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Sep 22 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Georgetown County  
The Honorable Larry B. Hyman, Jr., Circuit Court Judge  
Appellate Case No. 2018-002056

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THE STATE,

Respondent,

vs.

RANDY COLLINS,

Appellant.

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PETITION FOR REHEARING

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On September 8, 2021, this Court reversed Appellant's convictions for first-degree arson and criminal conspiracy by finding the trial judge erred in finding Appellant's confession was voluntarily given. State v. Collins, Opinion No. 5861 (S.C. Ct. App. filed September 8, 2021) (Howard Adv. Sh. No. 31). The State respectfully submits this Court misapprehended or overlooked relevant facts in the record and case law in three ways. First, whether Appellant's confession was rendered involuntary by Agent Hardee's promise of confidentiality was not preserved for appeal, because it was not raised to and ruled upon by the trial court during the Jackson v. Denno<sup>1</sup> hearing. Second, the trial court did not abuse its discretion in determining Appellant's confession was voluntary, because there was evidence in the record to support the trial judge's ruling. Third, this Court erred in denying the State's motion to supplement the record on appeal with Appellant's subsequent sworn testimony at his co-defendant's trial in which he acknowledged his guilt in the crimes for which he stood trial in this case. (Order dated

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<sup>1</sup> Jackson v. Denno, 378 U.S. 368 (1964).

April 29, 2020). Accordingly, pursuant to Rule 221(a), SCACR, this Court should grant the petition for rehearing and hold the issue of whether Agent Hardee's statement rendered Appellant's confession involuntary was not properly before this Court, and even if it were, the trial judge did not abuse his discretion because there was evidence in the record to support the trial judge's ruling. Furthermore, this Court should hold Appellant's subsequent confession of guilt in open court eliminates any possible prejudice from the trial judge's ruling and obviates the need for an appeal. This Court should affirm Appellant's convictions and sentences.

### **Error Preservation**

Because this Court's opinion focused heavily on the promise of confidentiality offered to Appellant by Agent Hardee, it is instructive to review the arguments made by Appellant at the Jackson v. Denno hearing as well as the arguments made by Appellant on appeal. State v. Collins, Opinion No. 5861 (S.C. Ct. App. filed September 8, 2021) (Howard Adv. Sh. No. 31 at 46-54). Before the Denno hearing began, the trial judge sought to clarify what issues needed to be addressed during the hearing. (R. 129-30). Counsel for Appellant responded:

Mr. Wilson: -- there, there is an issue regarding Miranda<sup>2</sup> in the beginning, in the middle, and at the end. So Miranda is an issue throughout the entire statement for the Defense.

The Court: Okay.

Mr. Wilson: As well as the duration of the video when the video is cut off and whether or not he was actually free to leave at some point in time during this particular interrogation, Judge.

(R. 130, lines 5-13). Although counsel asked Agent Hardee and Investigator Garrett about the promise of confidentiality on cross-examination, counsel did not argue to the trial judge that the promise rendered Appellant's statement involuntary. (R. 199, 240). In fact, counsel did not

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

mention Hardee's promise at all when arguing Appellant's confession should be suppressed. (R. 273-85). Rather, counsel articulated four separate grounds for the trial judge to suppress Appellant's statement: (1) Appellant did not understand his Miranda rights in general; (2) Rule 106 SCRE precluded the admission of Appellant's confession; (3) Rule 403, SCRE also precluded the admission of Appellant's confession; and (4) the admission of Appellant's confession violated his due process rights under the 14<sup>th</sup> amendment to the United States Constitution. (R. 279). In a detailed ruling, the trial judge found Appellant waived his Miranda rights, but Miranda rights were not required because Appellant was not in custody when he gave his confession. (R. 287).

On appeal, Appellant argued for the first time that the trial judge erred in admitting the Appellant's confession because it was induced by deception as a result of Hardee's promise of confidentiality. (Final Brief of Appellant 15). Appellant did not argue the trial judge erred by determining Appellant waived his Miranda rights or that the trial judge erred in determining Miranda rights were not required in his Final Brief. Furthermore, Appellant conceded at oral argument that the question of whether Miranda warnings were required was not before this Court<sup>3</sup>. (Oral Argument at 37:00-38:35). Thus, one of the four grounds for suppression that trial counsel raised to the trial judge was explicitly waived on appeal. The remaining three grounds raised by trial counsel were not raised in Appellant's brief or at oral argument. Therefore, the question of whether Appellant's confession was rendered involuntary by Hardee's promise of

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<sup>3</sup> In response to Appellant's admission, this Court correctly noted: "Well if the Miranda warnings weren't required then it doesn't matter whether they were negated or not." (Oral Argument 38:45-39:00).

confidentiality was not properly before this Court and should not have been addressed by this Court on appeal<sup>4</sup>.

### No Abuse of Discretion

In rendering its opinion reversing Appellant’s convictions, this Court maintained “We are not insensitive to the deferential standard of review we apply to the trial court’s determination of the voluntariness of a statement<sup>5</sup>.” State v. Collins, Opinion No. 5861 (S.C. Ct. App. filed September 8, 2021) (Howard Adv. Sh. No. 31 at 56). However, the Court noted it was “still tasked with considering the totality of the circumstances surrounding the defendant’s giving of a confession in determining whether a confession was voluntarily given.” Id. While an appellate court must consider the totality of the circumstances surrounding a confession, an appellate court must not “reevaluate the facts based on its own view of the preponderance of the evidence, but simply determine[s] whether the trial court’s ruling is supported by any evidence.” State v. Saltz, 346 S.C. 114,136, 551 S.E.2d 240, 252 (2001). The State respectfully argues that this Court substituted its own judgment of whether the totality of the circumstances supported a finding of voluntariness in a de novo fashion, rather than ruling on whether there was any evidence to support the trial judge’s finding that Appellant’s confession was voluntary.

Here, there was evidence in the record to support the trial judge’s ruling that Appellant’s confession was voluntarily given. First and foremost, Appellant testified he was not threatened

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<sup>4</sup> The State acknowledges it did not raise error preservation in its brief, however the State explicitly raised the issue at oral argument. (Oral Argument at 24:00-26:15). Furthermore, this Court can affirm based on any ground appearing in the record. See Rule 220 (c) SCACR (“The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal.”)

<sup>5</sup> This Court correctly held the standard of review was an abuse of discretion. Multiple questions were posed by the panel at oral argument regarding what the correct standard of review was. Counsel for Appellant conceded the correct standard of review was an abuse of discretion and not an error of law. (Oral Argument at 5:00-7:15).

by either of the officers, and the officers only promised him they would speak to the solicitor on his behalf. (R. 264-65). Perhaps more significant is what Appellant did not say. Appellant never mentioned Hardee's promise of confidentiality at any point in his testimony, nor did he testify that Hardee's statement had any bearing on his confession. (R. 247-65). Even if Appellant's testimony alone wasn't sufficient to support the trial judge's ruling of voluntariness, the testimony of Hardee and Garrett amply support the trial judge's ruling as well. Garrett and Hardee each testified Appellant was free to leave at any time, he was given multiple bathroom and cigarette breaks, he was provided a soda, and he was allowed to leave at the end of the interview. (R. 144-47, 228, 232-34). This evidence was not contradicted by Appellant. (R. 247-65).

Ultimately, the question this Court was called upon to answer on appeal was whether the trial judge erred by holding Appellant's will was not overborne and his capacity for self-determination was not critically impaired. See Saltz, 346 S.C. at 136, 551 S.E.2d at 252 ("If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process."). In this case, the trial judge observed Appellant's demeanor during his testimony and was able to assess his credibility after both seeing and hearing his live testimony, which put the trial judge in a superior position to evaluate the voluntariness of Appellant's statement. See State v. McClure, 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (Ct. App. 1994) ("The question of the voluntariness of McClure's confession came down to a question of credibility. The trial judge resolved the question in favor of the officers. We have no quarrel with that, finding, as we do, no abuse of discretion.") The trial judge appropriately assessed Appellant's demeanor and credibility in the following exchange with trial counsel:

The Court: I, I, I, I don't think that argument holds water, Mr. Wilson, because again today [Appellant] says that's really what happened. [Appellant] may view himself as having nothing to do with it by virtue of the fact that he was present aiding and abetting, but even today he says "what I said was true. James [Miller] did it. James went and threw the lighted thing in the window. James started the fire."

Mr. Wilson: What he was saying actually, Judge, and again, it's because he does not have good language skills, which is why I wanted to go back and question him again.

The Court: I want to question that. I watched him on three hours of tape. He seemed to have excellent language skills, pretty good manipulative skills, which are consistent with what two forensic psychologists had to say about his, his evaluation.

Mr. Wilson: Judge—

The Court: And he always seems to, I agree with [Assistant Solicitor] Richardson, that he, he only forgets those things that may be harmful to him. You know, he seems to have great recall, three hours of, of interrogation, and he was able to carry on conversations as clearly as you and I could.

....

The Court: Will you agree that the question here is whether or not there was coercion.

Mr. Wilson: It's not the only—

The Court: And I asked him if there was coercion.

Mr. Wilson: It's, its's not the only question, but the reason I put him up, Your Honor, was because I knew what he'd already told me about his experience there with the officer. It was important that the Court knows that obviously he felt as if he was overwhelmed with this information.

The Court: I asked him if he was threatened or anything. He said no.

(R. 274, lines 9-25 – R. 275, lines 1-4, lines 11-22). The preceding exchange highlights how the trial judge was able to observe Appellant's demeanor in person and use his observations of Appellant's demeanor to evaluate his credibility. The trial judge appropriately focused on the self-serving nature of Appellant's statement and how Appellant's instinct for self-preservation

never wavered. The preceding exchange also highlights how there was evidence in the record to support the trial judge's finding of voluntariness. Therefore, he did not abuse his discretion.

The trial court's reasoning should be persuasive for this Court. The trial judge correctly noted that Appellant's attempts to cast blame on his co-defendant, James Miller, indicated his will was not overborne. See State v. Pendergrass, 270 S.C. 1, 8, 239 S.E.2d 750, 753 (1977) ("The voluntariness of the waiver can be discerned from the fact that the statement which followed it was self-serving and was an attempt on appellant's part to cast blame on his co-defendant."). In determining whether Appellant's statement was voluntary, it does not matter that Appellant admitted his guilt by establishing his role in a conspiracy to burn down Marissa Cohen's trailer. The relevant consideration for this Court is that in Appellant's mind he was not admitting his guilt. The fact that James Miller, and not Appellant, lit the match that started the fire was very significant to Appellant. Indeed, Appellant emphasized this fact several times in his recorded interview and written statement. (State's Exhibit #3, R. 829-30). In fact, the very first words of Appellant's written statement are "I did not do it." (R. 829). Therefore Appellant's will could not have been overborne by the officer's tactics because his instinct for self-preservation and deflection of blame remained intact for the entirety of his interview.

#### **No Prejudice to Appellant**

Pursuant to Rule 212(b), SCACR, on February 25, 2020, the State moved for the leave of this Court to supplement the record on appeal to include Appellant's testimony from the trial of his co-defendant Marissa Cohen on January 8, 2020. On April 29, 2020, this Court denied the State's motion in a written order. (Order dated April 29, 2020). The State respectfully submits this Court erred in denying the State's motion because Appellant's subsequent admission of guilt under oath eliminated any possible prejudice to Appellant even if the trial court erred in its

determination that Appellant's confession was voluntary. Appellant's subsequent admission also precludes Appellant from obtaining any meaningful relief and effectively obviates the need for his appeal.

While represented by counsel, Appellant admitted under oath and in open court that he engaged in a criminal conspiracy with Marissa Cohen and James Miller to burn down Cohen's trailer in exchange for \$5,000 of insurance proceeds. (Proposed Supplemental Record 9-13). Appellant further admitted he suggested that kerosene be used to start the fire and that he traveled with Miller to the trailer on March 29, 2014 and witnessed Miller light a piece of paper on fire and throw it through a window of the trailer. (Proposed Supplemental Record 9-13). In light of this admission, Appellant is effectively worse off than he was prior to his trial because the State can now use his subsequent confession against him in a future trial. Appellant will be hard pressed to argue against the admission of a confession given under oath while represented by counsel. Appellant will also struggle to explain his subsequent confession to a future jury if this Court's reversal of his convictions stands.

In two previous decisions, our Supreme Court addressed situations where a defendant admitted their guilt in court and then sought appellate review. In State v. Sroka, the Supreme Court held that Sroka's convictions should be upheld because he admitted prior to sentencing that he participated in the robbery for which he stood trial. see State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976). ("We affirm because the guilt of the appellant is conclusively shown by the record and any alleged error could not have been prejudicial. Any doubt about the correctness of this conclusion is eliminated by the admission of Appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge that he had participated in the robbery with a sawed-off shotgun"). Here, in a similar fashion to Sroka, Appellant admitted his

guilt while under oath in a subsequent proceeding. In Whetsell v. State, the Supreme Court held that when multiple defendants admitted their guilt in a plea hearing and at a post-conviction relief hearing, any review of trial errors was unnecessary and trial counsel was not ineffective for failing to challenge the admission of evidence that would have been used against them. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (“Review of a trial error is unnecessary where a defendant admits in open court after his conviction that he is guilty.”). Similarly, Appellant’s subsequent admission of guilt makes any appellate review of potential errors by the trial judge unnecessary. Therefore, in light of our Supreme Court’s decisions in Whetsell and Sroka and Appellant’s sworn admission of guilt, Appellant did not suffer any prejudice from the trial judge’s decision to admit Appellant’s confession to law enforcement, nor can Appellant achieve any meaningful relief if this Court upholds its reversal of Appellant’s convictions.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, and find the issue of whether Agent Hardee's promise of confidentiality rendered Appellant's confession involuntary was not preserved for appeal, and even if preserved, the trial judge did not abuse his discretion in ruling the confession was voluntary because there was evidence in the record to support his ruling. Finally, even if this Court finds the trial judge erred in admitting Appellant's confession, this Court should grant the State's motion to supplement the record on appeal and find Appellant was not prejudiced by the admission of his confession because of his subsequent sworn admission of guilt at his co-defendant's trial. This Court should affirm Appellant's convictions and sentences.

Respectfully submitted,

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Appeal from Georgetown County  
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THE STATE,

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PROOF OF SERVICE

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I, Caroline Collins, certify that I have served the within Petition for Rehearing on Appellant by email to the address listed in AIS and with a copy of the same to be deposited in the United States mail, postage prepaid, addressed to:

E. Brandon Gaskins, Esquire  
Moore and Van Allen PLLC  
Post Office Box 22828  
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Robert Michael Dudek, Esquire  
S.C. Commission on Indigent Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.  
This 22<sup>nd</sup> day of September, 2021.



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## Caroline Collins

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**From:** Caroline Collins  
**Sent:** Wednesday, September 22, 2021 1:25 PM  
**To:** brandongaskins@mvalaw.com; rdudek@sccid.sc.gov  
**Cc:** William Blitch; Scott Matthews; Kellner, Haley  
**Subject:** RE: The State v. Randy Collins (2018-002056)  
**Attachments:** COLLINS Randy - Petition for Rehearing - 2018-002056 (02720121xD2C78).PDF;  
COLLINS Randy - Cover Letter - Petition for Rehearing (02720152xD2C78).PDF

My apologies. Attached please find both documents.

Thank you!

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**From:** Caroline Collins  
**Sent:** Wednesday, September 22, 2021 1:23 PM  
**To:** 'brandongaskins@mvalaw.com' <brandongaskins@mvalaw.com>; 'rdudek@sccid.sc.gov' <rdudek@sccid.sc.gov>  
**Cc:** William Blitch <wblitch@scag.gov>; Scott Matthews <SMatthews2@scag.gov>; 'Kellner, Haley' <hkellner@sccid.sc.gov>  
**Subject:** The State v. Randy Collins (2018-002056)

Good Afternoon Mr. Gaskins and Mr. Dudek,

Attached please find a copy of a Petition for Rehearing in The State v. Randy Collins (2018-002056). This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

**CAROLINE COLLINS**, Administrative Coordinator  
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