

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

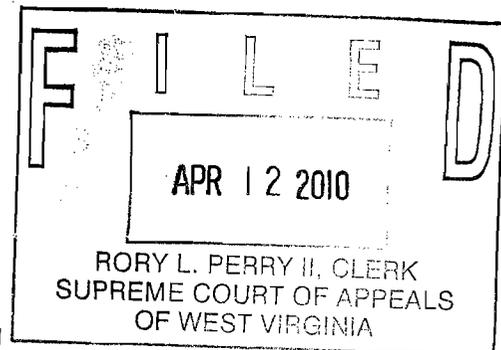
STATE OF WEST VIRGINIA,

CASE NO.: 35477

V.

JASON D. WILLIAMS,

APPELLANT'S BRIEF




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Now before this Honorable Court comes your Appellant, Defendant Jason D. Williams in the felony matter below, and petitions this Court to reverse the Order of the Circuit Court of Mercer County, the Hon. Omar Aboulhosn presiding, denying Appellant's Motion to Suppress, and to remand for further proceedings.

I.: Statement of Facts and Procedural History

On March 24, 2009, Appellant was arraigned by the Hon. Derek C. Swope, in the Mercer County Circuit Court, upon a probation-violation petition. Appellant had been granted probation by Judge Swope in a prior matter, separate from the instant case except as noted *infra*. Appellant appeared at arraignment in custody of the Southern Regional Jail.

Undersigned counsel had been Appellant's counsel in the prior matter and was re-appointed, to represent Appellant in the probation-violation matter. At his arraignment in the probation-violation matter, Appellant was released on bond and home confinement, pending a final evidentiary hearing.

Appellant, a day or two after his release from jail, and upon advice of counsel, reported to Cpl. James Long of the West Virginia State Police, as required by the provisions of the West

Virginia Sex Offender Registration Act. *West Virginia Code* 15-12.

One of Appellant's alleged probation violations was that he had been in the company of minors. This had been prohibited as a term of Appellant's probation.

Prior to Appellant's reporting to Cpl. Long, Appellant's probation officer had called Cpl. Long and had stated that she (the probation officer) had a suspicion that more may have transpired between Appellant and one or both of the referenced minors, than mere accompaniment.

Upon Appellant's arrival at the State Police barracks in Princeton, Mercer County, Cpl. Long updated the Registry information; secured a waiver-of-rights from Appellant; questioned Appellant regarding his relationship with the minors; and secured a confession by Appellant to a single incident of sexual intercourse with one of the minors, S. K..

Appellant was charged with the instant offense, one charge of sexual assault in the third degree. S. K. at the time of the offense was fifteen, and Appellant is more than four years older.

Appellant was indicted at the June, 2009, term of the Mercer County grand jury of one count of sexual assault in the third degree. On July 29, 2009, there came on for hearing before the trial court Appellant's Motion to Suppress.

Therein, Appellant argued that, by virtue of his having been appointed counsel at the probation-violation hearing, his right to counsel had attached. Cpl. Long could not therefore secure a waiver and thereby proceed to questioning without counsel's presence. Appellant specifically noted that the matter that Cpl. Long questioned Appellant regarding, Appellant's relationship with S. K., was effectively the same matter upon which Appellant's probation-

violation matter (in which Appellant was represented by counsel) was pending at that same time, awaiting final evidentiary hearing.

Appellant's Motion to Suppress was denied by the trial court. Appellant then entered into a conditional plea agreement. Appellant plead guilty to the indictment with the right to pursue this appeal of the trial court's denial of Appellant's Motion to Suppress, and to withdraw his guilty plea in the event that his petition of appeal to this Court be granted, and that the trial court's denial of Petitioner's Suppression Motion be reversed. Appellant was permitted to remain free on bond, with home confinement, pending the outcome of this Appeal.

II.: Assignment of Error

That the trial court erred in denying Appellant's Suppression Motion, for the reason that Appellant's confession should be suppressed from trial, because Appellant's right to counsel (and actual appointment of counsel) had already attached by the time of questioning by the State Police, and that the State Police therefore could not secure a waiver and thereby proceed to questioning without counsel present.

III.: Argument

In *State of West Virginia v. Barrow*, 178 W.Va. 406, 359 S.E.2d 844 (1987), this Court concluded:

“If police initiate interrogation after a Defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid because it was taken in violation of the defendant's Sixth Amendment right to counsel.” *Syllabus Pt. 1, in part quoting Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

The inquiry in the instant matter, then, per *Barrow*, is whether Appellant “asserted” his right to counsel.

In *Barrow*, Mr. Barrow “indicated a desire to obtain a lawyer”. *Barrow*, 359 S.E.2d, at 846.

Here, Appellant, while not verbalizing a “desire to obtain a lawyer”, nevertheless was seated next to his appointed attorney at the probation-violation hearing before Judge Swope. Appellant asserts that there is no essential distinction between his situation and that of Mr. Barrow, as to attachment of Sixth Amendment right to counsel.

Barrow relies on *Michigan v. Jackson, supra*.

However, *Montejo v. Louisiana*, Slip opinion No. 07-1529, 556 U.S. _____ (2009) has overruled *Michigan v. Jackson*.

In *Montejo*, defendant was arraigned on a murder charge and at that time counsel was appointed. Later that day, without his counsel present, Montejo waived his *Miranda* rights and then wrote an inculpatory letter of apology for the crime.

The letter was admitted at trial, over defendant’s objection. Defendant was convicted of first-degree murder and was sentenced to death.

The Louisiana Supreme Court affirmed in *State of Louisiana v. Montejo*, 974 So.2d 1238 (La. 2008), relying on *Michigan v. Jackson*, which the Louisiana Court reasoned had not been triggered, because Mr. Montejo had not actually requested a lawyer, or otherwise asserted his Sixth Amendment right to counsel (he had stood mute during his arraignment, while the judge appointed counsel).

The United States Supreme Court in *Montejo* states: “The central distinction - between defendants who “assert” their right to counsel and those who do not - is exceedingly hazy when applied to States that appoint counsel absent request from the defendant.” *Montejo*, 556 U.S., at _____.

The U.S. Supreme Court in *Montejo* overrules *Michigan v. Jackson* and remands for Mr. Montejo to pursue other options, such as an appeal under *Edwards v. Arizona*, 451 U.S. 477 (regarding termination of interrogation upon invocation of right to counsel).

Note that the issue in *Barrow*, as in *Michigan v. Jackson*, is different than in *Edwards*. The inquiry in the former two is whether there had been a prior “assertion”, at arraignment or otherwise, of right to counsel. At issue in *Edwards* is whether a suspect, during questioning, invoked his right to counsel.

Appellant then petitions this Court to settle the now unsettled status of *Barrow*, in light of *Montejo* having overruled *Jackson*, upon which *Barrow* relied.

In overruling *Jackson*, the Court in *Montejo* states:

“Under the rule adopted by the Louisiana Supreme Court, a criminal defendant must request counsel, or otherwise ‘assert’ his Sixth Amendment right at the preliminary hearing, before the *Jackson* protections are triggered. If he does so, the police may not initiate further interrogation in the absence of counsel. But if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant of his right to have counsel present.

“This rule would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made . . .

“But many States follow other practices. In some two dozen, the appointment of counsel is automatic upon a finding of indigency. . . .

Nothing in our *Jackson* opinion indicates whether we were then aware that not all States require that a defendant affirmatively request counsel before one is appointed; and of course we had no occasion there to decide how the rule we announced would apply to these other States.” *Montejo*, 556 U.S., at _____.

West Virginia is one of those “many States follow[ing] other practices.” *Loc. cit.*

Appellant here, based on his prior affidavit of indigency, was appointed counsel in his probation-violation matter at, or prior to, his arraignment in that matter. The invalidity of any waiver of his right to counsel thereafter should not turn on whether, despite having been appointed an attorney in the probation-violation matter, Appellant, at his arraignment, spoke the words, “I want a lawyer.” Why should or would he say such, having just been appointed an attorney?

“The Louisiana Supreme Court’s answer to that unresolved question [how to apply the rule in *Jackson* in states not requiring an “assertion” in order to appoint counsel] is troublesome.” *Montejo*, *op. cit.*

Indeed, *Montejo* faced execution as a result of the Louisiana Supreme Court’s answer, which of course was based upon *Jackson*’s awkward distinction.

Yet, while *Montejo*’s difficulty with *Jackson* is sensible, the Court’s solution, to jettison *Jackson*, is a huge step backward in Sixth Amendment jurisprudence. The total elimination of *Jackson*’s presumptive invalidity of a defendant’s waiver, even when he “asserts” his right to counsel, opens wide the door to police badgering that *Jackson*, and *Edwards*, had (partially) closed.

What *Montejo* of course does not do is overrule *Barrow*. Yet, *Montejo*’s convincing

criticism of the distinction in *Jackson*, and in *Barrow*, between an appointment of counsel, and an “assertion” of a right to counsel, presents this Court with an opportunity nevertheless to revisit *Barrow*.

If Appellant’s situation is distinguishable from the facts of *Barrow*, Appellant argues that *Barrow*’s prophylaxis should be broadened to include Appellant’s situation - of right to counsel attaching upon appointment of counsel - as the same as an “assertion” of right to counsel.

Appellant also notes that the trial court distinguished Cpl. Long’s interrogation of Appellant regarding sexual assault from questioning on being in the company of S.K., per the probation-violation charge. *Order Denying Defendant’s Motion to Suppress Statement*, p. 6 (Conclusions of Law, par. 6).

Appellant avers that such a distinction is too formalistic. By Cpl. Long’s own testimony, he was questioning Appellant about his having been in the accompaniment of S.K. 7/29/09 *Suppression Hearing Transcript*, p. 17-18. To conclude that questioning Appellant about his relationship with S.K., as far as being in the company of S.K. (which was the alleged probation violation), is suppressible, but that questioning Appellant regarding his allegedly engaging in sex with her while they were in each other’s company, is not suppressible, seems a formulaic approach lacking both in common sense and the affording of any meaningful protection to Appellant.

IV.: Conclusion

Appellant’s position is that his right to counsel attaches at a defendant’s assertion of such right, or at his appointment or retention of counsel (or, per *Edwards*, at his declining to be

interrogated), and that in each of these scenarios, the fruits of commencement or continuation of police interrogation is suppressible.

Otherwise, criminal jurisprudence will continue to demand of criminal defendants a grasp of *Jackson* so intricate as to cause a defendant, at an arraignment, having just been informed by the court that he has been appointed an attorney, to nevertheless, after being informed of such, to state, "I want a lawyer."

V.: Prayer for Relief

The trial court having erred in denying Appellant's Motion to Suppress, as regards Appellant's statement to the State Police, Appellant now seeks relief in this Court.

Appellant petitions this Court to review *West Virginia v. Barrow* in light of *Montejo v. Louisiana* having overruled *Michigan v. Jackson*; and to reverse the trial court's denial of Appellant's Motion to Suppress; and to remand for further proceedings.



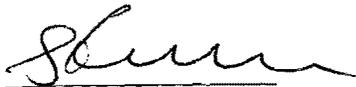
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has served, by first-class mail, sent today, April 12, 2010, a true and accurate copy of the foregoing *Appellant's Brief* upon the following:

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