

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Florence County

Michael G. Nettles, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

SCOTT LEE,

APPELLANT

APPELLATE CASE NO. 2012-210830

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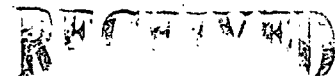
ANDERS BRIEF OF APPELLANT

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KATHRINE H. HUDGINS  
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MAR 15 2013

SC Court of Appeals

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in refusing to suppress a statement taken after Appellant had been arrested and invoked his right to counsel?

## STATEMENT OF THE CASE

In July of 2011, the Florence County Grand Jury indicted Lee for murder and arson third degree, indictment #2011-GS-21-1189. On March 12, 2012, Lee proceeded to jury trial before the Honorable Michael G. Nettles. Attorney Henry M. Anderson represented Lee at trial. Attorneys Matthew Ozment and Robert Wells prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Nettles sentenced Lee to 40 years for murder and 10 years concurrent for arson. A timely notice of intent to appeal was filed on March 23, 2012. This appeal follows.

## ARGUMENT

The trial judge erred in refusing to suppress a statement taken after Appellant had been arrested and invoked his right to counsel.

Prior to trial the Court held a hearing pursuant to Jackson v. Denno<sup>1</sup> to determine the admissibility of two statements made by Appellant. (R. pp. 56-87). Counsel for Appellant objected to the admission of the second statement taken on February 9, 2011, based on the fact that Appellant was under the influence of some substance or narcotic and asked about an attorney three times. (R. p. 82, lines 10-22). The judge, relying on State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001), found that Appellant did not make an unequivocal request for an attorney and allowed admission of the statement. (R. p. 83, line 19 – p. 84, p. 85, 86, 87, lines 1-3). The statement was played for the jury. (R. p. 464, line 15 – p. 465, lines 1-5). The judge erred in admitting the statement.

In State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001), the South Carolina Supreme Court wrote:

The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. Const. amend V; Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). If a suspect invokes her right to counsel, police interrogation must cease unless the suspect herself initiates further communication with police. *Id.* However, police officers are not required to cease questioning a suspect unless her request for counsel is unambiguous. Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362, (1994) (“Maybe I should talk to a lawyer,” was not a request for counsel); but see State v. Kennedy, 333 S.C. 426, 510 S.E.2d 714 (1998) (“I think I need a lawyer” was a request for counsel). The Supreme Court has noted that “if a suspect is ‘indecisive in his request for counsel,’ the officers need not always cease questioning.” Davis, 512 U.S. at 460, 114 S.Ct. 2350 (quoting Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 485 (1966)).

The trial judge in the present case stated, “He [Appellant] specifically said when he -- He says, ‘I thought about an attorney, but my tax – I didn’t have the money, but my

taxes were coming in.’ But it was explained to him early on that he had a right to an attorney and if he couldn’t afford one, one would be appointed for him. The case, Wannamaker, specifically says that although these issues are brought up, it’s not incumbent on the police to go further and explain it in great detail.” (R. p. 85, lines 9-16). The judge later stated, “He also said that one of the reasons why he was wanting to talk with a lawyer was that he was concerned that they would twist his words. He specifically wanted to know whether or not it was recorded and they indicated that his words would indeed be recorded.” (R. p. 85, line 23 – p. 86, lines 1-2).

The present case is distinguished from Wannamaker where the defendant requested to speak with either a lawyer or her mother and was in fact allowed to speak with her mother. In the present case Appellant said he thought about a lawyer but could not afford one and then stated that he wanted to talk with a lawyer so that his words would not be twisted. At this point, the custodial questioning should have stopped.

In State v. Kennedy, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998), the South Carolina Supreme Court wrote:

The United States Supreme Court has held the trial court is to consider whether the accused's statement “can reasonably be construed to be an expression of a desire for the assistance of an attorney.” McNeil v. Wisconsin, 501 U.S. 171, 178, 111 S.Ct. 2204, 2209, 115 L.Ed.2d 158 (1991). 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, and all questioning must cease until the person can consult counsel or the accused voluntarily reinitiates conversation. Davis, 512 U.S. at 459, 114 S.Ct. at 2355.

Lee’s statements can reasonably be construed to be an expression of a desire for the assistance of an attorney. Under the circumstances, the police officers should have

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<sup>1</sup> 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed 2d 908 (1964).

understood the statements to be a request for an attorney. As the questioning never stopped, it can not be said that Appellant reinitiated the conversation.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of March, 2013.

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Scott Lee states:

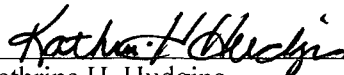
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Michael G. Nettles, which was held on March 14, 2012, and; in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Scott Lee.

Respectfully submitted,

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of March, 2013.

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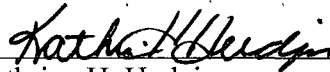
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheets;
- (2) Entire trial transcript;
- (3) State's Exhibit #3 – DVD of February 9, 2011, statement – to be transported.

I certify that this designation contains no matter which is irrelevant to this appeal.

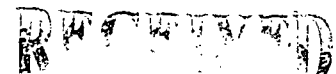
March 13th, 2013



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Attorney for Appellant



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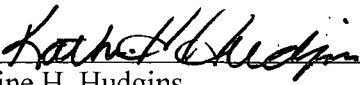
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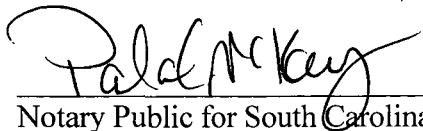
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at P.O. Box 50666, Columbia, SC; and on Scott Lee, #300606 at Lieber Correctional Institution, PO Box 205 Ridgeville, SC 29472 this 13th day of March, 2013.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 13th day of March, 2013.

  
Notary Public for South Carolina (L.S.)

My Commission Expires: July 24, 2022

RECEIVED

MAR 15 2013

SC COURT OF APPEALS