

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

COURTNEY ANTHONY SMITH,

APPELLANT

APPELLATE CASE NO 2019-000857

ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in denying defense counsel's motion to suppress Appellant's audio and video recorded interrogation where the officer told Appellant to read the Miranda waiver and sign the form and the Miranda waiver was illegible, rendering Appellant's waiver involuntary?

STATEMENT OF THE CASE

Appellant was indicted by the Marion County grand jury for criminal sexual conduct with a minor in the first degree, and criminal sexual conduct with a minor in the third degree. R. 204-205. Appellant's trial was held before the Honorable Thomas A. Russo and a jury on May 14 – 16, 2019. R. 1. Appellant was represented by William Meetze and the state was represented by David Richardson and Emily Neller-moe. R. 1.

The jury found Appellant not guilty of criminal sexual conduct with a minor in the first degree but found him guilty of criminal sexual conduct with a minor in the third degree. R. 190. Appellant was sentenced to fifteen years imprisonment. R. 198.

This appeal follows.

STANDARD OF REVIEW

“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).

STATEMENT OF FACTS

Appellant was married to Minor's mother, Mattie Smith, and they all lived together at the time of the events which gave rise to this case. R. 91, ll. 7 – 22. Appellant and Smith shared a bedroom and slept in the same bed together. One night, Smith recalled that she woke up and Appellant was not in the bed with her. Smith went to her children's bedroom and found Appellant in the bed with her son, Minor. R. 94, ll. 2 – 20.

Smith said that when she found Appellant in bed with her son, she turned the light on and pulled down the covers. Smith claimed that Appellant and Minor both had their boxers down. When Smith asked Appellant if he had "messed" with Minor, Appellant replied that he had not. R. 94, l. 22 – 95, l. 4. Smith then took Minor to her mother's house so that they could be away from Appellant. R. 96, l. 9 – 97, l. 8.

Smith admitted that she did not report the incident to law enforcement, claiming she did not want to believe that the man she loved and married would have done this to her. R. 97, ll. 9 – 21. Smith continued to have contact with Appellant after the incident and even let her youngest child continue to see Appellant and spend the night with Appellant unsupervised.¹ R. 97, l. 22 – 99, l. 4. On cross-examination Smith admitted that she never called the police about the incident but rather she was contacted by the police after she disclosed the incident to her "preacher." R. 103, l. 1 – 104, l. 1.

Minor said that on the night of the incident he was awakened by his mother, Smith, who came in to the room and turned the light on. R. 82, ll. 15 – 16. He recalled that his pants were off, and his underwear were pulled down to his knees when he was awakened. R. 81, l. 11 – 82,

¹ Smith's youngest child was not the alleged victim in this case. Smith claimed that she continued to let Appellant see her youngest because Appellant was the legal father of that child and she wanted the child to have a father figure in his life. R. 97, l. 22 – 99, l. 4; R. 101, l. 15 – 102, l. 22.

l. 14. Appellant was in his bed, but Minor did not see what Appellant was wearing and did not remember being touched in any way by Appellant. R. 82, ll. 19 – 20; R. 83, l. 4 – 84, l. 15.

Smith, Minor's mother, claimed that after she discovered Appellant in bed with Minor: "[Minor] called me in the room and he talked to me and he told me that he remember [sic] [Appellant] touching him and put his mouth down there, but he don't know. He believed he was dreaming and he don't know." R. 95, ll. 7 – 10. Minor's grandmother, Betty Woodbury, also testified at Appellant's trial. Woodbury claimed that when Smith brought Minor and her other children to her house on the night of the alleged incident that she spoke with Minor about what happened. Woodbury recalled her conversation with Minor at that time: "[Minor] said . . . [Appellant] put his mouth down there. I said put his mouth down there. He said yeah. He said, you know, like that. I said sucking. I said the word sucking, but he just said 'yeah' when I asked him." R. 136, l. 18 – 137, l. 19. Woodbury further claimed that Minor told her that Appellant touched him "down there."² R. 137, ll. 20 – 25.

Mike Hartson with the Mullins Police Department investigated the allegations against Appellant, including interrogating Appellant. R. 112, l. 7 – 115, l. 19. The interrogation of Appellant was audio and video recorded. State's Ex. 3 (interrogation of Appellant on file with this Court). Appellant told Hartson that he had gone into Minor's room that night to turn the television off because it was loud. Appellant then laid down on Minor's bed because his back was hurting and then fell asleep. When Smith came in the room, she turned the light on and awakened Appellant. State's Ex. 3 at 3:00 – 5:00.

² Minor had previously said that he did not remember telling his mother that Appellant touched and kissed his private parts, nor did Minor remember telling his grandmother that Appellant had "been touching and sucking [his] thing." R. 84, l. 23 – 86, l. 17.

As the interrogation of Appellant progressed, Appellant told Hartson that his hand “brushed” Minor’s penis and that he smelled Minor’s penis. State’s Ex. 3 at 22:00 – 44:00. Appellant maintained that neither he nor Minor were aroused. State’s Ex. 3 at 32:00; 46:00. Appellant’s written statement along with the video recorded interrogation were both introduced over defense counsel’s objection. R. 120, l. 21 – 122, l. 5. The video recording was played for the jury. R. 122, l. 17 – 125, l. 15.

ARGUMENT

The trial judge erred in denying defense counsel's motion to suppress Appellant's audio and video recorded interrogation because the officer told Appellant to read the Miranda waiver and sign the form and the Miranda waiver was illegible, rendering Appellant's waiver involuntary.

Relevant Facts

The trial judge held a Jackson v. Denno³ hearing prior to the start of Appellant's jury trial. R. 33 – 49. At the hearing, the state called one of the investigators who interrogated Appellant, Mike Hartson. The interrogation of Appellant was audio and video recorded. State's Ex. 3. Appellant also signed a written Miranda⁴ form and gave a written statement. R. 202-203.

When Hartson was advising Appellant of his Miranda rights, he read each one of them aloud from a form and had Appellant initial beside them. However, when he got to the waiver portion, Hartson told Appellant to read the waiver to himself and sign it. State's Ex. 3 at 2:30 – 2:42. Defense counsel argued that Appellant's statements should be excluded because the waiver portion of the form was illegible and therefore was not understood by Appellant. R. 47, l. 13 – 48, l. 4.

The trial judge denied defense counsel's motion to suppress the statement but did acknowledge the illegible nature of the waiver portion of the Miranda form. The trial judge found: "I do not disagree with you, Mr. Meetze. The waiver of rights – that looks like hieroglyphics and I would – just as an aside, I would tell law enforcement don't ever use this

³ 378 U.S. 368 (1964).

⁴ Miranda v. Arizona, 384 U.S. 436, 498–99 (1966).

form again like this. This is clearly – it’s not legible at all. There’s just absolutely no excuse for that.” R. 49, ll. 11 – 15. The judge went on to rule:

[A]ll I’m ruling is that I think the State has shown that the statement was – for purposes of admissibility is admissible for the jury to decide whether or not the statement was given freely and voluntarily. That’s . . . a jury question. But as far as the admissibility of the statement, I think that that has been shown and so I’m going to allow it in.

R. 49, ll. 17 – 23. Appellant’s written statement along with the video recorded interrogation were both introduced before the jury over defense counsel’s objection. R. 120, l. 21 – 122, l. 5.

Discussion

“A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under Miranda.” State v. Arrowood, 375 S.C. 359, 366–67, 652 S.E.2d 438, 442 (Ct. App. 2007). “If a suspect is advised of his Miranda rights, but chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived.” Id. South Carolina requires that the trial judge make a determination on the voluntariness of a criminal defendant’s statement based on the totality of the circumstances, “including the background, experience, and conduct of the accused.” State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). “If a suspect’s will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process.” Id.

The Supreme Court of the United States found that the “waiver inquiry has two distinct dimensions: waiver must be voluntary in the sense that it was the product of a free and deliberate choice . . . and made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Berghuis v. Thompkins, 560 U.S. 370, 382-383 (2010). A waiver does not need to be formal or express to be considered voluntary; an implicit

waiver is enough. Id. at 384. However, a valid waiver of an accused's Miranda rights does require the state to prove that the accused understood the rights prior to waiving them. Id.

The first step in determining the voluntariness of a statement is that the state must prove to the trial judge by a preponderance of the evidence that it was made voluntarily. Arrowood, 375 S.C. at 365, 652 S.E.2d at 441. If the judge finds the state has met its burden and thus admits the statement into evidence, the question then goes to the jury to decide whether or not the statement was voluntary beyond a reasonable doubt. Id. “When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence.” Id., at 366, 652 S.E.2d at 442.

The trial judge erred in denying defense counsel's motion to suppress Appellant's statements to law enforcement because the state did not prove by a preponderance of the evidence that Appellant voluntarily waived his Miranda rights. Even though Hartson read Appellant each of his rights from a written form, Hartson did not read the waiver section of the form out loud to Appellant. Instead, he only told Appellant to read it to himself.

Appellant's signature on the Miranda waiver portion did not change the fact that the waiver was completely illegible. The trial judge affirmatively found that the form was illegible, stating that it looked like “hieroglyphics.” R. 49, ll. 11 – 15. The judge went on to admonish law enforcement not to use the form signed by Appellant again because it was inexcusable having an illegible Miranda waiver form.

In State v. Rios, 388 S.C. 335, 339-340, 696 S.E.2d 608, 611 (Ct. App. 2010), this Court found that the defendant voluntarily waived his Miranda rights where English was not his first language. Specifically, defense counsel for Rios argued that the defendant did not understand his

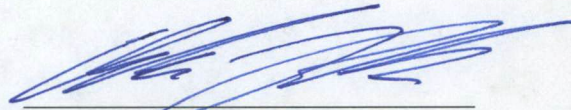
rights because he spoke Tarascan and his Miranda rights were only given to him in Spanish and English. Id. Contrary to defense counsel's argument, however, this Court found that the evidence in the record showed that Rios did in fact understand both Spanish and English and that when the investigator asked Rios if he understood his rights, he indicated that he did. Id.

Unlike in Rios, there was no evidence in the record that Appellant understood hieroglyphics and therefore, no evidence that he understood the written waiver of rights that he signed. It was pure speculation for the trial judge to rule that Appellant understood his rights and made a voluntary waiver. As was noted in Berghuis v. Thompkins, 560 U.S. 370, 384 (2010): "If the State establishes that a Miranda warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate 'a valid waiver' of Miranda rights. . . . The prosecution must make the additional showing that the accused understood these rights."

This is where the state failed in Appellant's case. The state did not prove by a preponderance of the evidence that Appellant understood his rights and therefore did not prove that he voluntarily waived them. The trial judge erred in admitting Appellant's written statement and the video recording of his interrogation over defense counsel's objection because his waiver was not voluntary. Appellant's conviction should be reversed. See Berghuis v. Thompkins, 560 U.S. 370 (2010); State v. Rios, 388 S.C. 335, 696 S.E.2d 608 (Ct. App. 2010).

CONCLUSION

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



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of February, 2020.

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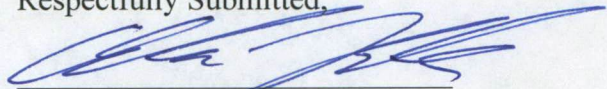
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Courtney Anthony Smith states:

1. He is 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 Thomas A. Russo, which was held on May 14 - 16, 2019, 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 Courtney Anthony Smith.

Respectfully Submitted,



Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

This 20th day of February, 2020.

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**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(s);
- (2) Entire trial transcript;
- (3) State's Ex. 1 (Miranda form);
- (4) State's Ex. 2 (Appellant's written statement);
- (5) State's Ex. 3 (Interrogation of Appellant).

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

February 20, 2020

Adam Sinclair Ruffin
Appellate Defender

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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."

February 20, 2020.



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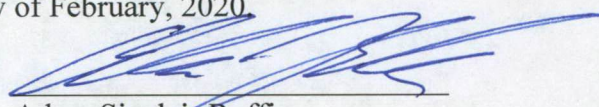
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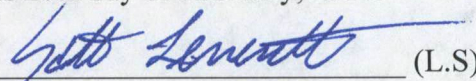
CERTIFICATE OF SERVICE

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 William M. Blicht, 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 Courtney Anthony Smith, 380104, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 20th day of February, 2020.



Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of February, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.