STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT

APPELLATE CASE NO. 2013-002027

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the trial judge abused his discretion by employing a rule of general applicability that responding to police questioning without an attorney precludes the possibility that a defendant requested an attorney before the questioning.

II. Whether Respondent's statement to an officer that "I need an attorney for this" and the officer's response that "The Judge will – the Judge will take care of that. When you get downtown, he issues a warrant" was a clear and unequivocal request for counsel.

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

STATEMENT OF THE CASE

On September 25, 2008, the Horry County grand jury indicted Respondent Brittany Alexis Johnson on one count of murder. Supp. App. 6, ll. 15-17; Supp. App. 482-483. 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. Supp. App. 6, ll. 1-17; Supp. App. 7, l. 11 – Supp. App. 8, l. 17. On February 11, 2011, the jury found Respondent guilty as charged. Supp. App. 457, l. 1; Supp. App. 463, ll. 16-19. The trial judge sentenced her to thirty years imprisonment. Supp. App. 472, l. 24 – Supp. App. 473, l. 1.

On appeal the South Carolina Court of Appeals reversed and remanded in an unpublished opinion. *State v. Johnson*, Op. No. 2013-UP-288 (S. C. Ct. App. filed June 26, 2013); App. 71 – App. 72. The State filed a petition for rehearing, which the court denied. App. 73 – App. 98.

ARGUMENT

STATEMENT OF FACTS

The evidence presented at trial showed that on June 24, 2008, Respondent was involved in a shooting in Conway. Supp. App. 97, 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. Supp. App. 262, l. 15 – Supp. App. 269, l. 24; Supp. App. 296, l. 14 – Supp. App. 310, l. 15; Supp. App. 318, l. 10 – Supp. App. 320, 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. Supp. App. 166, l. 10 – Supp. App. 171, l. 25; Supp. App. 187, l. 7 – Supp. App. 191, l. 13; Supp. App. 203, l. 12 – Supp. App. 207, 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. Supp. App. 13, l. 12 – Supp. App. 46, 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." Supp. App. 27, l. 13 – Supp. App. 33, l. 13.

A few hours later, two police officers from Horry County came to retrieve Respondent from Darlington. Supp. App. 29, l. 23 – Supp. App. 30, l. 2. Respondent

[1] 378 U.S. 368 (1964).

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."

Supp. App. 33, l. 21 – Supp. App. 34, l. 6. Respondent stated that she then "was under the impression that it was okay. It was okay to talk." Supp. App. 33, l. 15 – Supp. App. 34, l. 21.

Retired Conway Police officer John King testified that he and officer Shaun Patterson[2] 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 himself before the recording started and outside of

[2] During trial, King referred to the second officer in the room as Shawn Addison. Supp. App. 105, ll. 15-17; Supp. App. 338, ll. 1-20.

King's presence. King had no personal knowledge as to the substance of that conversation. Supp. App. 13, l. 25 – Supp. App. 26, l. 15.

The trial judge initially stated 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." Supp. App. 41, l. 12 – Supp. App. 42, l. 11. Respondent objected, 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. Supp. App. 42, l. 17 – Supp. App. 43, l. 7. The State conceded, "Your Honor, um, it's uncontradicted. We don't have anybody who says she never asked that." Supp. App. 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." Supp. App. 45, l. 21 – Supp. App. 46, l. 1. The trial judge responded 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." Supp. App. 46, ll. 2-7.

Over Respondent's contemporaneous objections, the video statement was played on multiple occasions for the jury. Supp. App. 106, ll. 15-18; Supp. App. 112, l. 22 – Supp. App. 113, l. 12. On one such occasion during the second day of trial, the judge 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." Supp. App. 142, ll. 1-7; Supp. App. 478. 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. Supp. App. 142, l. 22 – Supp. App. 143, 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. Supp. App. 142, l. 15 – Supp. App. 144, l. 2. The trial judge 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." Supp. App. 144, ll. 3-5. The judge then ordered "additional microphones put up so that the jury will understand the contents of that tape." Supp. App. 144, ll. 10-12. The judge also brought in additional loud speakers. Supp. App. 146, ll. 4-11.

In its closing, the State referred to Respondent's statements on the video multiple times. Supp. App. 423, l. 9 – Supp. App. 426, 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.

Supp. App. 423, ll. 4-11. After closing arguments, Respondent moved to charge self-defense and involuntary manslaughter. Supp. App. 454, ll. 1-4. The judge 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." Supp. App. 368, l. 3 – Supp. App. 373, l. 1.

The video was also played pursuant to the jury's request during deliberations. Supp. App. 430, l. 18 – Supp. App. 435, l. 19.

In the sentencing phase, the trial judge 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." Supp. App. 465, ll. 19-21.

On appeal Respondent argued that the trial judge 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. In reversing and remanding, the South Carolina Court of Appeals citied *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.

STANDARD OF REVIEW

"On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion." *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). Likewise, rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. *State v. Stokes*, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009). An abuse of discretion occurs when a trial court's ruling "reveals no discretion was exercised." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653,656 (2006). *See also United States v. Delfino*, 510 F.3d 468, 470 (4th Cir. 2007) ("A district court abuses its discretion when it

. . . fails to consider judicially recognized factors constraining its exercise of discretion [or] relies on erroneous factual or legal premises.").

In *James v. Jacobsen*, the Court of Appeals for the Fourth Circuit explicated abuses of discretion by "failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule" and "by failure, in attempting to exercise discretion, adequately to take into account judicially recognized factors constraining its exercise." *James v. Jacobsen*, 6 F.3d 233, 239 (4th Cir. 1993). The court explained that an abuse of discretion occurs when a "conclusion [is] based upon a general rather than a particularized assessment of the equities involved," and particularly when the conclusion "announces itself as a flat rule of general application based upon strongly felt personal predilection." *Id.* at 240-41.

DISCUSSION

I. The trial judge abused his discretion by employing a rule of general applicability that responding to police questioning without an attorney precludes the possibility that a defendant requested an attorney before the questioning.

The trial judge abused his discretion by employing a rule of general applicability that responding to police questioning without an attorney precludes the possibility that a defendant requested an attorney before the questioning. The State has a very stringent burden to prove a valid waiver of the right to counsel.

> [C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that

> case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations omitted).

In *Massiah v. United States*, the U.S. Supreme Court held that once a defendant's constitutional right to counsel accrues, the defendant cannot be presumed to have waived his right to counsel based merely on his response to police questioning without counsel present. *Massiah v. U.S.*, 377 U.S. 201, 204-207. (1964). The rule applies a fortiriori when police use a confidential informant to surreptitiously interrogate such a defendant. *Id.* at 206. Thus, the defendant in that case did not waive his right to counsel merely by speaking to a jailhouse snitch without his attorney, and his statements to the informant were inadmissible. *Id.*

Two years later, in *Miranda v. Arizona*, the U.S. Supreme Court held that a defendant's statements in the absence of counsel during custodial interrogation are inadmissible when the defendant has not been specifically advised of his right to have an attorney present. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). In other words, a defendant cannot validly waive his constitutional right to counsel during custodial questioning without being specifically advised of the right beforehand. The Court's central concern in implementing the prophylaxis of a specific warning was that police officers, zealous in ferreting out crime, tend to elicit statements through psychological coercion of an isolated defendant in incommunicado interrogation. Thus, the warning is necessary to protect against overbearing, inquisition-style questioning that is impermissible under the Constitution. *Id.* at 447-449.

Almost twenty years later, in *Smith v. Illinois*, the U.S. Supreme Court explained that when a defendant in custodial interrogation gives statements to police in the absence

of an attorney but avers that he requested one prior to the interrogation, two procedural stages are implicated:

> 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 Supreme Court explained that ceasing question upon a proper request for an attorney was absolutely necessary to protect against the risk of "'badgering' or overreaching'—explicit or subtle, deliberate or unintentional—[which] might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Id.* at 98 (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983)).

In this case, the trial judge applied a general rule that responding to police questioning without an attorney precludes the possibility that a defendant actually requested an attorney before the questioning. Specifically, the trial judge stated that Appellant's express and unrefuted claim that she requested an attorney prior to entering the interrogation room was not plausible because she had ample opportunity during the interrogation to repeat her desire for her attorney but did not.

In employing this rule of general applicability, the trial judge failed both to adequately take into account judicially recognized factors constraining his discretion in the matter and to particularly assess the equities involved. First, the judge failed to consider to any extent the possibility of coercion prohibiting Appellant from feeling free

to re-request an attorney. Appellant faced two officers in an interrogation room in a police office. She explained that she had just made a request for an attorney to another officer, who told her one would be arranged later. As described above in the *Massiah* line of cases, Appellant—isolated, outnumbered, and subjected to incommunicado interrogation—realistically could have been psychologically coerced to answer the officer's questions without making any resistance, including by asking the officers to stop the interrogation entirely and wait for an attorney to be appointed and transported. In this manner, the trial judge failed entirely to acknowledge the longstanding principle that statements to police are, in themselves, inherently unreliable evidence from which to infer that a defendant did not invoke the right to counsel. His decision therefore could not have resulted from a proper exercise of discretion.

Second, the trial judge failed to assess the particularities of the situation described to him in order to determine whether Appellant actually made the initial request to Officer Patterson. Appellant testified that she asked Officer Patterson just before entering the interrogation room, and Officer Patterson told her a judge would later appoint one. Under these circumstances, Appellant, assured by the auspices of the proper judicial procedures, would have felt that her rights were fully protected in cooperating with the police. Accordingly, she may have believed that she was speaking "off the record" or that her statements would not be usable against her for whatever procedural reason. Or she may have been willingly engaged in small talk, waiting for attorney to arrive, and been unwittingly led into discussions about the incident.

More troubling, the facts before the trial judge could have indicated that the officers willfully disregarded Appellant's actual request. Officer Patterson admitted on

the video and Officer King testified at the hearing that Officer Patterson and Appellant spoke before the recording started and outside of King's presence. Officer Patterson did not appear at the hearing to contradict Appellant's account and Officer King had no knowledge of the substance of the conversation. This "officer shuffling" provided plausible deniability for the officer who did appear in court to testify that he did not actually hear Appellant request an attorney. By refusing to acknowledge even one of these possibilities to any extent in favor of a rule of general applicability, the trial judge abused the discretion that was entrusted to him for particularized application on a case-by-case basis.

II. Respondent made 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.

Respondent made 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 of counsel 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 *Davis v. United States*, the U.S. Supreme Court stated that the determination of whether a defendant sufficiently invoked the right to counsel 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).

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 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 other 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 and deliberation 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 and deliberation 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.").

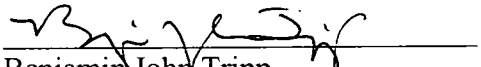
Here, a presumption existed that the trial court's presentation to the jury of Respondent's self-incriminating statements prejudiced her case. Additionally, the record

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 13th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Edward B. Cottingham, Judge

THE STATE,

PETITIONER,

V.

BRITTANY JOHNSON,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of November, 2014.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 13th day of November, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.