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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAWANDA ALLEN,

APPELLANT

Appellate Case No. 2010-172506

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court abused its discretion by admitting appellant's confession where appellant was threatened that she would be charged with murder if she did not "come straight," since a confession that is procured as a result of a threat is not admissible?

STATEMENT OF THE CASE

Appellant was indicted by the Williamsburg County Grand Jury for the offences of murder, burglary in the first degree, and criminal conspiracy. R.474. Her case was called to trial on August 30, 2010, before the Honorable Clifton Newman, and a jury. Kimberly Barr and Doward Harvin were the assistant solicitors. Verdell Barr represented appellant. R. 39.

At the conclusion of the trial, the jury found appellant guilty on all three (3) counts. R. 470, l. 17-23. Judge Newman sentenced appellant to forty-five years imprisonment for murder, and he imposed concurrent sentences of thirty years for burglary in the first degree and five years for criminal conspiracy. R. 472, l. 13 – 473, l. 4.

This appeal follows.

ARGUMENT

The court abused its discretion by admitting appellant's confession where appellant was threatened that she would be charged with murder if she did not "come straight," since a confession that is procured as a result of a threat is not admissible.

Relevant Facts

The suppression hearing was held before Judge Newman on August 23, 2010. R. 1. As will be seen infra, appellant's son, Ronald Mack, pled guilty to the murder and received a fifty year prison sentence. R. 389, l. 1 – 390, l. 25. Appellant's boyfriend, Kelvin Bowen, was also later convicted in the murder. This Court can take judicial notice from the SCDC website that he received a ninety-nine year sentence for murder.

Williamsburg County Sheriff's Office Investigator Pamela Lail was assigned to the murder case involving the victim, Kenyon Dorsey. He was murdered on April 15, 2009. R. 8, l. 14 – 9, l. 1. Lail testified that appellant was later arrested in Maryland and transported back to Williamsburg County.

Lail interrogated appellant on May 28, 2009. R. 9, ll. 4-14. The interrogation began at 10:30 a.m. Appellant had been arrested for accessory before and after the fact of murder. She was not charged with murder. R. 10, l. 12 – 11, l. 4.

Lail testified on direct-examination during the suppression hearing that appellant was read her Miranda¹ warnings and that she understood them. R. 13, l. 14 – 16, l. 21. Specifically, Lail denied she threatened appellant "in any way." R. 16, ll. 10-13. Lail also said appellant never requested an attorney during the one-hour interrogation. R. 16, l. 23 – 17, l. 18. Lail related that appellant ultimately confessed to driving her boyfriend from Maryland "and being the driver so-to-speak for this murder." Lail said appellant also

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

implicated her son, Ronald Mack, her boyfriend Kelvin Bowen, and Antonio McClary. R. 18, ll. 3-11.

On cross-examination, defense counsel focused on threats that were made to appellant. Lail acknowledged that appellant was originally charged with accessory before and after the fact of murder, but she maintained that appellant ultimately being charged with murder was the charging decision of the solicitor's office. R. 20, ll. 2-16. As will be seen infra, Lail admitted the obvious during appellant's trial: That the police department and the solicitor's office work very closely on these cases.

Lail acknowledged during the interrogation that Detective Collins told appellant "that she needed to come straight." Lail acknowledged they thought appellant was lying to them at that point during the interrogation. R. 21, ll. 12-25. Lail maintained appellant was "just roaming and rambling on," and that she would not tell the police what really happened. R. 22, ll. 8-24.

Lail admitted that appellant was told she needed to come straight or she could be charged with murder. Lail denied that telling appellant she could be charged with murder if she did not "come straight" was a threat. R. 22, l. 25 – 24, l. 11. Appellant was told "**don't let us have to change your charge to murder, so you need to tell us exactly what happened.** I have been sitting here listening to you roam on about what happened. All that is good, but you're here, so let's start on the fourth, which is a Saturday, when Kenyon got killed that night." R. 24, l. 18 – 25, l. 17. (emphasis added).

On re-direct examination, Lail said that the statement of co-defendant Antonio McClary was the basis for her arrest warrants for appellant and her son. R. 28, ll. 2-19.

Defense counsel Barr argued that appellant had been threatened "at least twice" during the interrogation. He noted that appellant was threatened if she did come straight that

accessory charges would be upgraded. Defense counsel argued at the point appellant was threatened “the statement took a different turn at that point.” R. 30, l. 11 – 31, l. 11.

The solicitor argued that the penalty for being an accessory before the fact of murder was the same as the penalty for murder and that appellant could read and write. The solicitor continued to stubbornly deny that appellant had been threatened into confessing. R. 31, l. 12 – 32, l. 11. Defense counsel Barr responded that appellant was threatened, and that appellant gave her confession out of the fear of the threat. R. 32, l. 14 – 33, l. 7.

Judge Newman ruled appellant had been given her Miranda rights and ruled by a preponderance of the evidence that appellant’s statements were made freely and voluntarily tendered. R. 33, l. 12 – 37, l. 9.

The trial

The decedent’s mother, Annette Dorsey Bradshaw, testified Kenyon was seventeen-years-old when he died. R. 42, l. 14 - 43, l. 19. Bradshaw and Kenyon were the only people living in their house at the time of the murder. Bradshaw knew appellant’s son, Ronald Mack. R. 43, ll. 15-25.

Kenyon and Mack had been friends. However, Bradshaw said she became angry when she learned Mack had stayed at her house one night while she was working. She worked the night shift and she did not like others besides Kenyon in her house when she was not home. R. 44, l. 1 – 46, l. 16.

Bradshaw had allowed her daughter to borrow her car on the night of the murders. The inference was that the robbers or murderers probably did not think she was at home. She remember Kenyon came home about 1:30 a.m. on the night of the shooting. She told Kenyon he better not complain in the morning because they had to go to Palm Sunday service. R. 53, ll. 3-23.

Bradshaw remembered Kenyon only said: “Ok Ma,” and he started watching television while sitting in a chair. R. 53, l. 23 – 54, l. 8.

Bradshaw testified that she woke up because she heard a noise that sounded like firecrackers. It was 2:20 a.m., and she yelled two or three times for Kenyon. However, he did not respond. Bradshaw testified she could hear people running from the house. She noticed blood on Kenyon, and she ran out the back door to her mother’s next door house telling them: “Somebody just shot Kenyon.” R. 54, l. 6 – 56, l. 25.

When Bradshaw ran outside, she looked back and saw a dark colored SUV or “some kind of small sport truck” speeding away. R. 65, l. 4 – 66, l. 1.

Pamela Lail testified about her interrogation of appellant at trial. Lail said she actually went to the murder scene on April 15, 2009. R. 295, ll. 1-7. Lail said after the murder they did not know that appellant’s son, Ronald Mack, “had a prior problem” with the decedent. However, the police did know from the GSR report that Mack had washed his hands with bleach recently. R. 299, l. 4 – 300, l. 3.

Lail said she learned through her investigation that Mack was no longer a student at Kingstree High School. He was now attending school in Maryland. R. 298, l. 1 – 310, l. 15.

Eventually arrest warrants were issued for appellant, her boyfriend, Kelvin Bowen, her son Ronald Mack, and Antonio McClary. R. 311, ll. 18-22. Appellant’s son, Mack, pled guilty. R. 312, ll. 1-7.

Lail interrogated appellant on May 28, 2009 beginning at 10:30 a.m. R. 313, ll. 17-23. Her testimony was largely consistent with that of the suppression hearing. The Miranda warnings and confession were admitted over objection. The tape, state’s exhibit 45 is now before this Court. The solicitor told the judge before the tape was admitted that “It is not until Page 24 when she really starts to come clean and tell the police about her

involvement with the planning and carrying out of the crime.” R. 318, l. 1 – 331, l. 4. Lail claimed appellant showed no emotion during the interrogation “she seemed sort of matter-of-fact almost.” R. 332, l. 21 – 333, l. 20. Lail said appellant did not say “a whole lot of anything” during the first twenty or thirty minutes of the interrogation. R. 333, l. 21 – 334, l. 2. Lail said appellant denied being in South Carolina the weekend the decedent was murdered during the first twenty or thirty minutes of the interrogation. R. 334, ll. 3-8.

Lail said appellant eventually admitted she knew what her boyfriend and son intended to do. Lail said this was not clear on the tape of the interrogation. R. 340, l. 10 – 341, l. 17.

On cross-examination Lail acknowledged appellant, at the time of the interrogation, had not been charged with murder but rather accessory before and after the fact of murder. R. 354, l. 22 – 355, l. 14. Lail stuck with her position: “There were no threats involved.” R. 356, ll. 6-9.

On the redirect-examination Lail said there was no difference between the penalty for accessory before the fact of murder and murder. R. 367, ll. 5-12.

On re-cross examination Lail admitted a normal person would not know the penalties for the crimes. Barr asked Lail to admit “the officers *actually told her that unless you come straight with us we’re gonna charge you with murder.*” Lail now answered: “That’s not exactly what they said, no, sir.” R. 367, l. 17 – 368, l. 9. Lail admitted that the police department did work jointly with the solicitor’s office and did get advice on what the “proper charges” were. R. 370, l. 23 – 372, l. 11.

Ronald Mack

Appellant’s son, Ronald Mack, testified he felt betrayed by the decedent because during their drug dealings with the Bloods that the decedent kept coming up short with

money on the drug deals that were being done in Maryland. Mack related that he “was tired” of having to “take up the slack” for the decedent’s failures in drug deals. R. 375, l. 5 – 387, l. 13. The two got in a fist fight two weeks before the shooting, and Mack believed Kenyon was responsible for a later incident where Mack was shot at by an unknown person. R. 377, l. 11 – 378, l. 25.

Mack also testified prior to the shooting he only discussed it with co-defendant Bowen. He denied that anyone that he and his mother had a plan to kill the decedent. R. 382, l. 10 – 385, l. 24. Mack insisted on cross-examination by the solicitor that although appellant was outside the house, she did not know what was going inside the house. R. 390, l. 19 – 391, l. 13.

In his closing argument defense counsel told the police threatened appellant and she was scared when she gave her inculpatory statement. “Now a layperson doesn’t know whether or not you’re gonna get 5 years, 10 years, or 20 years for a crime. She afraid, so they get the detectives to tell her, look, thus far you’re just being charged with accessory but now if you’re not forthcoming we’re gonna charge you with murder. Now I think that’s a threat . . .” R. 427, ll. 4-25.

Discussion

In State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990), Osborne was told she would be charged with “withholding evidence” if she did not make an honest statement. The Sheriff admitted that Osborne was told if she withheld information she could be charged with a crime. The Sheriff also acknowledged Osborne was told that fact from the beginning of the interrogation.

Our Supreme Court found Osborne was clearly distinguishable from State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990), where the polygraph examiner told the

defendant it would be in his best interest to tell the truth. Osborne was given a new trial because her statement should have been suppressed because it was the result of a threat.

Coercive police activity is a necessary predicate in finding a statement is not voluntary. Colorado v. Connelly, 479 U.S. 157 (1986). Coercion is determined from the perspective of the suspect. Illinois v. Perkins, 496 U.S. 292 (1990). A statement extracted by any sort of threat or promises, however slight, or improper influence is a coerced statement. See Hutto v. Ross, 429 U.S. 28 (1976).

In State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987), our Supreme Court held that a statement was not voluntarily given where the defendant was told if he gave a statement the investigating officer would guarantee him that he would not seek the death penalty.

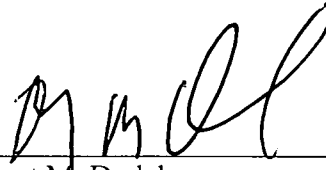
Here, Lail admitted that it was not reasonable for appellant to know that the punishment for accessory before the fact to murder was the same as that of murder. Further, appellant submits many people believe the death penalty is an available punishment for any murder.

If the threat in State v. Osborne rendered the confession inadmissible -- and it did -- then the confession here based on the threat of being charged with murder if appellant did not “come straight” was likewise inadmissible.

CONCLUSION

Based on the foregoing argument, appellant's convictions should be reversed in this case and remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

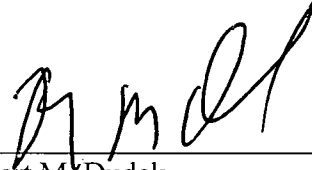
ATTORNEY FOR APPELLANT

This 27th day of March, 2013.

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."

March 27th, 2013



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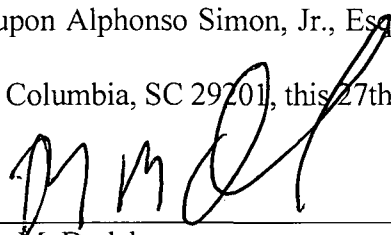
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TAWANDA ALLEN,

APPELLANT


CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of March, 2013.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of March, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.