9-28-2021

State v. Alker Appellant's Reply Brief Dckt. 48516

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 48516-2020**
	)	
v.	)	**ADA COUNTY NO. CR01-19-51643**
	)	
BRIAN C. ALKER,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JAMES CAWTHON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

The district court denied Brian Alker's motion to suppress statements made during a custodial interrogation, determining that his request for a lawyer was not a clear invocation of his *Miranda* rights. After listening to the audio recording of the interrogation, the district court found that Mr. Alker stated "That's what I'm going to have a [fucking] lawyer for because this didn't happen." The district court also believed that the totality of the interview, primarily post-request statements, showed that Mr. Alker's request for an attorney was futuristic and not a clear and present invocation.

On appeal, Mr. Alker asserts the district court erred when it denied his motion to suppress. The district court's factual finding as to what Mr. Alker said was clearly erroneous based on the audio recording. The audio recording reflects that after approximately twenty minutes of interrogation, Mr. Alker told the officer "That's what I want to have a fucking lawyer for." Further, the district court's legal conclusion that Mr. Alker's statement was not an unambiguous request for an attorney was in error because it used post-request statements to reach its conclusion. Because the exact same evidence is in the appellate record as was before the district court, de novo review of the factual finding is appropriate. Further, correct application of the proper constitutional precedent demonstrates that Mr. Alker made a clear and unambiguous request to have an attorney present during his custodial interrogation.

In its Respondent's Brief, the State argues the district court correctly found Mr. Alker stated "That's what I'm going to have a fucking lawyer for because this did not happen," Mr. Alker's challenge to the district court's factual finding is not preserved for appeal, deference should be afforded to the district court's factual finding, and the district court properly

considered Mr. Alker's post-request statements. The State also argues that even if the district court improperly considered Mr. Alker's post-request statements, any error was harmless. This Reply Brief is necessary to address the State's arguments.

Statement of the Facts and Course of Proceedings

Mr. Alker articulated the relevant facts and proceedings in the Appellant's Brief. They are not repeated here, but are incorporated by reference.

ISSUE

Whether the district court erred when it denied Mr. Alker's motion to suppress.

ARGUMENT

The District Court Erred When It Denied Mr. Alker's Motion To Suppress

Mr. Alker asserts the district court erred when it denied his motion to suppress. The district court's factual finding that Mr. Alker told the interrogating officer, "That's what I'm *going to* have a [fucking] lawyer for because this didn't happen" (Tr., p.14, Ls.5-7 (emphasis added)) was clearly erroneous because the audio recording reflects that he stated, "That's what I *want to* have a fucking lawyer for." (State's Ex., 21:13-21:18 (emphasis added).) Because the exact same evidence is before the appellate court as was before the district court, review of this factual finding should be de novo. Mr. Alker argued this issue below and therefore his factual challenge is preserved. Further, the district court's legal determination that Mr. Alker's statement was not a clear request that an attorney be present during his interrogation was based on post-request statements and in contradiction to clearly-established United States Supreme Court precedent. Further, the State has failed to prove beyond a reasonable doubt that improper consideration of Mr. Alker's post-request statements was harmless. Thus, the district court's denial of Mr. Alker's motion to suppress was reversible error.

A. De Novo Review Of The District Court's Factual Finding Is Appropriate Because The Exact Same Evidence That Was Before The District Court Is Before This Court

Mr. Alker argues de novo review of the district court's factual finding is appropriate. Although it concedes that this Court has exactly the same evidence that the district court had, and that Idaho precedent provides for de novo review in such circumstances, the State nevertheless contends that de novo review of the recording is inappropriate in this case. (Resp. Brief, p.5.)

At the suppression hearing, the district court explained that it had difficulty hearing the interrogation recording on the audio player from its regular computer and therefore retrieved a laptop computer to use. (Tr., p.11, Ls.3-11.) The district court then took the laptop computer

home and used headphones to listen to the recording several times. (Tr., p.11, Ls.13-17.) The State argues that these steps taken by the district court elevated the "level of scrutiny" used, and unless this Court "can employ the same or similar level of scrutiny to the recording," deference should be given to the district court's factual findings. (Resp. Brief, p.5.) The State provides no authority in support of its assertion that because the district court listened to the recording several times on different devices, deference is somehow required. (*See* Resp. Brief, pp.5-6.) Indeed, there is no support for such an assertion.

On a motion to suppress, "the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. Valdez-Molina*, 127 Idaho 102, 106 (1995). Thus, ordinarily, appellate courts accept the district court's factual findings that are supported by substantial evidence. *State v. Atkinson*, 128 Idaho 559, 561 (Ct. App. 1996). However, where the appellate court has exactly the same evidence before it as was considered by the district court, and therefore does not need to weigh conflicting evidence or judge the credibility of witnesses, de novo review is appropriate. *Id.* The fact that the district court used a second computer and headphones to listen to the interrogation recording does not somehow create conflicting evidence that the court must weigh or require a credibility determination. Furthermore, enhanced equipment or sophisticated tools were not used by the district court here. Rather, the district court merely listened to the recording several times on a laptop computer with headphones. While the State's argument might have merit if the district court had used tools to listen to the recording that are not widely available, or listened to an enhanced recording that is somehow not available to this Court on appeal, that was not the case. Here, the exact same recording is provided to this Court. This Court undoubtedly has comparable

tools at its disposal, so it can make its own determination of what Mr. Alker said to the interrogating officer regarding having counsel present.

B. Mr. Alker's Argument That He Said "That's What I Want A Fucking Lawyer For" Is Preserved For Appeal

Mr. Alker asserts on appeal that he told the interrogating officer, "*That's what* I want a fucking lawyer for." (App. Brief, p.8) (emphasis added).) This is a slight deviation from what defense counsel below believed Mr. Alker said: "*I just why* I want to have a [fucking] lawyer for."[1] (R., p.53 (emphasis added).) Based on this minor difference, the State argues that "Mr. Alker is presenting a new factual claim for the first time on appeal, [so] his argument is not preserved and should not be considered." (Resp. Brief, p.7.) The State's argument is without merit.[2]

The State relies on the Idaho Supreme Court's recent line of cases clarifying issue preservation. (Resp. Brief, p.7.) Those cases make clear that preservation hinges on whether the party raised the issue below and whether it maintains a consistent position on that issue on appeal. *See State v. Wolfe*, 165 Idaho 338, 342 (2019); *State v. Gonzales*, 165 Idaho 95, 99 (2019). An issue is not preserved if it was not raised below, or if a party changes its position or theory from that which was asserted below; however, a party's position and theory may evolve on appeal. *State v. Gonzales*, 165 Idaho 95, 98 (2019). "[D]uring the time of an appeal, parties will ruminate on issues and case law will be decided that may need to be applied to the specific facts of the case at hand." *Id.* "However, these pragmatic evolutions do not leave room for a

[1] At the suppression hearing, Mr. Alker asserted he told the officer, "*It's why* I want a lawyer for. (Tr.6, p. Ls. 23-24.)

[2] Mr. Alker notes that the State's interpretation of the recording has also changed slightly. In its opposition motion in the district court, the State argued Mr. Alker said "[T]hat's *why* I'm *gonna* have a fucking lawyer for." (Aug. R., p.3 (emphasis added).) On appeal, the State contends that Mr. Alker told the interrogating officer, "That's *what* I'm *going to* have a F'ing lawyer for." (Resp. Brief, p.8 (emphasis added).)

party to raise new substantive issues on appeal or adopt a new position on an issue that the trial court has not had the opportunity to rule on." *Id.* In short, "substantive issues may not be raised for the first time on appeal . . . ." *Id.*

Mr. Alker is not raising a new substantive issue on appeal. Rather, he has consistently argued that he told the interrogating officer that he *wanted to have* a lawyer, not that he was *going to have* a lawyer. (R., p.53; Tr., p.6, L.22 – p.7, L.21; App. Brief, p.8.) This is the critical language bearing on the question of whether Mr. Alker unambiguously expressed his present desire to have a lawyer present during his custodial interrogation. Indeed, the only difference in Mr. Alker's challenge to the district court's factual finding is that rather than stating "*I just why* I want to have a fucking lawyer for," as argued at the district court, he argues now on appeal that he said "*That's what* I want to have a fucking lawyer for." (*Compare* R., p.53, *with* App. Brief, p.8 (emphasis added).) The emphasized language is the only difference. However, whether Mr. Alker stated "I just why" or "That's what" is wholly irrelevant. Mr. Alker argued below that the use of the word "want" expressed a clear and present desire to have counsel at his interrogation. (R., p.55.) To the extent the district court found that Mr. Alker stated "That's what" at the beginning of that sentence (Tr., p.14, L.6), Mr. Alker agrees with the district court.

Furthermore, in its Respondent's Brief, the State concedes that Mr. Alker stated "That's what" at the beginning of the sentence. (Resp. Brief, p.6.) Therefore, this Court should reject the State's argument.

C. The District Court's Consideration Of Post-Request Statements To Support Its Conclusion That Mr. Alker Did Not Clearly Request Counsel Was Inconsistent With United States Supreme Court Precedent

In his Appellant's Brief, Mr. Alker argued the district court inappropriately relied on post-request statements to evaluate the clarity of Mr. Alker's invocation of his right to counsel.

(App. Brief, pp.9-12.) Mr. Alker maintained that the United States Supreme Court made clear in *Smith v. Illinois*, 469 U.S. 91 (1984), that only pre-request statements are relevant to determine if the request for counsel was sufficiently clear and that a defendant's post-request statements cannot be used to "cast retrospective doubt on the clarity of the initial request itself." (App. Brief, p.9 (quoting *State v. Robinson*, 115 Idaho 800, 805 (Ct. App. 1989) (citing *Smith*, 469 U.S. at 100)).) The district court here used Mr. Alker's post-request statements to determine that Mr. Alker's request was ambiguous. This was error.

In its brief, the State contends that any reliance on the post-request statements was merely to support the already-made finding that the request was ambiguous. (Resp. Brief., p.10.) Further, the State argues that "not all analysis of events after the allegedly unambiguous invocation of the right to counsel violates *Smith*." (Resp. Brief, p.10.) In support of its argument that post-request statements were relevant here, the State relies on dicta in *Davis v. United States*, 512 U.S. 452, 461 (1994), and a Seventh Circuit habeas corpus case, *Subdiaz-Osorio v. Humphreys*, 947 F.3d 434, 437 (7th Cir. 2020). (Resp. Brief, p.10.) Neither case supports the State's assertion that "events subsequent to an ambiguous statement are clearly relevant" to the clarity of an accused request for counsel during an interrogation. (Resp. Brief, p.10.)

The State seems to argue that the statement in *Davis* that "it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney" somehow modified the holding in *Smith*. (Resp. Brief, p.10.) In *Davis*, the Supreme Court considered whether officers are obligated to clarify whether a defendant is requesting an attorney. *Davis*, 512 U.S. at 454. The *Davis* Court held that officers are not required to do so. *Id.* at 461. *Davis* did not address whether post-request statements were relevant to whether a request for counsel was clear. *See generally id.* Thus, *Davis* in no way modified the holding of *Smith* that

"an accused's post-request statements may not be used to cast retrospective doubt on the clarity of the initial request itself" or that "such subsequent statements are relevant only to the distinct question of waiver." *Smith*, 469 U.S. at 100.

Subdiaz-Osorio also does not support the State's position. In fact, the Seventh Circuit explicitly acknowledged the holding of *Smith* in that case and noted that it was inappropriate for the Wisconsin Supreme Court to have referred to the defendant's post-request conduct, but it held the post-request conduct was not relevant to the court's determination that the statement was ambiguous:

> The Wisconsin Supreme Court stated that "[i]t was reasonable for Officer Torres to assume Subdiaz-Osorio was asking about how he could get an attorney for his extradition hearing, especially since Subdiaz-Osorio continued to answer questions and remained cooperative for the rest of the interview." [*State v. Subdiaz-Osorio*, 849 N.W.2d 748, 773 (Wis. 2014).] The second clause [of the Wisconsin Supreme Court's analysis], referring to Subdiaz-Osorio's poststatement conduct, causes us to hesitate. There is no question that if the court relied on Subdiaz-Osorio's postrequest cooperation to find ambiguity in the request itself, that reasoning would have gone beyond *Smith*'s admonition. *See Smith*, 469 U.S. at 98-99 ("Using an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable."). But that did not happen here.

Subdiaz-Osorio, 947 F.3d at 446. The Seventh Circuit held that the Wisconsin Supreme Court's passing reference to post-request conduct did not violate the *Smith* standard because the state court had already determined the request for counsel was ambiguous based on the *pre-request* conversation the officer had with the defendant. *See id.* at 447. The state court concluded that based on this prior conversation it was reasonable for an officer to believe the defendant was asking how to get an attorney for an extradition hearing, not the interrogation at hand. *Subdiaz-Osorio*, 849 N.W.2d at 773.

Here, while the district court may have stated that "the totality of the interview substantiates" its conclusion (Tr., p.14, Ls.21-22), the full context of its ruling reflects that it

actually considered the post-request statements in reaching its conclusion that the request was ambiguous. (Tr., p.14, L.8 – p.16, L.23.) The district court spent less than a minute—just three sentences—discussing the request itself, before turning to post-request statements. (Tr., p.14, Ls.8-20.) Specifically, after briefly stating Mr. Alker's request related to a court proceeding sometime in the future and was ambiguous, the district court then launched into a robust explanation of Mr. Alker's post-request statements. (Tr., p.14, Ls.8 – p.16, L.21.) It seems anomalous to say that the bulk of the explanation for why the statement was ambiguous was not in fact relied on to reach that conclusion. Indeed, the district court spent four times the amount of time discussing the post-request statements than it did discussing the request or the statements preceding the request. (Tr., p.14, L.21 – p.16, L.21.) In addition, after going on at length about the post-request statements, the district court then stated "And so *based on all of that*, the Court is going to deny the motion to dismiss." (Tr., p.16, Ls.22-23 (emphasis added).) This suggests that rather than simply supporting its conclusion, the district court relied on the post-request statements to find the ambiguity in Mr. Alker's request.

Furthermore, in Mr. Alker's interrogation, there was no discussion of trial or "future events" as there was in *Subdiaz-Osorio* that could lead to any ambiguity regarding a future court appearance. Rather, the entire conversation leading up to the request discussed the present, and specifically that Mr. Alker needed to provide the interrogating officer with a reason or an excuse, and that nothing Mr. Alker had provided up to that point satisfied the officer's request.

Taken in context, the only fair reading of the district court's comments about the post-request statements is that the district court considered the totality of the interrogation—including post-request statements—to determine that Mr. Alker's request was ambiguous. The district

court's reliance on post-request statements to justify the determination that Mr. Alker's statement was ambiguous is contrary to *Smith.* Thus, the district court erred.

D. The State Has Not Met Its Burden Of Proving Beyond A Reasonable Doubt That The District Court's Error Was Harmless

The State argues that even if the district court erred by considering post-request statements, any error was harmless. (Resp. Brief, pp.10-11.) If an appellant shows error, the State bears the "burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Anderson*, ___ Idaho ___, ___, 487 P.3d 350, 364 (2021). In other words, "the State has the burden of demonstrating that the error did not contribute to the district court's decision to deny [the] motion to suppress." *State v. Stone*, 154 Idaho 949, 959 (Ct. App. 2013). The State has failed to demonstrate the error in this case was harmless.

In making its "harmless error" argument, the State provides the single, conclusory sentence that, "[a]s set forth above, free application of the law to the facts of the case show that [Mr.] Alker's statement was not a clear and unambiguous invocation of his right to have counsel present at the interview." (Resp. Brief, p.11.) Essentially, the State asks this Court to pretend the error had not occurred, and conclude the district court would have reached the same result had it undertaken the correct analysis. This is not the "harmless error" standard.

To determine harmlessness, a two-step analysis is required. *State v. Garcia*, 166 Idaho 661, 674 (2020). First, the reviewing court must determine what the district court used in reaching its decision. *Id.* Second, the court must weigh the probative force of what was used against the probative force of the error standing alone. *Id.*

Here, the critical question in evaluating the suppression motion was whether Mr. Alker's request was ambiguous. It is well established that consideration of post-request statements in order to find ambiguity is improper. As explained above, because the district court found an

ambiguity by relying on post-request statements and circumstances, the disposition of the suppression motion turned on the erroneous analysis.

Additionally, when the error of considering the post-request statements to find ambiguity in Mr. Alker's request is weighed against everything else the district court considered, the district court's error was clearly not harmless. The context of the interrogation leading up to the statement shows that the statement was in response to an insistence by the officer that Mr. Alker provide an excuse, reason, or defense right then—during the interrogation—for the accusations against him. (State's Ex., 11:37-21:05.) Mr. Alker asked if he had to provide an excuse for something he did not do. (State's Ex., 21:06-21:07.) The officer responded that indeed, Mr. Alker needed to provide an excuse; the officer then clarified, "Well, other than 'I didn't do it.'" (State's Ex., 21:08-21:10.) The officer then told Mr. Alker, that "I didn't do it" was not a defense or an excuse. (State's Ex., 21:10-21:13.) At that point, Mr. Alker adopted the officer's contention that his statement was not a defense, and said, "That's what I want to have a fucking lawyer for. Because this did not happen." (State's Ex., 21:13-18.) As explained above, the evidence of the request itself paled in comparison to the expansive consideration of the post-request statements. The probative force of this evidence about the circumstances leading up to, and surrounding, Mr. Alker's request does not outweigh the force of the erroneously-considered post-request statements. Thus, the State failed to satisfy the second prong of the "harmless error" standard as well. Accordingly, the State has not met its burden of establishing beyond a reasonable doubt that the error in considering post-request statements did not contribute to the determination that the request was ambiguous.

Taken in context and objectively viewed, Mr. Alker's statement expressed a present desire to cut off questioning and speak to an attorney during his custodial interrogation.

Accordingly, the district court erred in concluding Mr. Alker's request for counsel was not clear. Therefore, the district court erred in denying Mr. Alker's motion to suppress statements made after he invoked his *Miranda* rights.

CONCLUSION

Mr. Alker respectfully requests that this Court vacate the judgment and commitment, reverse the order denying his motion to suppress, and remand his case to the district court for further proceedings.

DATED this 28th day of September, 2021.

/s/ Emily M. Joyce
EMILY M. JOYCE
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2021, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served as follows:

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