile home they used for training. Tr. 234, 1.4 - 235, 1.7.

The officer went to the "old mobile home" and shined his lights on the front door. Tr. 211, 1.8. - 212, 1.16. A man the officer identified as the Petitioner walked out of the house, Tr. 212, Tr. 211, 1.8 - 212, 1.16. The man was "flailing his arms" and told police officer "this is my house", "I don't have anything". Tr. 213, 11.2-6

The officer drew his gun. Tr. 213, 11. 7-9.
The man ran. Tr. 213, 11. 7-9.

The dog team went to the trailer and picked up a new scent " Tr. 407, 1. 23- 408, 1. 15 (Remember the search had been called off the previous night due to bad weather) (also the Chief only saw one suspect flee from the Grand Am)

They captured co-defendant Leon James Tr. 408, 11. 11-15. Then they captured co-defendant Lewis Garvin Tr. 409, 11. 16- 410, 1. 2. After tracking through the woods all night, the police discovered Petitioner in a wooded area near a hay field. Tr. 410, 11. 3-15. Petitioner "just popped up" between members of the dog team. Tr. 410, 11. 1-6. He had on no shirt, was covered in dirt, and was soaking wet. Tr. 411, 11. 2-8. He needed water. Tr. 420, 11. 4-8. The police brought him out of the woods in handcuffs. Tr. 420, 11. 9-11.

Before trial, the court held a Denno² Hearing. Pretrial hearing Tr. 13, 11. 4-9. The State called only two of the potentially nine officers who were present for Petitioner's alleged statements. Pretrial Hearing Tr. 13, 11. 4-9. Tr. 398, 11. 3-8. During the Denno hearing, Sled agent Jeff Craft testified that there were "at least three" officers surrounding Petitioner when he made his statements. Pretrial Hearing Tr. 27, 11. 6-8.

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

However, during the middle of the trial, the other Sled agent, Chip Steppe, remembered some photographs that were never produced to the defense. Tr. 353, 1.7 - 354, 1.16. Included in the pictures was a shot of the officers surrounding the Petitioner in the field and, noting the contradiction of the testimony at the Denno hearing, defense counsel argued "there were a lot more than just four officers sitting around being casual. Tr. 374, 1.21 - 375, 1.11. States Ex. 80. From looking at the picture, Agent Steppe admitted "at least eight or nine people" surrounded Petitioner. Tr. 398, 11.19-21. When asked why he failed to mention all these people's presence during the Denno hearing, Agent Steppe replied "I didn't - I didn't think it was necessary". Tr. 398, 11.19-21. Agent Steppe's recently found footage also included a photograph of a shoeprint the State desperately sought to admit into the Evidence Tr. 353, 1.7 - 401, 1.7.

At the Denno hearing, the police readily admitted they never gave Petitioner Miranda warnings. Pretrial Hearing Tr. 17, 11.9-11. The police admitted Petitioner was in custody. Pretrial Hearing Tr. 17, 11.7-8. But the police denied questioning Petitioner, instead repeatedly describing the interaction of the heavily armed police officers, dogs, and helicopter pilots with the dehydrated, shirtless Petitioner as

8.

"casual conversation" Pretrial Hearing

Tr. 17, l. 21. - 19, l. 17. States Ex. 80.

Agent Steppe described how Petitioner made incriminating statements:

"We-he-he was tired, kind of like us. We offered him water, took the handcuffs off him, we're getting water, talking, we're basically, you know, commending him on how long he's lasted in the woods and how well he did... we had already had a conversation with him about how long he'd lasted in the woods, what kind of fitness level he was at. You know, he made - we made the statement that these woods are nasty, man. And I think he made statements to the extent "that there were snakes everywhere, I seen snakes everywhere, and then that the offhand comment about the gun not being real or whatever came up."

Pretrial Hearing Tr. 64, l. 20 - 65, l. 20 (emphasis added). Agent Steppe also told Petitioner during this "casual conversation" that Petitioner was "in the top five of the guys that I've ever run like that before"

Pretrial Hearing Tr. 49, ll. 21-23. Petitioner responded that he used to be a boxer.

Pretrial Hearing Tr. 49, ll. 23-25. Petitioner then supposedly volunteered that "It wasn't a real gun" Pretrial Hearing Tr. 50, ll. 4-11.

Agent Croft admitted that he previously

asked him his age and how he stayed in shape. Pretrial Hearing Tr. 18, 11. 1-11.

Tr. 20, 11. 5-14. Agent Croft remembered Petitioner saying "it was the stupidest thing he'd ever done in his life". Pretrial Hearing Tr. 20, 11. 5-14.

Petitioner argued his statements were inadmissible because of the officers' failure to administer Miranda warnings. Pretrial Hearing Tr. 70, 1. 19 - 71, 1. 7. The trial judge agreed no dispute existed that Petitioner was in custody and no Miranda warnings were given. Pretrial Hearing Tr. 71, 11. 9-11. Pretrial Hearing Tr. 76, 11. 9-11.

The State's argument and the trial judge's questioning centered on whether Petitioner's statements were the product of interrogation. Pretrial Hearing Tr. 70, 1. 17-97, 1. 4.

The trial judge then questioned the solicitors about whether asking Petitioner how he stayed in shape and commenting about how hard he was to track was interrogation designed to elicit admissions about flight, which is evidence of guilt. Pretrial Hearing Tr. 86, 11. 19-24. The State admitted it intended to argue flight was evidence of Petitioner's guilt. Pretrial Hearing Tr. 87, 11. 8-25. The Solicitor then argued, "but I just don't feel like it reaches that level". Pretrial Hearing Tr. 87, 11. 7-25.

The Solicitor characterized the Sled agent's questions about Petitioner's stamina during the three-day chase in the woods as "giving him props" and claimed not to know what kind of responses such questions would elicit. Pretrial Hearing Tr. 91, 11.1-121. Petitioner argued that the questions about flight led to incriminating comments about the gun and the "stupidest thing" and was therefore interrogation.

Pretrial Hearing Tr. 94, 1.19, Transcript 97, 1.4.

The trial judge then ruled that the statements were admissible because they were not made in response to interrogation.

Pretrial Hearing Tr. 97, 11.5-19. Petitioner ^{Re-}newed his objections with contemporaneous objections when the State introduced the statements before the jury Tr. 421, 11.17-21

Tr. 425, 11.8-17. Tr. 472, 1.22-473, 1.3. Petitioner also filed a motion for a new trial and again argued the suppression issue, which was denied. Def. Mot. New Trial

Hearing Tr. Sept. 9, 2016, 1-5.

The trial judge erred in admitting Petitioner's statements because they were the product of custodial interrogation in violation of Miranda. U.S. Const. Amends. V, VI. No dispute existed that Petitioner was in custody; therefore Miranda warnings were required. Miranda 384 U.S. 478-79.

As the trial judge recognized, flight is evidence of guilt. State v. Pagan 369 S.C. 201, 631 S.E. 2d 262-266 (2006) "the critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the Petitioner had knowledge that he was being sought by Authorities" Id. It is sufficient that circumstances justify an inference that the Petitioner's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose". Id. "Flight or evasion of arrest is a circumstance to go to the jury". Id.

In this case, the state's theory was that Petitioner's flight began immediately after the robbery and ended three days later after continuously using bloodhounds and a helicopter. This is simply not supported by the record. (See page 5 of this brief: the Olar police chief saw one black male flee from car. Couldn't tell how many fled. Nor how many were in the car. Page 6 States the search was called off due to bad weather. Page 7 the following night 24 hours later police go to an abandoned mobile home, defendants fled due to the fact they were trespassing, then the dog team was called and alerted to the

scent of trespassers "it is fact that rain will kill a dogs ability to pursue.") "When police willingly give false and misleading testimony, not only does it cause a deliberate deception on the court, it also makes a defendants trial so fundamentally unfair as to deprive one of their State and Federal Due Process right to a fair trial." the State directly linked Petitioner's statements to his flight:

"It wasn't even a real gun". I don't know if Agent Croft even knew that it was a BB gun at that time. "It was the stupidest thing I'd ever done". Well, that could mean a lot of things. "Big rattlesnakes". Y'all have been chasing me a while. That's what I would think if somebody had talked about the rattlesnakes; It's acknowledgement he's being chased for a while. why? why?

The reason why is simple: He's being chased because he's running; He's running because he's guilty and he knows it. -

He isn't running out there in the woods so he can see if he can sneak in between the first guy in the chase team and the second guy in the chase team and miss the dog. Tr. 552, 11.6-19. (emphasis added). These statements to the Jury make the solicitor's earlier argument during the Denno hearing that the

police were not interested in eliciting any incriminating information rings hollow.

In *State v. Medley*, this court brushed aside the State's argument that police officers' questions were not designed to elicit incriminating information.

State v. Medley 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016).

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

In *Rhode Island v. Innis* 446 U.S. 291, 299 (1980), the United States Supreme Court stated that *Miranda* should not be interpreted narrowly. *Rhode Island v. Innis*. The court stated that an "interrogation environment" that subjugated the suspects will and undermined the Fifth Amendment privilege was its concern. *Id.* The court stated that "express questioning" was not required

to trigger Miranda and police actions that contrive situations leading to incriminating statements qualify. Id.

The police officers here took advantage of Petitioner's depleted state and made comments and asked questions about Petitioner's supposed flight, which were directly relevant to guilt. The questioning here similar to the questions in State v. Easter 327 S.C. 121, 489 S.E.2d 617 (1997)

In Easter, the police responded to an accident and saw a man fitting the description at a convenience store.

Easter at 125-26, 489 S.E.2d 620. The police asked the man if he had been involved in an accident and if he had left the scene. Id. Disagreeing with the Court of Appeals, the Supreme Court, held these questions, including about leaving the scene, were interrogation for purposes of Miranda because they were "likely to elicit incriminating responses". Id.

Just like the defendant's leaving the scene in Easter, questions about appellant's flight could only elicit an incriminating response. Beginning interrogation triggered Miranda; Therefore, appellant's were inadmissible. Especially given that the State has the burden of proving compliance with Miranda and the

admissibility of the statements, the officers' lack of memory regarding what other comments or questions were made by the multiple officers at the scene further weighs against admissibility.

Without the questions about flight, the State's case that Petitioner was the person who fled would be weakened. Tr. 542, 1-19

Tr. 544, 1-7. Petitioner's alleged statement about seeing rattlesnakes all night lent credence to the State's argument that Petitioner was, indeed, the person the person police had been tracking for days.

The trial judge recognized the importance of flight to the case, yet inexplicably still ruled the statements admissible. Petitioner's statements were the product of interrogation, not "casual conversation."

This Court should reverse.

Conclusion

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

Homer Arthur James # 234214

Homer Arthur James
Petitioner (ProSe)

x February 12, 2019

State of South Carolina
IN the South Carolina Supreme Court

Appeal From the S.C. Court of Appeals

The State, Respondent,

v.

Homer Arthur James, Petitioner,

Designation of matter to be included
in record on Appeal

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

1. Pretrial Hearing Transcript dated August 8, 2016,
pp. 1-124
2. Trial Transcript pp. 1-11; 48-597
3. Hearing Transcript dated September 9, 2016, pp. 1-51
4. Petitioner's motion for New Trial filed Aug. 22, 2016
5. State's Ex. 80 (To be transported)
6. Indictment

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

* February 12, 2019

Homer Arthur James #234214

Homer Arthur James
18. Petitioner (Pro Se)

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Homer Arthur James,

Petitioner S.C. SUPREME COURT

Certificate of Service

I certify that a copy of Petition of Writ of Certiorari to the South Carolina Supreme Court and a copy of the Appendix in this case, have been served on the South Carolina Supreme Court, and Alan Wilson, S.C. Attorney General at the Rembert Dennis bldg. 1000 Assembly St. Columbia S.C. 29211.

Date, February 12, 2019

~~Homer Arthur James~~ #234214

Homer Arthur James
Petitioner (Pro Se)

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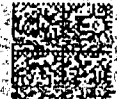
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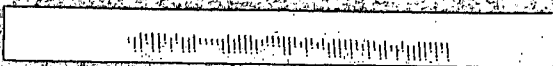
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