

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-1195

LeSHANNON JEROME SHELLY,

Petitioner,

vs.

L. T. Case No. 4D14-1910

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

On Appeal from the Fourth District Court of Appeal

CATHY A. WILLIAMS
Fla. Bar No. 0088862
Law Office of Cathy A. Williams PLLC
P.O. Box 157
Cornelius, North Carolina 28031
T. (704) 495-1920
E. cat.will2663@gmail.com
Pro Bono Counsel for Petitioner

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SUMMARY OF THE ARGUMENT

Contrary to the State's assertions in its Answer Brief, the police violated Shelly's *Miranda* rights by failing to scrupulously honor his request to remain silent and that questioning cease until his counsel could be present. Because Shelly's incriminating statements were the product of the detective's refusal to scrupulously honor his earlier request for counsel, the trial court erred in concluding that Shelly "reinitiated" contact with the police and waived his earlier invocation. For the same reason, Shelly's subsequent waiver of his *Miranda* rights was not made knowingly or voluntarily.

Likewise, Shelly's incriminating statements should have been suppressed because his statements resulted from improper and undue influence at the hands of the police. The detectives told Shelly that showing remorse could mean the difference between a needle in the arm and a life sentence. The comments were not meant to inform Shelly of a possible sentence. Rather, the comments were meant to coerce Shelly into confessing to murder. For the same reasons stated above, his subsequent waiver was not "free and voluntary."

Accordingly, the trial court erred in admitting his taped statements to the police at trial. The error was not harmless because the taped interrogation was shown to the jury and the prosecution relied on it in its case-in-chief as well as

in its closing argument. Without the confession, the jury may have reached a different verdict. Accordingly, the trial court erred in admitting Shelly's taped statement to the police. This Court should remand for a new trial.

ARGUMENT

I. THE COURT BELOW ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF SHELLY'S MOTION TO SUPPRESS HIS TAPED STATEMENTS TO THE POLICE BECAUSE THE POLICE VIOLATED SHELLY'S RIGHT AGAINST SELF-INCRIMINATION AND RIGHT TO COUNSEL AND COERCED HIS CONFESSION.

A. The Police Did Not Scrupulously Honor Shelly's Invocation of His Right to Counsel and Right Against Self-Incrimination.

The record reflects, and the State does not dispute, that Shelly invoked his right to counsel and right to remain silent several times during police interrogation. The State argues, however, the trial court correctly found that Shelly reinitiated conversation with the police and relies on a two-step analysis established in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). First, the trial court must find the suspect initiated the subsequent conversation with law enforcement. Second, the trial court must find that based on a totality of circumstances the suspect knowingly and voluntarily waived his right to counsel. *Id.* at 1045-46. Although an appellate court must defer to the factual findings surrounding the interrogation, it is not required to defer to the trial court's conclusions regarding voluntariness. *Calder v. State*, 133 So. 3d 1025, 1033 (Fla. 4th DCA 2014). Contrary to the

State's assertion, neither step was satisfied in this case.

The record reveals Shelly first mentioned an attorney while seated alone in the interrogation room. He stated: "You all better watch The First 48. I ain't done, I ain't do it. *When the man say he ain't do it and let him talk to his lawyer*, you all got to let him go, man." (T. 532-33) This statement – "let him talk to his lawyer" – was sufficiently clear to reasonably conclude he was invoking his right to counsel. *See Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (If a suspect "indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.") (emphasis added). Thus, Shelly's statement was a sufficient invocation of his rights requiring the cessation of further questioning by the police. *Moss v. State*, 60 So. 3d 540, 543 (Fla. 5th DCA 2011) ("[A]t a minimum, some statement that can be reasonably construed to be an expression of a desire for the assistance of an attorney' is a sufficient invocation of rights to require the cessation of further interrogation.") (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)). The interrogation should have stopped after Shelly stated "let him talk to his lawyer."

Instead the interrogation continued. Detective Heinig re-entered the room immediately after Shelly mentioned talking to a lawyer and advised Shelly that his mother and grandmother just called. (T. 533) Detective Heinig did not mention Shelly's comment about an attorney or make any attempt to terminate the

interrogation. Rather, he immediately began playing a recording of the detective's conversation with Shelly's grandmother obtained that morning. Thus, the detective's actions at this point violated Shelly's right to counsel by refusing to honor his request for an attorney.

After listening to the recording, Shelly complained that the police had spoken to his grandmother instead of his mother. (T. 537) He claimed his grandmother was not present when his mother allegedly picked him up at the bus station early that morning. Shortly thereafter, Shelly made a second request for an attorney directly to detectives in the interrogation room. Shelly clearly and unequivocally stated, "Man, let me speak to my lawyer now, dog. Let me talk to my lawyer now man . . ." (T. 537) According to the record, interrogation stopped. The detectives left the interrogation room to discuss transporting Shelly.

The trial court and the court below found this statement was a clear invocation of Shelly's right to counsel. But the State contends, and the trial court found, Shelly reinitiated contact with the police when Detective Consalo re-entered the interrogation room because he asked the detective to call his mom. (T. 541)

The trial court's conclusion is incorrect for two reasons. First, as discussed above, Shelly had already invoked his right to counsel, the first time being while seated alone in the interrogation room. That request was wholly ignored by the police because they continued to talk to Shelly and played a tape recording of their

conversation with his grandmother. Any statements he made after that point violated *Miranda* and should have been suppressed because the police did not scrupulously honor his request for an attorney. *See Cuervo v. State*, 967 So. 2d 155, 161 (Fla. 2007).

Second, although Shelly asked the police to call his mom after invoking his right to counsel, he then re-invoked his right to counsel *again* several more times. Immediately after asking the police to call his mom, the following exchange occurred:

Detective: Listen to me. Okay. You already, you asked for an attorney. Okay. You didn't want to talk anymore.

Shelly: *Yeah.*

Detective: Do you, so I'm not going to ask you any questions.

Shelly: All right.

Detective: Okay? If you want me to answer that question, then you need to tell me that you want to reinitiate conversation with us. All right. Because I was the one that talked to your mom.

Shelly: I know my mom picked me up from Fort Pierce, sir.

Detective: Okay.

Shelly: We met there, dog. Sir. Not dog but sir. I know we did. I know we did. I know we did.

Detective: All right.

Shelly: I know we did. We was there, man. She was there, sitting in a green Honda, right in the, the Greyhound station in Fort Pierce, their station, the Greyhound –

Detective: Listen.

Shelly: -- (inaudible).

Detective: You know your rights. You know, you might not want to say, if you want to talk to us a little bit longer, then you need to say I want to talk to you a little bit –

Shelly: *No.*

DETECTIVE: -- longer and then I'll sit there and talk to you. Okay?

SHELLY: You all fixing to book me for nothing.

DETECTIVE: All right.

SHELLY: What you all booking me like for? *Okay. No more talking.*

DETECTIVE: Well, that's up to you.

SHELLY: (Inaudible)

DETECTIVE: You understand

SHELLY: (Inaudible)

DETECTIVE: You said that you wanted an attorney.

SHELLY: *No more talking.*

DETECTIVE: -- so no more talking.

SHELLY: *Yeah.*

(T. 541-543) (emphasis added)

All questioning should have ceased when Shelly re-affirmed his request to remain silent until counsel could be present. Instead, the detective coaxed Shelly to talk by dangling as a carrot the detective's conversation with Shelly's mother.

The State contends that Shelly's change of mind as to whether he wanted to talk or did not want to talk constituted re-initiation of the interrogation. (Answer Br. at 37) The State is incorrect. Under *Miranda*, a suspect may invoke his rights in any manner and *at any stage* of the process. 384 U.S. at 445. "The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." *Id.*

The above exchange shows Shelly invoked his right to counsel several times. Instead of honoring Shelly's request, the detective, in the very next breath, continued talking to Shelly to coax him into changing his mind:

DETECTIVE: If you want to talk, I will be more than happy and I'm gonna shoot straight with you. I've known your family for a long time. I've played softball with your, your uncle Adam many, many times. Great

SHELLY: Sir, and –

DETECTIVE: -- softball player.

SHELLY: -- guess what? That's who picked me up man.

DETECTIVE: I'm--

SHELLY: All right.

DETECTIVE: So you want --

SHELLY: I'll talk, I'll talk to you.

DETECTIVE: You want to – you are reinitiating contact with us;

correct?

SHELLY: I'll talk to you.

(T. 543)

But when the detective attempted to clarify that Shelly was agreeing to talk at his *own* request, Shelly immediately stated that he did not want to talk.

DETECTIVE: At your request?

SHELLY: Uh-huh.

DETECTIVE: Okay.

SHELLY: I don't want to talk man.

DETECTIVE: Yes, or no?

SHELLY: If you're going to lock me up, lock me up.

(T. 543-545)

Following this statement “[i]f you gonna lock me up, lock me up,” the detective continued to press Shelly and brought up his conversation with his mother.

DETECTIVE: I will tell you what your momma said and I'll tell you what your grandma said. Okay? If you want to talk to me but –

SHELLY: But why -- I got a question. I got one more question. Why is you all asking my grandma when my grandma don't –

DETECTIVE: I didn't ask your grandma.

SHELLY: He did. He had it on a tape recorder.

DETECTIVE: You did, you going to let me tell you –

SHELLY: Okay.

DETECTIVE: -- that's what I was going to say. But I'm telling you right now, you need to say, I'm, do you want me to sit here and talk to you for a few minutes? You asked for an attorney. All right? I'm not going to ask you any questions or talk any further about it unless you want to. And you have to say I want, I want to reinitiate contact with you. Is that what you want to do?

SHELLY: Well, I ain't getting nowhere with it. You all –

DETECTIVE: Well, you didn't get anywhere with those guys. All right?

SHELLY: But I'm trying, all I need, man, is you to call my mom.

DETECTIVE: I'm telling you I talked to your mom, Shannon.

SHELLY: But –

DETECTIVE: That's what I'm telling you, brother. That's –

SHELLY: Well, he –

DETECTIVE: You tell me. If you want, if you want me to sit down for a few minutes and talk, I'll just talk. I won't even ask you questions.

SHELLY: I'll talk. Come on, man.

DETECTIVE: You want to –

SHELLY: I reinitiate. Come on, let's do it.

DETECTIVE: You're reinitiating the conversation.

SHELLY: (Inaudible) talk to you, man.

(T. 544-45)

As the above shows, the *detective* kept the conversation going by mentioning Shelly's uncle and mother. The detective's comments about his familiarity with Shelly's uncle and promise to tell him what his mother said if he agreed to reinitiate conversation constituted interrogation because the detective

should have known they were “reasonably likely to elicit an incriminating response.” *See Calder*, 133 So. 3d at 1030. The tactic worked. Shelly agreed to continue the interrogation and ultimately confessed. The above exchange violated Shelly’s *Miranda* rights. *See id.*; *Black v. State*, 59 So. 3d 340, 346 (Fla. 4th DCA 2011) (*Miranda* violated by continuing to ask defendant if he wanted to talk about the crimes after defendant had invoked his right to counsel); *Moss*, 60 So. 3d at 544-45; *Gilbert v. State*, 104 So. 3d 1123, 1125 (Fla. 4th DCA 2012) (*Miranda* violated by police telling defendant they were trying to protect him and encourage him to tell his side of the story).

Contrary to the trial court’s conclusion, Shelly did not reinitiate the interrogation because the interrogation never stopped. *Moss*, 60 So. 3d at 544; *Calder*, 133 So. 3d at 1030. Thus, the evidence in this case does not establish the first step under *Bradshaw*. Accordingly, Shelly’s statements should have been suppressed because the police did not scrupulously honor his request for counsel and terminate the interrogation until counsel could be present. And because Shelly agreed to reinitiate the interrogation only as a direct result of the detective’s coercive conduct, his subsequent waiver of his *Miranda* rights was not knowing, intelligent, or voluntary. *See Calder*, 133 So. 3d at 1033 (appellate court is not required to defer to the trial court’s conclusion regarding voluntariness).

Under *Bradshaw*’s second step, the totality of the circumstances in this case

show that Shelly’s “re-initiation” of the interrogation and subsequent waiver of his *Miranda* rights after they were re-read to him, were not voluntary, but instead, the product of improper police conduct.¹ *See Calder*, 133 So. 3d at 1033. His taped statements to the police should not have been admitted in evidence at trial.

B. Shelly’s Statements and Confession Were the Product of Improper Influence by the Police.

Contrary to the State’s argument on appeal, Shelly’s statements to police were the product of improper influences by the police, who suggested that showing remorse was the “difference” between a “needle in the arm” and a life sentence. The detectives raised the spectre of lethal injection to coerce Shelly to confess to the shootings.²

Throughout the interrogation, Shelly continued to maintain his innocence, claiming he was not present when the shootings occurred. In an apparent effort to convince Shelly to confess, the detective told Shelly that expressing “remorse” was

¹ That Shelly was a convicted felon at time of his interrogation does not alter the analysis. There is no evidence in the record describing his previous encounter with police.

² The State’s contention that Petitioner raises a new argument on appeal is meritless. The argument raised on appeal to this Court is the same as in the motion to suppress and on appeal to the Fourth Circuit, namely that the detectives exercised improper influence over Shelly by raising the possibility of lethal injection unless he showed remorse. Any references to the impact a death sentence would have on Shelly’s mother related to the consequences of a punishment of death and acted as additional coercion on Shelly relating to lethal injection.

the “difference between lethal injection and a life sentence.” (T. 547) The detective emphasized lethal injection a number of times by using the word “difference” – as in there is a “difference” between getting a needle in your arm and being sentenced to life in prison.

Detective Consalo: Okay? There’s a **difference** between getting a needle put in your arm for what happened tonight and having a life sentence. Okay? Or maybe even a possibility of getting out. And that’s remorse. Okay? That’s showing that you, you, you have feelings for another human being. I’ve dated girls and I know how mad they can make you. Okay? And I know I’ve snapped, not the extent that what happened tonight. But I’m telling you man to man that your momma called, Annie called just a few minutes ago. She called the front office. My secretary told me that, Annie Shelly is on the phone and she would like to speak to you. I got on that phone, Annie was on the phone. I explained to her what was going on and she broke down. I mean, she broke down like my mom broke down when I lost my sister to cancer years ago.

A. Yes, sir.

DETECTIVE: I, I know what it’s like to lose a family member. A mom knows what it’s like to lose a son. Okay.

A. Yes, sir.

(T. 547-548) (emphasis added)

Later, the detective mentioned the “difference” again in suggesting that Shelly’s sentence may depend on whether he showed remorse during the interrogation:

All right. I just, I’m telling you, there’s a **difference**. When, when this is all said and done and when you’re standing in front of the judge, did he show any remorse. And you know what we’re going to have to say? You know that all this stuff, all this stuff is, you know,

videotaped.

(T. 551-52)

Contrary to the State's assertion, the references to lethal injection were improper in this case because the sole purpose was to influence Shelly into giving an incriminating statement. *See Brewer v. State*, 386 So. 2d 232, 235–36 (Fla. 1980) (holding that although informing a defendant about possible penalties, by itself, is not deemed an improper influence, it is improper if the purpose in doing so is to influence the defendant into giving an incriminating statement); *Martinez v. State*, 545 So. 2d 466, 467 (Fla. 4th DCA 1989). Indeed, the only arguable reason for mentioning lethal injection was to coerce Shelly to give an incriminating statement to avoid being punished to death. Up until this point, Shelly had maintained his innocence and claimed he was out of town when the shootings occurred. The police investigation, however, targeted Shelly as the prime suspect of the homicide. The detective's comments, therefore, were intended to coerce a confession from Shelly. The fear of lethal injection weighed on Shelly's mind because after making incriminating statements, he stated, "I know I'm done," and "Lethal injection?" (T. 571) followed by "I just want you to remember me, man."

(T. 572)

The facts in *Walker v. State*, 707 So. 2d 300 (Fla. 1998), and *Nelson v. State*, 688 So. 2d 971 (Fla. 4th DCA 1997), are distinguishable. In *Walker*, the defendant

merely was reminded of the possibility of the death penalty. In *Nelson*, the detective mentioned the death penalty in the first thirty minutes of the interrogation and defendant continued to deny involvement in the shooting for another two hours. Unlike the facts in those cases, the detective here repeatedly referred to the death penalty and the “difference” showing remorse would make. In doing so, the detectives exercised improper influence over Shelly to coerce him to confess. The trial court erred in admitting Shelly’s taped statements to the police.

C. The Error in Admitting Shelly’s Confession was Not Harmless.

In this case, the error contributed to the verdict because the prosecution relied heavily on the recorded statements. The entire recording was played to the jury during the State’s case-in-chief. On cross-examination of Shelly, the prosecutor walked Shelly through his interrogation statements pointing out lies he told to the police before confessing to the shootings. The prosecutor also pointed out that Shelly’s confession was contrary to his trial testimony. Shelly responded that he had lied to the police during his confession about carrying the gun because he did not want to implicate Jackson in the shooting. In its closing argument, the State repeatedly mentioned Shelly’s confession during the interrogation and played several clips of the taped confession. (T. 776, 781, 783-84, 789-91, 793-94, 810, 835) The State argued Shelly’s confession was closer to the truth than his trial testimony. (T. 788, 789, 796, 798, 799, 808) Without Shelly’s taped confession,

the jury would only have had Jackson's testimony and Shelly's trial testimony to weigh in rendering a verdict and may not have rendered a verdict of first degree murder or first degree attempted murder. No other witness at trial saw Shelly shoot the victims. It cannot be said, therefore, that the confession did not contribute to the verdict. *See State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986).

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse Shelly's convictions and sentences and remand this cause for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief was electronically filed with the Court and a copy of it was served to Celia Terenzio, Assistant Attorney General, by email at CrimAppWPB@myfloridalegal.com this 1st day of June, 2017.

/s/ Cathy A. Williams

Cathy A. Williams

Pro Bono Counsel for Petitioner

Fla. State Bar No. 0088862

Law Office of Cathy A. Williams PLLC

P.O. Box 157

Cornelius, North Carolina 28031

T. (704) 495-1920

E. cat.will2663@gmail.com

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s/ Cathy A. Williams

Cathy A. Williams