

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Edward B. Cottingham, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

APPELLATE CASE NO. 2013-002027

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court erred in determining Respondent did not invoke her right to counsel at the start of her interrogation by considering that she continued speaking to police officers without being provided an attorney even though she testified that she requested one?

II. Whether the evidence supported the finding that Respondent's request for counsel during interrogation was not clear and unequivocal where she testified that she told an officer in the interrogation room, "I need an attorney for this" and that the officer responded, "The Judge will – the Judge will take care of that. When you get downtown, he issues a warrant."

III. Whether Respondent suffered prejudice from the presentation to the jury of her inadmissible statements in the interrogation video where the jury specifically requested multiple times to see the video and where in closing, the State argued that Respondent's statements constituted evidence establishing malice aforethought for purposes of the murder charge against her.

COUNTERSTATEMENT OF THE CASE

On September 25, 2008, the Horry County grand jury indicted Respondent Brittany Alexis Johnson on one count of murder. R. 1, ll. 15-17; R. 477. On February 7, 2011, Respondent's case proceeded to trial before the Honorable Edward B. Cottingham and a jury. Ronald Hazzard represented Respondent and Scott A. Graustein represented the State. R. 1, ll. 1-17; R. 2, l. 11 – R. 3, l. 17.

The evidence presented at trial showed that on June 24, 2008, Respondent was involved in a shooting in Conway. R. 92, ll. 5-23. Respondent was walking to an acquaintance's apartment through a parking lot when she encountered a vehicle with four female occupants, including a local woman with whom Respondent had recently had a number of hostile confrontations. R. 257, l. 15 – R. 264, l. 24; R. 291, l. 14 – R. 305, l. 15; R. 313, l. 10 – R. 315, l. 25. A physical altercation ensued between the woman and Respondent, both of whom were armed with pistols. The fight developed into a struggle over control of one of the pistols, which ultimately discharged, killing the woman. R. 161, l. 10 – R. 166, l. 25; R. 182, l. 7 – R. 186, l. 13; R. 198, l. 12 – R. 202, l. 5.

The State sought to introduce into evidence a DVD recording of Respondent's interrogation by police shortly after her arrest in early July of 2008. R. 8, l. 12 – R. 41, l. 8. In the *Jackson v. Denno*¹ hearing, Respondent testified that law enforcement officers apprehended her in Darlington County and booked her into the county jail. The officers did not Mirandize her or tell her the reason for her arrest. During the booking, Respondent asked one of the officers whether she needed an attorney, and he responded that “[h]e was pretty sure I would.” R. 22, l. 13 – R. 28, l. 13.

¹ 378 U.S. 368 (1964).

A few hours later, two police officers from Horry County came to retrieve Respondent. R. 24, l. 23 – R. 25, l. 2. Respondent testified that when they arrived back at their office in Horry County, the officers immediately began interrogating her:

A: When we got back to Conway, upon entering the, um, the police department on Racepath, I thought – well, I thought I would just be, like, booked in and then put in jail but when I got there and they opened up the door to the interview room and when I went in there, I realized what was going on, and I said, “I need an attorney for this, don’t I?”

Q: Uh-huh.

A: And I said, “I need an attorney for this.”

Q: All right.

A: And their response was, “The Judge will – the Judge will take care of that. When you get downtown, he issues a warrant.”

R. 28, l. 21 – R. 29, l. 6. Respondent stated that she then “was under the impression that it was okay. It was okay to talk.” R. 28, l. 15 – R. 29, l. 21.

Retired Conway Police officer John King testified that he and officer Shaun Patterson² questioned Respondent in an interview room at their Racepath Street annex. He presented Respondent with a Miranda rights advisement form, which he read aloud and which she signed. Respondent then answered questions from officer King without an attorney present. Officer King said that his interaction with Respondent appeared in its entirety in the video recording, and Respondent never asked in his presence for an attorney. However, he admitted that, as officer Patterson stated in the video recording, Patterson had spoken with Respondent in introducing

² During trial, King referred to the second officer in the room as Shawn Addison. R. 100, ll. 15-17; R. 333, ll. 1-20.

himself before the recording started and outside of King's presence. King had no personal knowledge as to the substance of that conversation. R. 8, l. 25 – R. 21, l. 15.

Respondent objected to the admission of the video, arguing that the uncontradicted testimony established that she requested and was denied the presence of an attorney, and therefore her responses to the ensuing questioning were inadmissible. R. 37, l. 17 – R. 38, l. 7.

The State conceded, "Your Honor, um, it's uncontradicted. We don't have anybody who says she never asked that." R. 40, ll. 21-23. However, the State further argued that Respondent "had forty minutes of tape and . . . could have indicated at any point that she had asked for an attorney but she did [not] during any of that time." R. 40, l. 21 – R. 41, l. 1.

The trial court initially held that Respondent's statement was given freely, voluntarily, and in compliance with *Miranda v. Arizona* and that she waived her rights "to remain silent and to have counsel present with her at the interview and interrogation." R. 36, l. 12 – R. 37, l. 11. After the arguments of Respondent and the State regarding her invocation of the right to counsel, the court concluded that "[Appellant's] testimony on that issue is simply not plausible in that with Officer King she had ample opportunity to express her desire for her attorney and that's, obviously indicated not only on Mr. King's testimony but on the video itself, and I note your objection for the record." R. 41, ll. 2-7.

Over Respondent's contemporaneous objections, the video statement was played on multiple occasions for the jury. R. 101, ll. 15-18; R. 107, l. 22 – R. 108, l. 12. On one such occasion during the second day of trial, the court received a note from the jury stating, "We are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding." R. 137, ll. 1-7; R. 473. Respondent objected, pointing out that the note indicated improper discussion regarding the elements and facts of the case

by the jury, and moved for a mistrial. R. 138, l. 22 – R. 138, l. 14. Counsel also argued that if the court did not grant a mistrial, then playing the video again before the jury heard any other evidence would place undue weight on the DVD. R. 138, l. 15 – R. 139, l. 2. The trial court denied the objection and motions, stating “there’s no basis in this note for me to assume they’ve discussed any issue in the trial.” R. 139, ll. 3-5. The court then ordered “additional microphones put up so that the jury will understand the contents of that tape.” R. 139, ll. 10-12. The court also brought in additional loud speakers. R. 141, ll. 4-11.

In its closing, the State referred to Respondent’s statements on the video multiple times. R. 418, l. 9 – R. 421, l. 25. In particular, the State argued that the jury could find the element of malice aforethought for purposes of the murder charge conclusively established based on certain statements:

As far as showing malice aforethought, if she had that gun – she was holding that gun, she just decided, “I’m going to pull the trigger and shoot Monica.”

That’s it. That’s all the malice aforethought you need. “I’m going to pull the trigger.”

So, she left – so, she said she had a gun the day before. So, she – she went and got her gun.

R. 418, ll. 4-11. After closing arguments, Respondent moved the court to charge self-defense and involuntary manslaughter. R. 449, ll. 1-4. The court denied the motion, stating the evidence in the record established without contradiction that Respondent went to the vehicle with a loaded gun in her hand, and “[t]he defendant can’t go to the scene of a difficulty, then claim self-defense.” R. 363, l. 3 – R. 368, l. 1.

The video was also played pursuant to the jury’s request during deliberations. R. 425, l. 18 – R. 430, l. 19.

On February 11, 2011, the jury found Respondent guilty as charged. R. 452, l. 1; R. 458, ll. 16-19. The trial court sentenced her to thirty years imprisonment. R. 467, l. 24 – R. 468, l. 1. In the sentencing phase, the trial court told Appellant “[t]here was no way in the world that [Counsel] could get around your video sworn statement where you said, ‘I pulled the trigger.’ Quote, unquote.” R. 460, ll. 19-21.

On appeal Respondent argued that the trial court erred in considering the evidence that Respondent continued speaking with the police officers to support the finding that she never invoked her right to counsel. App. 14 – App. 17. The appeals court reversed and remanded, citing *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989) for the proposition that the State has the burden to prove a valid waiver of Miranda rights and *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) for the proposition that once a suspect invokes the right to counsel, police interrogation must stop unless the suspect initiates further communication. App. 71 – App. 72. The State filed a petition for rehearing, which the appeals court denied. App. 73 – App. 97.

ARGUMENT

I. The trial court erred in considering Respondent’s continued participation in the interrogation without being provided an attorney as evidence that she did not invoke her right to counsel at the start of the interrogation.

The trial court erred in considering Respondent’s continued participation in the interrogation without being provided an attorney as evidence that she did not invoke her right to counsel at the start of the interrogation. “In *Miranda v. Arizona*, the [United States Supreme Court] determined that the Fifth and Fourteenth Amendments’ prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney.” *Edwards v. Arizona*,

451 U.S. 477, 481-82 (1981) (citing *Miranda v. Arizona*, 84 U.S. 436, 479 (1964)). “In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*.” *State v. Moses*, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010) (citation omitted); *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). This inquiry is two-fold:

First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam) (citations omitted).

The first determination is objective and requires the articulation of a desire that counsel be present “sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis v. U.S.*, 512 U.S. 452, 458-59 (1994); *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998). As a bright line rule, only statements or circumstances leading up to and during the request are relevant to the question of invocation. *Smith v. Illinois*, 469 U.S. at 98. Subsequent statements are not relevant to the question of invocation but “are relevant only to whether the accused waived the right he had invoked.” *Id.*

“Once an accused requests counsel, police interrogation must cease unless the accused himself ‘initiates further communication, exchanges, or conversations with the police.’” *State v. Kennedy*, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (quoting *Edwards v. Arizona*, 451 U.S. at 485). Further, his subsequent statements are inadmissible absent a finding that he knowingly and

voluntarily relinquished or abandoned his *Miranda* rights. *Edwards v. Arizona*, 451 U.S. at 482. After a request for counsel, a valid waiver is not established merely because the accused “responded to further police-initiated custodial interrogation even if he has been advised of his rights.” *Id.* at 484.

In this case the State had the burden at trial to prove by a preponderance of the evidence that Respondent did not invoke her right to an attorney. Respondent testified that when she entered the interrogation room, she told an officer, “I need an attorney for this.” Further, she testified that the officer directly and specifically responded to the question. The testimony constituted competent evidence that she invoked her right to counsel.

The State did not adduce any evidence to contradict Respondent’s testimony and even conceded so much. Although Respondent and the State agreed only two particular officers could have been the individual to whom Respondent allegedly made the request, the State only produced one of them at trial. Officer King agreed that although he did not recall Respondent making the request to him, the second officer had spoken with Respondent before the recording started and outside of King’s presence. King had no personal knowledge as to the substance of the conversation. Thus, the State did not vitiate Respondent’s affirmative, competent evidence that she invoked the right to counsel.

The trial court erred in merging the discrete inquiries of invocation and waiver. It contemplated the interrogation encounter as a whole in determining whether Respondent invoked her right to counsel and considered incompetent evidence that Respondent continuously talked with the officers. Instead, the court should have decided whether, by the preponderance of the evidence, Respondent actually invoked her right to counsel upon walking into the interrogation room as she

testified. The court was required to base that decision on the acts and circumstances leading up to and at that moment and not thereafter.

Similarly, if in such a case the continued discussion alone were sufficient to show lack of credibility and prove that no actual invocation occurred, then the State could preclude virtually every seemingly defendant from showing invocation simply by failing to produce an investigator at trial to confirm her request. Accordingly, the trial court committed a clear error in evaluating the relevance and sufficiency of the evidence presented, and this Court should affirm the appeals court's reversal and remand.

II. The evidence could not support the finding that Respondent's statement was not a clear and unequivocal request for counsel during interrogation because her statement to the officer in the interrogation room was "I need an attorney for this," and the officer responded directly to the request in telling her that an attorney would be appointed to her later.

The evidence could not support the finding that Respondent's statement was not a clear and unequivocal request for counsel during interrogation because her statement to the officer in the interrogation room was "I need an attorney for this," and the officer responded directly to the request in telling her that an attorney would be appointed to her later. As stated above, invocation merely requires the articulation of a desire that counsel be present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. While statements or circumstances leading up to and during the request are relevant to the question of invocation, those subsequent to the request are not.

"[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689 (1980); *State v. Howard*, 296 S.C. 481, 488, 374 S.E.2d 284, 288 (1988). "Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response." *State v. Whitner*, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008). *See also U.S. v. LaGrone*, 43 F.3d 332, 339-40 (7th Cir. 1994) ("[I]n order for a defendant to invoke his *Miranda* rights the authorities must be conducting interrogation, or interrogation must be imminent. Such a requirement advances the twin goals of *Miranda*: providing an opportunity for the defendant to dissipate the compulsion and allowing law enforcement the ability to conduct investigations.").

In this case, Respondent testified she told one of the officers in the interrogation room, “I need an attorney for this.” Further, based on her testimony of the officer’s response, the evidence established that the officer heard and understood the request.

The State argues in its petition that Respondent only inquired about the need for counsel. The State mischaracterizes the record. In its Statement of the Case, it cites Respondent’s testimony, “I need an attorney for this, don’t I?” while omitting her very next statement on the record, “I need an attorney for this.”

The record also shows Respondent invoked her Miranda right to an attorney for purposes of the impending police interrogation. Logically, a suspect must be able to invoke the Miranda prophylaxis prior to an actual question or prompt from police. In this case, Respondent requested counsel to an investigating officer as she was walking into a room she understood to be used for interrogations, and questioning was in fact impending. The State argues that Respondent was required to *invoke* her rights *during* interrogation. This argument fails because the boundaries of interrogation pose an issue for determining when Miranda safeguards apply; the issue is not determinative of when a suspect must summon the safeguards. Only a perverse rule would require a suspect to be smothered by the heat of oppressive interrogation before she is permitted to flee from it.

III. Respondent presumptively suffered prejudice from the presentation to the jury of her inadmissible statements during police interrogation, and the repetitious use of the statements during trial enhanced the prejudice.

Respondent presumptively suffered prejudice from the presentation to the jury of her inadmissible statements during police interrogation, and the repetitious use of the statements during trial enhanced the prejudice. “Ordinarily, the admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial . . . assum[ing] the existence of testimony both ways upon a disputed issue, and is based upon the possibility that the verdict of the jury may have been influenced, to the prejudice of the complaining party, by the improperly admitted evidence.” *S.C. State Highway Dep’t v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 484, 485 (1965). *See also Chapman v. California*, 386 U.S. 18, 24 (1967) (“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”).

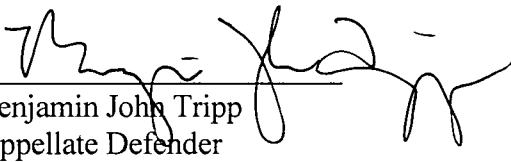
Here, a presumption existed that the trial court’s presentation to the jury of Respondent’s self-incriminating statements prejudiced her case. Additionally, the record shows that the video was played on multiple occasions for the jury, including during the presentation of evidence and deliberations. The jury twice specifically requested to watch the video because it was important to their understanding of the case. In its closing, the State argued that the jury could find the element of malice aforethought for purposes of the murder charge conclusively established based on Respondent’s statements that she considered beforehand obtaining the pistol and shooting the decedent. Finally, the trial court refused to charge self-defense and involuntary manslaughter because the evidence in the record, including Respondent’s statements from the video, established without contradiction that Respondent knowingly accosted the decedent with the pistol and

therefore could not claim to have merely responded to a provocation or attack. Accordingly, the appeals court properly reversed and remanded the case based on the trial court's prejudicial error.

CONCLUSION

For the foregoing reasons, the trial court erred in admitting Respondent's interrogation video into evidence, and Respondent requests that this Court affirm the decision of the appeals court to reverse and remand for a new trial.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 22nd day of November, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

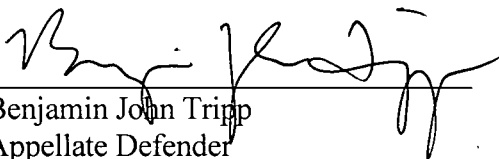
BRITTANY JOHNSON,

APPELLANT

APPELLATE CASE NO. 2013-002027

CERTIFICATE OF SERVICE

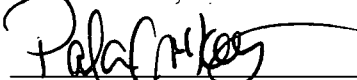
I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of November, 2013.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 22nd day
of November, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022