THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2018-002056
Lower Case Nos. 2014-GS-22-00803 | 2014-GS-22-00804

The State, ...Respondent,

v.

Randy Collins,.....Appellant,

FINAL REPLY BRIEF OF APPELLANT

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I. Appellant's statements should not have been admitted because they were induced by deception regarding their use and promises of leniency, and Appellant was especially susceptible to these improper techniques because of his intellectual impairments.

A. Misrepresentations and Deception About the Use of Mr. Collins's Statements.

Before he was coerced into confessing, Mr. Collins was promised by law enforcement that his statements would not be used against him. In its initial brief, the State acknowledges that law enforcement's promise of confidentiality is "problematic" but nevertheless attempts to excuse this deceptive tactic by speculating as to its effect on Mr. Collins and advancing a legal standard that has never been accepted by any jurisdiction. The Court should reject the State's position and refuse to become the first court to sanction false promises of confidentiality made by law enforcement to induce a suspect into confessing.

Despite admitting that the investigators' promise of confidentiality was "problematic" and "inappropriate," the State claims this tactic would have been improper only if it "was used in a repeated manner." (Resp. Initial Br. p. 10.) Yet the State identifies no authority to support that proposition. And because the issue is one of first impression in South Carolina, the State would have the Court create out of whole cloth a rule that would tolerate – if not encourage – blatant deception by law enforcement as long as such deception is not repeated.

The State's one-free-lie rule conflicts with the holdings in decisions from other jurisdictions that reject without qualification or equivocation the interrogation tactics utilized against Mr. Collins. The State neither criticizes the reasoning in these decisions nor identifies any counter-authorities to support its position. So it attempts to distinguish those cases, but those attempts are unconvincing.

First, the State attempts to distinguish the present case from *Redmond v. People*, 180 Colo. 24, 501 P.2d 1051 (1972), by focusing on the fact that law enforcement in that case gave confusing instructions to the defendant that his statements would not be used against him but could be used against his purported co-conspirator. While law enforcement did not qualify the promise of confidentiality in this case as the interrogators in *Redmond* did, this distinguishing fact does not get the State very far. Rather than give a confusing or qualified promise about the use of his statements, the investigators in this case clearly promised Mr. Collins that the entirety of his statements would not leave the interrogation room. Accordingly, the Court is not presented with the difficult task of determining which parts of the statement were voluntary. Instead, it can make the much easier determination that all of Mr. Collins's statements made after the promise of confidentiality were not voluntarily given because they were induced by a false promise of confidentiality.

Second, the State distinguishes this case from *Porter v. State*, 143 Ga. App. 640, 239 S.E.2d 694 (Ga. Ct. App. 1977), by arguing that the promise of confidentiality in *Porter* occurred immediately after the defendant was read the *Miranda* warning; whereas, the promise of confidentiality in this case occurred approximately twenty minutes after the interview began.[1] Yet the State fails to explain why this distinction is material to the Court's analysis, and nothing in *Porter* suggests it was based on the immediate temporal proximity between the promise of confidentiality and the *Miranda* warning.

[1] The State also claims that Mr. Collins was not promised confidentiality when he was read his *Miranda* rights. However, there is no citation to the record to support that contention, and the video recording of the interrogation does not begin until after the *Miranda* warning was supposedly read to him. Therefore, the record does not support the State's assertion.

Instead, the *Porter* court based its ruling on the fact that the "clear thrust of the conversation [between the law enforcement agent and the defendant] is that [the defendant] is being told that his statement would *not* be used against him and it was being recorded just so the agent's secretary could type his notes." *Id.* at 642, 239 S.E.2d at 696 (emphasis original). Here, Agent Hardee's promises to Mr. Collins had the same import as those of the agent in *Porter*, which is that the statement would not be used against him and was being recorded solely for the agents' case files.

Ironically, though, the State also argues that the promise of confidentiality to Mr. Collins was ineffectual because it was not sufficiently close to the time of his confession. The State fails to acknowledge or attempt to reconcile its seemingly inconsistent argument that to render a confession involuntary a promise of confidentiality must be made immediately after the *Miranda* warning and immediately before the confession.

But this inconsistency is irrelevant because neither *Redmond* nor *Porter* establish that there is a magic window of time in which a false promise of confidentiality to a defendant is permissible, as the State's argument implicitly suggests. Instead, the cases reveal that, for a promise of confidentiality to be improper, it must precede the confession and must not be rescinded. As explained in *Redmond*, the court was swayed by the fact that the promise not to use the defendant's statements against him was never retracted by law enforcement. *Redmond*, 180 Colo. at 26, 501 P.2d at 1052. Here, Agent Hardee, like the investigators in *Redmond* and *Porter*, promised Mr. Collins that what he said would not leave the room and the video would be placed in the agents' file, and he never rescinded that promise.

Third, the State attempts to distinguish *U.S. v. Preston*, 751 F.3d 1008 (9th Cir. 2014), by asserting in conclusory fashion that the interrogation tactics used in that case were much more

extreme than those used against Mr. Collins. But a close examination of the tactics utilized by law enforcement in both cases reveals that they are shockingly similar.

In *Preston*, the court discussed the questioning technique in which the investigators exerted "repeated pressure to change answers inconsistent with guilt and adopt answers evidencing guilt instead." *Id.* at 1024. The investigators repeatedly rejected the defendant's "denials and equivocations" and asked him "the same questions over and over until he finally assented and adopted the details that the officers posited." *Id.* According to the court, "[s]uch acquiescence and willingness to 'shift' answers in response to interrogative pressure is common for the intellectually disabled, who, when presented with leading or suggestive questions, 'frequently seek to conform to the perceived desires of the interrogator.'" *Id.* (citing Stanley L. Brodsky & Allyson D. Bennett, *Psychological Assessments of Confessions and Suggestibility in Mentally Retarded Suspects*, 33 J. Psychiatry & L. 359, 363 (2005)). The court found that the defendant, in response to those techniques, "attempted to tell the officers what they wanted to hear" by shifting his initial denials to answers that met the officers' desires. *Id.*

The *Preston* court further noted that the officers coupled their interrogation techniques with other discouraged practices, such as promising leniency. For example, the officers misled the defendant by telling him "that they would not tell anyone else what he said, and that the confession would never leave the 'folder' or the United States Attorneys Office." *Id.* at 1026. Also, the officers told the defendant "that he was free to leave *after* he finished answering their questions, and threatened that they would keep returning until [the defendant] did so. In this way, the police paired the prospect of relentless questioning with false promises of leniency." *Id.* (emphasis original).

The investigators in this case used the exact same techniques against an individual with intellectual impairments just as the agents did in *Preston*. The investigators repeatedly rejected Mr. Collins's denials and asked him the same questions over and over until he finally assented and adopted the details that they posited. When Mr. Collins failed to provide details of his involvement to the satisfaction of the investigators, they suggested the answers to him. (R. p. 263, lines 6-24; R. p. 267, line 18-p. 268, line 2.) When he provided information that was clearly inconsistent with the crime, they convinced him that that information was incorrect and got him to retract that information. (R. p. 828, State Ex. 3, DVD 2, 37:30-38:00.) Mr. Collins repeatedly searched for the answers he believed the investigators wanted to hear to the point where the investigators even acknowledged it. (R. p. 828, State Ex. 3, DVD 2, 22:55-23:20.)

And just as the investigators in *Preston* told the defendant that he would be free to go after he answered their questions, the investigators in this case promised Mr. Collins that they were going to let him go home and would not arrest him after the interrogation. Mr. Collins even asked at one point if they were going to let him go home before he divulged information. Perhaps most importantly, the investigators in *Preston* made the same promise that the investigators made in this case, which is that the answers to the questions would remain in the file and would not be disclosed to anyone else.

In sum, there are several important similarities between *Preston* and the present case, and the State's attempt to distinguish it rings hollow. As the court explained in *Preston*, interrogating officers may sometimes make false representations concerning the crime or investigation, but they cannot make false promises, whether direct or implied, however slight. *Id.*, 751 F.3d at 1026 (citing *Hutto v. Ross*, 429 U.S. 28, 30 (1976)). Here, the investigators falsely promised Mr. Collins that his statements would not leave the room and the video of the interrogation would

remain in their files. As a result, the Court should find that Mr. Collins's consequent statements were not voluntarily given.

B. Promises of Leniency

The State also argues that the investigators made no promises of leniency or threats of harsh sentencing to extract Mr. Collins's statements. According to the State, the investigators merely said they would speak to the solicitor and try to get him as much help as they could after Mr. Collins confessed. In so doing, the State disregards the most coercive aspect of the investigators' threats and promises of leniency.

As stated in Appellant's Initial Brief, the investigators threatened Mr. Collins that he would die in prison if he did not answer their questions truthfully and give them information to assist in their desired goal of getting Marissa Cohen. (R. p. 828, State Ex. 3, DVD 3 21:00-22:30.) One of the investigators then stated: "It's not you I want; it's Marissa. I promise my right hand to God." *Id.* (emphasis added). The implication of these statements is that the investigators would not pursue charges against Mr. Collins if he would provide information that would help them prosecute Ms. Cohen. When they are combined with the investigators' repeated entreaties to Mr. Collins to "save" himself and promises that his statements would not leave the interrogation room, there can be no doubt that the investigators were making threats of harsh punishment and promises of leniency that depended on Mr. Collins's cooperation in the interrogation.

While the State may choose to ignore these coercive tactics of the interrogators, the Court should not.

C. Intelligence

The State also disregards compelling evidence demonstrating that Mr. Collins's low intelligence impaired his ability to understand his rights against self-incrimination and made him susceptible to the deceptive interrogation techniques of the investigators. In fact, the State incredibly claims that "the only evidence in the record regarding Appellant's lack of intelligence was his own self-serving testimony and even that testimony lacked credibility because of its inherent contradictions."[2] (Resp. Initial Br. p. 15.)

An abundance of evidence, however, contradicts the State's mischaracterization of the record, which is replete with examples of how Mr. Collins lacked intelligence and suffered from cognitive impairments, including the following:

- Mr. Collins's education was limited, and he did not attend school past the 9th grade. (R. p. 840.)
- When he did attend school, he was placed in special education classes. (*Id.*)
- Mr. Collins suffered a stroke in 2013, which caused a partial loss of the ability to produce language, altered his mental status, and made him suffer from dysarthia. (R. p. 841.) His treating neurologist concluded that his symptoms were consistent with encephalopathy. (R. p. 26, line 13-p. 28, line 7.)
- As part of his competency evaluation, the evaluators administered the Montreal Cognitive Assessment ("MoCA"). Mr. Collins had a MoCA score of 18 out of 30, which is just above the average score for Alzheimer's patients and indicates global impairments in

[2] The State claims Mr. Collins's contradictory testimony about whether he understood his *Miranda* rights shows that he was intelligent enough to waive his rights. (Resp. Initial Br. pp. 14-15.) However, Mr. Collins repeatedly stated that he did not understand those rights at the time he was being interviewed. (R. p. 250, line 23-p. 252, line 13; R. p. 262, line 12-p. 263, line 5.)

visuocontructional skills, language, attention, abstraction, and delayed recall. (R. p. 842.)

- During his competency interview with the evaluators, Mr. Collins was unable to identify the current president of the United States and wrongfully identified "Kennedy" as the first president. (*Id.*)

- Mr. Collins provided two separate statements to the police as part of the investigation, and both times the investigators had to write his statement for him because he was not good at writing. (R. p. 667, lines 6-7; R. p. 697, lines 9-22; R. p. 826; R. p. 828, State Ex. 3, DVD 2B, 4:30-5:00.)

- One of the competency evaluators admitted during the competency hearing that there were indications that Mr. Collins was intellectually impaired. (R. p. 44, line 19-p. 45, line 19.) This was consistent with the finding in the competency evaluation report that Mr. Collins "does indicate some degree of impairment in general intellectual functioning, as evidenced by his self-reported issues in school and observed during the evaluation . . ." (R. p. 843.)

- The trial judge acknowledged that the evaluators concluded that Mr. Collins had "some intellectual disabilities or impairments." (R. p. 125, lines 20-22.)

- The video recording of Mr. Collins demonstrates that he lacked communication skills and was often confused. (R. p. 828, State Ex. 3, DVD 1, 2, 2B, and 3.)

This evidence relating to Mr. Collins's intelligence and mental condition must be considered in determining the voluntariness of his statements. "[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). "It takes less in terms of threats or other means of inducing fear to interfere with the deliberative processes of one whose capacity for rational choice is limited than it takes to affect the deliberative processes of one who capacity is not so limited." *Smith v. Duckworth*, 910 F.2d 1492, 1497 (7th Cir. 1990). As a result, Mr. Collins's impaired mental condition and low intelligence further support a finding that his statements were not voluntary.

II. The trial court erred by not requiring further evaluation of Appellant's competency based on the examiners' conclusion that there were indications that Mr. Collins suffered from an intellectual or related disability.

In defending the trial court's refusal to order further testing to determine whether Mr. Collins suffered from an intellectual or related disability in accordance with S.C. Code Ann. § 44-23-410(D), the State ignores the plain language of that statute and claims that no further testing was required because the Department of Mental Health ("DMH") did not diagnose him with an intellectual disability.

The State's interpretation of § 44-23-410(D) is incorrect because it is based on the circular logic that evaluation by the Department of Disabilities and Special Needs ("DDSN") for competency to stand trial based on a defendant's suspected intellectual disability is only warranted when DMH makes a diagnosis of an intellectual disability. However, the statute dictates that DMH is neither qualified nor authorized to make a diagnosis of an intellectual or related disability. Instead, the General Assembly has authorized only DDSN to make that determination.

The plain language of § 44-23-410(D) requires that DMH "not render an evaluation on the person's mental capacity" if an examiner designated by DMH "find indications of intellectual disability or a related disability but not mental illness." Thus, for the evaluation to be referred to DDSN, there only needs to be an "indication" of intellectual disability – not a diagnosis.

Here, there can be no doubt that Mr. Collins presented indications of an intellectual or related disability. In fact, the DMH evaluators acknowledged that Mr. Collins had an "intellectual impairment" and "does indicate some degree of impairment in general intellectual functioning." (R. p. 45, lines 1-7; R. p. 843.) These findings alone required DMH not to render

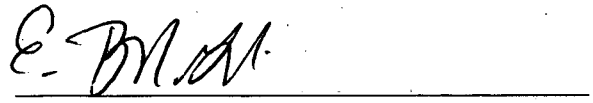
an opinion about his competency. Nevertheless, the DMH evaluators completed the evaluation and issued a report finding Mr. Collins competent to stand trial because his impairment did not meet the clinical definition of an "intellectual disability" because, in their opinion, he did not have problems with adaptive functioning. In so doing, DMH usurped the statutory role of DDSN.

Moreover, DMH's competency evaluation was incomplete because it did not consider whether Mr. Collins had a "related disability" under § 44-23-410(D). As stated above, this statute prohibits DMH from rendering a competency evaluation for individuals with "indications of an intellectual disability or related disability." *Id.* (emphasis added). While DMH refused to assign a diagnosis of an intellectual disability based on its finding that Mr. Collins did not have impairments in adaptive functioning, its finding of intellectual impairments was a sufficient indicator of a "related disability" under § 44-23-410(D).

Either way, the trial court had sufficient indications of both an "intellectual disability" and a "related disability" to refer Mr. Collins to DDSN for further evaluation. Its failure to do so violated § 44-23-410(D).

CONCLUSION

For the foregoing reasons, Mr. Collins respectfully requests that the Court reverse his conviction based on his involuntary confession and remand the matter for further evaluation of competency to stand trial under S.C. Code Ann. § 44-23-410.



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CERTIFICATE OF APPELLANT'S COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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