

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

PERRY BERNARD BUCHANAN,

APPELLANT

\_\_\_\_\_  
ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

BREEN RICHARD STEVENS  
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South Carolina Commission on Indigent Defense  
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ATTORNEY FOR APPELLANT

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**SC Court of Appeals**

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### **STATEMENT OF ISSUE ON APPEAL**

Whether trial court reversibly erred by admitting evidence of Appellant's statement to law enforcement where it was taken while Appellant was in custody, and where it was involuntarily made under circumstances of intimidation and deception due to Appellant's belief that he was under arrest for shoplifting rather than armed robbery while being interrogated at the police station?

STATEMENT OF THE CASE

Appellant Perry Bernard Buchanan was indicted by the Lexington County grand jury on June 7, 2010 for armed robbery, and of possession of a weapon during the commission of a violent crime. R. 4, lines 4-9; R.226 His case proceeded to trial before the Honorable R. Knox McMahan, and a jury. Appellant was represented by Casey Cornwell (Counsel), while the state was represented by J. Angela Garrick and Colleen E. Dickson. R. 1.

The jury found Appellant guilty of the lesser included offense of strong armed robbery, and not guilty of possession of a weapon during the commission of a violent crime. R. 204, line 21—R. 205, line 12. The trial court sentenced Appellant to fifteen years incarceration.<sup>1</sup> R. 217, lines 13-17; R.228.

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<sup>1</sup> A post-trial motions hearing was also held on September 22, 2011, based upon Appellant's motion to reconsider his sentence. However, Appellant withdrew the motion at the hearing. R.220.

## STATEMENT OF THE FACTS

Appellant was riding as a passenger in a Nissan XTerra on Jarvis Klapman Boulevard when the vehicle was stopped by police at approximately 4:40 pm to 5:00 pm on March 12, 2010, for suspicion of shoplifting from a nearby Walmart. R. 104, line 4—R. 107, line 9. Appellant and the driver, Tonya Doby, were handcuffed, and later taken to the West Columbia Police Department for interrogation. R. 28, lines 7-16; R. 108, ln. 4-6.; R. 120, lines 8-11. As acknowledged by investigator Bruce Wade (Wade) of the West Columbia Police Department, Appellant was under arrest and not free to go. R. 120, lines 22-25.

At the station, Wade Mirandized Appellant in the interrogation room with a written waiver form, which Appellant initialed and signed. R. 29, line 3—R. 31, line 4; R. 121, line 4—R. 122, line 9. Appellant purportedly gave an oral statement to Wade at approximately 5:59 pm confessing that he stole a computer from Walmart, and had an unopened box cutter in his hand. R. 33, line 2—R. 34, line 13; he R. 123, line 10—R. 125, line 11. When he attempted to get Appellant to give a written statement, Appellant asked Wade "why would he be talking to investigators on something simple as a shoplifting." R. 4, line 23--R. 35, line 1. Wade "explained to him that once he presented a weapon during the shoplifting, it was no longer a shoplifting, that made it an armed robbery, and at that point [Appellants] told me he couldn't give me a written statement." R. 35, lines 1-5. According to Wade, the interrogation occurred over a period of approximately one hour. R. at 5, lines 19-22.

Counsel objected to the introduction of Appellant's confession at the pretrial Jackson v. Denno<sup>2</sup> hearing, and contemporaneously during trial itself. R. 17, lines 6-11; R.

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<sup>2</sup> 378 U.S. 368, 84 S.Ct. 1774 (1964).

38, lines 2-16; R. 122, lines 10-15; R. 123, lines 22-25. Specifically, Counsel asserted the following:

[U]nder Jackson v. Denno I know there are several things that you have to look at.

One thing that I want to focus on in particular is that he was under custody the entire time he was under arrest.

.....

[W]hat I would suggest is that just being under arrest itself and being questioned in that manner, Your Honor, may have contributed somehow—any kind of statement may be tainted by that, Your Honor, the duress under that situation.

That's what we would base our motion on and we'd ask the Court to find in our favor.

R. 38, lines 2-16. In response, the State conceded that Appellant was in custody, but argued that the statement was voluntarily given. R. 38, line 19—R. 39, line 6.

The trial court found that Appellant was in custody, but freely and voluntarily waives his constitutional rights after he was advised of them. R. 40, lines 1-10. As a result, the State not only elicited testimony from Wade regarding Appellant's oral confession, but also introduced Wade's personal written notes regarding Appellant's oral confession and published them to the jury. R. 122, lines 10-25; R. 123, line 20—R. 125, line 11.

The jury found Appellant guilty of the lesser included offense of strong armed robbery, and acquitted of possession of a weapon during the commission of a violent offense. R. 24, line 21—R. 25, line 11. Trial court imposed a sentence of 15 years incarceration. R. 217, lines 13-17. This appeal follows.

## ARGUMENT

**The trial court reversibly erred by admitting evidence of Appellant's statement to law enforcement where it was taken while Appellant was in custody, and where it was involuntarily made under circumstances of intimidation and deception due to Appellant's belief that he was under arrest for shoplifting rather than armed robbery while being interrogated at the police station.**

Given the totality of the circumstances surrounding Appellant's statement, his confession was obtained in custody of police, and under circumstances of intimidation and deception, and without the full awareness of the nature and consequences of the rights being abandoned. Therefore, Appellant's waiver of his Miranda rights was not knowing or voluntary, and the confession should have been suppressed.

Additionally, Appellant was prejudiced by the trial court's erroneous admission of his confession due to the State's repeated use of it throughout the trial. As a result, Appellant respectfully requests reversal of his conviction, and remand for a new trial.

"[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, 378, 84 S.Ct. 1774, 1781 (1964)**Error! Bookmark not defined.** Additionally, "[e]ven absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [Miranda] rights when making the statement." State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 400 (Ct. App. 2010). Therefore, "[i]n order to introduce a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken

in compliance with Miranda v. Arizona, 84 U.S. 368, 84 S.Ct. 1774, 16 L.Ed.2d 694 (1964).” Id. 390 S.C. at 512, 702 S.E.2d at 400.

The United States Supreme Court specified two distinct dimensions of inquiry regarding the waiver of Miranda rights: (1) that the waiver was “voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception;” and (2) that the waiver was “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Id. 390 S.C. at 513, 702 S.E.2d at 401 (quoting Berghuis v. Thompkins, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2250, 2260 (2010)). Whether these dimensions of inquiry are satisfied is distilled to the test of whether the defendant’s will was overborne by the totality of the circumstances surrounding the confession. Id.

In the case at bar, Appellant was questionably interrogated while in the custody of law enforcement at the police station. The State admitted as much to the trial court when the prosecutor said, “certainly I think it’s clear that Mr. Buchanan was in custody.” R. 38, lines 19-20. Therefore, Appellant’s statement arose from a custodial interrogation.

Furthermore, Appellant’s waiver of Miranda rights was not made freely and voluntarily. First, Appellant was handcuffed, arrested, and involuntarily taken into the interrogation room of the police station where he was interrogated for approximately one hour. Under these intimidating circumstances, and while under the impression he was arrested for shoplifting, Appellant eventually made an oral statement to Wade regarding the incident at Walmart. However, once he revealed that she would actually be charged with armed robbery, Appellant immediately refused to cooperate. Therefore, Appellant’s

confession was not voluntary in the sense that it was the product of free and deliberate choice; rather, it was the result of both intimidation and deception.

Additionally, Appellant comments to Wade readily indicate that he was not aware of the nature or consequences of the rights being abandoned at the time he gave the oral confession. Specifically, Wade testified to the following at Denno hearing:

A. During the interview, I asked him to give me a written statement and he told me why was I talking to him, why would he be talking to investigators on something simple as a shoplifting. And I explained to him that once he presented a weapon during the shoplifting, it was no longer a shoplifting, that made it an armed robbery, and at that point he told me he couldn't give me a written statement.

.....

Q. And what, if anything, did you tell him at that point?

A. I told him, "You already confessed to this crime and I'm going to tell in court what you already told me."

Q. And did he, in fact, give you a written statement?

A. No, he didn't.

R. 34, line 23—R. 35, line 11. This, is readily apparent from Wade's own comments that Appellant's waiver of his Miranda rights was not made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon them. Accordingly, Appellant's statement during a custodial interrogation was inadmissible because he did not in fact knowingly and voluntarily waive his Miranda rights when making the statement.

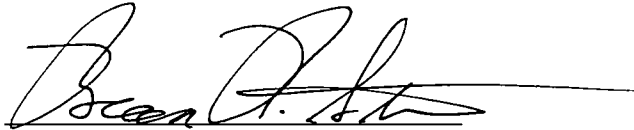
Moreover, Appellant was prejudiced by the improper admission of his confession. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 295, 111 S.Ct. 1246, 1257 (1991) (holding admission of involuntary confessions is a trial error, and a federal constitutional error is

reversible if the error was harmless beyond a reasonable doubt). Here, the State repeatedly exploited this constitutional error and compounded its prejudicial effect to Appellant by reminding the jury of Appellant's oral confession in opening statements, in trial testimony, and in closing argument. R. 51, lines 20-5; R. 123, line 1—R. 125, line 19; R. 179, line 3—R. 180, line 3. Literally, from beginning to end, the jury was inundated with the knowledge of Appellant's confession. As a result, the error cannot be deemed harmless beyond a reasonable doubt. Therefore, Appellant respectfully requests reversal of his conviction, and remand for new trial.

CONCLUSION

For the foregoing reasons, Appellant Perry Buchanan respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of September, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

PERRY BERNARD BUCHANAN,

APPELLANT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Perry Bernard Buchanan states:

1. He is an 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 R. Knox McMahon, which was held on April 25-27, 2011, 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 Perry Bernard Buchanan.

Respectfully submitted,



Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of September, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Trial transcript (April 25-26), pp. 1-219;
- (3) Post-trial motion hearing transcript (September 22, 2011), pp. 1-5;
- (4) State's Exhibit No. 10 (Notes 3-12-10);
- (5) Sentence sheet.

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

September 14th, 2012.



Breen Richard Stevens  
Appellate Defender

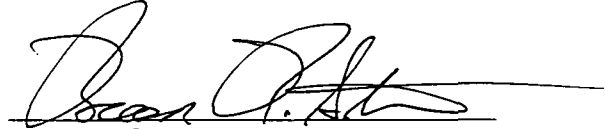
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 14, 2012

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen R. Stevens  
Appellate Defender

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Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

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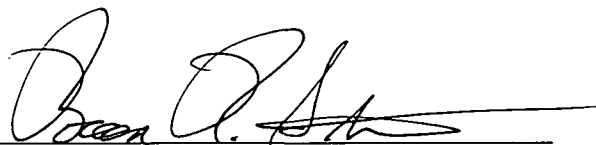
V.

PERRY BERNARD BUCHANAN,

APPELLANT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney 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 Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of appellant and Record on Appeal have been served on Perry Bernard Buchanan, #281305 at Kirkland Correctional Institution, this 13th day of September, 2012.



\_\_\_\_\_  
Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 14th day of September, 2012.

\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: \_\_\_\_\_.