

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APR 13 2014

South Carolina
Court of Appeals

Appeal from Newberry County
Frank R. Addy, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VERNON JACOB LIVINGSTON, JR.,

APPELLANT.

APPELLATE CASE NO. 2013-000541

ANDERS BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
ARGUMENT	11
The Trial Court erroneously admitted statements regarding methamphetamine made by Appellant to law enforcement where Appellant did not voluntarily, knowingly, and intelligently waive his constitutional rights with respect to any charges related to methamphetamine. When he was questioned by the investigators, he was led to believe that he was only being questioned and waiving his <u>Miranda</u> rights with respect to a criminal domestic violence charge. Appellant had not been charged with any methamphetamine offense when he signed the waiver of rights form and was questioned, and Appellant had not intended to waive his constitutional rights with respect any methamphetamine charges.	
CONCLUSION	15
PETITION TO BE RELIEVED AS COUNSEL	16

TABLE OF AUTHORITIES

Cases

<u>Arizona v. Mauro</u> , 481 U.S. 520 (1987)	13
<u>Dickerson v. United States</u> , 530 U.S. 428 (2000)	12
<u>Jackson v. Denno</u> , 378 U.S. 368 (1964)	11
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966).....	3, 8, 11, 12, 13, 14
<u>Moran v. Burbine</u> , 475 U.S. 412 (1986)	14
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218 (1973).....	13
<u>State v. Doby</u> , 273 S.C. 704, 258 S.E.2d 896 (1979)	13
<u>State v. Kennedy</u> , 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996)	13
<u>State v. Linnen</u> , 278 S.C. 175, 293 S.E.2d 851 (1982).....	13

Statutes

S.C. CODE ANN. § 44-53-375	4
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STATEMENT OF ISSUE ON APPEAL

The Trial Court erroneously admitted statements regarding methamphetamine made by Appellant to law enforcement where Appellant did not voluntarily, knowingly, and intelligently waive his constitutional rights with respect to any charges related to methamphetamine. When he was questioned by the investigators, he was led to believe that he was only being questioned and waiving his Miranda rights with respect to a criminal domestic violence charge. Appellant had not been charged with any methamphetamine offense when he signed the waiver of rights form and was questioned, and Appellant had not intended to waive his constitutional rights with respect any methamphetamine charges.

STATEMENT OF THE CASE

On April 20, 2013, Appellant Vernon Jacob Livingston, Jr. was indicted by the Newberry County Grand Jury for one count of manufacturing methamphetamine in violation of S.C. CODE ANN. § 44-53-375. R. 262-263 [Indictment].

Appellant appeared before the Honorable Frank R. Addy, Jr. and a jury on February 11-12, 2013. R. 1. Appellant was represented by Charles Verner, and the State was represented by Solicitor David M. Stumbo and Deputy Solicitor Dale Scott. Id.

On February 12, 2013, the jury found Appellant guilty as charged. R. 253, l. 24 – 254, l. 3. Judge Addy sentenced Appellant to twelve years imprisonment provided that upon the service of six years, the balance would be suspended to three years probation. R. 264 [Sentencing sheet].

Appellant timely filed and served his notice of appeal on February 12, 2013.

STATEMENT OF FACTS

Appellant lived off Highway 121 in Newberry County. R. 195, l. 21 – 196, l. 12. On January 30, 2012, he had been at the wood shop at his mother and father's house working. The wood shop was two miles up the road from his house. R. 196, ll. 15 – 24. He arrived home around 8:00 p.m. and noticed some lights on inside his shed and could hear the television playing in the shed. He tried to open the door to his shed, and it was locked from the inside. R. 196, l. 24 – 198, l. 15.

Appellant then asked who was in his shed, and Sheila Jackson replied. Appellant did not know that Sheila had been staying in his shed. R. 198, l. 22 – 199, l. 1.

Appellant and Sheila had a seven year old child together. Appellant and Sheila had previously been in an eleven year relationship. By the time their child was born, the relationship between Appellant and Sheila was over, and they had no relationship together on the night of January 30, 2012. R. 199, ll. 2 – 22.

When Appellant saw Sheila in his shed on the night of January 30, 2012, she told Appellant that she did not have anywhere to go or stay. Appellant told her that if she would come out of the shed, he would take her anywhere she needed to go in Newberry because the two of them did not need to be together in the same place since they did not get along. R. 201, ll. 17-25.

When Appellant told Sheila that she had to leave, she started "showing out and foul language and calling me names." Sheila had still locked herself up in the shed at this time. R. 202, ll. 1-4. Sheila finally came out of the shed and threw a bucket of nails at him. R. 202, ll. 5-22. The two scuffled for about thirty to forty-five seconds. R. 203, ll. 12-14.

Sheila eventually called the police. R. 205, ll. 24-25. Appellant saw a black trash bag in his yard and Sheila told him, with respect to the bag, "I got you right here. When they get here they got you." R. 206, l. 11 – 207, l. 3. Appellant, who had not put anything in the black trash bag and did not know what was in it, grabbed the bag, threw it in the back of his truck, left, drove off the main road, and then threw the black bag out on the first road he came to because he did not know what was in the bag or what Sheila was talking about with respect to the contents of the bag. R. 207, ll. 3-13. Appellant was eventually stopped by a law enforcement officer approximately eight to ten minutes after he left his house. R. 208, ll. 10-13. He denied making any meth with Sheila or on his own on the night of January 30 and denied that any contents found in the black trash bag belonged to him. R. 210, ll. 2-9; 210, l. 24 – 211, l. 3.

Officer Shawn Carnes of the Newberry County Sheriff's Office testified that at 9:04 p.m. on January 30, 2012, he responded to Appellant's home in response to a domestic call where Sheila Jackson said she had been assaulted by Appellant. R. 80, l. 8 – 81, l. 16. Officer Carnes recalled seeing nails spread out across the driveway when he arrived, and he actually stepped on one and injured himself. R. 83, l. 25 – 84, l. 7; 85, ll. 11-19.

Appellant was not at the home when Officer Carnes arrived, and Sheila told Officer Carnes that Appellant had fled the scene in a truck. R. 82, ll. 2-5. Sheila claimed Appellant was going to dispose of some items he was using to make meth. Officer Carnes relayed that information to his fellow officers. R. 82, ll. 8-23.

Sheila Jackson testified that she and Appellant have a seven year old daughter together, but that she lost custody of the child when the child was one and a half. The child is currently in the custody of Appellant's sister-in-law. R. 87, l. 22 – 88, l. 15. DSS had

removed this child from Sheila's custody. R. 93, ll. 12-14. Sheila also lost custody of another son who had shot himself in the eye causing him to lose that eye. R. 93, l. 17 – 94, l. 13.

Sheila said she called 911 on January 30, 2012 after the altercation between her and Appellant. R. 88, ll. 15-22. Officer Carnes responded, and she told Officer Carnes not only about the altercation, but that Appellant was making meth in his shed. Sheila alleged that when she called 911, Appellant “went in the shed and took a coffee pot with clear liquid and poured it on the ground and then he took a black trash bag and started putting all kind of items in it. And he throwed it on the back of his truck and he took off up the road and turned down the gravel road up above his house.” R. 89, ll. 2 – 19.

At trial, Sheila admitted to using meth before and said she used to buy pseudoephedrine for Appellant. App. 91, ll. 4-18. Sheila claimed that prior to the incident, she had come to Appellant's house to clean it for him. R. 97, ll. 1-8.

Officer Michael Claytor with the Newberry County Sheriff's Office responded on the evening of January 30 to a traffic stop of Appellant on Cypress Lakes Road. He was not the officer that actually conducted the stop, but he was the officer who transported Appellant to the detention center at the conclusion of the stop. R. 102, l. 3 – 103, l. 14

Officer Claytor said he had been advised by communications that the victim had said Appellant put a black bag in his truck and that law enforcement should look for the bag. R. 107, ll. 15-21. Officer Claytor said he found a black trash bag believed to have been carried by Appellant on Maple Lane which intersects with Cypress Lakes Road. Officer Claytor testified that the black trash bag was found in between Appellant's residence and the place where he was stopped. R. 103, l. 21 – 104, l. 2; 108, l. 2.

Officer Claytor said he spoke with Appellant about what went on up at his house with Sheila and Appellant denied all of it. Officer Carnes placed Appellant under arrest for domestic violence. R. 108, ll. 7-14.

Sergeant Nick Bouknight of the Newberry County Sheriff's Office also testified at trial. He was qualified as an expert in clandestine meth labs. R. 109, l. 21 – 110, l. 1; 116, l. 22 – 117, l. 16.

On the night of January 30, 2012, Sergeant Bouknight responded to both Maple Lane and Appellant's residence in Newberry County. R. 117, l. 20-25. Off of Maple Lane he found the black trash bag, liquid fire, drain cleaner, a green funnel, a plastic container that appeared to have Coleman fuel in it, a strain opener, a cold pack ammonium nitrate, a coffee pot and salt, muriatic acid, Coleman fuel, hoses, an acid generator, an aquarium pump, a yellow container labeled heat, an empty box of Sudafed, lithium batteries, and coffee filters. Sergeant Bouknight testified that all of these items were things one would see with a meth lab R. 118, l. 4 – 125, l. 11.

Sergeant Bouknight then left Maple Lane and went to Appellant's residence, in particular to the shed described by Sheila. R. 125, l. 11-17. There he claimed to find additional items indicative of a meth lab. R. 125, l. 18 – 128, l. 17.

The following day, on January 31, 2012, Sergeant Bouknight was present when Lieutenant Robert Dennis spoke with Appellant at the jail. R. 129, ll. 7 – 11. According to Sergeant Bouknight, Appellant was read his Miranda¹ rights and waived those rights and wished to speak to the investigators. R. 129, ll. 12 – 23. Appellant only gave a verbal statement. He did not give a written statement. R. 131, ll. 5 – 7. Sergeant Bouknight said

¹ 384 U.S. 436 (1966).

Appellant admitted “to putting the stuff in his truck, the stuff being referred to as this trash bag found on Maple Lane near where he was located.” Appellant admitted to throwing the stuff out on Maple Lane. R. 131, ll. 9-15.

Appellant also apparently admitted to taking the stuff away from his residence and throwing it out on the dirt road. He also allegedly described the process of cooking methamphetamine to the investigators, informing them that he used the shake and bake method and admitting to using “heat and Sudafed and then lithium, Coleman fuel, ammonium nitrate to another bottle and then salt, and like a drain opener.” R. 131, l. 19 – 132, l. 6.

Lieutenant Robert Dennis testified that he, along with Sergeant Bouknight, interviewed Appellant the day after the incident on January 31 when Appellant was still in custody. R. 170, l. 24 – 171, l. 6. Lieutenant Dennis said when they first started interrogating Appellant, they “pretty much told him we were there to talk about the CDV (criminal domestic violence). . .” R. 172, l. ll. 11-14.

Lieutenant Dennis testified that Appellant told the investigators the following:

[Appellant] didn’t touch Ms. Jackson, that she had been staying there a couple of days prior in the camper that was in the yard and that she had discussed with him that she had been involved in a fight over in the westend section of Newberry County He really didn’t give any indication, you know, as to who it was or what was going on. The second part of that was is that they began the argument, it was time for her to leave and most of their argument took place out there in the yard. And that he decided that, you know, that he needed to leave due to the fact that any time law enforcement is summoned they always seem to take the side of the female. And that was his reasoning for leaving. Once he made that comment we began to talk about the meth lab. [Appellant], after asking about the, we asked about the black bag that had been thrown out. He admitted that he had packaged that up and throwed it out.

R. 175, ll. 4-25.

Appellant then allegedly admitted to cooking meth using the shake and bake method. R. 176, ll. 6-8.

Brent Munnerlyn, the Market Director for the Health and Wellness Division of Walmart, testified that Appellant made eleven purchases of pseudoephedrine between October 21, 2011 and January 25, 2012. R. 161, l. 9 – 21; 164, l. 5 – 165, l. 9.

The jury ultimately found Appellant guilty of manufacturing methamphetamine. R. 253, l. 24 – 254, l. 3.

ARGUMENT

The Trial Court erroneously admitted statements regarding methamphetamine made by Appellant to law enforcement where Appellant did not voluntarily, knowingly, and intelligently waive his constitutional rights with respect to any charges related to methamphetamine. When he was questioned by the investigators, he was led to believe that he was only being questioned and waiving his Miranda rights with respect to a criminal domestic violence charge. Appellant had not been charged with any methamphetamine offense when he signed the waiver of rights form and was questioned, and Appellant had not intended to waive his constitutional rights with respect any methamphetamine charges.

Prior to trial, the Trial Court held a Jackson v. Denno² hearing to determine whether the verbal statements Appellant made to Sergeant Bouknight and Lieutenant Dennis were voluntary and whether Appellant had validly waived his Miranda rights. R. 43 – 77.

When Appellant was interviewed at the jail by Sergeant Bouknight and Lieutenant Dennis, he had only been issued a blue ticket on the criminal domestic violence (“CDV”) charge and had not been arrested for anything else when he waived his Miranda rights and gave his statement. R. 57, ll. 11-13; 58, l. 20 – 59, l. 5; 185, ll. 17-20. The waiver of rights form that Appellant signed did not notify Appellant that he was also being investigated and interviewed at that time for any charge relating to methamphetamine. R. 58, ll. 11-14; 292 [State’s Exhibit 28 – Waiver of Rights Form].

At the Jackson v. Denno hearing, Appellant testified that when Lieutenant Dennis interviewed him, the two were discussing the CDV charge and that is when Appellant signed the waiver of rights form. R. 70, ll. 2-19. Appellant’s understanding when he signed the waiver of rights form is that the officers had just come to talk to him about the domestic violence charge. The only charge the officers had mentioned to him was the CDV charge. R. 70, l. 20 – 71, l. 1. When Appellant spoke to the investigators, he was

² 378 U S 368 (1964)

not aware that he was going to be arrested for any charges related to methamphetamine.

R. 209, ll. 17-19.

Appellant moved the Trial Court to suppress his statements to the investigators.

R. 75, ll. 2-3 Appellant's defense counsel argued that he had not knowingly waived his constitutional rights:

I will submit that [Appellant] would have the right to know the charges that he was being interviewed for, Your Honor. The waiver form is blank, there is no written notice to him of it, unlike some waiver forms would specifically, we are interviewing you for X charge. This form does not include that or any other description for the reason for the interview. Obviously the defendant generally would know what he got arrested for. In this case he was given the CDV paper, he had a hold on him which is some evidence, Your Honor, but not specifically for the meth charge. The defendant puts it at the time of the interview that he only understood that he was being investigated for the domestic violence charge. That is the reason he waived his constitutional rights to testify. There is no evidence from the State prior to the interview that he knowingly waived his rights to testify about this particular charge other than the hold that was put on him which was realistically for this charge but it is just a generic hold. That is all the State has really to rely on the fact that at the time he was interviewed and executed his waiver that he knew he was talking about these charges.

R. 75, l. 14 – 76, l. 10.

The Trial Court denied the motion to suppress the statements and held Appellant's statements were admissible R. 76, l. 21 – 77, l. 15. The Trial Court's ruling was in error.

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966); Dickerson v. United States, 530 U.S. 428 (2000). The purpose of Miranda is to prevent "government officials from using the coercive nature of

confinement to extract confessions that would not be given in an unrestrained environment.” Arizona v. Mauro, 481 U.S. 520, 529–30 (1987).

If a defendant was advised of his Miranda rights, but nevertheless chose to make a statement, the “burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived.” State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996). The State bears this burden of proof even where a defendant has signed a waiver of rights form. The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused. State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982); see also Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

In State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979), our Supreme Court addressed the voluntariness requirement of a waiver of rights:

The signing of the waiver form alone is not conclusive; the State still has the burden of showing the waiver was voluntary. This requires an examination of the totality of the circumstances surrounding the waiver, including the background, experience, and conduct of the accused. (citations omitted).

Id. at 708, 258 S.E.2d at 899.

The United States Supreme Court has observed that a defendant may waive his Miranda rights provided the waiver is made voluntarily, knowingly, and intelligently. “First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an

uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.” Moran v. Burbine, 475 U.S. 412, 421 (1986).

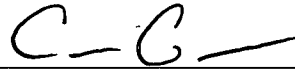
In this case, while Appellant signed a waiver of rights form and agreed to speak with the investigators and provide a statement, he was led to believe by the investigators that they only wanted to speak with him about the criminal domestic charge for which he had been taken to jail for the night before the interview. He did not voluntarily, knowingly, and intelligently waive his constitutional rights with respect to any charges related to methamphetamine.

Appellant’s waiver was not made with a full awareness of both the nature of the right being abandoned and the consequences of his decision to abandon it because he did not realize he was waiving his constitutional rights with respect to any offenses relating to methamphetamine. The totality of the circumstances surrounding the interrogation do not reveal the requisite level of comprehension required before a court can properly conclude that Appellant’s Miranda rights have been validly waived. Accordingly, the Trial Court erred in ruling that the statements made by Appellant regarding the methamphetamine were admissible, and Appellant is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Vernon Jacob Livingston, Jr. respectfully requests this Court to reverse the Trial Court's ruling that his statements were admissible and remand the case for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Frank R. Addy, Jr., Circuit Court Judge

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APR 16 2014

THE STATE,

SC Court of Appeals

RESPONDENT,

V.

VERNON JACOB LIVINGSTON, JR.,

APPELLANT.

APPELLATE CASE NO. 2013-000541

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vernon Jacob Livingston, Jr. states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Frank R. Addy, Jr., which was held on February 11-12, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Vernon Jacob Livingston, Jr.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Frank R. Addy, Jr., Circuit Court Judge

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SC Court of Appeals

THE STATE,

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APPELLANT.

APPELLATE CASE NO. 2013-000541

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

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

- (1) True-billed indictment;
- (2) Entire transcript of trial held February 11-12, 2013;
- (3) Sentence sheet;
- (4) State's Exhibits 1-29 and 31;
- (5) Defendant's Exhibit 1; and
- (6) Court's Exhibit 1.

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

April 16, 2014.



Carmen V. Ganjehsani
Appellate Defender

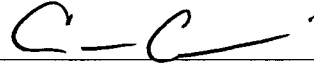
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

April 16, 2014.



Carmen V. Ganjehsani
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Vernon Jacob Livingston, #3354355 at 4530 Broad River Road, Columbia, SC 29210, this 16th day of April, 2014.



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of April, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.