STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No.: 2012-212391

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DONNIE ROLAND THIGPEN,

APPELLANT.

FINAL REPLY BRIEF

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STATEMENT OF THE ISSUE ON APPEAL

II. APPELLANT'S ISSUE REGARDING THE VOLUNTARINESS OF HIS CONFESSION IS NOT PRESERVED FOR APPELLATE REVIEW WHERE APPELLANT MADE A DIFFERENT ARGUMENT FOR SUPPRESSION BELOW. IN ANY EVENT, THE TRIAL JUDGE PROPERLY ADMITTED APPELLANT'S CONFESSION, WHICH WAS MADE AROUND 6:00 p.m. WHERE THE EVIDENCE REFLECTED THAT, ALTHOUGH APPELLANT HAD BECOME INTOXICATED THE NIGHT BEFORE, HE HAD STOPPED DRINKING IN THE EARLY MORNING HOURS, AND WHERE THE OFFICERS' TESIMONEY AND THE AUDIO RECORDING OF APPELLANT'S STATEMENT INDICATED THAT APPELLANT HAD SOBERED UP SIGNIFICANTLY AND THAT HE UNDERSTOOD HIRS RIGHTS AND GAVE HIS STATEMENT FREELY AND VOLUNTARILY.

REPLY ARGUMENT

In response to the Respondent's Initial Brief, more specifically Issue II, the Appellant would state as follows:

ISSUE TWO

The Respondent contends that the Appellant's issue of voluntariness of his confession is not preserved for Appellate review. That Defense counsel's objection to the Appellant's confession is limited solely to the issue that immediately prior to Appellant's 5:20 p.m. interview the Miranda warning failed to include advising the Appellant that he could stop the questioning process (ROA p. 88, lines 12-24).

The Appellant was first given his Maranda warnings around 11:30 a.m. Defense Counsel argues that the Appellant is questioned over and over again about the event and that he denies involvement in the incident dozens of times. (ROA p. 87, lines 19-22) He gives a blood alcohol sample at 12:40 p.m. and his blood alcohol registers .21. He later is given a breath test at 2:05 which registered a .19. That he is re-interviewed, and this interview is audio taped. (ROA. p.

87, lines 13-14) In the afternoon interview, before the questioning starts, he is re-mirandized and in that Miranda warning, the State leaves out the fifth (5) prong, where he is not told that he has the right to stop questioning at any time. (ROA p. 88, Lines 12-17) Counsel further argues that at 6:00 p.m. the Appellant finally makes a statement in which he confesses to driving and leaving the scene. (ROA p. 88, lines 20-22) Defense Counsel argues that "the basis of our Motion is that the statement was involuntary".

Counsel acknowledges that there are three hurdles that he must address regarding his suppression Motion:

1. Whether an initial advisement of rights by Trooper McKenzie controls all the way through to the final interview. Counsel argues that at this time, the Appellant was severely intoxicated to the point of having a blood alcohol level of almost .23, an hour after the Miranda rights were given. Counsel argues that the Appellant was too intoxicated to understand his rights at that point.

2. Defense Counsel argues and acknowledges that case law tends to say that Defendant must be almost "knocked out" to give an involuntary statement; and

3. Defense Counsel acknowledges that there are no promises or threat made to the Appellant and the only thing kept from him was having a phone call, which he had asked for on several occasions. (ROA p. 90, lines 15-24)

The Court initiates a *Jackson v. Denno,* 378 U.S. 368 (1964), hearing on the voluntariness of the confession. (ROA p. 91, lines 6-7) After the *Jackson v. Denno* hearing, the Court rules that once Miranda Rights are validly and voluntarily waived, the waiver continues until such time as the individual being questioned revokes the waiver or circumstances are such that he his will is overborn and his capacity for self-determination is critically impaired (ROA

143, lines 4-17). The Court further holds that you don't have to give Miranda Rights over and over again during the course of the interrogation. Only when it is apparent that the Defendant's will is overborn in its capacity for self-determination is critically impaired does there become a problem, *State v. Kennedy,* 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 2002). (ROA 143, lines 6-11)

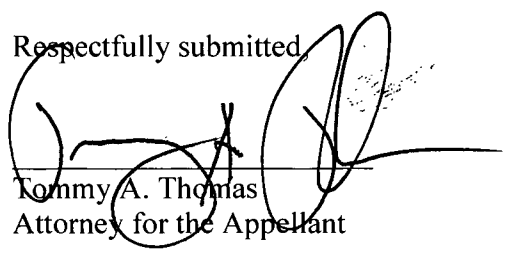
Further, the Respondent argues that there was clear evidence presented supporting that the Appellant's confession was given freely, voluntarily and with a full understanding of his rights. Notwithstanding the fact that the Appellant had been drinking the night before. Likewise, there is evidence on the record that indicates that the Defendant was extremely intoxicated. There is clearly evidence that the Defendant was intoxicated at the time of the first Miranda warnings. The Appellant would assert that the intoxication of the Appellant would have rendered him unable to give a voluntarily confession.

Therefore, the Appellant would contend that this issue is preserved for appeal and that the Circuit Court did improperly deny Defense Counsel's Motion to suppress a statement made by the Appellant.

CONCLUSION

Based on the foregoing reasons and on the Appellant's Initial Brief, the Appellant respectfully requests that the relief requested be granted.

Respectfully submitted,



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March 28, 2014