IN THE

Supreme Court of Virginia

RECORD NO. 081738

SARE ZEKTAW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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OPENING BRIEF OF APPELLANT

Appellant, Sare Zektaw, Defendant in the Circuit Court for the City of Alexandria, respectfully represents to this court that he is aggrieved by the judgment of conviction and sentence entered by Judge Lisa B. Kemler on April 16, 2007, following his jury trial on July 17, 18, and 19, 2006.

STATEMENT OF MATERIAL PROCEEDINGS

On July 6, 2006, Defendant's motion to suppress statements was heard and denied by Judge Lisa B. Kemler. On July 17, 18 and 19, 2006, Judge Kemler presided over Defendant's jury trial. The jury found Defendant guilty of rape, abduction, and assault and battery. The jury found Defendant not guilty of attempted sodomy. On April 12, 2007, Judge Kemler imposed the jury sentence of eight years for rape, one year for abduction, and twelve months and a fine of $2,500 for assault and battery. In addition, Judge Kemler imposed an additional 3 years of post-release supervision pursuant to VA CODE 19.2-295.2. On May 3, 2007, Defendant's motion to set aside the verdict was heard and denied. On July 8, 2008, in a published opinion, the Court of Appeals of Virginia affirmed Appellant's convictions and found no error in the denial of the motion to suppress or the instruction of the jury. On August 7, 2008, Appellant's petition for rehearing en banc was denied by the Court of Appeals of Virginia

ASSIGNMENT OF ERROR

The Court of Appeals erred in upholding the erroneous rulings of the trial court and in deciding that Defendant's words were ambiguous and that he did not clearly invoke his right to counsel.

QUESTION PRESENTED

Did the trial court err in denying Defendant's motion to suppress statements obtained in violation of Miranda and the Fifth and Fourteenth Amendments to the United States Constitution when the interrogating police officers ignored and continued to question Defendant after he had clearly asserted his right to counsel? App. at 94-95, 102-108, 110-115, 129-134, 681-687, 692-693, 734-735. (AE 1)

STATEMENT OF FACTS

On February 24, 2006, Appellant voluntarily visited Alexandria Police Headquarters after learning that Alexandria detectives had visited his workplace looking for him. App. at 552, 557. Appellant explained that "he knew that an officer was trying to get in touch with him, so he went down to the police department to find out why the officer was looking for him, and they transported him over to the detective bureau." App. at 84. Because Detective Ignacio, who was assigned to work on Appellant's case, was out of town, his

partner, Detective Sandy Hein, asked Detective Robert Hickman to assist in interviewing Appellant. App. at 80. Detective Hickman testified that Appellant was offered water and coffee. App. at 82-83, 553. Appellant also had his cell phone, which he used "a couple of times." App. at 83, 553. Detective Hickman testified that the initial discussion had a conversational tone, as neither he nor Detective Hein were sure why Appellant had been called in. App. at 83-85.

During the completion of a background information sheet, Appellant answered the questions asked of him and continued to inquire as to what was going on. App. at 86. Detective Hickman testified that Appellant claimed he believed that a woman had made accusations against him and inquired as to what they might be. App. at 86. The detectives did not give him an answer at that point. App. at 86. Eventually, Detective Hickman retrieved the case file concerning Appellant and came to understand that Appellant was suspected of committing rape. App. 87, 558. At that point the detectives informed Appellant that there was a warrant for rape against him and Detective Hein began a rights waiver sheet with him. App. at 87. Appellant was not free to leave. App. at 102.

Within two minutes of completing the rights waiver form, Detective Hein asked Appellant for his side of the story. App. at 94-95. Appellant replied: "Right, and I'd really like to talk to a lawyer because this - - oh, my God, oh, my Jesus, why?" App. at 95. Despite his request for a lawyer, the detectives "just continued on." App. at 95. Appellant was not provided with a lawyer and no attempt was made to get him a lawyer. App. at 108, 570.

During the interrogation, Appellant described the events of February 9, 2006. App. at 559-563. He explained to the detectives that Ms. Gebrehana was his girlfriend and that on February 9, they had argued because she had been with another man in her apartment. App. at 559-560. He admitted that the argument became heated and physical. App. at 560. He admitted to choking Ms. Gebrehana and pushing her down, causing an injury to her hip. App. at 560. He explained that these were the only injuries she sustained and that after the altercation, they began talking and subsequently had sex in the bedroom, with Appellant positioned behind Ms. Gebrehana. App. at 560-563.

Appellant stated that they then showered together, called Fasil, and went to Washington, D.C., to get Appellant's car. App. at 561. While in Washington, Appellant gave Ms. Gebrehana an engagement ring. App. at 561. Appellant told the detectives that following the incident on February 9, 2006, he did not talk with Ms. Gebrehana for a few days. App. at 562.

Appellant never told the detectives that he had sex with Ms. Gebrehana against her will. App. at 574. He never told the detectives he had or attempted to have anal intercourse with Ms. Gebrehana. App. at 575. He never told the detectives that he took Ms. Gebrehana to Washington, D.C., against her will. App. at 577.

At trial, three witness, Sara Gebrehana, Yeftusen Tiruneh, and Fasil Alemu testified for the Commonwealth through translation provided by the court Amharic interpreter. App. at 140, 239-240, 433-434, 482. According to the translation provided by the court interpreter, Ms. Gebrehana testified that in February 2006, she was Appellant's girlfriend. App. at 244. During that time, she shared an apartment with her cousin, Yeftusen Tiruneh. App. at 243. Fasil Alemu was a neighbor of theirs. App. at 280, 435.

Ms. Gebrehana testified that her relationship with Appellant "was rocky" and that "we fought a lot, and then we made up." App. at 246. Ms. Gebrehana testified that on February 9, 2006, she invited Appellant over to her home for lunch. App. at 248. When Appellant arrived at about four o'clock, Ms. Gebrehana informed him that her cousin was sleeping in the bedroom, although this was a lie. App. at 249. After eating his food, Appellant became suspicious and told Ms. Gebrehana he thought she had lied to him about her cousin's presence. App. at 249. She testified that she again lied to him, telling him that her cousin Yeftusen was ill and sleeping in the bedroom. App. at 249. Ms. Gebrehana testified that she lied to Appellant because she believed that if he thought her cousin was home, he would not pressure her for sex. App. at 250-251.

Ms. Gebrehana testified that Appellant then tried to peek under the bedroom door. App. at 250. Appellant opened the bedroom door and discovered that Ms. Gebrehana had lied to him. App. at 251. She testified that he pushed her into the bedroom and slapped her. App. at 251. She testified that she screamed and that Appellant asked her not to scream. App. at 251. Ms. Gebrehana

testified that Appellant took her by the hand and took her to the kitchen. App. at 252. She testified that Appellant took a knife sharpener from the drawer and used it to threaten her and to tell her that he would kill her. App. at 252. Gebrehana testified that she began to cry and Appellant took her to the living room, where he sat on the sofa and asked her to sit next to him. App. at 253. She testified that she remained standing and suggested they "go outside to take some fresh air." App. at 253.

Ms. Gebrehana testified that Appellant told her, "I am not going out, but you can if you want." App. at 258. She sat on the edge of the sofa. App. at 259. She refused to move closer. App. At 259. Ms. Gebrehana testified that Appellant began to strangle her with one hand, causing her to fall between the two sofas. App. at 259-260. Appellant released her and pulled her out from the sofas. App. at 262-263.

Ms. Gebrehana testified that Appellant gave her a soda to drink and she discovered an injury on her hip. App. at 263. Appellant told Ms. Gebrehana that he wanted to treat the injury with Vaseline. App. at 264. She testified that she followed him into the

bedroom because she thought "he was being genuine about" helping her. App. at 264-265. Ms. Gebrehana testified that after Appellant applied Vaseline to her hip, he asked her to take off her clothes, which she did. App. at 265-266. Ms. Gebrehana testified that when she removed her clothes, Appellant asked her to lay on the bed. App. at 267. Ms. Gebrehana told him that laying on the bed would be uncomfortable because of her injury so he told her to lay on the rug. App. at 267. Ms. Gebrehana testified that Appellant penetrated her anus and her vagina. App. at 269. Ms. Gebrehana testified that she "did make it clear that I didn't want to have sex," telling "him that I didn't want to take off my clothes and that I didn't want it." App. at 270-271. Ms. Gebrehana testified that after Appellant ejaculated, he went to the bathroom and then asked her to take a shower. App. at 272.

After they were dressed, Ms. Gebrehana testified that she, Appellant and her neighbor, Fasil Alemu drove to Washington, D.C. App. at 275-283. After picking up Appellant's other car from his work place, Appellant knelt down and gave Ms. Gebrehana a ring. App. at 283-286.

ARGUMENT

Did the trial court err in denying Defendant's motion to suppress statements obtained in violation of Miranda and the Fifth and Fourteenth Amendments to the United States Constitution when the interrogating police officers ignored and continued to question Defendant after he had clearly asserted his right to counsel? App. at 94-95, 102-108, 110-115, 129-134, 681-687, 692-693, 734-735.

"The issue whether a suspect invoked his right to counsel presents a mixed question of law and fact." Commonwealth v. Hilliard, 270 Va. 42, 49, 613 S.E.2d 579, 584 (2005)(citing to Commonwealth v. Redmond, 264 Va. 321, 326, 568 S.E.2d 695, 697 (2002). "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*." Hilliard, 270 Va. at 49, 613 S.E.2d at 584. "If the suspect waives his *Miranda* rights, the police are free to begin questioning him; however, if the suspect changes his mind during the interrogation and requests the assistance of counsel, the interrogation must cease until an attorney has been made available to the suspect or the suspect reinitiates the

interrogation." Hilliard, 270 Va. at 49, 613 S.E.2d at 584 (citing Davis v. United States, 512 U.S. 452, 458 (1994), and Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). "[A]n accused's subsequent statements [to questions asked by police officers] are not relevant to the question whether he invoked his right to counsel. A statement either asserts or fails to assert an accused's right to counsel." Redmond, 264 Va. at 327, 568 S.E.2d at 698 (citations omitted). "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" Redmond, 264 Va. at 328, 568 S.E.2d at 699 (citations omitted).

Within two minutes of the detectives finding the file and confronting Appellant with the charge against him, Appellant said, "Right, and I'd really like to talk to a lawyer because this - - oh, my God, oh, my Jesus, why?" Appellant had just been read his rights, told to sign the waiver, and asked to tell his side of the story. His response was to want the assistance of counsel.

In Redmond, the Court concluded that the accused's questions, "'Can I speak to my lawyer? I can't even talk to [a]

lawyer before I make any kinds of comments or anything?,' were not a clear and unambiguous assertion of his right to counsel." Redmond, 264 Va. at 329, 568 S.E.2d at 700. However, Redmond eventually told a second interrogator who had entered the room, "I would like to speak to a lawyer on this one", and the interrogation ceased. Redmond, 264 Va. at 326, 568 S.E.2d at 697. Redmond's statement that he would "like to speak with a lawyer on this one" is strikingly similar to Appellant's statement, "Right, and I'd really like to talk to a lawyer because ..."

The trial court erred in relying on the "entire interview" to conclude that Appellant did not assert his right to counsel. App. at 133. The trial court noted that Appellant's statement was "not in the same vein as the statements in Hilliard and Redmond, but relying on the "totality of the circumstances of the interview", did not find the statement a clear and unequivocal request for a lawyer. App. at 133-134. The entire interview was not relevant to the question of whether or not Appellant asserted his right to counsel. Appellant's statement can and should have been reasonably construed to be an expression of a desire for the assistance of an attorney.

The Court of Appeals of Virginia also commented on the entire interview in noting that "[t]ellingly, during the conversation that followed his statement, appellant did not again make a reference to an attorney, nor did he state he wished to consult with one during the ensuing interview." Zektaw v. Commonwealth, 52 Va. App. 230, 238, 663 S.E.2d 93, 96 (2008).

The Court of Appeals of Virginia erred in concluding that Appellant's statement was ambiguous. Id. The Court of Appeals theorized that Appellant's statement could be interpreted as an "exclamation of disbelief". Id. The Court of Appeals did not interpret Appellant's statement to be a question, as noted in Hilliard, 270 Va. at 51, 613 S.E.2d at 585 ("Can I have someone else present too, I mean just for my safety, like a lawyer like y'all just said?"), or Redmond, 264 Va. at 329, 568 S.E.2d at 700("Can I speak to my lawyer? I can't even talk to [a] lawyer before I make any kinds of comments or anything?"), or Mueller v. Commonwealth, 244 Va. 386, 396, 422 S.E.2d 380, 387(1992)("Do you think I need an attorney here?"), or Eaton v. Commonwealth, 240 Va. 236, 254 , 397 S.E.2d 385, 393 (1990)("You did say I could have an attorney if

I wanted one?") Nor did the trial court find Appellant's statement a question.

Once confronted with the charge of rape, once read his rights, Appellant clearly requested the assistance of counsel. He did not ask "should I talk to a lawyer?" He did not state, as in Midkiff v. Commonwealth, 250 Va. 262, 265, 462 S.E.2d 112, 114 (1995),"I'm scared to say anything without talking to a lawyer".

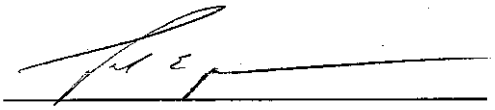
The detectives ignored his request. They "just continued on" with the interrogation. The words and the circumstances surrounding them are clear. The trial court erred in not granting Defendant's motion to suppress statements.

Conclusion

The trial court erred in not granting Defendant's motion to suppress statements obtained after Defendant clearly invoked his right to counsel. The Court of Appeals of Virginia erred in finding Appellant did not assert his right to counsel. Defendant respectfully

requests this Court reverse the erroneous rulings of the trial court and remand his case for a new trial.

Respectfully submitted,
SARE ZEKTAW
By Counsel



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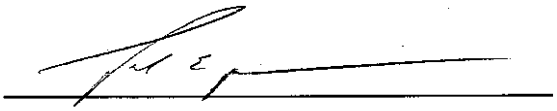
CERTIFICATE OF SERVICE

1. The appellant's name is Sare Zektaw. He is currently incarcerated with the Virginia Department of Corrections. The appellee is the Commonwealth of Virginia. Counsel for the appellant is Paul E. Pepper, Deputy Public Defender, 132 North Royal Street, Suite 200, Alexandria, Virginia 22314. His telephone number is (703) 838-4477. Counsel for the appellee is Leah A. Darron, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219. Her phone number is (804) 786-2071.

2. Counsel filed twelve copies of this Opening Brief of Appellant to the Clerk of the Court, Supreme Court of Virginia, 100 North Ninth Street, Richmond, VA, 23219, and mailed postage prepaid and/or delivered three copies to Leah A. Darron, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219., this 17th day of February, 2009. An electronic copy of the Opening Brief and the Appendix was delivered to the Clerk's Office via CD this same day.

3. Counsel for the Appellant is appointed by the court.

4. Counsel does wish to present oral argument.



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