

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

RECEIVED

MAR 14 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANTWAN J. JETT

APPELLANT

APPELLATE CASE NO. 2015-001042

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the recorded statement by Appellant Jett to Investigator Felicia Jones in the back of the patrol car which was a violation of Miranda v. Arizona, 384 U.S. 436 (1966) because Appellant Jett unambiguously asked for his lawyer initially when he said: "Where is my lawyer?" and Investigator Jones continued to question him and he again said later that Investigator Jones would have to ask his attorney any further questions, and the investigator continued to ask a question?

STATEMENT OF THE CASE

On April 3, 2014, the Florence County Grand Jury indicted Antwan Jett on the charges of burglary first degree, armed robbery (AR), criminal conspiracy, and possession of a weapon during the commission of a violent crime. On April 20, 2015, Appellant Jett proceeded to trial before the Honorable D. Craig Brown and a jury. Jett was represented by W. Vickery Meetze, and the state was represented by John C. Jepertinger. Tr. 1. The jury found Jett guilty as indicted of burglary first degree, armed robbery, criminal conspiracy, and the possession of a weapon during a crime of violence. Tr. 333, ll. 1 – 24. Judge Brown sentenced Jett to thirty years on the burglary first degree; twenty-five years on the armed robbery; five years on the criminal conspiracy; and 478 days on the possession of a weapon. All sentences were to run concurrent. Tr. 341, ll. 18 – Tr. 342, ll. 7. This appeal follows.

STATEMENT OF FACTS

On December 31, 2013, Michael Barr had fallen asleep in his chair where he had been watching television. About 3:30 that morning, he heard a knock on his front door. The person said it was BJ who was a friend of Barr's. When Barr opened the door, three men, with their faces covered, rushed in and began beating him. They kept asking him for his money. One of them had a small gun like a Derringer which he stuck in Barr's face. They took money from his pocket and bottles of pills from his medicine cabinet. Barr's female roommate was in the bedroom. One man, who was wearing a green hoodie, and a second man entered the bedroom. Barr heard screaming, and then the three left. Some of them wore gloves but Barr not sure which ones. Tr. 69, ll. 24 – Tr. 72, ll. 23; Tr. 83, ll. 20 – Tr. 88, ll. 24; Tr. 101, ll. 5 – 19.

Barr described the men and their clothing to the police. The three men were African American. The first man was about 5'10" tall and wore a green hoodie. He had the gun. The second man was taller and had dreadlocks. He wore a dark blue or brown or black hoodie. He also wore a hat with flaps. The third man wore a dark hoodie also with it pulled tight around his head. Barr could not see any of their faces so he could not identify any of the three. Tr. 89, ll. 1 – Tr. 93, ll. 12; Tr. 243, ll. 5 – 16.

The police arrived as the men were running out of the back door. Tr. 101, ll. 5 – 8. Officer Thomas Herman saw two of the subjects running from the back of Barr's house. One was wearing a green hoodie, and the second one wore a dark blue or black shirt which may have been a hooded sweatshirt. A second officer, Officer William Blackmon, had arrived and was in pursuit, on foot, of the two subjects running away. Officer Herman

pursued in his patrol car but did not find the subjects. He did find a small Derringer type gun. Tr. 122, ll. 21 – Tr. 123, ll. 22; Tr. 125, ll. 1 – Tr. 130, ll. 24.

Officer William Blackmon testified that he saw two men running from Barr's house when he arrived on the scene. One of the men was wearing a green hoodie, and the other one wore a dark blue or black hoodie. He yelled to the men to stop but they continued to run. He chased them on foot but lost them. Tr. 137, ll. 5 - Tr. 141, ll. 25.

Officer Legrande Gowdy was the supervisor of the investigation. When he arrived on scene, he and Officer Lacey Allen started walking back through the area where the subjects ran between the apartments. They found a green pullover and a gray pullover on the front porch of one of the apartments. Two toboggan type hats were found with the pullovers. As Officer Gowdy was walking away, Officer Allen yelled that a subject was under a Cadillac parked in front of the apartment. Tr. 186, ll. 16 – Tr. 190, ll.25; Tr. 146, ll. 13 – Tr. 152, ll. 15.

Officer Allen had her weapon pointed under the Cadillac because she knew a weapon had been involved in the home invasion and did not know where that gun was. Tr. 152, ll. 9 – 25. Officer Gowdy looked under the car and saw a black male who appeared to be coming out. Then he withdrew back under the car and refused to come out. Officer Gowdy knew a weapon had been involved in the home invasion so he used his taser on the subject to strike him in the back. A brief struggle ensued but the subject was detained and handcuffed. Tr. 190, ll. 19 – Tr. 193, ll. 2.

As Officer Gowdy was pulling him out from under the car, the man kept asking why he was detaining him. Officer Gowdy then began reading Miranda rights to the man. Before Officer Gowdy finished the reading, the man said: "I don't know anything about that gun."

Officer Gowdy said that he had not mentioned anything about a gun. Officer Gowdy then placed the man in the back of the patrol car. His officers had found in the area a gun, knife, and several pill bottles. Officer Gowdy called Investigator Felicia Jones to come to the scene. Tr. 193, ll. 7 - Tr. 199, ll. 20. Officer Gowdy noted that the man was dressed in a T-shirt, jeans and gloves. The man told him those were his "walking gloves." Officer Gowdy said it was cold that night as the temperature was in the low 30's. Tr. 206, ll. 9 – Tr. 207, ll. 9.

Investigator Felicia Jones arrived and talked with the man in the patrol car who identified himself as Antwan Jett. Investigator Jones recorded this interview which was marked as State's Exhibit 54. She asked Jett his name and age which he provided. Jett immediately said to her: "**Where's my lawyer at?**" [Emphasis added.] Investigator Jones then read Jett his Miranda rights and continued to question him. Jett was upset at having been tazed, and wanted to know why they were questioning him. When asked about his statement to Officer Gowdy about the gun, Jett responded that Officer Gowdy asked him where the gun was as he pulled him from under the car. According to Investigator Jones, Jett said he had been at a friend's house and had been drinking. He just wanted a place to sleep so he got under the car. When Investigator Jones asked his address, Jett told her and then said: "**If you want to know anything else, you will have to talk to my lawyer.**" [Emphasis added.] Investigator Jones continued to ask him questions for a few minutes, and then ended the interview. She testified that after Jett did not want to talk to her, she went and talked with the victim. State's Exhibit 54 (Recording of police interview with Appellant Jett); Tr. 237, ll. 2 – Tr. 245, ll. 5.

Catherine Leisy was the forensic scientist with the South Carolina Law Enforcement Division (SLED) who was assigned to the DNA department. She was qualified as an expert in DNA analysis by the trial court. She analyzed five pieces of evidence from the investigation for a possible DNA match to Jett's DNA. She tested a purple toboggan, a blue toboggan, a blue hat, a green jacket, and a gray sweatshirt jacket. The only item that matched Jett's DNA was the gray sweatshirt jacket. Jett's DNA was not found on the green hoodie jacket. Tr. 165, ll. 4 – Tr. 167, ll. 2; Tr. 172, ll. 25 – Tr. 179, ll. 8.

In a pretrial motion following a Jackson v. Denno¹ hearing, defense counsel made a motion for Jett's statement, as found in the recording made to Investigator Jones, be found inadmissible because Jett "did indeed affirmatively and unambiguously assert his right to an attorney prior to any questioning in that regard." Counsel argued that Jett clearly said: "Where's my lawyer at?" which was not ambiguous. Counsel argued that Jett's statement was quite different from the statement in the case cited by the solicitor that "maybe I should speak to a lawyer" which was a question. Counsel said that the questioning of Jett should have stopped then. Tr. 54, ll. 7 – Tr. 55, ll. 12.

The solicitor had argued before defense counsel's motion that Jett's first statement should be admitted because it was admissible as a voluntary statement. The solicitor also argued that Jett's second statement to Investigator Jones which was recorded was admissible because it was ambiguous, and the case law provided that there had to be an unambiguous request for an attorney. The solicitor cited Davis v. United States, 512 U.S. 452 (1994) where the request for an attorney: "Maybe I should talk to a lawyer" was found to be ambiguous. Tr. 52, ll. 7 – Tr. 54, ll. 3.

¹ Jackson v. Denno, 378 U.S. 368 (1964).

The judge ruled that the first statement to Officer Gowdy was freely and voluntarily given and so was admissible. The second statement to Investigator Jones was ambiguous. Therefore, the police did not have to stop questioning Jett according to the case law. The judge relied on the cases of State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001) and Davis v. U.S., *supra*. The judge did note that Wannamaker stated that it was good practice for the police to clarify the defendant's request, but the law did not require they do so. Tr. 57, ll. 10 – Tr. 59, ll. 24.

When the recording of Jett's statement to Investigator Jones was admitted into evidence, the judge stated: "Subject to defense counsel's previous objection, so admitted." The statement was then published to the jury. Tr. 237, ll. 2 – Tr. 239, ll. 25.

ARGUMENT

The trial court erred in admitting the recorded statement by Appellant Jett to Investigator Felicia Jones in the back of the patrol car which was a violation of Miranda v. Arizona, 384 U.S. 436 (1966) because Appellant Jett unambiguously asked for his lawyer initially when he said: "Where is my lawyer?" and Investigator Jones continued to question him, and he again said later that Investigator Jones would have to ask his attorney any further questions.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court ruled that although a suspect in a criminal investigation has no constitutional right to the assistance of counsel, a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins.

In State v. Johnson, 413 S.C. 458, 776 SE.2d 367 (2015), the South Carolina supreme Court ruled that if an accused invokes her right to counsel, she may only be questioned thereafter in the presence of counsel, and her responses to further questioning outside the presence of counsel are admissible only if she initiates further questioning and then knowingly and intelligently waives her previously invoked right to counsel.

If the suspect waives his right to counsel after receiving the Miranda warnings, law enforcement officers are free to question him. North Carolina v. Butler, 441 U.S. 369 (1979). But if the suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. Edwards v. Arizona, 451 U.S. 477 (1981).

However, the United States Supreme Court ruled in Davis v. U.S., 512 U.S. 452 (1994), that if a suspect makes an ambiguous or equivocal reference to an attorney, cessation of questioning is not required but, rather, the suspect must unambiguously request counsel.

In Davis, the suspect who was a member of the United States Navy, was being questioned about the murder of a sailor. Initially, Davis waived his right to counsel. However, about an hour and half into the interview, Davis said to the investigator: "Maybe I should talk to a lawyer." When the investigator asked if he were asking for a lawyer, Davis said he was not. Following a break, the investigator reminded Davis of his rights again. Later, Davis asked to have a lawyer present. The Supreme Court found that Davis' remark: "Maybe I should talk to a lawyer" was not a request for counsel; therefore, the investigator was not required to stop questioning him. The Supreme Court also held that when a suspect makes an ambiguous or equivocal statement as to counsel, it would be good police practice for the interviewer to clarify whether the suspect actually wants an attorney but is not required.

In State v. Wannamaker, 346 S.C. 495 (2001), the South Carolina Supreme Court held that the defendant's request for her mother or a lawyer was not an "unambiguous invocation of her Fifth Amendment right to counsel," but was completely ambiguous. When the investigating officer asked for clarification, the defendant then asked for her mother. The defendant was advised of her rights again, and then gave a statement. The Court ruled that her statement was not improperly obtained. A request for someone other than an attorney did not invoke a Fifth Amendment right to counsel. State v. Register, 323 S.C. 471, 476 S.E.2d 153 (1996).

Jett's case is distinguished from both Davis and Wannamaker. Jett's statement was not ambiguous in that he did not say he may need to talk to an attorney. He clearly asked for his attorney when he said: "Where is my lawyer at?" Any reasonable law enforcement officer would have seen that as a request for an attorney. At the least, the request was sufficient enough for the officer to ask for clarification. That did not happen. Instead, Investigator Jones continued to talk to him and ask question which Jett did not initiate. Later, it was very clear when Jett told Investigator Jones that she would have to talk to his attorney if she wanted any more information. That second request made it more likely that the first request was an unambiguous request for an attorney.

Jett's case is distinguished from Wannamaker in that Wannamaker asked for her mother who was someone other than an attorney. That made her request ambiguous when she was willing to have someone other than her attorney. This was not the case with Jett who clearly asked for his attorney when he asked where his attorney was.

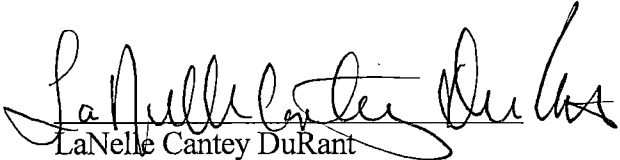
This recorded interview of Jett was prejudicial because it made him appear guilty although it was not a confession. He was angry and belligerent because he had been tazed. His statement about his reason for being under the car could have been considered unreasonable by the jury. The state did not need this recorded statement because it was not a confession as Jett did not say anything incriminating about the burglary. The state had his first statement that he knew nothing about the gun.

The recorded statement should have been suppressed.

CONCLUSION

Based on the above, Appellant Jett's convictions and sentences should be reversed,
and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

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THE STATE,

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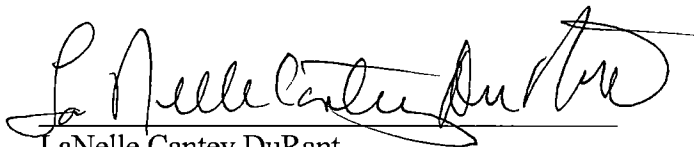
ANTWAN J. JETT

APPELLANT

APPELLATE CASE NO. 2015-001042

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Antwan Jett, #358650, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 14th day of March, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of March, 2016.

Maia Henschel (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.