In The

Supreme Court of Virginia

RECORD NO. 081645

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

MICHAEL RAY FERGUSON, JR.,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF CASE

The statement of the case by appellant is correct.

QUESTION PRESENTED

a. WHETHER FERGUSON'S CONFESSION WAS ADMISSIBLE WHEN MADE AFTER INTENTIONAL MIRANDA AND EDWARDS VIOLATIONS FOLLOWED BY BEING CONTINUOUSLY HELD BY THE SAME OFFICERS IN THE SAME PLACE WITHOUT CONSULTATION WITH COUNSEL AND ONLY A TEN OR TWENTY MINUTE BREAK IN THE ACTIVE INTERROGATION?

STATEMENT OF FACTS

After being stopped and detained by two Altavista police officers, five police officers including Hurt Police Chief Brian Marr and Investigator Jerry Hagerman detained Michael Ray Ferguson, Jr. and took him to the Hurt police department for interrogation. He was thereafter continuously in the custody and presence of Marr. Both Marr and Hagerman were present and participated in the interrogation of Ferguson.

After Ferguson asserted his desire for counsel, Hagerman (in the presence of Marr) stated,

> Hagerman: Okay. Well, you don't have to talk to me. Let me talk to you now. (Statement lines 48-49. App. at p. 84.)

Hagerman continued to attempt to get Ferguson to talk to him without a waiver:

Hagerman: I've got positive identification of your car. As it was pulling out of that house yesterday. Uh, there was about four thousand dollars worth of items stolen. Now, if you're willing to talk. If you want to go ahead and talk to me about this fine, if you don't, you know you're in trouble right now. Uh, I'm not, I'm not playing with you. I'm not, I'm,

Ferguson: I understand.

Hagerman: [Unintelligible] straight out. Uh, the only hope you've got right now is to come clean as you can get. Let me try to get this stuff back that was stolen, that was taken, and uh, if, you know, you're on probation, I mean you need to think of yourself, you're twenty years old. [Unintelligible] saw the vehicle come down the hill right behind your car when you was [sic] pulling out spinning wheels.

Ferguson: I don't nothing [sic] about that.

Hagerman: Okay. Where was [sic] you at yesterday?

Ferguson: I was with my daddy up at the house. (Statement lines 51-69. App. at p. 84).

Hagerman then turned off the tape recorder and threatened Ferguson, "he would bring the wrath of hell on

me." Ferguson "felt scared." (App. at p. 41). This was confirmed in part by Brian Marr.

> And didn't Hagerman say to him something like you're going to burn in Hell, or the wrath of Hell is going to come down on you? Something to the effect, I don't remember exactly what he said, but something if you ever come back to Pittsylvania County he would put him in jail. I don't remember the exact words. (App. at p. 68).

Hagerman then told Marr in Ferguson's presence to stay with Ferguson while he went outside. (App. at p. 64). After ten to twenty minutes (App. at pp. 69-70), Ferguson said "this is messed up" or something similar. (App. at p. 68). No one claims or suggests that Ferguson asked a question or equivocated on his previous request for counsel. Marr then began persuading Ferguson to talk to him, promising that he would help him. (App. at p. 69). He told Ferguson "he needed to help his self," (App. at p. 65), Marr told him he would help him (App. at p. 69).

> Well he told me that, he was like, might as well go on and admit to it 'cause we would take it easy on you. He said he would help me all he could about trying to get this behind me, and trying to

> help me get a job and whatnot. (App. at p. 51).

Marr admitted he was trying to get Ferguson to waive his rights and confess. (App. at p. 69). At one point, Chief Marr stated, “I’ve advised you that you can help yourself, okay.” Later in the statement, Chief Marr acknowledged part of the earlier, unrecorded conversation, “Just like I’ve told you before, we know more than what you’re telling us . . . Help yourself out. You come this far man. You want me to help you and you want the investigator to help you.” Chief Marr also alluded to promises made by himself and Investigator Hagerman that were not recorded, saying “The man [Investigator Hagerman] has already given you his word to help you. I’ve give you my word to help you.” After convincing Ferguson to change his mind and waive his rights, Marr called Hagerman in, had Ferguson sign a Miranda waiver form and recorded a confession from Ferguson. The subsequently recorded statement confirms that the officers had promised to help him.

SUMMARY

When Ferguson requested counsel, his request was intentionally ignored by the officers and coercive tactics were used to attempt to persuade him to waive his right to counsel and confess.

No break in the encounter occurred although active questioning ceased for ten to twenty minutes before the interrogation continued.

Ferguson's statement, "this is messed up" was not the initiation of another encounter nor was it an expression of a desire to waive his right to counsel.

Ferguson's statement, "this is messed up" was a product of the Edwards violation and the coercive tactics of threats and promises.

Any waiver of Miranda rights was invalid due to the coercive tactics, the Edwards violations and the totality of the circumstances.

ARGUMENT

"The right of a criminal suspect to have an attorney present during custodial interrogation was first

articulated by the Supreme Court in Miranda v. Arizona, 384 U.S. 436, 469-73 (1966)." Commonwealth v. Hilliard, 270 Va. 42, 49, 613 S.E.2d 579, 584 (2005). The Court in Miranda "held that before interrogating a suspect who is in police custody, law enforcement officers must inform the suspect of certain rights, including the right to the presence and assistance of counsel." Id. "Miranda conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights; failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." Missouri v. Seibert, 542 U.S. 600, 608 (2004).

The protections of Miranda were further expanded by the holdings in Edwards v. Arizona, 451 U.S. 477 (1981), Arizona v. Roberson, 486 U.S. 675 (1988) and McNeil v. Wisconsin, 501 U.S. 171 (1991).

"An 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 conversation with the police." Edwards, 451 U.S. at 484-85. This provided a "bright-line" protection.

Critical to this protection is that upon assertion of the right to counsel, further interrogation must cease.

> *Edwards* set forth a "bright-line rule" that *all* questioning must cease after an accused requests counsel, *Solem v. Stumes*, 465 U.S. 638, 646(1984). In the absence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching" - explicit or subtle, deliberate or unintentional - might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.

Smith v. Illinois, 469 U.S. 91, 99 (1984)

The validity of any subsequent waiver is dependent upon the police honoring the assertion of the right to counsel and not attempting to interfere with the accused's assertion of that right. The police cannot indirectly do what they are prohibited from doing directly - coerce the accused. The principles sought to be protected by Edwards were clearly violated in this

case by not immediately ceasing the interrogation, this was aggravated by the tone and content of the interrogation.

The trial court and the Court of Appeals found that Ferguson made an unequivocal request for counsel. The evidence supports this finding. The Attorney General has conceded this issue.

The en banc decision of the Court of Appeals in this case sets forth the legal basis for exclusion of the statement of Ferguson.

As the Court of Appeals has previously held,

> [b]y asking Hines "whether [he was] going to be a witness or a defendant in the matter," the officer continued the conversation that he was bound to cease. This inquiry was a reintiation of the dialogue that Hines sought to terminate. . . Thus, the ensuing "communication, exchanges, or conversation with the police," Edwards, 451 U.S. at 485, was initiated by the police officer's further inquiry to Hines.

Hines v. Commonwealth, 19 Va. App. 218, 221 (1994).

This Court held,

> If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in

> custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This is 'designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights.'" McNeil, 501 U.S. at 177 [(quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)].

Commonwealth v. Gregory, 263 Va. 134, 148, 557 S.E.2d 723 (2002).

It is clear that Hagerman failed to cease the interrogation upon a request for counsel. Hagerman clearly attempted to badger Ferguson, it just took a few minutes for the badgering to accomplish its purpose. In fact, he attempted to persuade Ferguson to give up his rights by intimidation and innuendo. Hagerman continued asking questions despite the request for counsel. Marr was present and participated during the whole of the interrogation. The police "encounter" never ended.

Ferguson was continually held in custody in the same room by Marr after Hagerman left the room. There was no break in the continued custody by Marr. After Ferguson

mumbled something about, “this is messed up,” Marr did not readvise Ferguson of his Miranda rights nor seek clarification of his assertion of rights but continued to try to persuade him, this time with promises of help. This is confirmed in the recorded statement - “the man has already given you his word to help you. I’ve give you my word to help you.”

Nothing broke the continuous holding and interrogation of Ferguson. The same officers in the same place pursued the interrogation with only a ten or twenty minute interruption.

Ferguson asked no question, he made no indication of wanting to waive his right to counsel or to engage in further discussions. He made a statement, he did not ask a question as occurred in Oregon v. Bradshaw, 462 U.S. 1039 (1983). His remark was merely a comment on the police holding him, the interrogation and the failure to give him an attorney. The mere statement of “this is messed up,” did not initiate an encounter or request further discussion with the police nor did it allow the police to use promises of help to attempt to change his

mind on his request for counsel. It did not evince "a willingness and a desire for a generalized discussion about the investigation" as the plurality decision in Bradshaw defined "initiate". Bradshaw, 462 U.S. at 1045-1046.

Justice Powell in his concurring opinion in Bradshaw, made plain the issue of what "initiation" means and how it should be analyzed.

> This bifurcating of the *Zerbst* standard is not compelled by Edwards or any of our other cases. The inquiry in Edwards did focus on the reopening of communication with the accused by the police - a reopening that properly was held to be coercive. As there were no other significant facts or circumstances bearing upon the waiver question, there was no occasion for the Court to consider whether a two-step analysis is required in the more customary case. An incarcerated person, accused of crime, does not remain silent and speak only when conversation is initiated by others, whether by fellow prisoners, guards, or law enforcement officers. Jail or prison confinements prior to indictment or trial may extend over days and weeks, and numerous conversations customarily occur, often accompanied by collateral facts and circumstances. Rarely can a court properly focus on a particular conversation, and intelligently base a judgment on the

> simplistic inquiry as to who spoke first.
>
> In this case, for example, Bradshaw's initiating question ("what is going to happen to me now?") was not an isolated event. It was immediately followed by a renewal of Miranda warnings and additional conversation. The following day there was a further conversation, a third reading of Miranda rights, and finally Bradshaw's signing of a written waiver of those rights. Only then did he confess.

Oregon v. Bradshaw, 462 U.S. 1039, 1049-1050 (1983).

> My concern is that a two-step analysis could confound the confusion evident from the differing views expressed by other courts, see n.1, *supra*, and indeed evidenced by the conflicting readings of Edwards by JUSTICES MARSHALL and REHNQUIST. The *Zerbst* standard is one that is widely understood and followed. It also comports with common sense. Fragmenting the standard into a novel two-step analysis - if followed literally - often would frustrate justice as well as common sense. Courts should engage in more substantive inquiries than "who said what first." The holding of the Court in Edwards cannot in my view fairly be reduced to this.

Oregon v. Bradshaw, 462 U.S. 1039, 1050-1051 (1983).

One cannot isolate the "initiation" issue without a review of the context of the interrogation. Edwards

requires a substantive inquiry into the circumstances leading up to and the details of a claimed termination of interrogation and initiation of a waiver of the right to counsel. The manipulation in this case violates the protections Edwards clearly encompasses.

In Bradshaw, the police respected the defendant's request for counsel and immediately readvised Bradshaw of his Miranda rights upon his asking a question. By contrast, in Ferguson's case, they failed to respect his request for counsel in a deliberate violation of Miranda and failed to again advise him of his Miranda rights until convincing him to change his mind with promises of help.

The totality of the circumstances in this case are such that a finding of a subsequent voluntary, knowing waiver of rights is untenable.

The effect of the traffic stop, the taking of Ferguson to the police station, the refusal to grant his request for counsel, the continued interrogation, the accusations and veiled intimidations, the refusal to allow him to leave and the promises of the police to help

him all amounted to coercion. See Missouri v. Seibert, 542 U.S. 600 (2004).

First, a knowing, intelligent person who has asserted his rights would not waive his rights absent a fear of the officers and a promise of help if he “cooperated.”

Second, Ferguson specifically refused to waive his rights and requested counsel.

Third, only under the totality of the pressure from the seizure, detention, intimidation, refusal to give him access to counsel, continued holding of Ferguson, followed by promises of “help”, help yourself - we will help you, did he succumb to the pressures of the police and sign a waiver.

The facts are not in dispute in this case. There was no factual finding by the trial court, only an application of the facts to the law. The encounter with the police never ended. The police allowed Hagerman’s intimidations to sink in then followed those threats with Marr’s promises of “help.” Marr was present throughout and participated in the interrogation asking questions at various points.

Although the U.S. Supreme Court dealt with a slightly different issue in Missouri v. Seibert, 542 U.S. 600 (2004), the reasoning of the Court supports Ferguson. The intentional police misconduct used to obtain a confession, "where the interrogation was nearly continuous...the second statement, clearly the product of the invalid first statement should have been suppressed." Seibert at 606.

> In Miranda, we explained that the "voluntariness doctrine in the state cases...encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice," id., at 464-465.

Missouri v. Seibert, 542 U.S. 600 608 (2004).

CONCLUSION

The en banc decision of the Court of Appeals should be affirmed, the statements of Ferguson should be suppressed, the conviction reversed and the case remanded.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to Rule 5:26(d), twelve true and correct paper copies of the foregoing Brief of Appellee were hand filed with the Clerk of the Supreme Court of Virginia as well as one electronic copy on CD, and three true and correct copies of the same were served, via U.S. Mail, postage prepaid, to Josephine F. Whalen, Assistant Attorney General II, 900 East Main Street, Richmond, Virginia 23219, this 10th day of February, 2009.

GLENN L. BERGER