STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

Unpub. Op. No. 2013-UP-288 (S.C. Ct. App. filed June 26, 2013), App. Case No. 2011-185926

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT.

REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS IN REPLY

I. Contrary to Johnson's First Argument in his Return, the Trial Court did not Rule that Johnson Failed to Invoke her Right to Counsel at the Start of the Interrogation, but Instead Ruled, as a Factual Matter, that Johnson's Testimony, that she Inquired about Counsel Prior to her Interview, was simply not Plausible and as such, no *Edwards* Violation Occurred

In argument one of Johnson's Return to Petition for Writ of Certiorari, she contends 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 to speak to police officers without being provided an attorney even though she testified that she requested one." Ret. to Pet. for Writ of Cert. at 2. However, this was not the trial court's ruling.

Rather, as detailed in the State's petition for writ of certiorari, the trial court, after hearing Johnson's testimony and observing her demeanor, determined her testimony was "simply not plausible." (R. 17-18). In other words, a review of the record reflects the trial court simply declined to accept Johnson's version of the facts—that she twice inquired about counsel prior to being advised of her Miranda[1] rights—a ruling which is clearly supported by the evidence. Indeed, as discussed in argument I in the State's petition for writ of certiorari, because (A) the trial court is the preliminary finder of fact in a Jackson v. Denno, 378 U.S. 368 (1964) hearing;[2] (B) a trial court's credibility determinations are factual determinations which are entitled to great deference on appeal;[3] and (C) the trial court is not required to accept the defendant's testimony

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

[2] State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-01 (Ct. App. 2003); State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006).

[3] See Ballard v. Roberson, 399 S.C. 588, 599, 733 S.E.2d 107, 112 (2012) (holding that despite conflicting testimony on a contested issue appellate courts give great deference to the credibility determinations of the circuit court); Kolle v. State, 386 S.C. 578, 593, 690 S.E.2d 73, 81 (2010) (J. Pleicones concurring) (stating appellate courts give great deference to a PCR court's credibility determinations and as a result the Supreme Court was required to defer to the PCR court's ruling that a witness was credible even where that witnesses testimony is directly refuted elsewhere in the record); Fiddie v. Fiddie, 384 S.C. 120, 126, 681 S.E.2d 42, 45 (Ct. App. 2009) (giving deference to the family court's credibility determination because the family court had the opportunity to hear the testimony and observe the witness on the stand); Clardy v. Bodolosky, 383 S.C. 418, 428, 679 S.E.2d 527, 532 (Ct. App. 2009) (deferring to

as true,[4] the trial court was free to disregard Johnson's testimony as implausible. As a result, the trial court's ultimate ruling, that the inquiry never happened and therefore there was no violation of the prophylactic rule from Edwards v. Arizona, 451 U.S. 477 (1981) is correct and the Court of Appeals' ruling reversing the trial court must be reviewed.

II. Johnson's Legal Assertion, that the Trial Court could not Consider the State's Impeachment of Johnson During Cross-Examination, is Incorrect as the Trial Court was Serving as the Preliminary Finder of Fact and the State's Burden of Showing Compliance with *Miranda* only Requires the State to Prove that the Accused was Advised of and Understood his or her *Miranda* Warnings for Purposes of Proving a Valid Waiver of the Accused's Constitutional Rights

Furthermore, the legal argument advanced by Johnson, that the trial court erred in considering the State's impeachment of Johnson during her cross-examination because it was an allegedly improper means of proving compliance with Miranda, is simply at odds with the law. As detailed in footnote two above, South Carolina law clearly permits a trial court to serve as a preliminary finder of fact in motions such as a Jackson v. Denno hearing. E.g. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-01 (Ct. App. 2003); State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Additionally, as noted in footnote four, the trial court, when serving as a preliminary finder of fact, is not required to accept a defendant's testimony as true. State v. Boone, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955) (quoting State v. McAlister, 133 S.C. 99, -, 130 S.E. 511, 512 (1929)). Thus, as detailed above, there was simply no legal error when the trial court, acting

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the circuit court's credibility determination as the trial court was in a better position to evaluate the credibility of a witness); Weathers v. Bolt, 293 S.C. 486, 488, 361 S.E.2d 773, 774 (Ct. App. 1987) ("It is axiomatic that the probate court was in the best position to judge credibility.").

[4] State v. Boone, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955) (quoting State v. McAlister, 133 S.C. 99, --, 130 S.E. 511, 512 (1929)); see also Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991); Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct.App.2000); Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003); Johnson v. Painter, 279 S.C. 390, 392, 307 S.E.2d 860, 861 (1983); South Carolina Dep't of Soc. Serv. v. Cummings, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001); Dorchester County Dep't of Soc. Serv. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996); South Carolina Dep't of Soc. Serv. v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984).

in its' fact finding capacity, determined Johnson's testimony regarding her alleged inquiry into counsel was not plausible in light of her demonstrated understanding of her constitutional rights, and her subsequent waiver of such rights.

Moreover, while Johnson maintains that, as a matter of law, compliance with Miranda means the State must prove that Johnson did not invoke her right to an attorney, the State again disagrees. While it is true that the State, during a Jackson v. Denno hearing, must prove, by a preponderance of the evidence and under the totality of the circumstances, that (A) the accused's statement was knowingly, freely and voluntarily tendered; and (B) the State complied with Miranda, "compliance" with Miranda does not mean the State must disprove an alleged invocation of the right to counsel. See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (holding the trial court, as a preliminary matter, must determine whether the accused's statement was knowingly, freely and voluntarily tendered and whether the accused received and understood his or her Miranda rights). To the contrary, South Carolina case law regarding compliance with Miranda only requires the State to prove that the accused received and understood his or her Miranda rights for purposes of proving a valid waiver of the constitutional rights mentioned in Miranda. See Goodwin, 384 S.C. at 602, 683 S.E.2d at 507 (quoting State v. Davis, 309 S.C. 326, 342, 422 S.E.2d 133, 143 (1992) ("Once the court determines that a defendant received and understood his rights, the court allows a confession into evidence.")). Thereafter, the issue of compliance with Miranda is only relevant insofar as it goes to the jury's determination regarding the voluntariness of the waiver of such rights, which, as discussed in Davis, must be proven to the jury beyond a reasonable doubt. Id.

Accordingly, in a case such as this, where the State disputes the defendant's assertion of an alleged invocation of counsel and, via the crucible of cross-examination, attempts to impeach

the defendant, there is no requirement that the State introduce additional evidence to disprove the defendant's testimony. Rather, as mentioned above, South Carolina law only requires that the State prove (A) that the accused's statement was knowingly, freely and voluntarily tendered; and (B) that the accused was advised of and understood the constitutional rights mentioned in Miranda. Compliance with the prophylactic rule of Edwards[5] is not required, nor should it be where, as is the case here, the trial court found the alleged inquiry into counsel never occurred. Thus, the State asks that certiorari be granted.

III. Johnson's First and Second Arguments are also Predicated upon Two Faulty Assumptions: (1) that Johnson's Inquiry as to Whether she Needed an Attorney Constituted a Clear and Unequivocal Invocation of Her Right to Counsel; and (2) that her Inquiry into Counsel Occurred when she was Subject to Custodial Interrogation. Neither of these Assertions are Correct.

Johnson's brief, specifically arguments one and two, are premised upon two incorrect assumptions: one that Johnson's alleged inquiry, "I need an attorney for this, don't I?" was a clear and unequivocal invocation of her Fifth Amendment right to counsel; and two, that assuming such an inquiry actually occurred, which is of course contrary to the trial court's finding, the inquiry occurred while she was being interrogated. These assertions are addressed in the State's petition for writ of certiorari.

In particular, the legal assumption made by Johnson, that her alleged inquiry regarding counsel amounted to a clear and unequivocal invocation, is at odds with established precedent as detailed in argument II(B) of the State's petition for writ of certiorari. See e.g. Davis v. U.S., 512 U.S. 452, 458-62 (explaining the statement "maybe I should talk to a lawyer" was not a clear and unequivocal invocation of Davis' right to counsel); Burket v. Angelone, 208 F.3d 172, 197-98 (4th Cir. 2000) (holding the statement "I think I need a lawyer" did not amount to a clear and

[5] See Davis v. U.S., 512 U.S. 452, 458 (1994) (holding Edwards is a prophylactic rule); Id. at 460 ("[T]he rule of Edwards is our rule, not a constitutional command; and it is our obligation to justify its expansion.").

unequivocal invocation of the defendant's right to counsel). Additionally, Johnson's factual assumption, that her alleged inquiries regarding counsel occurred during a custodial interrogation, is addressed in argument II(A) of the State's petition where it is explained that these alleged inquiries both occurred prior to her being interviewed with the latest occurring during her booking. (R. 28-29). Thus, regardless of the trial court's credibility determination, Edwards does not apply to these facts since this case, unlike Edwards involves a mere inquiry regarding counsel in a non-custodial setting. Therefore, certiorari should be granted and the Court of Appeals ruling must be reversed.

CONCLUSION

In conclusion, the State submits the aforementioned arguments in reply to Johnson's return to the petition for writ of certiorari. Further, the State stands on the arguments contained within the petition with respect to the Court of Appeals' apparent failure to assess prejudice as is required by the standard of review as mentioned in argument III of the petition. Finally, the State asks that this Court grant certiorari to Court of Appeals summary reversal of the conviction and sentence of Brittany Johnson.

Respectfully Submitted,

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December 2, 2013.

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THE STATE,

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PROOF OF SERVICE

I, Brendan J. McDonald, certify that I have served the Reply to the Return to the Petition for Writ of Certiorari on Respondent by depositing two (2) copies of the Reply to the Return to the Petition for Writ of Certiorari in the United States mail, first class postage prepaid, to counsel for Respondent, addressed as follows:

Benjamin Tripp
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This 2nd day of December, 2013.

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ALAN WILSON
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December 2, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
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Re: The State v. Brittany Johnson
Appeal from Horry County
Appellate Case No.: 2011-185926

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the State of South Carolina's Response to Return to Petition for Writ of Certiorari to the South Carolina Court of Appeals, together with Proof of Service in the above referenced matter.

Thank you for your assistance in this matter.

Sincerely,

Brendan J. McDonald
Assistant Attorney General

BJM/mv

cc: Benjamin Tripp, Esq., Appellate Defender
The Honorable Jimmy A. Richardson, Solicitor, Fifteenth Judicial Circuit
S.C. Court of Appeals
Sandi Wofford, Victim Services