

ORIGINAL

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APR 25 2013

THE STATE,

RESPONSE

SC Court of Appeals

V.

CONNIE DUMAS,

APPELLANT

APPELLATE CASE # 2011-193106

Appeal from York County

Paul M. Burch, Circuit Court Judge

Opinion No. 2013-UP-150

PETITION FOR REHEARING

On April 10, 2013, this Court affirmed Appellant's convictions of armed robbery and possession of a firearm during the commission of a violent crime and sentences in an unpublished opinion. State v. Dumas, Op. No. 2013-UP-150 (filed April 10, 2013). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter.

Concerning Appellant's first issue that the trial court erred in admitting her statement to police into evidence because the police failed to provide adequate warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), this Court cited State v. Tyson, 283 S.C. 375, 378, 323 S.E.2d 770, 771 (1984) for the proposition that Miranda does not require rigidity and that an effective equivalent of the warnings will suffice. Additionally, this Court cited Duckworth v. Eagan, 492 U.S. 195, 198,

203-205 (1989) for the proposition that “an officer’s Miranda warnings adequately informed a defendant of his right to have counsel present before and during questioning and a portion of the Miranda warnings that stated a defendant could have an appointed attorney ‘if and when [the defendant] [went] to court’ merely described the appointment procedure.” This Court’s opinion misapprehends the United States Supreme Court’s holding of Duckworth and Miranda’s progeny.

Detective Jerry Waldrop testified that he placed Appellant, who was handcuffed, in a police car after stopping her on the side of the road. R. 7 lines 15-19. He then advised Appellant of her rights as follows:

Before I ask you anything, you’ve got the right to remain silent. Anything you say can and may be used against you in a court of law. You have the right to have an attorney present for your questioning. If you cannot afford to hire one - - if you cannot afford one, one will be appointed to you by the courts at a later date. You can stop answering questions at any time you so desire.

R. 8 lines 12-18. This was captured on the in-car video camera. R. 8 lines 2-14. Detective Waldrop then began questioning Appellant. R. 8 lines 23-24. Appellant provided an inculpatory statement thereafter. R. 11 lines 5-19.

Later, Appellant was taken to the police station. R. 11 lines 21-23. Waldrop then advised Appellant of her Miranda rights in writing as follows:

Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to an attorney for advice before we ask you any questions and have them with you during questioning. You have this right to advice and presence of an attorney even if you cannot afford to hire one. We have no way of appointing you an attorney, but one will be appointed by the court for you, if you wish. If you wish, you may answer the questions without the presence of an attorney and you may stop answering any time you desire until an attorney is present.

R. 13 lines 5-16. Subsequently, Appellant provided Waldrop with an inculpatory statement. R. 15 line 24 – R. 16 line 17.

Appellant testified during the pre-trial hearing as well. She testified that based on what Waldrop told her, “it was [her] understanding that [she] had no representation and no choice but to be asked questions without an attorney.” R. 34 lines 2-6.

In Miranda, the Court delineated four specific warnings: “(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants.” Miranda, 384 U.S. at 479. Concerned that the circumstances surrounding a custodial interrogation can quickly overbear one’s will, the Court held advising an individual of his right to consult with a lawyer and to have the lawyer present during interrogation was “an absolute prerequisite to interrogation.” Id. at 471.

In California v. Prysock, 453 U.S. 355, 361, 101 S.Ct. 2806, 2810 (1981), the Court held an officer’s warnings were sufficient where the officer informed the defendant of his right to the presence of appointed counsel prior to and during interrogation, but did not use the rigid language set out in Miranda. In examining the issue, the Court noted this was not a case in which the offer of an appointed attorney was associated with a future time in court. Id.

In Duckworth, the Court determined the following advisement of rights satisfied the requirements of Miranda:

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer question now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you’ve talked to a lawyer.

Id. at 198 (emphasis in original). According to the Court, the relevant state law provided that an attorney would be appointed at the defendant's initial appearance; therefore, the advice regarding when an attorney would be appointed anticipated a question that a defendant would ask after being advised that he had the right to an attorney. Id. at 204. In arriving at its conclusion, the Court focused on the totality of the warnings, including the advisement that the defendant could speak with an attorney prior to questioning, have an attorney present during questioning, and could stop answering questions until he spoke to an attorney. Additionally, the Duckworth Court explained the concerns expressed in Prysock were that warnings linking the appointment of counsel to a future point in time after the police interrogation were not present in Duckworth as the warnings specifically provided for counsel prior to and during any questioning and that the suspect could stop answering questions at any time until he spoke to an attorney. Id. at 205.

Recently, in Florida v. Powell, 130 S.Ct. 1195 (2010), the Supreme Court examined the requirement of Miranda that an individual be informed of his right to consult with an attorney. In Powell, the arresting officer informed Powell that he had the right to talk to a lawyer before answering any of law enforcement's questions and that if he could not afford to hire a lawyer, one would be appointed for him without cost and before any questioning. Id. at 1200. Additionally, the officer advised Powell that he had the right to use any of his rights at any time during the interview. Id. The Court concluded that these warnings were sufficient because "[t]he first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway." Id. at 1205. Thus, the Court determined when read together, "the two warnings reasonably conveyed Powell's right to have an attorney present not only at the outset of the interrogation, but at all times." Id.

“[T]he right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege.” Miranda, 384 at 469, 86 S.Ct. at 1625. This right to counsel includes “not merely a right to consult with counsel prior to questioning, but to have counsel present during any questioning.” Id. at 470, 86 S.Ct. at 1625-1626. Taken as a whole, the advisement of rights provided by Waldrop on the roadside were inadequate. Although Waldrop advised Appellant that she had the right to have an attorney present for questioning, his next statement completely negated the advisement. Unlike the warnings in Duckworth, Waldrop did not advise Appellant that she had the right to an attorney prior to questioning or that she had the right to stop answering questions at any time until she had spoken to an attorney. What the Court warned against in Prysock is a reality in Appellant’s case. Law enforcement connected the appointment of counsel for Appellant with a future unknown time without clearly conveying Appellant’s rights to her prior to interrogation.

Concerning Appellant’s second issue that the trial court erred in refusing to instruct the jury on the lesser-included offense of common law robbery, this Court affirmed the trial court’s decision based upon its decision in State v. Golston, 399 S.C. 393, 398, 732 S.E.2d 175, 178 (Ct. App. 2012) that “to warrant a jury charge on [a] lesser offense, the evidence viewed as a whole must be such that the jury could conclude the defendant is guilty of the lesser offense instead of the indicted offense.” This Court’s opinion misapprehends the status of South Carolina jurisprudence in the area of jury charges and lesser-included offenses.

The state presented evidence that Appellant used a gun to rob the store. R. 54 line 18 – R. 55 line 15; R. 72 lines 11-17; R. 73 line 14 – R. 74 line 2; R. 80 lines 11-19; R. 98 lines 24-25; R. 113 line 18 – R. 114 line 13; R. 121 line 16 – R. 122 line 8. However, Appellant testified she “never had a gun or been in possession or had access to a weapon or gun.” R. 193 lines 3-5.

On cross-examination, the prosecutor pressed Appellant on the issue of the gun, and Appellant continued to deny having a gun while in the store. R. 194 line 15 – R. 195 line 9.

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow “a rational inference” that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), “[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury’s view of the facts.”

Strong arm robbery, or common law robbery, is a lesser-included offense of armed robbery. S.C. Code Ann. § 16-11-330 (defining armed robbery as the commission of robbery while armed with a deadly weapon); Gourdine, 322 S.C. at 398, 472 S.E.2d at 241; State v. Tasco, 292 S.C. 270, 356 S.E.2d 117 (1987); State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985). In light of the contradictory evidence presented by the state and Appellant regarding the presence of a weapon, the trial judge was required to charge the jury on the lesser-included offense of common law robbery.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett  
Appellate Defender

This 25th day of April, 2013.

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CERTIFICATE OF SERVICE  
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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blicht, Jr., Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Connie Dumas, Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 25th day of April, 2013.

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day  
of April, 2013.

Sharon A. Graham (L.S.)

Notary Public for South Carolina

My Commission Expires: April 27, 2022