STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID RICHARD WALKER, JR.,

APPELLANT

APPELLATE CASE NO. 2017-000550

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether appellant's statements to police that he had an outstanding warrant for murder were admitted in violation of appellant's Fifth Amendment rights because police failed to give appellant his Miranda[1] warnings and their seizure of appellant and questioning amounted to custodial interrogation?

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

STATEMENT OF THE CASE

In October 2015, a Lexington County grand jury indicted appellant David Richard Walker, Jr. for murder. R. 1196 – 1197. On February 21, 2017, appellant was tried before the Honorable R. Knox McMahon and a jury. R. 1. D. Shawn Graham and Shannon Davis represented the State. R. 1. Appellant represented himself. R. 1. Sarah Mauldin served as standby counsel. R. 1. The jury convicted appellant. R. 1162, ll. 8 – 14. Judge McMahon sentenced appellant to fifty years' imprisonment. R. 1195, ll. 9 – 14. This appeal follows.

ARGUMENT

Appellant's statements to police that he had an outstanding warrant for murder were admitted in violation of appellant's Fifth Amendment rights because police failed to give appellant his *Miranda* warnings and their seizure of appellant and questioning amounted to custodial interrogation.

Factual and Procedural Background

Introduction

The State tried appellant for the murder of his girlfriend in West Columbia. Appellant represented himself. The State's case rested chiefly on the fact that appellant lived at the residence where the body was found and the pathologist's opinion that the victim was strangled. The State also relied on appellant's incriminating statement to police that he was wanted for murder when they encountered him days later in Aiken. Appellant's statement was improperly admitted and this Court should reverse.

Appellant's Statements

Appellant's nighttime encounter with the police that is the subject of this appeal was recorded by law enforcement's dashboard camera. R. 350, ll. 9 – 21. (State's Ex. 2). The camera activates as the police drive through a dark neighborhood. (State's Ex. 2). They turn on their lights as they enter the parking lot of a closed mom-and-pop grocery store. (State's Ex. 2). Appellant is sitting alone at a picnic table underneath a metal, open-air shed. (State's Ex. 2). He stands up when the police cruiser comes to a stop. (State's Ex. 2).

Officer Darrell Kostyk ("Kostyk") asks appellant as he walks slowly forward, "What are you doing, guy?" (State's Ex. 2). Appellant continues to amble forward and then places his

hands behind his back, as if to be handcuffed. (State's Ex. 2). Officer Kostyk motions for him to turn around. (State's Ex. 2).

Officer Kostyk takes appellant's hands from behind his back and brings them perpendicular to appellant's sides. (State's Ex. 2). He pats down appellant and feels his pockets through his clothes. (State's Ex. 2). He asks an unintelligible question. (State's Ex. 2). He then asks if appellant has any identification. (State's Ex. 2). A second officer enters the scene and a dog barks in the background. (State's Ex. 2).

Reaching in appellant's back pocket, Officer Kostyk asks if appellant has a knife. (State's Ex. 2). He continues to search appellant and then asks his name. (State's Ex. 2). Appellant responds, "David Walker." (State's Ex. 2). Officer Kostyk asks him his birthday. (State's Ex. 2). Appellant answers. (State's Ex. 2). During this questioning, Officer Kostyk looms only a few inches behind the smaller appellant's back. (State's Ex. 2).

The officer then asks if appellant has any warrants. (State's Ex. 2). He did not hear appellant's response and says, "Hunh?" (State's Ex. 2). Appellant then responds that he probably has a warrant. (State's Ex. 2).

Officer Kostyk then directs appellant to the hood of the police car. (State's Ex. 2). He orders appellant to place his hands on the hood of the car and then tells appellant to keep backing up his feet until appellant's weight is mostly on his hands. (State's Ex. 2). Officer Kostyk testified at the Denno hearing that he wanted appellant "off balance for my safety at that point." R. 352, ll. 15 – 20. Appellant had difficulty following the officer's instructions. (State's Ex. 2).

Officer Kostyk then calls in appellant's name and birthday on his radio, asking appellant his birthday again while appellant is leaning against the car. (State's Ex. 2). Officer Kostyk then asks, "What do you think you got a warrant for, bud?" (State's Ex. 2). Appellant says, over his

shoulder, "Murder." (State's Ex. 2). Officer Kostyk says, "Hunh?" (State's Ex. 2). Appellant repeats, "Murder." (State's Ex. 2).

Officer Kostyk says, "For murder? You done murdered somebody?" (State's Ex. 2). Appellant says no, then the officer says, "No? Then why you think you got a murder warrant?" (State's Ex. 2). Appellant's response is hard to hear. (State's Ex. 2). The officer responds, "You did murder somebody? Who did you murder?" (State's Ex. 2). Appellant then says he wants to talk to a lawyer. (State's Ex. 2). A third officer appears in the picture, they handcuff appellant and put him in the patrol car. (State's Ex. 2).

During the Denno hearing, the solicitor told the court that the State only sought to admit the video and statements up until appellant's request for an attorney. R. 363, ll. 10 – 23. The solicitor said, "**We acknowledge that he's in custody** and we acknowledge when he says he wants a lawyer, that should probably end where it's at." R. 363, ll. 10 – 20 (emphasis added). The solicitor said, "Our intent was to use for direct evidence to the part where he's asked about warrants and him saying murder warrants, and then for impeachment when he's asked 'did you murder somebody,' and he says 'for murder.'" R. 363, ll. 14 – 20.

Officer Kostyk explained at the Jackson v. Denno, 378 U.S. 368 (1964), hearing[2] that he was surveilling a convenience store that is frequently robbed when he noticed appellant at the adjacent grocery store. R. 347, ll. 4 – 15. The grocery store was closed and the officer said appellant "was concealing himself under an awning and he appeared to be watching the

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[2] Judge McMahon heard pretrial testimony from Officer Kostyk about the circumstances surrounding appellant's statements twice, first during an immunity hearing pursuant to S.C. Code Ann. § 16-11-440, and again during the Denno hearing. R. 271, ll. 6 – 8 (officer called by appellant at immunity hearing). R. 345, ll. 4 – 10 (officer called by State during Denno hearing). Judge McMahon stated he would "take everything into account" when making his rulings on both issues and stated he would not rule on the immunity issue until deciding the admissibility of appellant's statements. R. 154, l. 15 – 158, l. 23.

convenience store." R. 347, ll. 8 – 15. Appellant's behavior was "consistent with someone who was potentially going to rob a convenience store." R. 275, ll. 11 – 15. After watching appellant "for a little while," Officer Kostyk called for backup and said he was going to approach "the suspicious male and find out what he was doing." R. 348, ll. 9 – 13.

After calling in appellant's name and birthday, Officer Kostyk learned that appellant had no outstanding warrants, but was "listed as a missing person, endangered, listed as endangered and violent tendency, which isn't a warrant by any means." R. 354, ll. 10 – 22. They determined that the West Columbia police had "suspicions about him," but there were no charges and Officer Kostyk "switched over to more of a civil mode of his mental well-being." R. 354, l. 23 – 355, l. 12.

The officer never gave appellant Miranda warnings and his testimony indicates that he misunderstood when such warnings are required or when interrogation must cease. R. 279, l. 1 – 280, l. 18. Officer Kostyk repeatedly asserted that Miranda warnings are not required unless a suspect is "charged with a crime." R. 279, ll. 9 – 25. R. 279, ll. 20 – 25. R. 280, ll. 8 – 21. The officer said, "I'm not charging any crime. I have no concern with Miranda, sir." R. 279, ll. 20 – 25. The officer also incorrectly asserted that it was proper to continue to question a subject after they asserted their right to counsel. R. 279, ll. 1 – 8. In response to whether he would further question someone after they said they wanted an attorney, Officer Kostyk responded, "I certainly could if they are not under arrest." R. 279, ll. 1 – 8. As shown above, the solicitor conceded such questioning was improper. R. 363, ll. 10 – 20. R. 543, ll. 8 – 13.

Officer Kostyk took appellant to a hospital in Aiken for a mental evaluation. R. 357, l. 17 – 358, l. 22. R. 429, ll. 9 – 25. The hospital released appellant and Officer Kostyk took appellant to a truck stop in Lexington County. R. 360, ll. 4 – 8. Officer James Kemfort from the

Lexington County Sheriff's Department met Officer Kostyk and appellant at the truck stop. R. 373, l. 20 – 374, l. 14. Officer Kemfort contacted the West Columbia Police Department who sent an investigator to the truck stop. R. 374, ll. 2 – 21. R. 388, ll. 19 – 24. The investigator took appellant to West Columbia. R. 390, l. 4 – 392, l. 24. After interrogating appellant, EMS took appellant to Richland Memorial. R. 406, l. 22 – 407, l. 3. Appellant's father then took appellant to MUSC. R. 406, l. 22 – 407, l. 3. After the police received the autopsy results for appellant's girlfriend, Carrie Banty ("Banty"), they arrested appellant for murder. R. 407, ll. 11 – 15.

Banty's Death and Appellant's Mental Health

On December 11, 2012, a neighbor found Banty dead in her mobile home after being led there by her child. R. 587, l. 16 – 593, l. 18. The neighbor called 911 and the police obtained a search warrant and investigated the scene. R. 592, ll. 11 – 25. R. 617. 6 – 25. Investigators saw no sign of forced entry. R. 619, ll. 3 – 13. Banty was found face down at the foot of a bed. R. 620, ll. 3 – 11. The police found appellant's ID in the master bedroom. R. 699, l. 4 – 700, l. 24.

The State's primary evidence against appellant was the testimony of pathologist Dr. Janice Ross who testified that Banty was strangled. R. 1029, l. 15 – 1030, l. 7. She found petechia in Banty's eyes and bruising around her collarbones. R. 1026, l. 2 – 1027, l. 9. The toxicology report was negative. R. 1017, ll. 11 – 16.

Appellant testified at the immunity hearing, but not at trial. R. 18, l. 6 – 19, l. 23. Appellant was at home when Banty returned with their daughter. R. 20, l. 15 – 21, l. 21. Appellant saw Banty abusing their daughter in the car and the abuse continued in the house and in the yard. R. 20, l. 17 – 50, l. 21. Banty threatened to kill both appellant and their daughter.

R. 20, l. 17 – 50, l. 21. Appellant defended himself and his daughter from Banty's attacks, eventually choking her in self-defense. R. 20, l. 17 – 50, l. 21.

When appellant realized Banty was dead, he briefly lost consciousness and then wandered into the woods near a train track. R. 50, l. 22 – 64, l. 15. Appellant hopped a train and got off in Graniteville. R. 50, l. 22 – 64, l. 15. After wandering around Aiken County, appellant eventually encountered Officer Kostyk as described above. R. 50, l. 22 – 64, l. 15. Judge McMahon denied immunity and the case proceeded to trial.[3] R. 545, ll. 7 – 14.

Throughout the trial and at sentencing, Judge McMahon heard extensive testimony regarding appellant's mental health and his competency to stand trial, finding appellant competent each time. R. 5, l. 1 – 10, l. 11. R. 210, l. 21 – 246, l. 23. R. 835, l. 4 – 848, l. 7. R. 854, l. 4 – 892, l. 9. R. 1175, l. 19 – 1185, l. 4. Dr. Donna Schwartz Maddox repeatedly testified that appellant suffered from severe mental illness, but that he was competent to stand trial. R. 5, l. 1 – 10, l. 11. R. 210, l. 21 – 246, l. 23. R. 835, l. 4 – 848, l. 7. R. 854, l. 4 – 892, l. 9. Judge McMahon also relied on a pre-trial finding of competence by Judge Eugene C. Griffith. R. 12, l. 16 – 13, l. 6.

Dr. Maddox presented the most concise history of appellant's mental health at sentencing. R. 1175, l. 19 – 1185, l. 4. Appellant had been hospitalized because of his mental illness repeatedly since 2002. R. 1175, l. 19 – 1185, l. 4. He is schizophrenic and had at least one episode of catatonia, which Dr. Maddox said was "very rare" and "associated with very regressed schizophrenia." R. 1175, l. 19 – 1185, l. 4. In the time leading up to Banty's death, Appellant was taking Clorazil, which Dr. Maddox said is reserved "for the most severe forms of schizophrenia." R. 1175, l. 19 – 1185, l. 4. On the night before Banty's death, Banty took

[3] Appellant did not testify at trial.

appellant to Lexington Medical Center because of concerns about his mental health. R. 1179, l. 16 – 1185, l. 4. The staff at the emergency room was so concerned about appellant, they contacted the on-call psychiatrist twice, but appellant was ultimately not committed. R. 1179, l. 16 – 1185, l. 4. The emergency room offered appellant a shot that would have organized his thinking, but he refused. R. 1179, l. 16 – 1185, l. 4. When Judge McMahon found appellant competent to represent himself, he followed State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014), in which the Supreme Court had reversed Judge McMahon for applying a higher standard for competence for a criminal defendant to represent himself than the standard from Faretta v. California, 422 U.S. 806 (1975). R. 869, l. 20 – 871, l. 9. R. 891, l. 1 – 892, l. 10.

The Trial Court's Ruling Admitting Appellant's Statements

The trial court first commented on the admissibility of appellant's statements to Officer Kostyk during the immunity hearing. R. 280, l. 8 – 281, l. 23. Appellant asked whether the officer considered his detention outside the convenience store a Terry[4] stop and the officer replied, "Absolutely." R. 279, ll. 14 – 17. Appellant then asked whether the police should give Miranda warnings during a Terry stop and Officer Kostyk replied that he did not have to give Miranda warnings unless he charged somebody with a crime. R. 279, ll. 20 – 23.

The trial judge interrupted appellant's questioning and said, "Miranda applies to . . . custodial interrogation. It's at least those two prongs. Taken into custody does not trigger Miranda. It's interrogation." R. 281, ll. 2 – 8. Appellant tried to cite a case on custody and Judge McMahon recited the facts of Terry, concluding by saying, "this is classic. This officer is observing." R. 281, ll. 9 – 23.

[4] Terry v. Ohio, 392 U.S. 1 (1968)

After testimony was complete, the court heard argument on the admissibility of appellant's statements to Officer Kostyk. R. 513, l. 7 – 537, l. 8. The solicitor argued that Miranda was not required because Officer Kostyk only had appellant in "investigative detention." R. 513, ll. 9 – 12. The State asserted that the encounter was not a custodial interrogation and added, "Although he may be detained, he's not being interrogated. That's a routine question." R. 513, ll. 13 – 19. The solicitor claimed the officer's questions were only administrative. R. 513, l. 20 – 515, l. 8.

However, the solicitor then admitted that appellant was in custody when he asked for a lawyer. R. 514, l. 23 – 515, l. 8. The solicitor conceded:

> Once past that, Your Honor, he's placed into handcuffs at that point, and we move into the next question, which is something like you, you've murdered somebody, and the testimony from Sergeant Kostyk is yes.
>
> The State would claim that that is an impeachable, that it would not be used in its case in chief, but would be used in impeachment purposes cause his response is you murdered somebody and the answer was yes. And then it's I said yes, sir.
>
> **Past that point, Your Honor, he quickly asked for a lawyer and we agree that he's in custody and he's asked, he's invoked his rights.** Although there could be a question of voluntariness after that point, there's nothing the State wants to use.

R. 514, l. 14 – 515, l. 2 (emphasis added). Appellant argued that he was in custody and should have been read his Miranda rights, rendering his statement inadmissible. R. 519, l. 23 – 531, l. 17.

The trial judge ruled Officer Kostyk conducted a valid Terry stop. R. 538, ll. 6 – 12. The court found that "at no time during the period of time at which certain identifying information was given and questions were asked to Mr. Walker by the Aiken deputy was Mr. Walker in custody." R. 538, ll. 13 – 22. Judge McMahon found that the officers treated Mr. Walker

respectfully and that he "barely has his hands on him" when appellant had his hands on the front of the patrol car. R. 538, l. 23 – 539, l. 24. The court then addressed whether the remainder of appellant's statements could be used for impeachment and found all of the statements were "admissible in the case in chief." R. 539, l. 20 – 543, l. 18. Appellant contemporaneously objected when the State introduced the statements during the trial. R. 938, l. 23 – 940, l. 14.

Discussion

The trial judge erred in admitting appellant's statements because he was in custody and Miranda was required. Miranda defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 468 U.S. at 444. The question of whether Miranda is required during a Terry stop is controversial. See Luis Then, Note, Applying the 'Cuffs: Consistency and Clarity in a Bright-Line Rule for Arrest-Like Restraints Under Miranda Custody, 42 Fla. St. U. L. Rev. 843 (Spring 2015) (advocating courts require Miranda warnings when a Terry stop rises to the level of arrest-like detention because of the ease of applying such a rule for law enforcement and trial judges); Eugene L. Shapiro, Miranda Warnings and Terry Stops: Another Perspective, 15 Barry L. Rev. 1 (Fall 2010) (noting that the federal circuit courts are divided on the issue); Mark A. Godsey, When Terry Met Miranda: Two Constitutional Doctrines Collide, 63 Fordham L. Rev. 715 (Dec. 1994) (concluding that the expansion of the police's ability to use force during Terry stops undermined the old rule that Miranda did not apply). Because Miranda applies when a suspect is in custody, a categorical rule that Miranda can never be implicated in a Terry stop is illogical. Instead, a court should examine police questioning on a case-by-case basis. Here, the trial court erroneously assumed that Terry stops

cannot trigger Miranda, which led to the incorrect finding that appellant was not in custody—even though the State conceded appellant was in custody when he asked for an attorney.

As the above-cited law review articles explain, much of the incongruence between Miranda custody and Terry stops arises from the United States Supreme Court's decision in Berkemer v. McCarty, 468 U.S. 420 (1984). Like many of the cases holding Miranda does not apply to Terry encounters, Berkemer began with a traffic stop. Berkemer, 468 U.S. at 422-23. A police officer saw the defendant's car weaving, followed him for two miles, stopped him, and directed the defendant to get out of his car. Id. at 423. The defendant was obviously intoxicated. Id. In response to the officer's questioning, the defendant said he drank two beers and smoked marijuana. Id. The officer arrested the defendant and he made further incriminating statements at the jail. Id. at 423-24. At no point did the police give him Miranda warnings. Id. at 424.

The Court first rejected the argument that Miranda should not apply to misdemeanor arrests. Id. at 429-34. After rejecting this argument, the Court concluded that the defendant's post-arrest statements at the jail were inadmissible. Id. at 434-35.

The Court then turned to the more difficult question of the admissibility of the defendant's statements during the traffic stop. Id. at 435-42. Distinguishing traffic stops from "stationhouse interrogation," the Court found that roadside detentions are brief, public, and motorists do not feel "completely at the mercy of the police." Id. The Court then analogized "the usual traffic stop" to a Terry stop. Id. at 439-40. With the notion of a brief, limited Terry stop in mind, the Court wrote, "The comparatively nonthreatening character of detentions of this sort explains the absences of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda." Id. at 440. The holding found that motorists detained in "ordinary" traffic stops were not in custody pursuant to Miranda. Id.

However, the Court recognized that some traffic stops could be so similar to an arrest that Miranda could be required and declined to create a categorical rule. Id. at 440-41. "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Id. at 440. The Court recognized that, "Either a rule that Miranda applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line," but expressly declined to adopt such a rule and entrusted the lower courts with making custody determinations on a case-by-case basis. Id. at 441.

Despite the Berkemer Court's refusal to adopt any bright-line rule, lower courts repeatedly cite Berkemer for the proposition that Miranda is not required during a Terry stop. See United States v. Leshuk, 65 F.3d 1105, 1109-10 (4th Cir. 1995). In Leshuk, the Fourth Circuit wrote, "[w]e have concluded that drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for Miranda purposes." Id. It seems unlikely that the detentions described in Leshuk were what Justice Marshall had in mind when he described the "noncoercive aspect of ordinary traffic stops" in Berkemer. Berkemer, 468 U.S. at 439-40.

Despite this seeming conflict, this Court quoted Leshuk with approval in State v. Corley, 383 S.C. 232, 244, 679 S.E.2d 187, 193 (Ct. App. 1994) *aff'd as modified* 392 S.C. 125, 708 S.E.2d 217 (2011) ("We affirm the court of appeals' excellent opinion with one modification."). Like Berkemer, Corley involved a traffic stop, albeit pretextual. Corley at 236-37, 679 S.E.2d at 189-90. A police officer was surveilling a drug den. Id. At 2:50 AM, the defendant parked his

car, walked to the back of the house, and returned to his car two minutes later. Id. The officer followed the defendant and stopped him for failing to use a turn signal. Id.

During the traffic stop, the officer noted the defendant's nervousness and asked him to step to the rear of his car. Id. He asked the defendant where he had been and the defendant lied. Id. The officer then asked the defendant if he had purchased drugs and the defendant said he bought crack and indicated where in the car he had the drugs. Id.

On appeal, the defendant sought suppression of his statements because he was not given Miranda warnings. Id. at 239-45, 679 S.E.2d at 191-94. Citing Leshuk, this Court held that Miranda warnings were not required because the traffic stop "was akin to a Terry stop, for which no Miranda warnings are required." Id. The Court, however, left the door open by realizing that if the defendant had been detained "as if he were under arrest," then Miranda custody could be triggered. Id. at 244, 679 S.E.2d at 193-94.

Unlike Berkemer and Corley, this case did not originate from an ordinary traffic stop. The police watched appellant, suspected him of planning to rob a convenience store, and advanced on him *en masse*. (State's Ex. 2). In Corley, one officer asked the defendant questions at the rear of his vehicle. Here, three officers surrounded appellant while another patted him down, loomed behind him, then made him lean off-balance, spread-eagle against the hood of a police car. (State's Ex. 2). All of the officers' guns are visible. (State's Ex. 2). Appellant does not utter the incriminating phrase "murder" until after the police have him against the police car and completely at their mercy. (State's Ex. 2). No reasonable person would believe that they were not in police custody in appellant's situation. The officer's questions were designed to elicit incriminating information. Therefore, Miranda was required and appellant's statements were inadmissible.

Appellant's case resembles a Tenth Circuit case, United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993). In Perdue, the police executed a search warrant on rural land and found a marijuana cultivation operation and guns. Perdue, 8 F.3d at 1458-59. Two officers charged with perimeter security saw a car approach and, with guns drawn, ordered the occupants out of the car and face down on the ground. Id. The police asked them what they were doing on the property and the defendants replied they were there to check on their marijuana. Id.

After concluding that the officers' Terry stop was valid, the court analyzed whether Miranda warnings were required. Id. at 1461-63. After acknowledging Berkemer, the court said, "The traditional view . . . is that Miranda warnings are simply not implicated in the context of a valid Terry stop." Id. at 1463-64.

> This view has prevailed because the typical police-citizen encounter envisioned by the Court in Terry usually involves no more than a very brief detention without the aid of weapons or handcuffs, a few questions relating to identity and the suspicious circumstances, and an atmosphere that is "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in Miranda." Berkemer, 468 U.S. at 439, 104 S.Ct. at 3149.
>
> Thus, historically, the maximum level of force permissible in a standard Terry stop fell short of placing the suspect in "custody" for purposes of triggering Miranda. This fact led the Court to announce in Berkemer, "[t]he comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda." Berkemer, 468 U.S. at 440, 104 S.Ct. at 3150.
>
> The last decade, however, has witnessed a multifaceted expansion of Terry. Important for our purposes is the trend granting officers greater latitude in using force in order to "neutralize" potentially dangerous suspects during an investigatory detention.

Id. at 1464. The court reasoned that the greater degree of force in Terry stops since Berkemer compelled it to analyze whether a reasonable person in the defendant's position "would have felt completely at the mercy of the police." Id. at 1464-65 (internal quotation omitted). The court

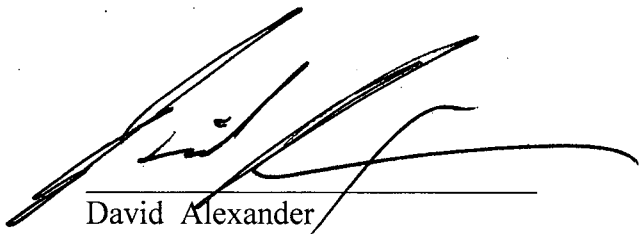
concluded "as a matter of law" that the defendant was in custody and that Miranda warnings were required because the officers' questioning was likely to elicit an incriminating response. Id. at 1465-66.

Using a case-specific analysis like Perdue, appellant was in custody and should have been given Miranda warnings. The solicitor admitted appellant was in custody when he asked for an attorney. R. 363, ll. 10 – 20. Nothing is different about appellant's position when he gives the incriminating answers about a murder warrant than when he asks for an attorney. (State's Ex. 2). He is handcuffed only after he asks for an attorney. (State's Ex. 2). Officer Kostyk wrongly thought Miranda warnings were only required if someone is charged with a crime. R. 279, l. 1 – 281, l. 23. Appellant, surrounded by officers at night, having been searched, and then placed in a humiliating position on the hood of their car, was in police custody.

The failure to give Miranda warnings renders appellant's statements inadmissible. Just as in Perdue, appellant's confession that he was wanted for "murder" cannot be harmless. Perdue, 8 F.3d at 1469 (concluding that confession could not be harmless beyond a reasonable doubt). "[A] confession (sometimes called 'the Queen of proofs) is among the most explosive and incriminating of evidence, and often profoundly impacts the jury." State v. Young, 420 S.C. 608, 626, 803 S.E.2d 888, 898 (Ct. App. 2017). The State's case against appellant rested primarily on circumstantial evidence and the pathologist's testimony. The lower court's error cannot be harmless beyond a reasonable doubt and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand this case for a new trial.



David Alexander
Appellate Defender

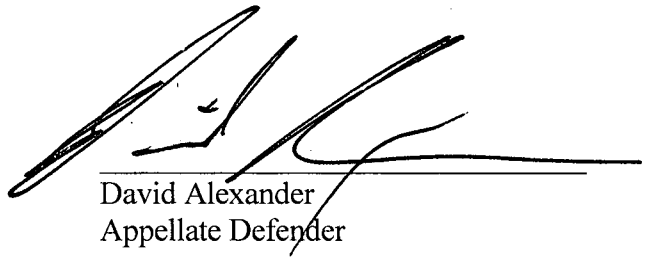
ATTORNEY FOR APPELLANT

This 24th day of July, 2018.

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 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."

July 24, 2018



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