

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Brooks P. Goldsmith, Circuit Court Judge

ORIGINAL

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SAMUEL OLALDE GONZALEZ,

APPELLANT

APPELLATE CASE NO. 2018-000807

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing the admission of appellant's statement into evidence where it was given without the assistance of a certified or otherwise qualified interpreter, and also by trying appellant without the assistance of a certified or otherwise qualified interpreter since it was undisputed appellant could not speak English, and not having the assistance of a certified or qualified interpreter violated S.C. Code § 17-1-50(B)(1), and the essence of fundamental fairness?

STATEMENT OF THE CASE

Appellant was indicted by the Jasper County Grand Jury for the offense of murder. R. 264 – 265. His case was called to trial on April 23, 2018, before the Honorable Brooks Goldsmith and a jury. R. 1. Robert Hughes represented appellant. Hunter Swanson and Brian Hollen were the assistant solicitors. R. 2.

On April 25, 2018, the jury found appellant guilty.¹ R. 251, ll. 15-19. Judge Goldsmith sentenced appellant to thirty-seven years' imprisonment. R. 262, ll. 2-6.

This appeal follows.

¹ Defense counsel Hughes moved for a new trial on the basis that the jury only deliberated sixteen minutes, which showed the verdict was the result of passion and prejudice. The judge refused to grant a new trial on that basis. R. 256, ll. 6-25.

STANDARD OF REVIEW

Confession:

“On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion.” State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751. (1998). Put another way, the reviewing court will reverse a trial judge’s ruling on the voluntariness of the confession when the ruling is “so erroneous as to constitute an abuse of discretion.” State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488; 492 (2004). “In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law.” State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

Interpreters:

S.C. Code § 17-1-50(B)(1) states that a party to a criminal proceeding must have appointed a certified or otherwise qualified interpreter to interpret the proceedings to the party or victim or to interpret the testimony of the witness where necessary.

ARGUMENT

The court erred by allowing the admission of appellant's statement into evidence where it was given without the assistance of a certified or otherwise qualified interpreter, and also by trying appellant without the assistance of a certified or otherwise qualified interpreter since it was undisputed appellant could not speak English, and not having the assistance of a certified or qualified interpreter violated S.C. Code § 17-1-50(B)(1), and the essence of fundamental fairness.

Relevant Facts

Prior to trial, a Jackson v. Denno, 378 U.S. 368 (1964), hearing was held. Omar Nieves, a bilingual Hardeeville police officer, testified that on August 8, 2016, he spoke to appellant on the telephone. R. 6, l. 17 – 7, l. 18. Nieves said appellant told him in Spanish “that he had killed his wife and that he was at his house along with two boys and a girl baby, a female, girl baby.” R. 7, ll. 22-25.

When Nieves arrived at appellant's mobile home, he read appellant his Miranda² warnings in Spanish. R. 9, ll. 8-16. Nieves said appellant told him “that he had an argument with his wife earlier that -- the day prior and that while they were arguing, it got physical and he strangled his wife.” R. 9, ll. 17-20.

Nieves then interpreted for appellant as Detective Jeff Crosby questioned him. “I was interpreting for both, so whatever Detective Crosby said at that time, I interpreted it in Spanish for him and whatever he said in Spanish, I translate (sic) to English for the detective.” R. 10, ll. 4-16. Appellant also wrote a statement in Spanish for the police, but the solicitor said during

² Miranda v. Arizona, 384 U.S. 436 (1966).

argument on the admissibility of the oral and written statements that she did not intend to introduce the written statement. R. 13, ll. 3-10.

Nieves said that appellant told Crosby that he strangled his wife "during an outrage of jealousy." They had argued about a photograph on appellant's telephone of a former girlfriend. The solicitor got before the jury that appellant apparently attempted to commit suicide by hanging himself after his wife died of strangulation. R. 15; l. 13 – 17, l. 18. Appellant was taken to the hospital upon his arrest. R. 17; ll. 18-24.

The solicitor questioned Nieves about the different Spanish dialects. Nieves said the biggest difference was that in Puerto Rico, where he was from, that they "talk a little faster" than someone from Mexico such as appellant. R. 21, ll. 8-19. However, Nieves maintained if he did not understand what appellant was saying that he would have sought clarification before translating what appellant said to Detective Crosby. R. 21, l. 8 – 22, l. 13.

Detective Crosby testified that he did not speak Spanish but that "Officer Nieves is fluent in it." R. 22, l. 20 – 23, l. 17. Crosby testified that Nieves translated for him and he learned that appellant killed his wife during a heated argument in a jealous rage. R. 24, l. 17 – 25, l. 16.

The solicitor then argued that appellant was not promised anything for his statement and that it was admissible. R. 27, l. 22 – 28, l. 1. Defense counsel Hughes argued that Nieves was not a court certified interpreter and he was not a native of Mexico, as was appellant. Hughes argued that important matters get lost in the translation and that because Nieves was not a qualified interpreter, appellant's statement should not be admitted. Further, the entire trial was going to be compromised without a certified or qualified interpreter being appointed. R. 28, l. 2 – 30, l. 15.

The judge said he found appellant's statement was freely and voluntarily given and he made no ruling as to the qualifications of interpreter Omar Nieves at that time. As will be seen infra, the judge later said he overruled this lack of a qualified interpreter objection. R. 31, ll. 1-6.

Appellant's statement, State's Exhibit 3, was introduced over the defense objection that Nieves was not a qualified interpreter. R. 138, l. 10 – 139, l. 11. The judge now ruled that he had previously overruled appellant's objection regarding the interpreter not being certified or qualified. R. 139, ll. 4-14. State's Exhibit 3, appellant's statement, is on file for this Court to review.

Testimony before the jury

Lance Puryear was a Bluffton city police officer on August 8, 2016. R. 90, ll. 12-24. Puryear met a Gustavo, appellant's boss, in the parking lot of Publix that day. Gustavo spoke English. R. 91, ll. 3-23. Gustavo conveyed to Puryear that he knew someone had been murdered. R. 92, ll. 18-23.

Gustavo's full name was Gustavo Adolfo-Aguirre Isidro. R. 93, l. 23 – 94, l. 17. Gustavo said that he would attempt to testify in English without the use of the interpreter. R. 94, ll. 5-23.

Appellant worked with Gustavo in the painting business. Gustavo knew that appellant had a girlfriend, and that the couple had just had a baby. R. 94, l. 18 – 95, l. 17. Gustavo was in the habit of picking up appellant in the morning on the way to work. He picked appellant up at the Zaxby's on Highway 170.

On August 8, 2016, Gustavo called appellant prior to picking him up at the Zaxby's. Appellant told Gustavo that he had made a big mistake. "I think I killed my girlfriend." Gustavo called the police after speaking with appellant. R. 96, l. 7 – 97, l. 23.

Gustavo had never seen appellant fight with his girlfriend. However, he did notice that appellant came to work with scratches on him. Without objection, the solicitor asked Gustavo if he knew appellant tried to cover up a tattoo with a Nazi symbol on his hand. R. 102, ll. 4-7.³

Jasper County police officer Donald Hipp went to appellant's mobile home when he learned of the murder. R. 102, l. 16 – 103, l. 6. Officer Nieves was also his interpreter that day. R. 104, ll. 12-17. When they arrived at appellant's mobile home, Nieves was talking to appellant on the telephone. Appellant was asked to step outside, which he did, and he was detained. R. 104, l. 18 – 106, l. 8.

When the police entered the mobile home, they discovered the decedent's body was covered with a Dallas Cowboys blanket. The police also found two small children and a baby inside as they were told. The three children were taken to live with relatives upon appellant's arrest. R. 106, l. 4 – 107, l. 17; R. 112, ll. 1-4.

The state also introduced evidence appellant attempted to hang himself after the decedent's death. There was no objection to this testimony. R. 125, l. 18 – 126, l. 8; R. 127, ll. 5-20. See, State v. Cartwright, 425 S.C. 81, 419 S.E.2d 756 (2018).⁴

Detective Jeff Crosby also testified about appellant's attempt to commit suicide. R. 160, ll. 19-24. Crosby likewise told the solicitor that he was told appellant had a tattoo "to cover up a swastika or the Nazi symbol that he had in the web of his hand right there." Again, there was no objection to this Nazi sympathizer testimony. R. 161, ll. 16-11.

³ Since there was no objection, this may be an issue appellant could pursue on post-conviction relief (PCR) after his direct appeal is completed.

⁴ A defendant's attempted suicide may only be admitted if there is an unmistakable nexus linking the suicide attempt to a guilty conscience derivative of the offense charged. This must be proved by clear and convincing evidence. Further, the judge also must find that evidence of the suicide attempt passed a Rule 403, SCRE, test that its probative value was not substantially outweighed by its unduly prejudicial nature, or its tendency to confuse the issues.

Appellant's testimony

Appellant testified in his own defense that he was from Mexico and that he had one daughter who was then two years old. R. 180, ll. 5-17. Appellant said his argument with the decedent was over a photograph of his ex-girlfriend on his cell phone. R. 181, ll. 2-16. Appellant told the jury that the argument got very heated, that the decedent was cursing at him, and that the decedent hit him. This was not the first time the decedent had become violent. Appellant testified he killed the decedent, who he said had been violent in the past, in a heat of passion during the argument. R. 191, l. 20 – 202, l. 9.

The judge charged the jury the law on murder and voluntary manslaughter. R. 244, l. 11 – 247, l. 13. As stated, the jury returned with a guilty verdict to murder in less than sixteen minutes following evidence that appellant had a Nazi symbol on his hand, that he was from Mexico, likely was in this country illegally, and that he had tried to commit suicide after the decedent died. The judge denied the motion for a new trial on grounds that the verdict was the product of passion or prejudice.

Discussion

S.C. Code § 17-1-50(A)(1) defines a “certified interpreter” as one “who is qualified by education, training, and experience to speak English and a foreign language fluently and who is certified by the administrative office of the United States courts, by the office of the administrator for state courts, or by a nationally recognized professional organization as a certified interpreter.”

A “qualified interpreter” means a person who is eighteen years of age, who is not a family member, is not confined to an institution, and “has [the] education, training, or experience that enables him to speak English and a foreign language fluently, and is readily able to interpret

simultaneously and consecutively and to sight-translate documents from English into the language of a non-English speaking person, or from the language of that person into spoken English.” See, S.C. Code § 17-1-50(A)(4)(d).

As a party to a criminal proceeding, who did not sufficiently understand or speak English, the Court in appellant’s case, was required to appoint a “certified or otherwise qualified interpreter to interpret the proceedings to the party or victim or to interpret the testimony of the witness.” See, S.C. Code § 17-1-50(B)(1).

Defense counsel Hughes argued that appellant’s statement should not be admitted, since he did not have a certified or otherwise qualified interpreter at the time he gave his statement. Similarly, appellant did not have a qualified interpreter at trial or when he testified. As seen, the judge denied the defense motion, and he admitted appellant’s recorded statement over objection.

In State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999), Perez argued that the court erred by denying him an interpreter and by failing to administer an oath to the interpreter that was at his trial. The Supreme Court found that the issues involving the interpreter were not preserved for appellate review, given the lack of an objection. See, State v. Rosa, 47 Ohio App.3d 172, 547 N.E.2d 1232 (1988); People v. Avila, 797 P.2d 804 (Colo. App. 1990).

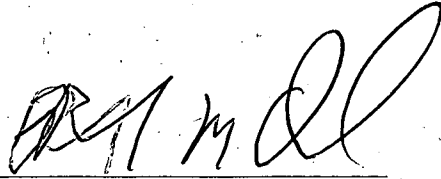
Here, there were objections to the interpreter not being qualified or certified. The interpreter, Omar Nieves, agreed that the Spanish language had different dialects. He admitted that people who grew up speaking Spanish in Puerto Rico spoke much faster than people, in general, from Mexico. Nieves claimed he overcame this difficulty by asking appellant to clarify what he was saying if Nieves was uncertain. Regardless, the trial judge violated the mandates of S.C. Code § 17-1-15(B)(1) by allowing the admission of appellant’s statement without a

qualified or certified interpreter having been there to interpret the interrogation, and by allowing appellant to be tried without a certified or qualified interpreter, as defined by the statute.

The issues of appellant having a Nazi symbol on his body, and his attempting suicide before he was even charged in the death of his girlfriend were not preserved for appellate review in this case. However, the lack of a qualified or certified interpreter should result in this Court granting appellant a new and fair trial given this critical statutory violation, and because this trial violated the essence of fundamental fairness because a Spanish speaking man was tried without a qualified interpreter. See, Hipp v. South Carolina Department of Motor Vehicles, 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009)(Due process is violated when a party is denied fundamental fairness).

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed, and this case should be remanded to the Jasper County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of April, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL OLALDE GONZALEZ,

APPELLANT

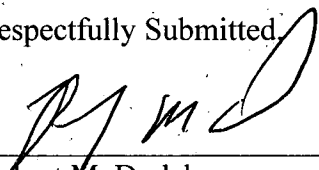
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Samuel Olalde Gonzalez states:

1. He is Chief 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 Brooks P. Goldsmith, which was held on April 23-25, 2018, 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 Samuel Olalde Gonzalez.

Respectfully Submitted,


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 8th day of April, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County
Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL OLALDE GONZALEZ,

APPELLANT

**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) Transcript (April 23-25, 2018)
- (3) State's Exhibit #3 (Appellant's Statement)

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

April 8, 2019



Robert M. Dudek
Chief Appellate Defender

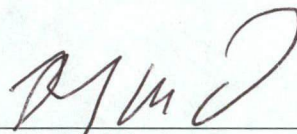
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 8, 2019.



Robert M. Dudek
Chief Appellate Defender

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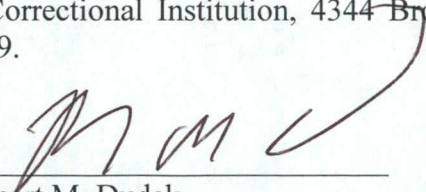
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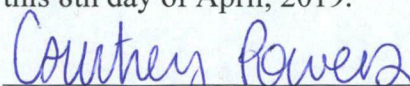
CERTIFICATE OF SERVICE

The undersigned 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 Melody J. Brown, 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 have been served on Samuel Olalde Gonzalez, 376196, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 8th day of April, 2019.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of April, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.