

SUPREME COURT OF MISSISSIPPI

GILBERTO HILARIO CHIM

v.

STATE OF MISSISSIPPI

2006- KA 1839- SCT

NO. 06-CR-044-SC-G

Appeal from Circuit Court of Scott County, Mississippi

BRIEF FOR APPELLANT

FILED

MAY 16 2007

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COURT OF APPEALS**

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Oral argument not requested.

CERTIFICATE OF INTERESTED PERSONS

GILBERTO HILARIO CHIM

v.

STATE OF MISSISSIPPI

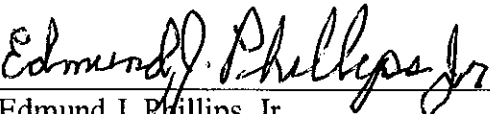
No. 06-CR-044-SC-G

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

GILBERTO HILARIO CHIM
Appellant

Hon. Jim Hood
Attorney General
State of Mississippi

Hon. Mark Duncan
District Attorney



Edmund J. Phillips, Jr.
Attorney of record for Gilberto Hilario Chim

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STATEMENT OF THE ISSUES

The court erred in denying Appellant's motion to suppress his confession.

STATEMENT OF THE CASE

Gilberto Hilario Chim appeals his conviction on the charge of statutory rape and sentence of life imprisonment in the custody of the Mississippi Department of Corrections and his conviction of the charge of sexual battery and sentence of twenty years confinement in the custody of the Mississippi Department of Corrections, the sentence, to be served concurrently.

Before trial Appellant had agreed to a plea bargain in exchange for a guilty plea to the charges. Appellant was not provided an interpreter and did not answer the Court's questions satisfactorily. The court did not accept his guilty plea.

After voir dire Appellant made the following motion resulting in the following ruling (T-22):

By MR. HARRIS: Your honor, I also have one more motion. Uh—the defendant would wish to re-new his petition to plead guilty before the court. He originally attempted to plead guilty before. He's a Hispanic gentleman that does not speak English and requires an interpreter. I believe he was confused about some of the court's questions and to re-new his petition to plead guilty.

BY THE COURT: the court's questions were very elementary. I was just simply asking him was he guilty of the crime for which he was pleading guilty, and he says that he was not, because he was drunk and didn't know what was going on. This court is required to determine that a crime was committed, and I then must determine that defendant is admitting his guilt to that crime, and that his admittance is free and voluntary with full understanding, so therefore I—I don't see no reason to go back into it because if he should now say that he's guilty, he's committing perjury.

The primary evidence against appellant was his confession. After his arrest, Appellant was incarcerated and interrogated, but was not provided

an interpreter during the interrogation. He signed a waiver of his Miranda rights and a confession that he did the acts he was later indicted for.

The court provided Appellant an interpreter for the trial.

During the trial Appellant moved to suppress the confession, and a suppression hearing was held out of the presence of the jury. Forest police officer Will James testified as follows on direct examination.(T-48)

- Q. Is there any question in your mind as to whether or not he could understand the English language?
A. We felt very comfortable that he spoke the English language.
Q. And what about respond and speak the English language?
A. Yes, sir. He –spoke and understood quite well.

On cross examination, Assistant Chief of Police Robert Roncolli testified as follows (T-57):

- Q. Mr. Roncolli, you say that you couldn't communicate with the defendant in English. Is that right ?
A. Yes, sir

The confession was hand printed by Forest Police Chief Mike Lee and signed by Appellant (T-60). During the suppression hearing Appellant was provided an interpreter and testified that he did not understand much of the waiver of rights form (T-68), but signed it "Because they told me I have to sign." He further testified (T-69):

- Q. Can you read some of the words on that paper?
A1. Yes.
Q. Can you read all of the words on that paper?
A1. Not all of them.
Q. Were you ever offered to have an interpreter brought to the jail to interpret English for you?
A1. No, because they told me they understood what I was saying.
Q. Repeat that please.

AI. No, because they understood what I was saying, and they understood what I was speaking. That's why they never offered.
Q. They said they understood?
AI. Yes. They told me.
Q. They told me they understood?
AI. Yes.
Q. Did you ever indicate to them you wanted an interpreter?
AI. Yes.

On cross examination he testified (T-71) that he did not understand part of the confession. During the suppression hearing the state called Appellant's estranged wife, Kimberly Chim in rebuttal. She testified (T-73):

Q. Okay. Now, are married to the defendant here, Gilberto Chim ?
A. Yes, sir. For right now until we get divorced this month on the nineteenth.
Q. During the time you and he were living together, the first time you met him up until now, what language did you and he talk in?
A. English.
Q. Does he have any difficulty understanding English?
A. He don't know much English, only little bit, not much.

and:

Q. You know English. I've been asking about him. He knows English too doesn't he?
A. Little, not much.

The court denied the motion to suppress.(T-82).

Relying on the confession, the jury convicted Appellant of both charges.

SUMMARY OF THE ARGUMENT

In a confession suppression hearing, the prosecution must prove beyond all reasonable doubt that an accused understood the Miranda rights, the effect of waiver of those rights and the content of the confession, to render the confession admissible into evidence.

ARGUMENT

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION

Appellant had a very limited understanding of the English language, the only medium through which the interrogation of him by the police was conducted. In the hearing on the motion to suppress the confession State witness Kimberly Chim testified on direct examination (T-73):

He don't know much English, only little bit, not much.

On cross examination, she testified (T-74, 75): that at times she obtained an interpreter to permit communication between the two of them. That interpreter was generally her sister-in-law's son.

Although the police largely testified that Appellant appeared to understand what they asked of or said to him, Kimberly Chim was Appellant's estranged wife and knew him best. If she had occasionally required an interpreter to communicate with Appellant, surely the police could not communicate with him without an interpreter and should have provided one to permit him to understand what they said and asked during the interrogation that produced the confession. The police hand wrote the confession and he signed it.

Appellant challenges both the waiver and the confession itself. Appellant testified that there were parts of the waiver and the confession, that he did not understand. He signed them "Because they told me I had to sign."

A. THE WAIVER

The prosecution has a heavy burden to prove a knowing and intelligent waiver of an accused's Miranda rights, before a resulting confession is admissible. *Abston v. State*, 361 So. 2d 1384 (Miss.1978); *Brewer v. Williams*, 430 U. S. 387, 95 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

Per *Brewer* (supra), "courts indulge in every reasonable presumption against waiver."

For Appellant to have made a knowing and intelligent waiver of his rights (including his right to counsel), he had to understand the words read to him from the waiver form. When Appellant was on cross examination, (T-70), he made it clear that he had not understood the meaning, inter alia, of his right to counsel, an essential part of the Miranda warnings. The right of counsel is guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

Mississippi holds that all prerequisites to admissibility of a confession must be proven beyond a reasonable doubt. *Rhone v. State*, 254 So. 2d 750 (Miss. 1971); *Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634 (1887). This proof that Appellant made a knowing and intelligent waiver of his Miranda rights had to meet this standard for the confession to be admissible. The testimony of Kimberly Chim, a witness for the prosecution, provided reasonable doubt that Appellant could understand these rights and knowingly and intelligently waive them. The Court's holding otherwise was error.

B. THE CONFESSION

Implicit in the requirement that a confession be voluntary is the corollary that it be intelligently made. *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed. 2d. 242 (1960).

The language barrier separating Appellant from his interrogators was thus capable of creating misunderstanding between them and rendering the confession involuntary. *Gallegos v. State*, 152 Neb. 831, 43 NW 2d 1 (1950), affirmed 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951); *Commonwealth v. Woong Knee New*, 354 Pa. 188, 47 A.2d 450 (1946). Appellant could not read the confession. Appellee had the burden of proving he understood its contents.

Mississippi holds that all prerequisites to admissibility of a confession must be proven beyond a reasonable doubt. *Rhone v. State*, 254 So. 2d 750 (Miss. 1971); *Ellis v. State*, 65 Miss. 45, 3 So. 188, 7 Am. St. Rep. 634 (1888). Proof that Appellee understood the contents of the confession had to meet the reasonable doubt standard for the confession to be admissible.


As in the previous part of this argument, the testimony of Kimberly Chim, a witness for the prosecution in the suppression hearing, provided reasonable doubt that Appellant could understand the contents of the confession.

The court's denying the motion to suppress was error.

CONCLUSION

The absence of an interpreter at the interrogation rendered Appellant's admission inadmissible. The verdict should be overturned.


RESPECTFULLY SUBMITTED,


EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Marcus D. Gordon, P. O. Box 220, Decatur, MS 39327, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220 Jackson, MS 39205, Attorney general for the State of Mississippi.

DATED: May 16, 2007.


EDMUND J. PHILLIPS, JR.
Attorney for Appellant