IN THE SUPREME COURT OF FLORIDA

BRYAN JENNINGS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO: 62,600

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLEE

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TOPICAL INDEX

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

Smith v. Illinois, 469 U.S.___, 105 S.Ct. 490, ___ L.Ed.2d___(1984) prohibits the use of subsequent statements as a basis for determining an equivocal assertion of right to counsel. Since a basis for an equivocal assertion can be made here without regard to subsequent statements, Smith v. Illinois leaves this court's judgment unaffected. The circumstances of the interview, especially appellant's initial indication of proceeding without an attorney, ("Yeah, but let me wake up a little bit first, ...") rendered the request for an attorney equivocal.

QUESTION PRESENTED

WHETHER THE DECISION IN SMITH V. ILLINOIS, ___ U. S. ___, 105 S.Ct. 490, ___ L.Ed.2d. (1984) REQUIRES A DIFFERENT RESOLUTION OF THE ISSUE SURROUNDING THE ADMISSIBILITY OF APPELLANT'S CONFESSION.[1]

In Smith v. Illinois, supra, the Supreme Court considered only the narrow question of whether an accused's post-request responses to further interrogation may be used to cast retrospective doubt on the clarity of an initial request for counsel. The only holding was that they could not. Specifically not decided was the question of what circumstances in which an accused's request for counsel may be characterized as either ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself. 105 S.Ct. at 495.

The question to be now answered is whether the decision in Smith in any way affects this court's two previous resolutions of the issue surrounding the admissibility of appellant's confession.

In Jennings v. State, 413 So.2d 24 (Fla. 1982), this court found appellant's confession to be properly admitted, holding that a suspect can waive the presence of counsel even

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[1] Any consideration in light of Shea v. Louisana, 470 U.S. ___ (1985) regarding the retroactivity of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), is totally unnecessary since this court considered the principles thereof in both decisions of this case.

though he has indicated a prior desire to have counsel, provided that the waiver is not coerced, is freely given and is a continuation of the original dialogue. 413 So.2d at 27. Nothing in the record or subsequent case law was deemed necessary to change that ruling in Jennings v. State, 453 So.2d 1109 (Fla. 1984).

Given the treatment of the issue by this court and the basis for remand by the Supreme Court, it is suggested that the task at hand is to determine if the judgment of this court was bottomed on the principle that the appellant's assertion of right was rendered unclear or equivocal by virtue of subsequent statements. This suggestion is offered on the theory that if the Supreme Court was of the opinion that this court's judgment was made in contravention of Edwards v. Arizona, supra, then it did not need Smith v. Illinois, as authority to vacate that judgment; Edwards would have provided the authority to reverse outright without the need for remand and further consideration. We view the remand for further consideration in light of Smith v. Illinois, as the Supreme Court's way of directing this court to elucidate the basis of its holding so as to include the question of whether subsequent statements were relied upon to determine equivocation in appellant's request.[2] If such is the case, then

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[2]We acknowledge that the basis of the court's holding in 413 Jennings is directed to a notion of waiver, but if that determination was incorrect, then, again, Edwards would have been sufficient to reverse. With Smith as the predicate for remand, the issue of concern must focus on the invocation of the right; waiver was distinguished as a separate consideration, and was not addressed by the Court. 105 S.Ct at 494.

Smith requires a contrary judgment of this court. If such is not the case, then the judgment of this court remains unaffected and should be reinstated.

Not at issue is whether it was proper for the police to have awakened appellant at 1:00 A.M. for purposes of questioning. Likewise, whether it was proper for the police to do everything for the purpose of getting appellant to talk (of course, they were) is not a relevant consideration. The only question to be answered is whether the request for counsel or the circumstances leading up to the request rendered it ambiguous.

The record shows the appellant was awakened at approximately 1:00 A.M. and was asked his name by the police. He was told he was being interviewed regarding a murder and that he was a suspect (R 1184). As appellant was advised of his rights and asked if he understood each right, he replied either "Uh-huh" or "Yeah" (R 1184). When asked if he was willing to proceed without an attorney being present, he responded with the word, "Ah,..." (R 1185). When asked again if he wanted to go ahead and talk with police, appellant replied, "Yeah, but let me wake up a little bit first, this is not good when I just woke up (long pause)." (R 1185) It was after this long pause that he stated,"No, I don't think so, I definitely have to have a lawyer for this." The next question asked of appellant was not one relating to the crime being investigated nor was it a repeated question concerning appellant's rights or his desire to proceed without an attorney. The question, "Are you fully awake and understand everything that I am saying to you?" is

unrelated to anything but a determination of whether appellant was capable of understanding anything the officer was telling him. As the officer told defense counsel at the hearing on the motion to suppress, "...I was there and you weren't." (R 899)

It was the officer and only the officer who observed appellant's attitude, demeanor, and overall sense of awareness after being recently awakened. It was the officer who assessed appellant's responses of "Uh huh" and "Yeah" to conclude that appellant, despite his statement that he definitely needed a lawyer, nevertheless was, as a result of the circumstances, not fully comprehensive of what was going on. It was only because of this conclusion did the officer seek only to inquire further if appellant knew and understood his rights and determine what appellant wanted to do. Appellant was repeatedly told it was his decision to make, but that he had to do so intelligently. (R 1185) The officer's conclusion was obviously correct since appellant asked for the five minutes so that he could go to the bathroom, "...get some water and clear my head a little bit..." and that then he would talk. (R 1185)

It is therefore submitted that the record contains sufficient evidence and allowable inferences from that evidence that the request for an attorney, though verbally precise, was substantively equivocal based on the facts and circumstances of the interrogation, known and observed by the interrogating officer. A finding that the invocation of the right was equivocal can be sustained without any regard to subsequent

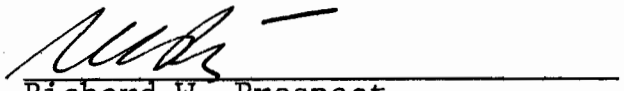
statements made by the appellant, Smith v. Illinois requires no more, and accordingly, reinstatement of this court's judgment on the issue can and will be had in complete harmony with the decision of the Supreme Court.

CONCLUSION

Based on the above and foregoing, appellee respectfully suggests that the court reinstate its original judgment holding that appellant's confession was properly admitted.

Respectfully submitted,

Jim Smith
ATTORNEY GENERAL



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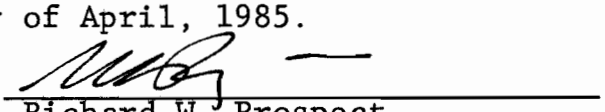
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Supplemental Brief of Appellee has been furnished by mail, to Christopher S. Quarles, Assistant Public Defender for Appellant, at 1012 South Ridgewood Avenue, Daytona Beach, Florida, 32014, this 12th day of April, 1985.



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