Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00794-CR

The **STATE** of Texas,
Appellant

v.

Michael Lawrence **REISING**,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 15-1601-CR-B
Honorable William Old, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: October 11, 2017

REVERSED AND REMANDED

The State of Texas appeals the trial court's order granting Michael Lawrence Reising's motion to suppress. The State first asserts the trial court abused its discretion in holding the State to an erroneous legal burden. The State also asserts that under the correct legal standard, the State satisfied its burden to show Reising knowingly, intelligently, and voluntarily waived his right to counsel during his custodial interrogation. We reverse the trial court's order and remand the cause to the trial court for further proceedings.

BACKGROUND

On June 9, 2015, Reising was arrested on a warrant for continuous sexual abuse of a child. When brought before a magistrate, Reising declined to apply for a court appointed attorney. On June 13, 2015, however, he completed paperwork requesting the appointment of an attorney.

At approximately 10:00 a.m. on June 23, 2015, Reising was transported from jail and interrogated by Detective Craig Jones. Prior to the interrogation, Detective Jones informed Reising of his *Miranda* rights, and Reising signed an acknowledgment waiving those rights. Reising told Detective Jones that he had submitted a request for a court appointed attorney to "see about getting [his] bond lowered." Reising also told Detective Jones he did not believe an attorney had been appointed to represent him. Detective Jones told Reising he would check on the status of the appointment. The interview ended at approximately 1:00 p.m.

At the hearing on Reising's motion to suppress, evidence established that an attorney was appointed to represent Reising on June 23, 2015; however, the trial court found the time of the appointment was "unknown." The evidence established the jail and the appointed attorney were notified of the appointment at approximately 3:00 p.m. on June 23, 2015. The trial court concluded the State failed to satisfy its burden to prove Reising did not have an attorney at the time he made his statements to Detective Jones on June 23, 2015. Accordingly, the trial court granted Reising's motion to suppress.

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *State v. Rodriguez*, 521 S.W.3d 1, 8 (Tex. Crim. App. 2017); *Hernandez v. State*, 387 S.W.3d 881, 884 (Tex. App.—San Antonio 2012, no pet.). We defer to the trial court's determination of historical facts, examining the record in the light most favorable to its ruling, and

review de novo the trial court's determination of the legal significance of those facts. *Rodriguez*, 521 S.W.3d at 8; *Hernandez*, 387 S.W.3d at 885.

STATE'S BURDEN WITH REGARD TO SIXTH AMENDMENT RIGHT TO COUNSEL

In its first issue, the State asserts the trial court erred in holding the State to an erroneous legal burden by requiring the State to prove Reising did not have an attorney at the time of the custodial interrogation. We agree.

Before the United States Supreme Court's decision in *Montejo v. Louisiana*, 556 U.S. 778 (2009),[1] a distinction was drawn between the waiver of a Fifth Amendment right to interrogation counsel and a Sixth Amendment right to trial counsel.[2] *See Pecina v. State*, 361 S.W.3d 68, 70, 74-78 (Tex. Crim. App. 2012). Under the prior law, when an attorney-client relationship was established after a defendant's Sixth Amendment right to counsel attached, the police could initiate interrogation only through notice to defense counsel. *See Upton v. State*, 853 S.W.2d 548, 557 (Tex. Crim. App. 1993); *State v. Morris*, 228 S.W.3d 246, 250 (Tex. App.—Austin 2007, no pet.); *Cloer v. State*, 88 S.W.3d 285, 288 (Tex. App.—San Antonio 2002, no pet.). A defendant's unilateral waiver of his Sixth Amendment right to counsel during interrogation, without the involvement of his attorney, was invalid even if the defendant received the required *Miranda* warnings. *Holloway v. State*, 780 S.W.2d 787, 796 (Tex. Crim. App. 1989); *Morris*, 228 S.W.3d at 250; *Cloer*, 88 S.W.3d at 288. After *Montejo*, however, both the Fifth and Sixth Amendment right to counsel during custodial interrogation are "waived in exactly the same manner." *Pecina*, 361 S.W.3d at 70. Therefore, when law enforcement officers approach a defendant and provide

[1] In *Montejo*, the Court overruled its decision in *Michigan v. Jackson*, 475 U.S. 625 (1986). *See Montejo*, 556 U.S. at 797.

[2] "The Sixth Amendment right to counsel attaches once the 'adversary judicial process has been initiated,' and it guarantees 'a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings.'" *Pecina*, 361 S.W.3d at 77 (quoting *Montejo*, 556 U.S. at 786). The Texas Court of Criminal Appeals refers to "this Sixth Amendment right with the short-hand term 'trial counsel.'" *Id.*

him with *Miranda* warnings, the defendant must invoke his Sixth Amendment right to counsel at that time. *Id*. at 78.

In this case, the trial court erred in applying the law as it existed before the United States Supreme Court's decision in *Montejo*. Applying the prior law, the trial court concluded the State "had the burden to prove that the defendant did not have an attorney at the time of the [interrogation]." Under existing law, however, the State's burden was to show Reising knowingly, intelligently, and voluntarily waived his right to counsel. *See Hernandez*, 387 S.W.3d at 885. Therefore, we sustain the State's first issue.

Although the trial court erred in applying the wrong burden, we must still uphold the trial court's ruling if it is correct under any theory of law applicable to the case. *Id*. In this case, if the evidence established Reising invoked his right to counsel after being read his *Miranda* warnings, then the trial court's ruling would still be upheld because Reising's statement would have been taken in violation of his right to counsel. *See Pecina*, 361 S.W.3d at 78. Therefore, we must examine whether Reising invoked his right to counsel after being read his *Miranda* warnings.

DID REISING INVOKE HIS RIGHT TO COUNSEL?

An accused has the right to have an attorney present during custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Once an accused has invoked that right, police interrogation must stop until counsel has been made available or the accused himself initiates a dialogue with the police. *Edwards*, 451 U.S. at 484–85; *State v. Gobert*, 275 S.W.3d 888, 892 (Tex. Crim. App. 2009). However, not every mention of a lawyer will suffice to invoke the right to the presence of counsel during questioning. *Gobert*, 275 S.W.3d at 892.

To trigger law enforcement's duty to terminate the interrogation, a defendant's request for counsel must be clear, and the police are not required to attempt to clarify ambiguous remarks. *Davis v. United States*, 512 U.S. 452, 461–62 (1994); *Gobert*, 275 S.W.3d at 892. Whether a

statement referring to a lawyer constitutes a clear request for counsel depends on the statement itself and the totality of the circumstances surrounding the statement. *Gobert*, 275 S.W.3d at 892. The test is objective: whether the defendant articulated his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *Davis*, 512 U.S. at 458-59; *Gobert*, 275 S.W.3d at 892-93. An "ambiguous articulation of a desire for counsel" is insufficient. *Mbugua v. State*, 312 S.W.3d 657, 665 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("Can I wait until my lawyer gets here?"); *see also Davis*, 512 U.S. at 462 ("Maybe I should talk to a lawyer."); *Davis v. State*, 313 S.W.3d 317, 341 (Tex. Crim. App. 2010) ("I should have an attorney."); *Flores v. State*, 30 S.W.3d 29, 33–34 (Tex. App.—San Antonio 2000, pet. ref'd) ("Will you allow me to speak to my attorney before?"); *Cooper v. State*, 961 S.W.2d 222, 226 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) ("Where is my lawyer? Where is he?").

In this case, a videotape of the custodial interrogation was admitted into evidence. As Detective Jones read the *Miranda* rights to Reising, Reising verbally acknowledged the rights and initialed and signed the written form. Reising informed Detective Jones that he had a question and stated that he had "put in a request for an attorney … at least [to] see about getting [his] bond lowered." He also asked Detective Jones about the timing and procedure for an appointment and stated he did not think an attorney had been appointed. Detective Reising responded that he did not know if an attorney had been appointed but he did not mind asking about it. The interrogation then continued.

We hold Reising's reference to requesting the appointment of an attorney was not an unequivocal request to have an attorney present during the interrogation or to terminate the

interrogation until he spoke with an attorney.[3] Because Reising did not invoke his right to counsel after being read his *Miranda* warnings, the trial court's order cannot be affirmed on this basis.

CONCLUSION

The trial court's order is reversed, and the cause is remanded to the trial court for further proceedings.

Karen Angelini, Justice

DO NOT PUBLISH

[3] In his brief, Reising also argues he invoked his right to counsel by submitting the request for an appointed attorney. The Texas Court of Criminal Appeals, however, has held that a defendant must invoke his right to counsel when "law-enforcement agents approach him and give him his *Miranda* warnings." *Pecina*, 361 S.W.3d at 78.