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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.

QUINTERRIS JAVON CARMICHAEL,

APPELLANT

APPELLATE CASE NO. 2023-000162

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

1.

The trial court erred by refusing Appellant's request to individually poll the jurors, since a poll must be taken if a request for polling is made.

The State concedes the trial court reversibly erred. *See* Brief of Respondent at 10. Nevertheless, the State asks this Court to overturn its decision in *State v. Wright*, 432 S.C. 365, 373, 852 S.E.2d 468, 472 (Ct. App. 2020), *aff'd*, 439 S.C. 101, 886 S.E.2d 206 (2023). However, the State does not address how that could happen since the South Carolina Supreme Court affirmed this Court's decision in *Wright*, and held: "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 (2023). The Supreme Court also noted this Court's opinion in *Wright* was "well-reasoned." *Id.* This error requires a new trial.

2.

The trial court erred by admitting a recorded custodial interrogation of Appellant, where Appellant invoked his right to counsel, but law enforcement, in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), told Appellant he could only have a lawyer if he "ha[d] one on retainer," since the resulting statement was not knowingly, voluntarily, and intelligently given.

Upon being provided with *Miranda* warnings,[1] Appellant invoked his right to counsel: he asked Investigator Shelley for a lawyer "right now." However, Shelley lied to Appellant and told him he could only have a lawyer present during questioning if he had one "on retainer." Appellant invoked his right to counsel five times during the interrogation: "Can I um, I get my

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

lawyer up here right now?"; "My lawyer can still come?"; "I need my lawyer, bro;" as well as two later invocations, the verbiage of which did not make it into the record. State's Exhibit #2; R. 27, l. 17 – 30, l. 7; R. 35, ll. 1-21. Yet, Shelley continued his recorded interrogation. His contempt for the rule of law in this regard was breathtaking. The State sees no problem with it.

The State argues that Shelley's response to Appellant's request for counsel during questioning: "if you have one on retainer, they can come up here," "was an accurate response that juxtaposed the difference between the immediate availability of an attorney on retainer, and the time that obtaining assigned counsel would require." The State continues in this vein, arguing that, "Had Officer Shelley simply said 'yes', as Appellant argues, he would have been misinforming Appellant because assigned counsel is not immediately available in the fashion that Appellant was asking."[2] *See* Brief of Respondent at 13. That argument is misguided. Appellant was entitled to have an attorney present during questioning even if it took one a while to get there. U.S. Const. amend. XIV; U.S. Const. amend. V; *e.g.*, *Edwards v. Arizona*, 451 U.S. 477, 82 (1981) (when accused requests counsel, interrogation must cease until attorney is present).

The South Carolina Supreme Court has recently explained how false statements by a law enforcement officer in the context of *Miranda* warnings may render a subsequent statement involuntary. *See State v. Collins*, 442 S.C. 444, 461, 900 S.E.2d 426, 435 (2024) ("[O]fficers may not mislead a suspect about the law, particularly their constitutional rights."). Tellingly, the State does not attempt to grapple with this recent, unanimous holding. The accused in *Collins* was provided with *Miranda* warnings at the start of his interrogation. However, as the interview

[2] The State does not give any citation to the record or to any other references for the argument appointed counsel could not make a timely appearance, although that is frankly irrelevant. Appellant's invocation of his right to counsel trumped Investigator Shelley's preferences on the interrogation's timing.

progressed, officers told Collins the interview was confidential, and reassured him that anything he told them would not "leave this room." Collins's subsequent statement was admitted over objection at his trial. The Supreme Court held the intentional misrepresentation of the law regarding the legal consequences and risks of proceeding with an interrogation violated due process. "A false assurance of confidentiality from law enforcement is inherently coercive because it interferes with a layperson's ability to make a fully informed decision whether to engage in an interview under such circumstances." *State v. Collins*, 442 S.C. at 455, 900 S.E.2d at 432.

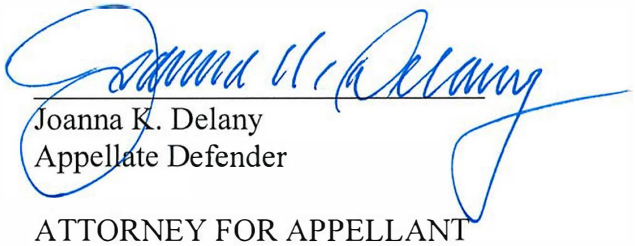
In this case, Shelley's false statement that Appellant could have a lawyer present for questioning only if he had one on retainer rendered Appellant's subsequent statement the involuntary product of deception rather than the result of an intelligent waiver. It negated the provision of *Miranda* warnings and interfered with Appellant's ability to make an informed decision whether to answer questions. *Collins*, 442 S.C. at 455, 900 S.E.2d at 432; *see Berghuis v. Thompkins*, 560 U.S. 370, 382-83 (2010) (waiver must the product of a free and deliberate choice rather than intimidation, coercion, or deception, and must be made with a full awareness of both the nature of the right being abandoned and the consequences of abandoning it).

The State baldly asserts, without any exposition, that Appellant's invocation of the right to counsel was ambiguous. *See* Brief of Respondent at 13. It makes no rebuttal to Appellant's argument that Shelley plainly understood Appellant had invoked his right to counsel since he told Appellant he could only have counsel if he had one on retainer. That is because there is no legitimate response that can be made. *See* Brief of Appellant at 14; *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) ("it is obvious from the record the solicitor and everyone involved viewed petitioner's request as an invocation of his right to counsel").

Appellant's statement was involuntary under the totality of the circumstances and should have been excluded. *Miranda*, 384 U.S. at 479; *Jackson v. Denno*, 378 U.S. 368, 385 (1964); *Edwards v. Arizona*, 451 U.S. at 482; U.S. Const. amend. V; US. Const. amend. XIV.

CONCLUSION

Based on the foregoing argument, and for the reasons contained in Appellant's principal brief, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of October, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 11, 2024.

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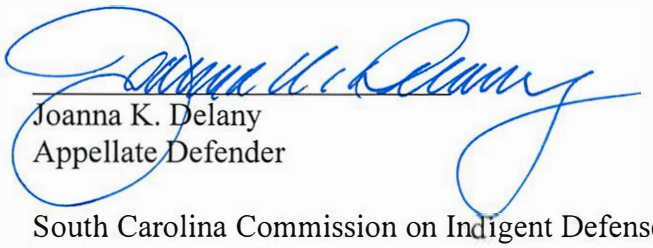
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Reply Brief of Appellant in the above-referenced case has been served upon W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 11th day of October, 2024.



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