

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2015-001042

RECEIVED
MAY 30 2018
SC Court of Appeals

THE STATE,

Respondent,

vs.

ANTWAN JAMAL JETT,

Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On April 25, 2018, this Court issued a published opinion in which a two-judge majority affirmed Appellant Antwan Jamal Jett's convictions and sentences after finding the trial judge properly denied Jett's motion to suppress the statement he made to Investigator Felicia Jones of the Florence Police Department on the date of the incident. State v. Jett, Op. No. 5554 (S.C. Ct. App. filed Apr. 25, 2018). Pursuant to Rule 221(a), SCACR, Jett petitioned this Court for rehearing, and this Court asked Respondent ("the State") to file a return to Jett's petition. For the following reasons, Jett's petition for rehearing should be denied.

Propriety of the Trial Judge's Decision to Admit Jett's Statement to Law Enforcement in Light of the Fact Jett Did Not Unequivocally Invoke His Right to Counsel

The lone issue involved in Jett's case was whether the question Jett asked of Investigator Jones—"Where's my lawyer at?"—constituted an unambiguous and unequivocal invocation of his right to counsel. If Jett's question was an unambiguous and unequivocal invocation, any

custodial interrogation had to immediately cease, and any further statements Jett made would have been inadmissible unless counsel was first made available to Jett or Jett himself initiated any further conversations with law enforcement. See Edwards v. Arizona, 451 U.S. 477, 484-485 (1981) (“[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”). Meanwhile, if Jett’s question was *not* an unambiguous and unequivocal invocation, custodial interrogation could continue unless and until Jett actually invoked his rights in an unambiguous and unequivocal manner. See Davis v. United States, 512 U.S. 452, 461 (1994) (“[A]fter a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect *clearly* requests an attorney.” (emphasis added)); see also State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) (“[P]olice officers are not required to cease questioning a suspect unless her request for counsel is unambiguous.”).

Significantly, in order to actually invoke his right to counsel, Jett was not required to “‘speak with the discrimination of an Oxford don[.]’ ” Davis, 512 U.S. at 459 (citation omitted). However, he *was* required to articulate his desire for counsel in a sufficiently clear, unequivocal, and unambiguous manner such that a reasonable police officer would have understood his statement to be an actual request for an attorney. Id.; see State v. Kennedy, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (“If the desire for counsel is presented ‘sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney,’ no ambiguity or equivocation exists[.]” (citation omitted)); see also Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (explaining “good reason” exists to require a suspect to

invoke his rights in an unambiguous manner). If the best that could be said was Jett *might* have been requesting an attorney through his statement, that possibility would not have been enough to constitute a valid invocation of his right to counsel. See Davis, 512 U.S. at 462 (“[W]e are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.”).

In the case sub judice, if Jett wanted a lawyer present before speaking with the officers, all he had to do was say so. See McNeil v. Wisconsin, 501 U.S. 171, 180 (1991) (“If a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that when they give him the Miranda warnings.”). However, Jett—who personally confirmed he had been informed of his rights multiple times—did *not* simply ask for a lawyer while speaking with Investigator Jones. Instead, he posed a question—“Where’s my lawyer at?”—to the officer. Cf. State v. Ash, 169 N.C. App. 715, 723, 611 S.E.2d 855, 860-861 (N.C. Ct. App. 2005) (holding the trial judge committed no error in finding Ash’s act of asking where his lawyer was at after being informed of his rights during custodial interrogation was *not* an unambiguous and unequivocal request for counsel); State v. Raber, 189 Ohio App. 3d 396, 406-407, 938 N.E.2d 1060, 1067-1068 (Ohio Ct. App. 2010) (analyzing whether Raber unequivocally invoked her right to counsel during interrogation and identifying various statements—including “Where’s my lawyer?”—that have been determined *not* to constitute unequivocal invocations of that right).

By its very nature, Jett’s inquiry was a request for information about his attorney’s location, which did not necessarily imply a clear, unambiguous, and unequivocal desire to have

counsel present.¹ See Paulino v. Castro, 371 F.3d 1083, 1088 (9th Cir. 2004) (“Paulino’s queries, ‘Where’s the attorney?’ and ‘You mean it’s gonna take him long to come?’, could be construed as inquiries into the location and availability of an attorney, rather than the assertion of Paulino’s subjective desire for a lawyer at that time.”). While it was *possible* Jett intended his inquiry to communicate a desire for the assistance of counsel, it did *not*, in fact, clearly communicate such a desire as it reasonably could have been interpreted as a genuine request for information or as a defiant expression of Jett’s displeasure with his circumstances at the time.² See Cooper v. State, 961 S.W.2d 222, 226 (Tex. App. 1997) (concluding Cooper’s act of repeatedly asking where his lawyer was did not constitute an unequivocal invocation of his right to counsel that required interrogation to cease and, instead, “was a facetious expression of defiance”); cf. State v. Aleksey, 343 S.C. 20, 31, 538 S.E.2d 248, 253-254 (2000) (“We conclude [Aleksey]’s statement, ‘That’s all I’ve got to say,’ was not an unequivocal invocation of his right to discontinue questioning. In context, the statement was ambiguous, indicating either a desire to discontinue questioning or simply the end of his story.” (footnote omitted)). Therefore, just as a majority of this Court recognized, Jett’s inquiry did not constitute a valid invocation of the right to counsel as it simply was not clear, unambiguous, and unequivocal, and the fact it *might* have been an attempt at an invocation did not require Investigator Jones to discontinue her

¹ Supporting a conclusion Jett’s question was not an unequivocal request for counsel, Jett himself appears to acknowledge its inherently ambiguous nature by maintaining “[a]t the least” it was “sufficient enough” to warrant a request for clarification on the part of the officer. (Pet. for Reh. p. 3).

² Importantly, the burden was on Jett to unequivocally invoke his right to counsel, and the officer had no duty to seek clarification of what Jett actually intended by posing his question. See Davis, 512 U.S. at 461-462 (“[W]e decline to adopt a rule requiring officers to ask clarifying questions. If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”).

conversation with Jett.³ See Davis, 512 U.S. at 461 (“[I]f we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.”); see also Matthews v. State, 106 Md. App. 725, 737-738, 666 A.2d 912, 917-918 (Md. Ct. Spec. App. 1995) (“Appellant complains that he did, in fact, request an attorney by asking two or three times, ‘Where’s my lawyer?’ The trial court ruled that this interrogative was not tantamount to a request for counsel. We agree. . . . Even if we were to concede that Matthews’s questions, ‘Where’s my lawyer?,’ might have indicated that he wanted the assistance of counsel, as we read the language of Davis, that is not enough to require the immediate cessation of interrogation. While we can speculate that it *might* have been such a request *in appellant’s mind*, the statement *to the officers* was not unambiguous and unequivocal. As the Davis Court held, ‘might,’ in terms of Miranda, is not enough.” (footnote omitted)). Accordingly, the trial judge did not abuse his discretion by denying Jett’s motion to suppress his statement, and a majority of this Court correctly affirmed the trial judge’s decision. See Wannamaker, 346 S.C. at 500, 552 S.E.2d at 287 (finding the trial judge did not abuse his discretion by admitting Wannamaker’s statement after concluding she did not unequivocally invoke her right to counsel before making it). Jett’s petition for rehearing should be denied.

³ Notably, the fact reasonable minds can disagree on whether Jett’s inquiry was an invocation of his right to counsel is, at a minimum, strong evidence the inquiry was *not* unequivocal and unambiguous such that interrogation should have immediately ceased in response to it. See Bradley v. Com., 327 S.W.3d 512, 516 (Ky. 2010) (“Stated another way, ‘[i]f reasonable minds could differ on whether a request for an attorney had been made, the language is perforce ambiguous or equivocal.’ ” (brackets in original and footnote omitted)).

Conclusion

Based on the foregoing coupled with the arguments raised in the Final Brief of Respondent and during oral argument before this Court, the State respectfully submits Jett's petition for rehearing should be denied.

Respectfully submitted,

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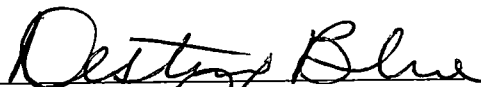
Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify I have served the within Respondent's Return to Petition for Rehearing on Appellant by sending two copies of the same to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 30th day of May, 2018.


DESTINY BLUE
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ALAN WILSON
ATTORNEY GENERAL

May 30, 2018

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SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: State v. Antwan Jamal Jett – Appellate Case No. 2015-001042

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Return to Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/
Enclosures

cc: LaNelle Cantey DuRant, Esquire
Victim Services