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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIRIK JAQUAN JOHNSON-EPPS,

APPELLANT

APPELLATE CASE NO. 2023-000179

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court committed reversible error by refusing appellant's request to individually poll the jurors after the guilty verdicts were announced since appellant was entitled to individual polling?

2.

Whether the court erred by allowing state's exhibit #2, the interview of co-defendant Carmichael, into evidence where law enforcement improperly told Carmichael he was only entitled to the assistance of "retained" counsel since this violated the commands of Miranda v. Arizona 384 U.S. 436 (1966), and the failure to honor Carmichael's initial invocation of his right to counsel allowed appellant to be implicated in the crime based on Carmichael's involuntary and unintelligently tendered statement?

STATEMENT OF THE CASE

Appellant was indicted at the May 6, 2021, term of the Florence County grand jury for the offenses of murder and possession of a weapon during a violent crime. R. p. *. Appellant's case and that of co-defendant, Quinterris Carmichael, were called to trial on January 23, 2023, before the Honorable D. Craig Brown, and a jury. Appellant was represented by Gregory Ammons. William "Josh" Edgeworth, III, represented co-defendant Carmichael. J. Ryan White was the assistant solicitor.

On January 27, 2023, the jury found appellant and co-defendant Carmichael guilty of murder and possession of a weapon during a violent crime. Tr. 288, ll. 6-22. Judge Brown sentenced appellant and Carmichael to life imprisonment for murder. Tr. 311, ll. 5-12.

This appeal follows.

STANDARD OF REVIEW

Issue One: Polling the jury individually: "If the request [for individual polling] is made, a poll must be taken." State v. Linder, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981). The refusal to individually poll the jury upon request is reversible error. State v. Wright, 432 S.C. 365, 370, 373, 852 S.E.2d 468, 471-72 (Ct. App. 2020) *aff'd* State v. Wright 439 S.C. 101, 886 S.E.2d 206 (2003).

Issue Two: Voluntariness of a statement: The question of the voluntariness of a statement presents a mixed question of law and fact. The appellate court reviews the trial court's factual findings regarding voluntariness for any evidentiary support. However, the ultimate legal conclusion—whether, based on those facts, a statement was voluntarily made—is a question of law subject to de novo review. State v. Miller, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023).

ARGUMENT

The court committed reversible error by refusing appellant's request to individually poll the jurors after the guilty verdicts were announced since appellant was entitled to individual polling.

Introduction

This case involves a shooting at the Tiger Mart gas station and convenience store in Florence, South Carolina on the night of September 12, 2023. Co-defendant Carmichael, "Man Man" was driving the car that evening, and appellant, "Ty," was sitting in the back seat when they went to the Tiger Mart that night to purchase cigars and soft drinks. Their female friends, Tyrin Jones, and Kami Mitchell were with them in the car.

An altercation and shooting occurred at the Tiger Mart, which was captured on a surveillance camera from several different angles. Tr. 207, l. 16 – 211, l. 23. See State's Exhibit 3 on file with this Court. Appellant was said to be the young man with dread locks on the surveillance tape.

Relevant facts

After closing arguments and the charge on the law, the jury began deliberating at 12:24 p.m. Tr. 287, l. 18 – Tr. 288, l. 8. The jury reached a verdict and came back into open court at 2:30 p.m. Tr. 289, ll. 1-2. The jury verdicts of guilty of murder and possession of a weapon during a violent crime were then announced in open court. Tr. 289, ll. 5-22.

The judge asked the jurors collectively to raise their hand if this was their verdict. Tr. 289, l. 23 – Tr. 290, l. 4. Both defense attorneys then moved to poll the jurors individually. Tr. 290, ll. 5-8. The judge ruled that although the defense attorneys had asked him to poll the jurors individually, that he had collectively asked the jurors if this was still their verdict, and all twelve

jurors raised their hands. Therefore, the judge ruled that he was not going to individually poll the jurors. Tr. 290, ll. 14-24.

Discussion

In State v. Wright 439 S.C. 101, 886 S.E.2d 206 (2003), our Supreme Court held that it was reversible error to deny the defendant's request for individual polling of the jury. In this case, defense counsel Ammons joined in the motion for individual polling of the jurors. The trial judge refused to individually poll the jurors.

Further, there was a motion for a new trial based upon the jury's verdict being the result of the inflamed passions and prejudices based upon the state's closing argument which used an unofficial transcript as a demonstrative exhibit to urge what was being said the defendants at the time of the shooting where this was "largely inaudible" on the surveillance tape that was introduced into evidence and shown to the jury. Tr. 292, l. 9 – Tr. 298, l. 9.

In State v. Wright, the Supreme Court affirmed this Court's "well-reasoned opinion" but further cited State v. Linder 276 S.C. 304, 308, 278 S.E.2d 335, 338 (1981), stating "polling is a practice whereby the court determines from the jurors individually whether they assented and still assent to the verdict." State v. Wright 439 S.C. 101, 102, 886 S.E.2d 206, 207 (2023). (Court's emphasis). The Supreme Court in State v. Wright also wrote "this takes us to the rule we set forth in Linder: 'if the request [for individual polling] is made, a poll must be taken.' Id. at 309, 278 S.E.2d at 338. However, the holding in Linder is not an empty one, and we agree with the Court of Appeals that the denial of a defendant's request for individual polling is reversible per se ." State v. Wright 439 S.C. 101, 103, 886 S.E.2d 206, 207 (2013).

As in State v. Wright the request for individual polling came immediately after the collective polling of the jurors -- whereby raising their hands was concluded. The judge here

committed reversible error by refusing to individually poll the jurors as requested by trial counsel. State v. Wright 439 S.C. 101, 886 S.E.2d 206 (2003)

2.

The court erred by allowing state's exhibit #2, the interview of co-defendant Carmichael, into evidence where law enforcement improperly told Carmichael he was only entitled to the assistance of "retained" counsel since this violated the commands of Miranda v. Arizona 384 U.S. 436 (1966), and the failure to honor Carmichael's initial invocation of his right to counsel allowed appellant to be implicated in the crime based on Carmichael's involuntary and unintelligently tendered statement.

Relevant facts

Prior to trial, a Jackson v. Denno 378 U.S. 368 (1964), hearing was held on the admissibility of co-defendant Carmichael's statement to the police. Investigator Ashley Shelley, of the City of Florence police department, testified that he was working on the night of September 12, 2019. That was the day the shooting occurred at the Tiger Mart gas station and convenience store. Tr. 31, ll. 1-15.

Shelley interviewed co-defendant Carmichael after his arrest on September 20, 2019. A copy of that interview -- which was played for the jury -- is on file with this Court. See State's Exhibit #2. Tr. 32, ll. 1-21. Shelley testified that he went over Carmichael's Miranda[1] warnings with him prior to asking him questions. Tr. 33, ll. 3-23. Shelley testified that he "alluded to my familiarity with him, my personal knowledge, but no speculation." Tr. 34, ll. 18-22.

During the interview, Shelley called Carmichael by his nickname "Man-Man." Shelley told Carmichael that he knew that he often went to the Tiger Mart. Shelley also

[1] Miranda v. Arizona 384 U.S. 436 (1966)

informed Carmichael that he knew Carmichael was well-aware of the fact that there were many surveillance cameras at the Tiger Mart.

On cross-examination, at first, Shelley claimed that he could not remember telling Carmichael that he had the right to have a lawyer present *if he had one on retainer*. Tr. 39, ll. 13-24. Shelley did admit that Carmichael asked if he could get a lawyer at the 5:33 "mark of this video." Tr. 40, l. 10 – Tr. 41, l. 12.

The tape, watched by the judge, showed Shelley telling Carmichael he had the right to talk to a lawyer and to have him or her present during questioning, and that if he could not afford to hire a lawyer one would be appointed "to represent you before any questioning if you wish, you can decide at any time that is your right to not answer any questions or make any statements, do you understand that part of it?"[2] State's Exhibit 2 at 5:05 – 5:52

Carmichael immediately responded: " Can I get my lawyer up here right now?" Shelley then tells Carmichael: "I mean, if you have one on retainer they can come up here." The subject of the redacted interview than changes to Carmichael signing the form stating he is a giving a statement "without threat or reward." State's Exhibit 2 at 5:05 – 5:52

Shelley ultimately did admit during the hearing that he told Carmichael that he could have a lawyer if he had one on retainer "in this particular instance." Tr. 41, ll. 13-15.

Defense counsel Edgeworth asked Shelley to admit that co-defendant Carmichael asked for a lawyer "multiple times Shelley responded "I don't recall the exact times. No, sir." Shelley admitted that at 5:33 into the interrogation, Carmichael asked if he could have a lawyer, and Shelley continued speaking with Carmichael anyway. Tr. 45, ll. 13-19.

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[2] There was no transcript of this interview available, and the quotes come from undersigned counsel listening to State's Exhibit 2 countless times to try and have a completely accurate account of the interview for this Court.

Defense counsel Edgeworth argued that Carmichael's statements should be suppressed. Counsel said Shelley admitted -- and it was clear from watching the redacted video itself -- that Carmichael asked for an attorney and Shelley "kind of side-stepped and continued on." Tr. 47, l. 16 – Tr. 48, l. 5. Counsel noted that Carmichael asked for an attorney on multiple occasions and that Carmichael's statement should be suppressed. Tr. 47, l. 16 – Tr. 49, l. 7.

The judge stated that he was bothered by investigator Shelley's statement that co-defendant Carmichael could have a lawyer if he had on retainer. Tr. 78, l. 23 – Tr. 79, l. 8. The judge noted that after Shelley told Carmichael that he could have a lawyer if he had one on retainer that the Miranda form discussion and the interview continued. Tr. 79, ll. 4-19.

The judge ruled that Carmichael's statement that "I can get my lawyer up here right now" was not an unambiguous request for counsel. The judge stated at that at approximately 12:55 into the video, Carmichael said "I need my lawyer, bro," and he ruled only that was an unambiguous request for counsel. Tr. 78, l. 23 – Tr. 80, l. 22. The judge ruled under the totality of the circumstances that the state had proved by a preponderance of the evidence that Carmichael's statement was tendered voluntarily. Tr. 80, l. 23 – Tr. 81, l. 4.

On the interview with Carmichael on file with this court, Carmichael asked "can I get my lawyer up here right now?" Investigator Shelley answers if you have one on retainer. This is at approximately 5:34 on the interview tape. During questioning, Carmichael also stated that he knew the police have talked with the **"little dude with the dreads"** about what happened at the place with all of the cameras that night - - meaning the Tiger Mart. See State's Exhibit #2 at 8:50 - 8:55. It was clear during the playing of the surveillance tape that appellant was the man with the dreadlocks. See State's Exhibit 3.

Co-defendant Carmichael also told Shelley during the interview that he had nothing to do with the gun shots. He said that he would "take an assault charge" for admittedly hitting one of the victims. See State's Exhibit #2 at 10:31. When Shelley continuously pressed Carmichael and asked him "tell me who you were with?" Carmichael then asserted that he needed a lawyer.[3]

When State's Exhibit #2, the interview with Shelley and Carmichael, was introduced into evidence, defense counsel Ammons for appellant joined in the Carmichael objection. [4] Tr. 1, 138, l. 6 – Tr. 139, l. 12.

Discussion

Co-defendant Carmichael requested an attorney. He was told he had could have an attorney if he had retained counsel. Carmichael's assertion of his right to counsel was not equivocal. See State v. Kennedy, 333 S.C. 426, 429-31, 510 S.E.2d 714, 715 (1998) (acknowledging invocation of right to counsel where defendant stated, "Well, I think I need a lawyer");State v. Henderson, 286 S.C. 465, 469, 334 S.E.2d 519, 521-22 (Ct. App. 1985) (finding where defendant asserted in the first interrogation that he would make no statement until he spoke with an attorney, he invoked the right to counsel); State v. Cox, 287 S.C. 260, 262, 335 S.E.2d 809, 810 (Ct. App. 1985), aff'd in part, rev'd in part on other grounds, 290 S.C. 489, 351 S.E.2d 570 (1986) (finding defendant made unambiguous assertion by stating to police, "I'll tell you about it when I talk to my lawyer").

"The United States Supreme Court has held the trial court is to consider whether the accused's statement "can reasonably be construed to be an expression of a desire for the

[3] At 6:49 on the interview, Carmichael again asked if his lawyer could "still come."

[4] The proceedings of January 25-27, 2023, were taken by a difference court reporter and renumbered. This portion of the record is referred to as "Transcript 1 or Tr. 1"

assistance of an attorney. McNeil v. Wisconsin, 501 U.S. 171, 178 (1991). If the desire for counsel is presented 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney,' no ambiguity or equivocation exists, and all questioning must cease until the person can consult counsel or the accused voluntarily reinitiates conversation. Davis v. United States, 512 U.S. 452, 459 (1994)." State v. Kennedy, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998).

Here it was apparent Carmichael wanted an attorney, and Investigator Shelley told him he could have a lawyer if he had one on retainer. Carmichael then made statements implicating himself and appellant.

In State v. Pillar, 359 N.J. Super. 249 (2003), the court held that a misrepresentation by police may result in an inadmissible involuntary statement where the misrepresentation "contradicts and thereby neutralizes" Miranda purposes, or the misrepresentation effectively overbears the defendant's will. In Pillar the court found "an acquiescence to hear an off-the-record statement which the officer *ought to know* cannot be off-the-record totally undermines and eviscerates Miranda warnings with respect to a statement" State v. Pillar, 359 N.J. Super. 249, 268 (2003).

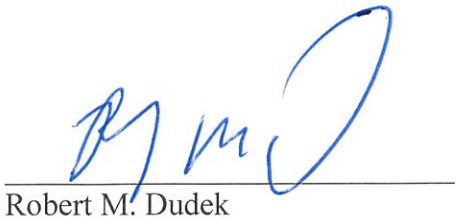
Here, the police investigator contradicted Miranda warnings by conditioning the presence of an attorney upon Carmichael's existing retainer of an attorney. This misrepresentation neutralized at best or contradicted Miranda protections and rendered Carmichael's subsequent statements involuntary.

Pillar cited Bram v. United States, 168 U.S. 532 (1897), emphasizing "the Court held that 'the impact of the conversation' between the defendant and the police officer was not to be considered "from a mere abstract point of view, but by the light of that it was

calculated to produce on the mind of the accused, situated as he was at the time the conversation took place" State v. Pillar, 359 N.J. Super. 249, 270 (2003). Conditioning co-defendant Carmichael's right to an attorney on that attorney being retained counsel effectively eviscerated the letter and spirit of Miranda, and since Carmichael implicated appellant as being present at the scene of the shooting as the man with "dreads" and by stating that he, Carmichael, only "assaulted" one of the victims was very prejudicial. Carmichael was able to "corroborate" what appeared on the surveillance tape, State's Exhibit 3, which appeared to show a man with dreads firing a gun while Carmichael said he only punched one of the victims. Appellant joined in the objection to the introduction of Carmichael's inculpatory statement, and appellant should be granted a new trial since Carmichael's statement implicated appellant in the crime.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Florence County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of January, 2024.