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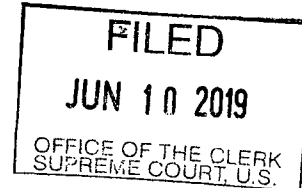
IN THE
SUPREME COURT OF THE UNITED STATES

COLBY L. SIMMONS,
Petitioner,

v.

ORIGINAL

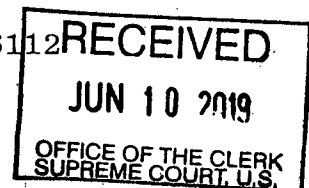
UNITED STATES OF AMERICA,
Respondent.



On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

Petition For A Writ of Certiorari

Colby L. Simmons
Reg. No. 70556-019
FPC Montgomery
Maxwell AFB
Montgomery, AL 36112



QUESTIONS PRESENTED

Did the district court violate petitioner's Fifth Amendment right as set forth in Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct 1602, 16 L. Ed. 2d 694 (1965), when it admitted evidence found and pre-warned statements made by petitioner while in a custodial situation into evidence that was the basis of the jury returning a guilty verdict?

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PETITION FOR A WRIT OF CERTIORARI

Colby Simmons petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The order of the court of appeals affirming Simmon's sentence (Appendix, *infra* ("App. E")) is unpublished. The district court's judgment of conviction and sentence is unpublished.

Jurisdiction

The court of appeals denied Simmon's direct appeal on April 8, 2019. App. E. The jurisdiction of this Court is involved under 28 USC § 1254(i).

Constitutional and Guideline Provisions Involved

U.S. Const. Amend. V provides in relevant part:

No person shall be compelled in any criminal case to be a witness against himself.

INTRODUCTION

On December 7, 2017, Mr. Simmons was convicted in United States District Court for the District of South Carolina, contrary to his pleas, of the following felony offenses: (1) One count of conspiracy to defraud the United States (forfeiture), in violation of 18 U.S.C. § 371; and (2) one count of false statements or entries generally (on a U.S. Government form), in violation of 18 U.S.C. § 1001(a)(2).

On May 17, 2018, the lower court sentenced Mr. Simmons to a term of 78 months in prison (60 months for the first offense and 18 for the second, to run concurrently), supervised release for three years following that, a \$200 special assessment, and restitution of \$236,523.37. The judgment was entered on May 17, 2018. Mr. Simmons filed a timely notice of appeal on May 23, 2018. This appeal follows.

STATEMENT OF THE CASE

The Traffic Stop

This case stems from a traffic stop. On June 16, 2014, at approximately 4:40 p.m., Greenville County, South Carolina, Sheriff's Deputy James A. Cannon, pulled over the vehicle driven by Mr. Simmons as he was traveling southbound on Interstate-85 for allegedly following the vehicle in front of him too closely.

Deputy Cannon's primary duty is K-9 services, but that afternoon he was simply patrolling traffic on I-85 in Greenville County with his working dog. After making the stop, Deputy Cannon approached at the passenger side window and said he noticed the driver (and sole occupant), Mr. Simmons, seemed "extremely nervous" as he retrieved his license and vehicle information, to the extent "his hands were shaking." Deputy Cannon began questioning Mr. Simmons about his purpose for being on the road, where he was going, etc. Deputy Cannon then had Mr. Simmons exit his vehicle and stand by the deputy's police vehicle while his license was run through the system.

Within 5-6 minutes of making the stop, Deputy Cannon had run Mr. Simmons's driver's license and learned that he was driving on a suspended license from out of state. Deputy Cannon's policy is to arrest out-of-state drivers with suspended licenses.

Even though he was planning to formally arrest Mr. Simmons, Deputy Cannon did not do so immediately. Instead, he radioed for backup and began an in-depth investigation against Mr. Simmons. He clearly seemed to be suspicious that Mr. Simmons was involved with more than simply driving on a suspended license. So, he continued to interrogate Mr. Simmons.

When the back-up officer arrived at 14:57 into the stop, Deputy Cannon noted that Mr. Simmons was still so nervous "his hands were shaking, his arm was shaking when he reached out to hand the keys [to his car] to the deputy, so much so that I asked him if he was okay."

Ultimately, Deputy Cannon conducted a dog sniff with his K-9, searched the vehicle, searched Mr. Simmons's person and questioned him throughout. During the course of this questioning, he received answers that he felt were contradictory and suspicious. These statements became a central part of the Government's case at trial. During the searches, he found a treasury check and the \$10,000 in cash that became central pieces of evidence in the Government's case at trial, as well.

Mr. Simmons consented to the K-9 sniff and the search of his vehicle. And as the Government and the Judge pointed out, an inventory search of the car was done -- as is routine -- following his arrest. However, he was never provided his Miranda rights prior to any questioning, until the arrest, which occurred after the dog sniff and vehicle search, more than 23:46 minutes into the

stop (beyond the Government's transcript of the stop video).

During that time, before he was provided his Miranda warnings, Mr. Simmons was questioned by Deputy Cannon about where he was going, what was his purpose, and what was the nature of his business. Then his answers were picked apart, and he was pressed on what kind of car he was buying, who he was buying it from, times, locations, etc., repeatedly. Meanwhile, Deputy Cannon noted the signs of extreme nervousness, specifically mentioning his shaking hands, his cottonmouth and white on the sides of his mouth.

Deputy Cannon initially characterized all of this as casual conversation, but when called out on this by Mr. Long, Appellant's first defense counsel, he adjusted his answer, stating that "As long as I am conducting business regarding my traffic stop, I can ask him what I want to." He then admitted that he suspected criminal activity.

At trial, Deputy Cannon again said he did not administer Miranda warnings but justified himself by saying, "I did not ask him anything about why his license was suspended." He admitted on the stand that he (erroneously) believed the way Miranda works is that he could ask any questions so long as he didn't ask about the crime he was planning to arrest him for.

He also admitted that his investigation became an "interrogation." He was asked by Defense Counsel: "So at this point you are clearly interrogating him for the purpose of

investigating what you believe to be criminal activity?" He answered: "That's correct." Defense Counsel followed with: "Did you Mirandize him at this particular time?" Deputy Cannon responded: "No. I was asking him questions."

When asked why he eventually read Miranda rights to Mr. Simmons, Deputy Cannon essentially admitted that he was under the belief Miranda warnings were only required if there is an arrest. He stated that he did so only, "Because he was under arrest at that point and it was a common practice of mine."

Ultimately, Deputy Cannon provided the treasury check (Prosecution Exhibit 12) he found in Mr. Simmons's vehicle that day to federal investigators, who took it from there, until Mr. Simmons ended up in federal court facing these charges. All of that sprung from this traffic stop, however.

The Motions Hearing

Mr. Long, Mr. Simmons's first attorney, filed a motion with the District Court seeking to suppress this evidence as well as the items seized in the car. He argued that, "All the testimony is that ... he was not free to go and was subject to obvious interrogation, and it all should be suppressed." He raised this issue through his written motion but failed to cite any case law in support. The Government responded in writing and did cite to case law on the 4th Amendment issue he raised but did not cite any

case law to address this 5th Amendment issue.

The District Court Judge, ruling from the bench, denied his motion to suppress. The Judge, however, focused exclusively on the 4th Amendment issue, and not on the Miranda/5th Amendment issue that was also raised.

The Judge made an oral finding of fact that, "The Defendant was extremely nervous, his hands were shaking, he exhibited what has been described as cotton mouth or dry mouth symptoms, and exhibited laughter that was inappropriate to the situation, which has been described as nervous laughter." He made other findings of fact in support of his conclusion that the 4th Amendment was not violated. But he did not address the Miranda issue at all in finding that the defense motion "should be denied as applied to any of the evidence that has been discussed or addressed here today."

Defense Counsel then reminded the Trial Judge that he failed to address the Miranda issue. The Government then argued that Defense was incorrect in arguing that as a prime suspect Mr. Simmons should have had Miranda warnings given, and that he was "not in custody until the cuffs were put on him." The Government's position was that it was cuffing and arresting him that should have triggered Miranda warnings.

The Trial Judge then came up with his own theory about Miranda, which was that "Miranda does not come into play" in a traffic stop because it is a "temporary seizure." The Trial Judge

expounded further and said this:

The Officer testified that at some point in this encounter in his mind the Defendant was not free to leave ... When he turned on his blue light, the Defendant's obligation was to pull over, he was not free to keep going, and he was not free during the course of the traffic stop, to get in his car and drive off. But he was not subject to a custodial interrogation. So I just don't see that Miranda applies here.

So I don't know if I have adequately addressed your motion or adequately explained the rationale for my ruling, and if I haven't, I confess that I am deficient in that regard. That is about all I know that to say about it."

He then expounded further, stating:

In other words, I think there is a difference between someone who is not free to leave, I think that is what the whole body of law from Terry and its progeny is about, and has developed since the 1960s is, you know, it is a temporary detention, a temporary seizure, you are not free to leave, but you are not under arrest. And I don't think that Miranda came into play in any way that would preclude the evidence that was secured by way of traffic stop.

Defense Counsel then said, "Maybe they were never talking about misdemeanor traffic stops in the first place as far as being in real custody." The Trial Judge replied, "Well, I don't make the law, I just do my best to apply it to a set of facts, and you might make some law out of this case ... It wouldn't be the first time somebody made some law off a case I handled, and it wouldn't be the last, I'm sure. That is my ruling."

Other than superficially referencing Terry v. Ohio in the above statement, no case law was cited at all in the oral ruling,

and no written ruling was produced.

The Trial

Mr. Gibson, the second attorney for Mr. Simmons, filed a written motion asking for reconsideration of Mr. Long's suppression motion. The Government filed a written motion in opposition. Again, no one brought up any case law relevant to the 5th Amendment issue, and the Judge summarily denied the motion to reconsider without citing to any relevant law either.

At trial the Government elicited Mr. Simmons' statements to Deputy Cannon at the traffic stop as proof of guilt on each count. Deputy Cannon testified on the merits about the conflicting and suspicious things Mr. Simmons said at that stop.

After Deputy Cannon's testimony had concluded, Defense raised the motion again, and the argument extended for five pages of transcript mid-trial, again without anyone -- including the District Court Judge -- referencing case law or a rule. Mr. Gibson said that Deputy Cannon's testimony demonstrated unequivocally that, "Mr. Simmons was in custody. ... That's a clear violation of Miranda, Your Honor." The Government argued that the issue had already been settled by the Judge and was therefore the law of the case, and at any rate, the Government said, an officer is "not required to Mirandize an individual the moment he suspects the individual is guilty of a crime."

The Defense insisted they wanted to ensure a record was made that this issue had been raised, and the Judge, in denying the Defense yet again, said, "I think you're fully protected."

This evidence was a central part of the Government's case. The U.S. Attorney relied heavily on that testimony in closing argument to argue that Mr. Simmons was guilty on both counts and freely acknowledged this to the jury. In fact, he said to the jury, "What is this case actually built on, as you've just seen? How about Mr. Simmons's own statements and activity during the car stop." At another point in closing, the U.S. Attorney argued, "Did what you heard on the audio from that traffic stop ... did those sound like the words of an innocent man?" He tied the un-warned statements very effectively into Count 1 and Count 2. That argument worked, as Mr. Simmons was convicted by the jury on both counts.

REASONS FOR GRANTING THE WRIT

Mr. Simmons was in a custodial situation absent a Miranda warning when he was interrogated by South Carolina Deputy Cannon in the traffic stop that produced the only evidence which led to his conviction after a jury trial.

The Fifth Amendment requires that, "No person ... shall be compelled in any criminal case to be a witness against himself."

In Miranda v. Arizona, the Supreme Court adopted prophylactic procedural measures to ensure that a defendant is advised of his Fifth-Amendment rights during custodial interrogations because the Supreme Court recognized that "inherently compelling pressures" are placed on the persons interrogated. As this Court stated, "Absent formal arrest, Miranda warnings only apply where there has been such a restriction on a person's freedom as to render him 'in custody'." For Miranda purposes, "First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave? Whether a suspect is in custody depends upon the reasonable perception of a person in the suspect's position. United States v. Cole, 70 F.3d 113 (4th Cir. 1995) (table decision.)

Pre-Miranda, Mr. Simmons (I) was told by the officer that his movements had been restrained; (II) was questioned and labeled as the prime suspect of criminal activity by the officer; (III) withdrew his consent to search his vehicle before the search began; and (IV) was placed in a police-dominated environment.

I. Petitioner's movements had been restrained

On June 16, 2014 Mr. Simmons was pulled over in Greenville County, SC for following too close. His license was suspended in the State of Georgia. The officer ran his license and six minutes into the stop, Mr. Simmons's license came back suspended. At this time, Officer Cannon told Mr. Simmons he wasn't free to leave and "the officer stated that his intent was to arrest him and take him to jail." (App. A, p. 68). The officer also stated that "the policy of the Greenville County Sheriff's Office is to arrest the individual that drives under suspension that is from another state." (App. A p. 14-15). However, at this time, there is no arrest nor Miranda warning.

II. Petitioner was labeled the prime suspect

Next, Mr. Simmons was labeled as a prime suspect from the constant questioning about totally unrelated topics to the reason his license was suspended. This line of questioning was intended to solicit incriminating responses. When Officer Cannon was asked why did he ask Mr. Simmons these questions, he replied, "I am trying to detect criminal activity" (App. A p. 56) The line

of questioning was about automobiles, his business and money -- "The bulge that was in his pocket."

During this period, Officer Cannon stated his actions were justified due to Mr. Simmons's strange movements, nervousness, shaking hands, cotton mouth, nervous laughter, conflicting travel accounts and conflicting stories. Officer Cannon stated that creates a definite suspicion of criminal behavior. However, these same actions are characteristic to a person who knows a consequence of driving with a suspended license in another state may be jail time. United States v. Hill, 852 F.3d 377, 382 (4th Cir. 2017) ("while diligently pursuing the purpose of a traffic stop, officers may engage in other investigative techniques unrelated to the underlying traffic infraction or the safety of other officers"). In Mr. Simmons's case, the purpose of the traffic stop was determined that he was driving with a suspended license six minutes into the stop and also there was no threat, aggression, or danger posed to the officer. However, still no arrest or Miranda warning.

III. Petitioner withdrew his consent to search

Mr. Simmons withdrew his consent to search his vehicle.

Officer Cannon was asked, "Do you recall a SECOND time it came up about before the car was searched and Mr. Simmons said, "No, I don't want you to," and you said, "But you have already given me permission," and then began searching. There was a dual ..." (App A p. 78). Then, in support thereof, in another part of the officer's interview, the officer stated, "the SECOND time he was trying to clarify" (App A p. 34) However, still no arrest or Miranda warning.

IV. Petitioner was placed in a police-dominated environment

Mr. Simmons was in a police-dominated environment. Not only was a second officer called to the scene, Homeland Security (an entirely different department of law enforcement) was contacted and two additional officers reported to the scene. "Officer Cannon located the US Treasury check after the vehicle search and then called Homeland Security (ICE) to come to the scene." (App. A p. 61)

"Department of Homeland Security Agents Criswell and Wright" (App. A p. 22). A typical traffic stop usually involves only one or two officers. This traffic stop definitely exceeded the scope of a Terry stop. After this series of events, Mr. Simmons was

then formally arrested and then finally read his Miranda rights.

Relying solely on the record, it shows that the officer chose not to inform Mr. Simmons of his Miranda rights at the discovery of his license coming back suspended, throughout the incriminating questioning, after the withdrawal of his consent to search his vehicle nor after placing him in a police-dominated environment. "Under the totality of the circumstances, Mr. Simmons's freedom of action was curtailed to a degree associated with formal arrest." United States v. Hashime, 734 F.3d 278, 282 (4th Cir. 2013) (quoting United States v. Parker, 262 F.3d 415, 419 (4th Cir. 2001)). Mr. Simmons definitely did not feel he was at liberty to terminate the interrogation and leave. So, Mr. Simmons was definitely in a custodial situation unprotected by Miranda.


Due to the violation of this 5th Amendment constitutional right, the US Treasury check that was found in the vehicle and the cash that was on his person were improperly admitted into evidence. The motion to suppress this evidence should have been granted by the District Court. The admission of this evidence was not a harmless error because it provided the Government the only nexus that linked Mr. Simmons to the conspiracy and without it, Mr. Simmons would not have been found guilty by the jury on

counts one and two. (As the Fifth Circuit has recognized, where "the government's closing argument relied on the very evidence that offends [a constitutional right], we cannot see how the government can conclusively show that tainted evidence did not contribute to the conviction.") United States v. Jackson, 636 F.3d 687, 697 (5th Cir. 2011). Being that these events happened pre-Miranda makes Mr. Simmons's statements involuntary and the evidence to not be admissable, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1965).

CONCLUSION

The petition for a writ of certiorari should be granted. Simmon's sentence should be vacated. And the matter should be remanded for further proceedings consistent with Miranda

Respectfully Submitted.

 70556-019

Colby Simmons

June 3rd, 2019

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