IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MARCH 17, 2005
AS MODIFIED: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0283-MR

DATE 8-25-05 ElIA Grant DC.

SAMUEL ARTHUR YENAWINE — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
INDICTMENT NO. 01-CR-293

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING AND REMANDING IN PART

Appellant, Samuel Yenawine, was convicted of arson in the first degree (KRS 513.020), four misdemeanor counts of wanton endangerment in the second degree (KRS 508.070), tampering with physical evidence (KRS 524.100), and of being a persistent felony offender in the second degree (KRS 532.080(2)). He was acquitted of the homicide charge. He received a life sentence for the arson conviction, and appeals as a matter of right.[1] We hold that the trial court erred in failing to give an instruction on third-degree arson and accordingly, we reverse the first-degree arson conviction. Appellant's convictions of second-degree wanton endangerment, tampering with physical evidence, and of being a persistent felony offender in the second degree are affirmed.

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[1] Ky. Const. § 110(2)(b).

On appeal, Yenawine argues that the trial court erred by not giving an instruction on arson in the third degree (KRS 513.040); and that the trial court erred by admitting an incriminating statement obtained by the police in violation of his Fifth and Sixth Amendment rights, and in violation of his rights under Section 11 of the Kentucky Constitution. We hold that Yenawine should have received an instruction on arson in the third degree, but that his statement to the police was not an unambiguous or unequivocal request for counsel that a reasonable police officer would have understood it as such. Therefore, we reverse in part and remand to the trial court.

Prior to his death, the victim, Brian Tinnell, lived in an apartment adjacent to Appellant's apartment. The house was a large, two-story building with a one-story apartment in the rear. The Yenawines rented the house and Tinnell rented the apartment in the rear. The first story of the house consisted of several large rooms used for Brooke and Wendy Modeling, an adult entertainment business. The upstairs consisted of bedrooms for the Yenawines and their children. The apartment at the back of the house did not have an access door into the main building when the Yenawines rented the house. However, since the house did not have a kitchen, but the apartment did, the Yenawines and Tinnell agreed to cut a door in the wall to allow access. In exchange for use of the kitchen, Yenawine's wife, Wendy Yenawine, agreed to pay Tinnell's rent and employ him as a bodyguard for her business.

In the early morning hours of January 10, 2001, firefighters responded to a fire in the building. Yenawine, his wife, and their three children were rescued from the front porch roof of the burning building. After extinguishing the fire, firefighters found the body of Tinnell in the apartment attached to the back of the residence. Arson investigator, Sgt. Kevin Fletcher, examined the premises and concluded that the fire

originated in the back apartment. Sgt. Fletcher recovered two metal containers of PVC glue and cleaner, and a knife in the back apartment near Tinnell's body. Sgt. Fletcher determined that the fire spread from its point of origin in the apartment to the large rooms of the first floor of the house, and from there up the steps and wall spaces to the second floor. An autopsy on Tinnell's body revealed that his death was caused by knife wounds, rather than by exposure to fire.

Yenawine was indicted on January 18, 2001 for murder and arson. He turned himself in to police the next day. While in police custody, Yenawine gave incriminating statements to police and arson investigators. These statements were later used at trial to establish that Yenawine killed Tinnell and then burned his body. In the statements, Yenawine told how he and the victim were in the apartment at the back of the building smoking marijuana on the night of the fire. Later that night, according to his statement, Yenawine went upstairs to his bedroom where his wife was asleep. After about an hour or so, Yenawine heard floorboards creaking from the direction of his children's room. He went to investigate and saw Tinnell sneaking out of the room. Yenawine, afraid that Tinnell had molested his children, followed Tinnell downstairs to his apartment. When confronted, Tinnell came at Yenawine with a knife. A fight ensued, and Yenawine stabbed Tinnell six times, and slashed his throat.

In his taped statement, Yenawine continued to describe the night's events. Stating that he was confused and disoriented by the fight with Tinnell, Yenawine took off his bloody clothes and piled them in the center of the room. He then placed a cardboard box on top of the clothes, poured PVC glue and cleaner on that, and lit a fire. Yenawine went back upstairs, showered, dressed, and laid down in his bed with his wife. Yenawine explained that Mrs. Yenawine awoke, felt her throat

burning, and shook him. After trying various ways to get out of the house, Yenawine was able to get himself and his family through the front window and onto the porch roof, where they were rescued by firefighters.

At trial, the medical examiner testified that cuts on Yenawine's hands were consistent with defensive wounds caused by fending off a knife attack. Yenawine's recorded statement was presented to the jury. Arson investigators and firefighters testified and confirmed the fire's origin as being consistent with Yenawine's statements.

I.

Yenawine's first argument is that the trial court erred when it refused to give an instruction on arson in the third degree. Yenawine tendered a third-degree arson instruction at trial and objected to its exclusion.[2] Only an instruction on arson in the first-degree was given. A defendant is entitled to instructions on the whole law of the case where those instructions are supported by the evidence.[3] Kentucky law has established that "an instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the lesser offense."[4]

KRS 513.040 states that "[a] person is guilty of arson in the third degree if he wantonly causes destruction or damage to a building of his own or of another by intentionally starting a fire or causing an explosion." The Commonwealth relies on a

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[2] RCr 9.54.
[3] Barbour v. Commonwealth, 824 S.W.2d 861 (Ky. 1992).
[4] Caudill v. Commonwealth, 120 S.W.3d 635, 668 (Ky. 2003).

case involving similar circumstances to show that no third degree arson instruction was necessary. Perdue v. Commonwealth[5] dealt with an act of arson, in which the accused burned an automobile and all of its contents, including a body, with the help of a chemical accelerant. While the facts are similar, Perdue differs from this case in an important respect. In Perdue, the act of burning the car was not secondary to the fire, but the purpose of the fire. Yenawine argues that the resulting fire in this case was not intended, but merely a byproduct of his attempt to burn the clothes and the victim's body.

In his statement to the police, Yenawine stated that he went back to sleep after setting the fire, that his children and wife were upstairs in the adjacent house, and that he was in a state of shock after his actions. This recounting of events is corroborated by other evidence, and would have permitted a jury to believe that Yenawine did not intend to burn the building; rather that he intended to destroy any evidence including Tinnell's clothes and body. On remand, if the evidence is the same or substantially similar, an instruction on arson in the third degree should be given.

II.

Yenawine's statement that he might need to speak with his attorney was not unambiguous or unequivocal, even in light of the surrounding circumstances. In Davis v. United States,[6] the United States Supreme Court, in discussing the Fifth Amendment right to counsel, explained that Miranda v. Arizona[7] entitles a suspect "to the assistance of counsel during custodial interrogation even though the Constitution

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[5] 916 S.W.2d 148 (Ky. 1996).
[6] 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d (1994).
[7] 396 U.S. 868, 90 S. Ct. 140, 24 L. Ed. 2d 122 (1969).

does not provide such assistance"[8] and that Edwards v. Arizona[9] requires the police to immediately cease questioning the suspect once he or she invokes the right to counsel.[10] But the Court went on to note that it was "unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue."[11] And that is exactly what happened here. Yenawine told the detectives "I might need to speak with my lawyer about whether I should talk with you," and handed them the business card of his wife's attorney. Recently in Abela v. Martin,[12] the Sixth Circuit held that a defendant who said that "maybe" he should speak with a specific attorney and handed over that attorney's business card had invoked his right to counsel. We believe Abela is wrong and is not binding precedent on this Court. Yenawine's statement is not the sort of "unambiguous or unequivocal request for counsel"[13] that would have required the police to stop questioning him. Thus, Appellant's confession is admissible and its admission did not violate Appellant's Fifth and Sixth Amendment rights or his rights under Section 11 of the Kentucky Constitution.

For the forgoing reasons, we affirm in part, reverse in part, and remand to the trial court for further consistent proceedings.

Lambert, C.J., and Cooper, Graves, and Keller, JJ., concur with Part I. Graves, Johnstone, Keller, Scott, and Wintersheimer, JJ., concur with Part II. Lambert, C.J., files a separate opinion concurring in part and dissenting in part in which Cooper,

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[8] Davis, 512 U.S. at 462, 114 S. Ct. at 2356.
[9] 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 368 (1981).
[10] Davis, 512 U.S. at 462, 2356.
[11] Id. at 462, 2357.
[12] 380 F.3d 915 (6th Cir. 2004).
[13] Davis, 512 U.S. at 462, 114 S.Ct. at 2356.

J., joins. Johnstone, J., files a separate opinion dissenting in part and concurring in part in which Scott and Wintersheimer, JJ., join.

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COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY CHIEF JUSTICE LAMBERT CONCURRING IN PART AND DISSENTING IN PART

I concur with respect to part I of the majority opinion reversing for failure to provide an instruction on arson in the third degree, but I disagree with part II. Yenawine's second claim for reversal concerns his Fifth and Sixth amendment rights under the United States Constitution, and his rights under Section 11 of the Kentucky Constitution. Yenawine stated in his brief with citations to the record that he requested counsel three separate times: (1) during questioning by Detective Schweitzer on January 10, 2001, when he requested that his attorney, Bill Butler, be present; (2) that he made a verbal request to police to speak to Bill Butler on January 19, 2001; and (3) that he requested counsel in writing by means of Butler's business card.

During the police interview on January 19, 2001 the following colloquy occurred:

> Yenawine: I might need to speak with my lawyer about whether I should talk with you.
> Detective Phelps: Who is your lawyer?

> Yenawine: Bill Butler. [Yenawine produces Butler's business card.]
> Detective Phelps: Bill says he is not your lawyer because he is your wife's lawyer. [Pause] Do you want to talk with us or not?
> Yenawine: I am not going to see my kids?
> Detective Phelps: If you want to talk to us we want to tape you so we get your word right.
> Yenawine: Okay.

Butler's business card that Yenawine provided to Detective Phelps stated:

> My lawyer has told me not to talk to anyone about my case, not to answer any questions and not to reply to any accusations. Call my lawyer if you want to ask me any questions. I do not agree to answer any question without my lawyer present. I do not agree to waive any of my constitutional rights.

It is not clear whether Butler actually represented Yenawine. But Butler testified that he may have provided some legal advice and that he considered himself Appellant's lawyer on January 19, 2003. Butler also testified that he only informed Detective Phelps that he may have a conflict of interest in representing Yenawine. Butler testified that after the taping of Yenawine's statement of January 19, had he been aware of the interrogation he would have instructed police to stop questioning his client until he arrived. Officer Roberts, another officer present during the interrogation, testified during the suppression hearing that he and Officer Phelps did not contact Butler while they were interrogating Yenawine on January 19. In fact, neither Officer Phelps nor Officer Roberts contacted Butler until Yenawine provided his statement. At trial, the trial court denied Yenawine's request to suppress the statements on the basis that he made no direct request for counsel. The trial court determined that Yenawine's statement that he "might" need to speak with his attorney was not unambiguous. During trial, Yenawine objected and was overruled, and the taped statement was played for the jury.

The Fifth Amendment, as analyzed in Miranda v. Arizona,[1] protects a suspect from self-incrimination. Prior to custodial interrogation, a police officer must inform one in police custody of the familiar Miranda warnings and obtain a waiver of rights prior to interrogation. Central to the rights articulated in Miranda is the right to have counsel present during a custodial interrogation. The request for counsel must be unequivocal and unambiguous.[2] These rights are not crime specific, and upon a request for counsel all questioning must cease. The invocation of the right to counsel endures so long as the suspect remains in continuous custody.[3]

The Sixth Amendment right to counsel is designed to ensure fair prosecution and thereby provide a defendant with a right to have counsel present at all critical stages. The Sixth Amendment right to counsel does not attach until the government initiates adversarial proceedings, i.e., after a charge or indictment.[4] After formal charges are filed, a defendant is guaranteed the right to counsel without exception.[5] When a suspect requests counsel under the Sixth Amendment, the interrogation must cease until the attorney arrives.[6] This request for counsel is offense

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[1] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
[2] Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 1883, 68 L. Ed. 2d 378 (1981) (holding waiver of Fifth Amendment right to counsel must be a voluntary, knowing, and intelligent "relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon particular facts and circumstance surrounding that case, including the background, experience, and conduct of the accused'").
[3] Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990).
[4] United States v. Gouveia, 467 U.S. 180, 188, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984).
[5] Powell v. Commonwealth, 346 S.W.2d 731 (Ky. 1961) (holding the right to counsel during trial is firmly rooted in our criminal jurisprudence and is cherished as one of the most important safeguards against an unfair trial).
[6] Minnick, 498 U.S. at 146.

specific and does not require that the suspect be in custody.[7] However, a suspect's request for counsel under the Sixth Amendment must also be unambiguous.[8]

The right to counsel guaranteed by Section 11 of the Kentucky Constitution is no greater than that guaranteed by the Sixth Amendment of the United States Constitution.[9] To be afforded the protections provided under Section 11, a suspect who expresses a desire to deal with police only through counsel is not required to make such a request during custodial interrogation, and where at arraignment the accused requests counsel, there can be no further interrogation by authorities, even on an unrelated charge, until counsel has been made available, unless the accused initiates further communications, exchanges or conversations with the police, or unless the accused intends to limit his request.[10]

The question here is whether Yenawine's request for counsel was clear and unequivocal as required by Miranda v. Arizona,[11] Edwards v. Arizona,[12] Davis v. United States,[13] and Kotila v. Commonwealth.[14] A defendant must clearly articulate a desire for legal counsel with respect to criminal charges brought against him so that a reasonable police officer would understand the statement to be such a request; otherwise it is unnecessary to stop the interrogation.[15] Justice Scalia, writing for the majority in McNiel v. Wisconsin, stated that a request for counsel under the Fifth

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[7] Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).
[8] Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).
[9] Cane v. Commonwealth, 556 S.W.2d 902 (Ky. App. 1977) *cert. denied*, 437 U.S. 906, 98 S.Ct. 3094, 57 L. Ed. 2d 1136 (1978).
[10] United States v. Wolf, 879 F.2d 1320 (6th Cir. 1989).
[11] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
[12] 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 368 (1981).
[13] 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).
[14] 114 S.W.3d 226 (Ky. 2003).
[15] Id. *citing* Davis v. United States 512 U.S. at 459.

Amendment "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police."[16]

Strikingly similar to this case is the recently decided United States Court of Appeals for the Sixth Circuit decision in Abela v. Martin.[17] The court held that although the defendant said "maybe" he should speak to a specific attorney, because he had named a specific attorney and presented that attorney's business card, a reasonable officer would have understood that to be a clear request for counsel.[18] In Abela, the Sixth Circuit held that the specific request for a named attorney, leading the suspect to believe that his attorney would be contacted, and the presentation of that attorney's business card all corroborated the unequivocal nature of the request for counsel.[19] The court held:

> Accordingly, we reject Respondent's contention that the word "maybe" be viewed in isolation, and as dispositive of the question before us. Moreover, as we have determined in other cases, language that might be less than clear, when viewed in isolation, can become clear and unambiguous when the immediately surrounding circumstances render them so.[20]

In the present case, Yenawine's statement that he might need to speak with his attorney was unambiguous and unequivocal in light of the surrounding circumstances. Following Officer Phelps's question as to the identity of Yenawine's Attorney, Yenawine stated that his attorney was Bill Butler and presented Butler's

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[16] 501 U.S. 171, 11 S.Ct. at 2208, 115 L. Ed. 2d 158 (1991).
[17] 380 F.3d 915, 926 (2004), *cert. denied by* Caruso v. Abela, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004).
[18] Id.
[19] Id.
[20] Id.

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[18] Id.
[19] Id.
[20] Id.

business card with pre-printed instructions that all questioning cease until the attorney was contacted.[21] Instead, Officer Phelps did not contact Bill Butler to verify whether he was Yenawine's attorney. And based upon a previous conversation where Butler stated that he might have a conflict of interest, Officer Phelps informed Yenawine that Butler was not his attorney because Butler was his wife's attorney. The circumstances here corroborate that Yenawine requested Butler's presence during his questioning. Yenawine's request for a specific attorney, the presentation of the attorney's business card with a written request that the attorney be contacted and all questioning cease, and officer Phelps's response all corroborate that this was a reasonable expression of a desire for the assistance of an attorney prior to custodial interrogation. At the very minimum police should have contacted Butler at this point. Griffin v. Lynaugh is distinguishable because the requested attorney declined to represent the suspect after being contacted by police and the defendant did not request another attorney.[22]

Because Yenawine's Fifth Amendment right to counsel was violated during a custodial interrogation, his statement should have been suppressed.[23] Yenawine's graphic statement recounting the horrific chain of events played a major role in incriminating him on the first-degree arson charge. Moreover, as he was under indictment and requested the assistance of counsel, his right to have counsel present as provided by the Sixth Amendment and Section 11 of the Kentucky Constitution was violated.

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[21] As the surrounding circumstances demonstrate a clear request for counsel, we need not decide whether the pre-printed instructions on the attorney's business card are alone sufficient to invoke the right to counsel. Nevertheless, the pre-printed instructions added weight to the totality of the circumstances.

[22] 823 F.2d 856, 858 (5th Cir. 1987).

[23] Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); Baril v. Commonwealth, 612 S.W.2d 739 (Ky. 1981).

Cooper, J., joins this opinion concurring in part and dissenting in part.

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2001-CR-0293

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE JOHNSTONE
CONCURRING IN PART AND DISSENTING IN PART

I concur with respect to part II of the majority's opinion. However, I respectfully dissent from part I reversing for failure to provide a third-degree arson instruction, and quote Chief Justice Lambert in Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1996), another case involving an intentionally set fire, wherein he stated:

> As to appellant's claim that a third degree arson instruction should have been given, this, too, is without merit. Third degree arson requires the lack of intention to damage the item burned. KRS 513.040. In the present case, a chemical accelerant was placed in the floor of the car to assist the burning of the car. The argument that the resulting fire was unintended is preposterous.

Scott and Wintersheimer, JJ., join this opinion concurring in part and dissenting in part.

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ORDER

The petition for rehearing is denied. The Memorandum Opinion of the Court rendered on March 17, 2005, is modified on its face by substitution of the attached opinion in lieu of the original opinion. Modifications on pages 1 and 6 of the original opinion affected the pagination so as to necessitate substitution of the entire opinion.

All concur.

ENTERED: August 25, 2005.

CHIEF JUSTICE