IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-KA-0847-COA

BENJAMIN ROBERSON — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

Issue No. 1: *The alleged confession.*

The state's position is that Roberson's questioning by police was non-custodial and that *Miranda* is not, therefore, implicated. See *Hunt v. State*, 687 So. 2d 1154 (Miss. 1996). Primarily, Roberson does not agree that the questioning was non-custodial.

Whether an individual is in custody for purposes of *Miranda* requires a totality of circumstances analysis. *Beckwith v. United States*, 425 U. S. 341, 347-48, 96 S. Ct. 1612, 1617, 48 L. Ed. 2d 1 (1976). Under *Beckwith*, an appellate court should "examine the entire record and make an independent determination of the ultimate issue of voluntariness." [Citation omitted.].

Roberson's custodial status is only one factor to be considered. The ultimate issue is whether the alleged confession was coerced or involuntarily. In *Beckwith*, the Court noted, that "non-custodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where the behavior ... of 'law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.'" *Id.*

The test to determine if a person is in custody requires the court to decide whether a reasonable person, under the totality of the circumstances, felt that he or she was in custody, that the detention was not temporary, and that the he or she was going to jail. *Hunt v. State*, 687 So. 2d 1154, 1160 (Miss. 1996) (citing *Compton v. State*, 460 So. 2d

847, 849 (Miss. 1984)). The factors to be considered include "the place and time of the interrogation, the people present, the amount of force or physical restraint used by the officers, the length and form of the questions, whether the defendant comes to the authorities voluntarily, and what the defendant is told about the situation." *Id.* If this analysis shows that such reasonable person would believe they were not free to leave or she was not free to remain silent, an in-custody interrogation exists. *Id.* See also, *e. g.*, *U. S. v. Booth*, 669 F. 2d 1231, 1235 (9th Cir. 1981).

Roberson was not told he was free to go, he was in the presence of his superiors to whom he felt obligated to speak. Roberson said he did not feel free to leave. [T. 80, 401]. Roberson said he felt the interrogators were going to take him into custody if he did not make a statement. [T. 79, 404].

Roberson also allegedly indicated to his friend waiting outside that he intended to make a statement. [T. 276]. It is reasonable to conclude that such statement, in the mind of Roberson, could subject him to immediate arrest. This concern is evidenced by the anxiety exhibited concerning Roberson, then a police officer, being housed in regular jail population. [T. 15, 28, 35, 52, 54, 58-61, 68-69, 78, 80, 249-51, 265, 269, 401-03]. It was this anxiety to which the interrogators responded with promises of special treatment. *Id.*

It is likewise significant that the duration of Roberson's interrogation totaled approximately two hours. [T. 62]. The nature and degree of pressure used in the

interrogation, is the most important factor in Roberson's case, for he was given hopes of reward and he was not given any warnings until after incriminating statements were allegedly rendered. [T. 71].

Under the totality of the circumstances, using a reasonable person standard, the evidence supports the conclusion that Roberson's interrogation was custodial. The evidence also shows that Roberson's purported confession was coerced. A new trial is respectfully requested.

The state did not respond to the argument that, if Roberson's request for counsel was ambiguous, there was a duty to clarify before continuing the interview as shown in *Holland v. State*, 587 So. 2d 848, 856-58 (Miss. 1991). Likewise, the state did not respond to Roberson's argument that his statements were the product of promises of favorable treatments prohibited in *Abram v. State*, 606 So. 2d 1015, 1031 (Miss. 1992).

Since the state did not respond to all Roberson's arguments, the state has waived opposition of the ignored positions. *Sumrall v. State,* 758 So. 2d 1091, 1094 (Miss. Ct. App. 2000) and *Magee v. State*, 542 So. 2d 228, 234 (Miss. 1989). Accordingly, a reversal would be required.

Regarding whether Roberson placed a call to an attorney during the interview, Appellant's counsel acknowledges misreading the transcript so as to indicate in the initial brief that, "[t]he attorney testified at the suppression hearing that he was contacted by Roberson on the date the interview was given." Such does not appear to be the case. [T.

45-46].

It should also be pointed out that, even though there was testimony from state witness that Roberson's tape recording of the interview was inaudible, it is the appellant's position that audible portions of the tape clearly confirm the appellant's position and clearly corroborate his testimony that he said, that it would be in his "best interest to have an attorney present" during his discussions with the interrogators. [T. 15, 59, 77-78, 401-02; Ex. D-1].

Issue 2: *Rule 412, R. P.'s prior sexual activity and false reports*

The state misconstrues Roberson's arguments under this issue. Roberson does not equate R. P.'s prior sexual activity with false reports. There is no need to, because R. P. clearly had prior sexual relations, *and* made false reports and accusations about the paternity concerning her inaccurate pregnancy test. By attempting to equate prior sexual activity with false reports, the state seeks to minimize the impeachment value of the evidence which the jury was not allowed to hear.

The state says that Roberson's proffered testimony and evidence under this topic is irrelevant. However, the state fails to explain why. It cannot, because the evidence is extremely relevant and saliently poignant. The Brentwood records contained conflicting details of the alleged sexual encounter, an identification of the purported father, and information on prior false sexual accusations of family members. [T. 390-392; Ex. D-4

(Ident.)]

The evidence suggests that R. P. was sexually active with another male. [T. 118, 120-21, 351-52]. Before she found out she was not pregnant, R. P. told counselors that the father of the expected child was someone other than Roberson. [T. 118, 120-21, 351-52]. R. P.'s prior false accusations and prior sexual conduct were the basis of charges against another male being presented to a grand jury which did not indict him. [T. 120-21]. Youth Court records were expected to corroborate this information and perhaps contain additional relevant evidence. [T. 94-151; R. 144-45].

Without this information going to the jury, Roberson did not have "a meaningful opportunity to present a complete defense." *Caldwell v. State*, 6 So. 3d 1076, 1080 (¶15) (Miss. 2009). A new trial would cure the unjust error.

Issue No. 3: Youth Court Records

The state argues procedural bar asserting that the issue was not raised in Roberson's motion for new trial. However, the trial court was presented with the opportunity to rule on the youth court records during the trial, hence, there is no requirement for the issue to be raised again in a motion for new trial. [T. 94-151, 351-52; R. 121-23, 130, 126-27, 142-45, 154-57].

According to *Ahmad v. State,* 603 So. 2d 843, 846-47 (Miss. 1992), issues which are not "raised in the pleadings, transcript, or rulings" are barred if not addressed in a

motion for new trial. The well known rationale is to give the trial court the opportunity to consider the issue prior to appellate review. *Id.*

Since the issue of the Youth Court records here was clearly considered by the trial court in Roberson's trial, there was no need to raise the issue in a motion for new trial. As recognized in *Jackson v. State,* 423 So. 2d 129, 131-32 (Miss. 1982), the rule stated *Colson v. Sims*, 220 So. 2d 345, 346, fn. 1 (Miss. 1969), controls, "that it is not necessary to make a motion for a new trial grounded upon errors shown in the official transcript of the record, including the pleadings, transcribed evidence, instructions, verdict and judgment of the court." *Id.*

The state's argument also ignores the established principle reiterated in *Whigham v. State,* 611 So. 2d 988, 995-96 (Miss. 1992) that "[a] trial error ... involving violation of a Constitutional right may reach such serious dimension, however, that this Court is required to address it, though first raised on appeal. [citing *Brooks v. State*, 209 Miss. 150, 46 So. 2d 94, 97 (1950)]." See also *Scarbough v. State*, 893 So. 2d 265, 271 (Miss. Ct. App. 2004). Roberson's claim involves the fundamental right to present a defense under the Sixth and Fourteenth Amendments.

Therefore, the state's position is opposite to the law. The issue as raised is reviewable and meritorious.

Issue No. 4: Ineffective assistance of counsel.

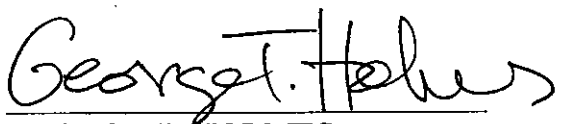
Appellant relies on initial arguments under this topic.

Issue No. 5: Weight of Evidence

Appellant relies on his initial brief.

Respectfully submitted,

BENJAMIN ROBERSON

BY: 

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 16th day of March, 2010 mailed a true and correct copy of the above and foregoing Reply Brief to Hon. Richard A. Smith, Circuit Judge, P. O. Box 1953 Greenwood, MS 38935, and to Hon. Dwayne Richardson, Dist. Atty., P. O. Box 426, Greenville MS 38702, and to Hon. Jeffrey A. Klingfus, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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