

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Letitia H. Verdin, Circuit Court Judge

RECEIVED

Sep 09 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JAMES ANTHONY DURHAM,

APPELLANT

APPELLATE CASE NO. 2019-001959

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting Appellant's statement to law enforcement where Appellant invoked his right to remain silent and law enforcement failed to scrupulously honor his invocation?

STATEMENT OF THE CASE

On October 11, 2016, a Pickens County grand jury indicted Appellant for criminal sexual conduct with a minor in the second degree (2016-GS-39-1419). R. 567 – R. 568. The state, represented by Megan Moricle Owen and James Durham Hill, called the case to trial before the Honorable Letitia H. Verdin and a jury on November 18-19, 2019. R. 1. Daniel Martin Hines King, John W. DeJong, and Teal Johnson represented Appellant. R. 1. The jury found appellant guilty as charged. R. 257, ll. 2-6. Judge Verdin sentenced Appellant to thirteen years imprisonment. R. 263, ll. 4-5; R. 569.¹

Appellant served his notice of appeal on November 22, 2019. This brief follows.

¹ On August 19-21, 2019, the state called Appellant to trial before the Honorable G. Thomas Cooper, Jr., and a jury. R. 265. The jury was unable to reach a unanimous verdict. R. 560, ll. 15-19. Judge Cooper declared a mistrial. R. 560, ll. 18-19.

STATEMENT OF FACTS

Appellant entered Minor's life when she was a toddler. R. 69, ll. 13-22. Minor, who was fifteen at the time of Appellant's trial, considered Appellant to be her father. R. 67, ll. 18-19; R. 69, ll. 13-22. Minor lived with her mother and Appellant in an apartment while Minor was in elementary school and middle school. R. 69, l. 23 – R. 70, l. 17.

On May 14, 2016, Minor, who was eleven-years old, woke up as her mother was leaving. R. 73, l. 25 – R. 74, l. 3; R. 97, ll. 5-7. Minor watched television while sitting on the couch on Appellant. R. 74, l. 4; R. 74, l. 24 – R. 75, l. 1. She recalled that a maintenance man, Larry King, arrived to repair their shower. R. 74, ll. 4-5; see also R. 174, ll. 2-5 (King testifying he arrived at 10:30 a.m.). Minor opened the door for the maintenance man to enter the apartment. R. 75, ll. 5-9; see also R. 174, ll. 9-11 (King testifying he knocked on the door and was told to enter). He left and returned with a part to fix the shower. R. 74, ll. 5-6; R. 174, ll. 12-20. When King returned the second time, he did not knock prior to entering; he simply entered the apartment while knocking. R. 75, ll. 21-23; R. 175, l. 21 – R. 176, l. 3; R. 180, ll. 1-3. King had told Appellant and Minor that he needed a part and would return; thus, there was no need to knock upon his return. R. 179, ll. 20-25. Minor explained that she and Appellant were sitting still on the couch when King returned. R. 77, ll. 21-24. However, King claimed he saw “a gentleman, young lady having oral sex on the sofa.” R. 176, ll. 3-5.

According to Minor, as soon as King entered he “[t]urned around and went back out.” R. 74, ll. 24-25. Both Minor and Appellant called King to enter, but he did not. R. 76, ll. 8-13. Minor opened the door for him. R. 76, l. 13. Minor recalled that she tickled Appellant on his stomach that morning, but she was uncertain if King saw the encounter. R. 84, ll. 23-25; see also R. 106, ll. 2-13.

On this point, King contradicted Minor as well. King claimed that he simply put his head down and proceeded to the bathroom. R. 176, ll. 7-8. King repaired the showerhead and left. R. 176, ll. 12-15. King called his boss to report what he claimed he saw. R. 176, ll. 20-23. King then went to the police department shortly after 11:00 a.m. R. 100, ll. 2-21; R. 176, ll. 22-24.

Shortly thereafter, the police arrived at the apartment Minor shared with her mother and Appellant. R. 74, ll. 7-8. When an officer told Minor they were investigating an alleged sexual assault, Minor denied that she was assaulted by Appellant. R. 80, ll. 10-17; R. 90, l. 22 – R. 91, l. 5; R. 103, ll. 12-14. Minor went to the hospital that day to have tests performed. R. 85, ll. 6-9. While there, Minor denied Appellant assaulted her. R. 85, ll. 10-12; R. 92, ll. 10-20. Minor then went to live with her family's pastor, Joe Holloway, as required by the Department of Social Services (DSS). R. 85, l. 15 – R. 86, l. 7; R. 92, ll. 21-23. When questioned by the DSS caseworkers, Minor denied any sexual assault. R. 93, ll. 4-12. The police required Minor participate in a forensic interview at the Julie Valentine Center. During the interview, Minor denied being sexually assaulted. R. 110, l. 18 – R. 111, l. 1. During the trial, Minor emphatically denied that Appellant sexually assaulted her or forced her to perform oral sex on him. R. 88, ll. 19-23.

STANDARD OF REVIEW

“The trial judge’s determination of whether a statement was knowingly, intelligently, and voluntarily made, requires an examination of ‘the totality of the circumstances’ surrounding the waiver.” State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990) (citing State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979)). “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.” Id. (citing State v. Livingston, 223 S.C. 1, 73 S.E.2d 850 (1952)).

ARGUMENT

The trial judge erred in admitting Appellant's statement to law enforcement where Appellant invoked his right to remain silent and law enforcement failed to scrupulously honor his invocation.

Relevant facts

Prior to trial, defense counsel moved to exclude statements made by Appellant to law enforcement, which were on the video from a body camera worn by an officer. Ross Ables was an officer with Clemson City Police Department on May 14, 2016. R. 49, ll. 13-15; State's Exhibit #2. Ables, along with several other officers, went to Appellant's home upon receipt of the complaint made by King, the maintenance man. R. 49, ll. 16-24; R. 55, ll. 12-15. Ables advised Appellant of his Miranda² rights. R. 50, ll. 21-23; R. 51, ll. 14-25; State's Exhibit #2. Ables made clear that Appellant was not allowed to leave. R. 52, l. 15 – R. 53, l. 2. According to Ables, Appellant was in "investigative detention." R. 53, ll. 3-4. Early on, Appellant asked law enforcement to leave, but the officers at Appellant's door refused, stating they were investigating some serious allegations. R. 53, ll. 13-16; R. 56, l. 25 – R. 57, l. 15. State's Exhibit #2. When the police refused to leave, Appellant continued to talk to the police. R. 59, ll. 8-12; State's Exhibit #2.

After the state presented its evidence, defense counsel moved to suppress the recording from the body camera video because the police violated Appellant's Fifth Amendment right to silence by continuing to interrogate Appellant after he invoked his right to silence. R.. 60, l. 1 – R. 61, l. 10. Defense counsel noted that Appellant asked the officers to leave, which was an invocation of Appellant's right to silence. R. 60, l. 1 – R. 61, l. 10. Instead of scrupulously

²Miranda v. Arizona, 384 U.S. 426, 473-474 (1966).

honoring Appellant's invocation, the police continued with their interrogation in violation of the Fifth Amendment. R. 60, l. 1 – R. 61, l. 10.

Judge Verdin found “the statements to be freely and voluntarily given after Miranda warnings.” R. 62, ll. 13-18. She understood that Appellant “wanted the police officers to leave his property.” R. 62, ll. 19-21. However, she indicated the police “couldn't just do that” because “they were in the midst of [an] investigation.” R. 62, ll. 22-23. Further, Judge Verdin found that most of Appellant's statements were “just spontaneous not really even - - not really even elicited through questioning.” R. 63, ll. 1-3.³

Ables told the jury about his encounter with Appellant on that day. Ables noted that his first question to Appellant was whether the maintenance repair man had been there earlier in the day. R. 119, ll. 23-25. After Appellant indicated in the affirmative, Ables asked “if there was anything that he might have seen when he was there.” R. 120, ll. 3-5. To this Ables claimed that Appellant “[i]mmediately jump[ed]” to asking what the police were insinuating and to “That's sick.” R. 120, ll. 10-13. Ables insisted that neither he nor any of the other officers informed Appellant of the maintenance man's allegations. R. 120, ll. 14-16; R. 124, ll. 1-6; R. 128, ll. 23-25.

During its closing argument, the solicitor relied heavily upon the statements made by Appellant during the interrogation to convince the jury to convict. According to the solicitor, after Ables asked if the maintenance man could have seen anything Appellant “just goes off.” R. 236, ll. 7-8. He told the jury that Appellant continued along the same refrain for approximately

³ When the state offered the recording into evidence, defense counsel renewed his objection, which the judge overruled. R. 122, ll. 9-15. Additionally, the state and defense counsel entered into a stipulation that two areas of the recording would be muted while it was played for the jury. R. 122, ll. 18-19; R. 566.

twenty minutes. R. 236, ll. 9-10. The solicitor notes for the jurors that no one told Appellant what the maintenance man claimed he saw. R. 236, ll. 10-17.

Discussion

The United States Supreme Court held that “[i]f [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. ... [A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.” Miranda v. Arizona, 384 U.S. 426, 473-474 (1966). If a suspect invokes his right to silence, the interrogators must scrupulously honor the invocation. Michigan v. Mosley, 423 U.S. 96, 103 (1975); State v. Benjamin, 345 S.C. 470, 476, 549 S.E.2d 258, 261 (2001). A suspect invokes his right to silence by clearly articulating his desire to end the interrogation and must do so “unambiguously.” Berghuis v. Thompkins, 560 U.S. 370, 381 (2010); Davis v. United States, 512 U.S. 452, 459 (1994); State v. Reed, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998). Put another way, “before law enforcement officers are required to discontinue questioning, the suspect must clearly articulate his desire to end the interrogation.” State v. Aleksey, 343 S.C. 20, 31, 538 S.E.2d 248, 253 (2000).

The first question is whether Appellant clearly articulated his desire to end the interrogation. The South Carolina Supreme Court held a defendant stating, “That’s all I’ve got to say,” was not an unequivocal invocation of his right to end the interrogation. Aleksey, 343 S.C. at 31, 538 S.E.2d at 253. According to the Court, “the statement was ambiguous” due to the context. Id. At 31, 538 S.E.2d at 253-254. Based on the context, it was unclear whether the defendant wanted to end the questioning or whether he was simply remarking on the conclusion of his story. Id. At 31, 538 S.E.2d at 254. Appellant’s statement to his interrogators was an unequivocal desire to end the interrogation. Appellant told the police to leave to his home and to leave his property. In doing so,

Appellant made clear his desire not to speak to police. Appellant's statement to police were not ambiguous and were a clear invocation of his desire to end the questioning.

However, determining Appellant invoked his right to silence does not end the inquiry. “[L]aw enforcement officers may certainly speak with a suspect who reinitiates communication subsequent to an invocation of rights.” Aleksey, 343 S.C. at 31, 538 S.E.2d at 253 (citing Edwards v. Arizona, 451 U.S. 477, 485 (1981)). According to the South Carolina Supreme Court, “[t]he principle underlying Michigan v. Mosley is that the suspect, rather than the police controls the time, duration, and subject matter of an interrogation.” Id. At 31, at 254. Thus, “[o]fficers do not fail to ‘scrupulously honor’ an invocation of rights when they engage in conversation initiated by the suspect.” Id.

Contrary to the state's position as revealed through its questioning of Ables and the judge's implicit finding that Appellant re-initiated the conversation with the police, the recording of the interrogation demonstrated that the police continued with their questioning with little to no regard for Appellant's requests. Upon his request that law enforcement leave his home, the police simply refused and continued to interrogate Appellant. While law enforcement needed to continue its investigation, as the judge found, such a need could not override Appellant's Fifth Amendment right to silence. Law enforcement could have continued its investigation, but needed to do so without continuing its interrogation of Appellant. This was not a situation in which the police honored Appellant's invocation and Appellant re-initiated. Here, the police flatly refused to honor Appellant's request. Therefore, Appellant's continued conversation with the police was not the result of his desire to re-initiate the interrogation. Rather, it was because Appellant was led to believe that he could nothing to stop the police interrogation.

Our state supreme court noted with approval that other courts have set forth five factors to ascertain whether the defendant's right to cut off questioning was scrupulously honored. The first is whether the police warned the defendant of his Miranda rights at the first interrogation. The second is whether the police immediately stopped the interrogation when the defendant indicated he did not want to answer questions. The third is whether the police resumed questioning only after passage of a significant period of time. The fourth is whether the police provided a second set of Miranda warnings prior to the second interrogation. Finally, the fifth factor is whether the second interrogation was restricted to a crime that had not been the subject of the earlier interrogation. Benjamin, 345 S.C. at 476-477, 549 S.E.2d at 261. These "factors provide a framework for determining whether, under the circumstances, an accused's right to silence was scrupulously honored." Id. at 477, 549 S.E.2d at 261.

In Benjamin, the South Carolina Supreme Court agreed with other courts that a second interrogation on the same subject matter is not rendered unconstitutional automatically. Id. at 477, 549 S.E.2d at 262. After Benjamin was arrested, he was not advised of his Miranda warnings and told the questioning officer that he did not want to talk to him. Id. at 475, 549 S.E.2d at 261. Approximately one hour later, a SLED agent interrogated Benjamin. The SLED agent advised him of his rights and Benjamin agreed to waive those rights and speak. Id. In deciding that the statement was admissible, the Court noted that the initial officer did not advise Benjamin of his right to silence, that the officer immediately ceased talking to him, and there was no immediate resumption of questioning. Id. at 478, 549 S.E.2d at 262. The Court explained that "[w]hat is paramount is that police, under the totality of the circumstances, 'scrupulously honor' the suspect's right to remain silent." Id.

Applying the five-factor test to Appellant's interrogation demonstrates the police failed to scrupulously honor Appellant's invocation of his right to end the questioning. While the police warned Appellant of his constitutional rights prior to initiating the interrogation, and, thereby satisfying the first factor, the other four factors weigh heavily in Appellant's favor that the police failed to scrupulously honor his invocation. The police failed to immediately stop the interrogation when the defendant indicated he wanted the police to leave his home. Instead, the police flatly refused and continued questioning Appellant. Turning to the third factor, the police did not await any amount of time before resuming questioning of Appellant. There was not a significant passage of time; instead, as demonstrated by the recording, the interrogation resumed within seconds of the invocation. The police did not provide a second set of Miranda warnings prior to the second interrogation as the second interrogation continued seamlessly from the first as if the numerous invocations never even occurred. Finally, the second interrogation concerned the same crime for which the police were initially questioning Appellant – the alleged sexual assault of Minor. Consideration of these factors requires a conclusion that the trial judge erred in admitting Appellant's statement to law enforcement because the police failed to scrupulously honor his unambiguous request to cease questioning.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of September, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Anthony Durham states:

1. She is an 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 Letitia H. Verdin, which was held on November 18 & 19, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for James Anthony Durham.

Respectfully Submitted,

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 9th day of September, 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) Trial transcript dated November 18-19, 2019 (Tr);
- (2) Trial transcript dated August 19-21, 2019 (Mistrial Tr.);
- (3) Court's Exhibit #3 (stipulation);
- (4) State's Exhibit #2 (body cam video);
- (5) True-billed indictment; and
- (6) Sentence sheet.

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

September 9, 2020

s/Susan B. Hackett

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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.”

September 9, 2020.

s/Susan B. Hackett

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