STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP0342-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNY JEROME JONES,

Defendant-Appellant

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit
the Honorable David L. Borowski, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did Johnny Jerome Jones unequivocally invoke his right to counsel when he said "so y'all can get a public pretender right now" during a custodial interrogation?

The circuit court denied the motion to suppress Mr. Jones's statements finding that he did not unequivocally invoke his right to counsel.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Whether Mr. Jones invoked his right to counsel is fact-specific. Therefore, oral argument and publication is not warranted.

STATEMENT OF THE CASE AND FACTS

Johnny Jerome Jones was charged with one count of second-degree reckless homicide, contrary to Wis. Stat. § 940.06(1), one count of duty upon striking an occupied or attended vehicle resulting in death, contrary to Wis. Stat. §§ 346.67(1) & 346.74(5)(d), and one count of duty upon striking occupied or attended vehicle resulting in great bodily harm, contrary to Wis. Stat. §§ 346.67(1) & 346.74(5)(c). (5:1-2).

The complaint alleged that on December 31, 2009, Milwaukee police officers in a marked squad car observed a Mercury Mountaineer that did not have a front license plate. (5:2). The officers turned behind the Mountaineer, which was owned by Mr. Jones's wife, and activated the squad's emergency lights. (5:2-4). The Mountaineer accelerated. The

squad then activated its siren and spotlight. The Mountaineer did not stop. Due to road conditions, the officers decided not to pursue the Mountaineer, turned off the lights and siren, and slowed the squad. (5:2). The Mountaineer continued to accelerate and eventually proceeded through a red stop light at an intersection, striking another car at approximately 2:30 a.m. This resulted in injury to the driver and the death of the passenger in the other car. (5:2-3, 6). One of the officers observed Maria Barber exit the front passenger door of the Mountaineer, and a person, later identified as Sean Moore, exit the Mountaineer and flee. (5:3). Moore, who was apprehended by the police after a chase, stated that Mr. Jones was the driver. (5:3, 5).

A surveillance video from a gas station, which was approximately 23 blocks away from the accident, reflected that at 2:26:16 a.m. Mr. Jones got into the driver's seat of the Mountaineer. The Mountaineer drove westbound and out of the range of the camera at 2:27:06 a.m. (5:4).

The police also interviewed several people who were not witnesses to the accident, but had allegedly seen Mr. Jones afterwards. Mr. Jones's grandmother, Almeta Brown, stated that she woke up and saw Mr. Jones on her living room couch with a cut on his forehead and blood on his face and mouth. Mr. Jones did not state if he was a passenger or the driver in the accident. (5:4-5). Sean Moore's girlfriend, Tierra Cole, stated that she picked Mr. Jones up from his grandmother's house and he was bleeding from his head, having trouble walking, was intoxicated, and told her that he was driving. (5:5). Portia Blackmon stated that Mr. Jones came to her residence and she saw a cut on his forehead and blood on his face and he told her that he had been driving. (5:5).

After the complaint was filed, Mr. Jones turned himself in to the police and stated that he was the driver of the Mountaineer. (74:31-32; 111:Exh. 1 & 2).

Mr. Jones waived his right to a preliminary hearing and was bound over for trial. (7: 66).

Suppression Proceedings

Prior to trial, the defense filed a motion to suppress asserting that Mr. Jones's statements to the police were not freely and voluntarily given because he was intoxicated and because police told Mr. Jones that "the most 'he could get' was 15 years." (13).[1]

On August 24, 2011, a hearing was held on the motion to suppress. Detective James Hensley and Detective Charles Mueller testified for the State. (74:5-29). The State moved two recorded interviews of Mr. Jones, a ***Miranda*** warning card, and an arrest-detention report into evidence. (74:4-5, 18-19; 111). Mr. Jones also testified. (74:31-62).

During the hearing, trial counsel asserted that Mr. Jones's statements should also be suppressed because after he was read his ***Miranda*** rights, he said "Y'all can get me a public pretender now." (*See, e.g.,* 74:40-43). The statements on the recording are as follows:

> DET.: You see the thing is Johnny, no one can, no one can speak for you, no one else, no witnesses, no one that was there.
>
> MR. JONES: I know
>
> DET.: We can't, nothing like that

[1] Mr. Jones is not pursuing this issue on appeal.

> MR. JONES: I just feel so damn horrible
>
> DET.: Well and that's, and that's why it's important to get your side out
>
> MR. JONES: *So y'all can get a public pretender right now*[2]
>
> DET.: You said it right, pretender…they're called public defenders
>
> MR. JONES: Oh yeah
>
> DET.: Um, we, obviously due to the time right now, we can't, um
>
> MR. JONES: How much… time is that anyway, you face off reckless homicide
>
> DET.: Well it's, I believe it's between the max is 15 years, I believe… [Interrogation continued].

(111:Exh. 1 at 28:50-29:56; App. 101) (emphasis added).

At the evidentiary hearing, Detective James Hensley, testified that he knew a "public pretender" was an appointed attorney and that Mr. Jones was referring to a lawyer. (74:15-16; App. 104-105).

Mr. Jones testified that he wanted a lawyer. Mr. Jones testified in pertinent part as follows:

> TRIAL COUNSEL: Alright. Do you recall telling the detectives that ya'll can get me a public pretender now?

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[2] Trial counsel's and the State's recitation of this line varied slightly. According to trial counsel's circuit court brief, Mr. Jones said "Y'all can get me a public pretender now." (26:1-2). According to the State's brief, Mr. Jones said "So you all gonna get a public pretender right now". (25:2).

> MR. JONES: Yes. Because we made a joke. They made a joke right after that about it.
>
> TRIAL COUNSEL: Well, what do you mean when you told them you could get me a public pretender right now?
>
> MR. JONES: For them – for them to get me a lawyer right there because prior to this I've been trying to get a lawyer.
>
> TRIAL COUNSEL: So did you get a lawyer at that point?
>
> MR. JONES: No.
>
> TRIAL COUNSEL: Why did you continue with the interview then?
>
> MR. JONES: Because – because – because – I'm thinking like – like – like – like might as well, might as well go ahead and take the wrap for Sean. I was still going to take the wrap for Sean, though.

(74:37; App. 107; *see also* 74: 39-44, 47, 61-62; App. 108-116).

The circuit court denied the motion to suppress on the basis that the statements were not freely and voluntarily given (74:70-72), but ordered briefing on the "public pretender" statement. (74:73).

On September 2, 2011, the circuit court denied the motion to suppress based on Mr. Jones's "public pretender" statement. The court concluded that Mr. Jones's request was equivocal. (76:12; App. 128). The court found that Mr. Jones said "so y'all going to get a public pretender right now, sort of with a question mark at the end of it, and he says it in a sort of a joking manner." The court stated that "[t]o my ears, he

and the two detectives were laughing at this comment. It was said in a tone that was, in my view, not particularly serious from Mr. Jones." (76:8, 12; App. 124, 128). The court noted that Mr. Jones had been read his rights, he understood them, he "wanted to answer the questions badly," and had experience in the criminal justice system. (76:9-10; App. 125-126). The court also found that "I do believe that the detective knew that public pretender meant public defender." (76:9; App. 125).

Plea and Sentencing

After several adjournments,[3] a jury trial began. However, after the completion of opening statements, a mistrial was granted on the grounds that Mr. Jones's attorney had previously represented a witness in the case. (79:28-30).

A second jury trial was set. Mr. Jones was appointed new counsel. After additional adjournments,[4] a jury trial began. (94; 95). Prior to jury selection, the State indicated on the record that it made a global offer of 13 years of initial confinement followed by extended supervision to be determined by the court, restitution, and that the victim's family would be free to make an independent recommendation. (95:7, 9). Trial counsel stated that he believed the recommendation for extended supervision was

[3] The reasons for adjournment included the withdrawal of Mr. Jones's original attorney due to the suspension of his law license (67), court calendar congestion (70:3, 6), the State's unavailability due to another speedy trial case (72:3-4), and the transfer of the case to a new court, resulting in the need for additional time to litigate a motion to suppress Mr. Jones's statements. (73:9, 15-16).

[4] The reasons for adjournment included to give trial counsel additional time to prepare (82:3-4), and because trial counsel slipped on ice and was injured (84:2).

10 years. (95:8). The court then inquired whether Mr. Jones understood the agreement. During the court's exchange with Mr. Jones, he asked "can we go down on the plea," and the court indicated that it was "not here to negotiate." Mr. Jones rejected the plea. (95:10).

The following morning, May 22, 2012, Mr. Jones pled guilty to one count of homicide by negligent operation of a motor vehicle, contrary to Wis. Stat. § 940.10(1), one count of hit-and-run resulting in death, contrary to Wis. Stat. §§ 346.67 & 346.74(5)(d), and one count of hit-and-run resulting in great bodily harm, contrary to Wis. Stat. §§ 346.67 & 346.74(5)(c). (35; 96:4, 7-9). The State agreed to recommend 13 years of initial confinement with the length of extended supervision left to the discretion of the court, consecutive to any other sentence. (96:4-6).

After an adjournment of the sentencing hearing because Mr. Jones's attorney stated he was not prepared to proceed (97), the Honorable David Borowski imposed prison sentences of 10 years (5 years confinement and 5 years supervision) on the homicide by negligent operation of a motor vehicle count, 7 years (5 years confinement and 2 years supervision) on the hit-and-run resulting in death count, and 8 years (5 years confinement and 3 years supervision) on the hit-and-run resulting in great bodily harm count, all to run consecutive to each other and a revocation case. (98:37-39).

Postconviction Proceedings

Mr. Jones filed a postconviction motion seeking plea withdrawal on the grounds that prior to his plea trial counsel incorrectly advised him that the sentence in this case could not run consecutive to his revocation and that he would be entitled to 810 days of sentence credit in this case. (51; 52). After an evidentiary hearing, the Honorable David Borowski

denied the postconviction motion finding that trial counsel was not deficient and no prejudice existed. (100; 62).[5]

Additional relevant facts are referenced below.

ARGUMENT

I. Mr. Jones Unequivocally Invoked His Right to Counsel and the Court Should Have Granted the Motion to Suppress His Statements.

A. Legal principals and standard of review.

In ***Miranda v. Arizona***, 384 U.S. 436, 467-74 (1966), the United States Supreme Court recognized the right to have counsel present during custodial interrogations to safeguard the right against compulsory self-incrimination under the Fifth and Fourteenth Amendments.

Subsequently, in ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981), the Supreme Court established a bright-line rule that when the accused requests counsel during a custodial interrogation, the police must immediately cease questioning. ***Edwards*** stated that "it is inconsistent with ***Miranda*** and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." ***Id.*** at 485.

Thirteen years later, in ***Davis v. United States***, 512 U.S. 452, 458-59 (1994), the Supreme Court held that a suspect must clearly and unambiguously request counsel in order for the ***Edwards*** rule to apply. The court stated that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the

[5] Mr. Jones is not pursuing this issue on appeal.

circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." ***Id.*** at 459.

Davis emphasized that whether a reference is equivocal is an objective inquiry. ***Id.*** "Although a suspect need not 'speak with the discrimination of an Oxford don,' he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." ***Id.*** (internal citation omitted). Any lower standard "'would transform the ***Miranda*** safeguards into wholly irrational obstacles to legitimate police investigative activity.'" ***Id.*** at 460 (citation omitted). Wisconsin adopted ***Davis***'s test in ***State v. Jenning***s, 2002 WI 44, ¶¶ 30, 36, 252 Wis. 2d 228, 647 N.W.2d 142.

When determining whether a defendant effectively invoked his right to counsel, an appellate court engages in a two-step analysis. The circuit court's findings of evidentiary or historical facts are upheld unless clearly erroneous. ***Jennings***, 252 Wis. 2d 288 at ¶ 20. The application of constitutional principals to the facts is reviewed independently. ***Id***.

B. The circuit court's factual findings are clearly erroneous.

The circuit court's factual findings that Mr. Jones stated "so y'all going to get a public pretender right now" in "a sort of a joking manner," and then was "laughing at this comment" with the officers, are clearly erroneous and not supported by the record. (76:8; App. 124). ***State v. Walli***, 2011 WI App 86, ¶¶ 14-17, 334 Wis. 2d 402, 799 N.W.2d

898 (a trial court's findings of fact based on a recording is reviewed using the clearly erroneous standard of review).[6]

An examination of the audio recording in this case does not support the circuit court's findings. Because the recording was admitted into evidence, this Court may make its own review of the recording like any other evidence in the record. *See* ***State v. Billings***, 110 Wis. 2d 661, 671, 329 N.W.2d 192 (1983); ***Walli***, 334 Wis. 2d 204, at ¶ 18.

The recording reflects that Mr. Jones actually stated "so y'all *can* get a public pretender right now". (111:Exh. 1 at 29:10; App. 126) (emphasis added). Mr. Jones did not state, as the circuit court found, "so y'all *going to* get a public pretender right now". (76:8; App. 124) (emphasis added). And, contrary to the circuit court's finding, Mr. Jones did not make the statement in a "joking manner" in the recording. Mr. Jones's tone was non-descriptive. (111:Exh. 1 at 29:10-29:56; App. 101). Further, it is not possible to tell from the recording who laughed—Mr. Jones or the officers. (111:Exh. 1 at 29:10-29:56; App. 101).

In addition, the suppression hearing testimony does not support the finding that the statement was made in a "joking manner." The State did not elicit any testimony from the officers or Mr. Jones describing his tone when he stated "so y'all can get a public pretender right now." Nor was there any testimony indicating who laughed. Rather, Mr. Jones testified that he "asked" for a public pretender "[b]ecause I thought

[6] Mr. Jones does not dispute the circuit court's finding that he made the comment "sort of with a question mark at the end of it." (76:8; App. 124).

that you could get one during the course of the interview." (74:37; App. 107).[7]

Thus, the circuit court's factual findings that Mr. Jones made his statement in a joking manner are clearly erroneous.

C. Mr. Jones unequivocally invoked his right to counsel.

Even if this Court finds that the circuit court's findings are not clearly erroneous, Mr. Jones unequivocally and unambiguously invoked his right to counsel, and questioning should have ceased.

Regardless of whether Mr. Jones said "so y'all can get a public pretender…" or "so y'all going to get a public pretender…," the statement was an unequivocal request for counsel. Under ***Davis***, an unequivocal, unambiguous request for counsel is one "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." ***Davis v. United States***, 512 U.S. 452, 459 (1994). Here, as Detective Hensley testified at the suppression hearing, he understood "public pretender" to mean an appointed attorney. (74:15; App. 104; 111; App. 101). If any ambiguity existed surrounding the meaning of a "public pretender," such ambiguity was eliminated when Detective Hensley responded "they're called public defenders" and Mr. Jones agreed, stating "Oh yeah". Consequently, a reasonable police officer would understand Mr. Jones's statement to be a request for an attorney. And,

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[7] When asked if he recalled "telling the detectives that ya'll can get me a public pretender now," Mr. Jones responded "Yes. Because we made a joke. They made a joke right after that about it." (74:37; App. 107). The meaning of Mr. Jones's statement "[b]ecause we made a joke" is unclear, as it is followed by "*[t]hey* made a joke after that about it."

based on the officer's statement in this case "Um, we, obviously due to the time right now, we can't, um," the officer clearly understood Jones's statement to be a request for an attorney.

Moreover, Mr. Jones's statement is analogous to "can I get an attorney," which courts have previously found to be an unequivocal request for counsel. *Compare with* ***State v. Edler***, 2013 WI 73, ¶¶ 35-37, 350 Wis. 2d 1, 833 N.W.2d 564 (holding that "can my attorney be present for this," constituted an ambiguous, unequivocal invocation of the right to counsel); ***State v. Lee***, 413 F.3d 622, 626 (7th Cir. 2005) (finding that "Can I have lawyer?" was a valid invocation of the right to counsel); ***State v. Dumas***, 750 A.2d 420, 425 (R.I. 2000) (stating that the phrase "Can I get a lawyer?" is a reasonable and acceptable way to frame a request for counsel).

Mr. Jones did not state "maybe," "I think," or "how". *Contrast with* ***State v. Jennings***, 2002 WI 44, ¶ 35, 36, 252 Wis. 2d 228, 647 N.W.2d 142 (holding that defendant's statement during custodial interrogation "I think maybe I need to talk to a lawyer," was ambiguous or equivocal and insufficient to invoke the right to counsel); ***State v. Subdiaz-Osorio***, 2014 WI 87, ___ Wis. 2d ___, ___ N.W.2d ___ (Per David T. Prosser, J., with five justices concurring solely in a mandate that the decision of the court of appeals is affirmed) (finding "how can I do to get an attorney here because I don't have enough to afford for one" equivocal). Rather, Mr. Jones's statement undisputedly included the phrase "get a public pretender." Mr. Jones did not need to "'speak with the discrimination of an Oxford don.'" ***Davis***, 512 U.S. at 459 (citation omitted).

Therefore, when Mr. Jones asked for "a public pretender," questioning should have ceased, and all of Mr. Jones's subsequent statements should have been suppressed. *See generally*, ***State v. Stevens***, 2012 WI 97, ¶ 70, 343 Wis. 2d 157, 822 N.W.2d 79 (once a defendant invokes the right to counsel, an officer cannot approach the defendant again, cannot ask him whether he is willing to talk, and cannot administer a new ***Miranda*** warning).

CONCLUSION

For the reasons stated, Mr. Jones respectfully requests that this court vacate the judgment of conviction, reverse the circuit court's denial of the suppression motion based on Mr. Jones's unequivocal assertion of the right to counsel, and order his statements to be suppressed.

Dated this 1st day of August, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,151 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of August, 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of August, 2014.

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