

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 MAY -5 P 2:16

NO. 80391-9

BY RONALD R. CARPENTER

RR

CLERK IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES DANIEL RADCLIFFE,

Petitioner.

COURT OF APPEALS No. 34447-5-II

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-02111-5

HONORABLE RICHARD D. HICKS and
HONORABLE JUDGE WM. THOMAS MCPHEE, Judges

SUPPLEMENTAL BRIEF OF RESPONDENT - STATE OF
WASHINGTON

EDWARD G. HOLM
Prosecuting Attorney
in and for Thurston County

JAMES C. POWERS
Deputy Prosecuting Attorney
WSBA #12791

Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502
Telephone: (206) 786-5540

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
ARGUMENT	11
1. <u>The trial court properly ruled that the defendant made an equivocal reference to his right to an attorney in his interview with Detective Miller after a proper advisement of <i>Miranda</i> rights and after the defendant had knowingly, intelligently, and voluntarily waived those rights, and that Miller acted lawfully in his response to the defendant's equivocal reference to his right to an attorney.</u>	11
CONCLUSION	20

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Davis v. United States</u> , 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) . . .	9,10,11 13,14,15,16,17,18,20
<u>Nash v. Estelle</u> , 597 F.2d 513, 5 th Cir. 1979)	12
<u>State v. Aten</u> , 130 Wn.2d 640, 927 P.2d 210 (1996)	16,17,18
<u>State v. Earls</u> , 116 Wn.2d 364, 805 P.2d 211 (1991)	19
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	19
<u>State v. Foster</u> , 91 Wn.2d 466, 589 P.2d 789 (1979)	19
<u>State v. Franco</u> , 96 Wn.2d 816, 639 P.2d 1320 (1982)	19
<u>State v. Mecca Twin Theater and Film Exch. Inc.</u> , 82 Wn.2d 87, 507 P.2d 1165 (1973).	19
<u>State v. Moore</u> , 79 Wn.2d 51, 483 P.2d 630 (1971)	19
<u>State v. Robtoy</u> , 98 Wn.2d 30, 653 P.2d 284 (1982).	12,13,15,16 17,18,20
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994)	19

<u>CASES</u>	<u>PAGE</u>
<u>State v. Walker</u> , 129 Wn. App. 258, 118 P.3d 935 (2005), <i>review denied in</i> <u>State v. Garrison</u> , 157 Wn.2d 1014, 139 P.3d 350 (2006)	10
<u>State v. Wethered</u> , 110 Wn.2d 466, 755 P.2d 797 (1988)	19
 <u>CONSTITUTIONAL</u>	 <u>PAGE</u>
Fifth Amendment, U.S. Const. 12,13,14,15,18,19	
Art. I, Sect. 9, Washington Const.	19

A. STATEMENT OF THE ISSUES

1. Whether the trial court erred either in finding that the defendant made an equivocal reference to his right to an attorney, or in finding that detective Miller responded appropriately to that equivocal reference.

B. STATEMENT OF THE CASE

On the evening of November 16, 2004, S.K. met with Lacey Police Detective Shannon Barnes. S.K.'s date of birth is May 25, 1988, and so was 16 years old at that time. S.K. reported details of an incident of alleged indecent liberties with forcible compulsion. The incident was alleged to have taken place on November 13, 2004 and the defendant, James Radcliffe, was the person S.K. accused of having committed this offense. S.K. also accused the defendant of having committed years of child sexual abuse upon her in the past. Trial RP 629, 652. Barnes concluded she had probable cause to arrest Radcliffe for indecent liberties and for rape of a child in the second and third degree. 10-3-05 Hearing RP 58.

At the request of Barnes, Lacey Police Sergeant Rick Monk contacted the defendant at his

place of employment at about 8 a.m. the next day, November 17th. 10-3-05 Hearing RP 45-47. Monk informed the defendant there was probable cause for his arrest based on the investigation of a reported sex offense. The defendant was handcuffed and transported to the Lacey Police station. Monk informed the defendant that he had the right to remain silent and the right to the assistance of an attorney. 10-3-05 Hearing RP 47-50.

At about 8:30 the morning of November 17th, Detective Barnes was informed that the defendant had arrived at the Lacey Police station. She went down to meet him. At this point, the restraints had been removed. She escorted Radcliffe upstairs to the detective division's interview room. 10-3-05 Hearing RP 59-60.

Barnes informed the defendant that a complaint had been made by S.K. and that the matter was under investigation. She then used a card she carried to inform the defendant completely and accurately of his constitutional

rights concerning the making of any statement, the Miranda rights. 10-3-05 Hearing RP 61-63; Finding of Fact No. 2 in CP 158-162. The defendant responded that he understood his rights and wished to speak with her. 10-3-05 Hearing RP 63; Finding of Fact No. 3 in CP 158-162.

Barnes explained the allegations S.K. had made. The defendant denied them. Barnes' interview with the defendant only lasted about 10 minutes. During that time, the defendant never asked that the questioning cease, nor did he request the assistance of an attorney. There were no promises or threats made to induce him to speak. The defendant remained cooperative and calm throughout this interview. 10-3-05 Hearing RP 64-65.

Barnes then told the defendant to remain in the room. She left, closing the door behind her. She contacted Detective David Miller and asked him to confront the defendant with the possibility of physical evidence against him. She asked Miller to do this because she was 5 or 6 months pregnant

and was not supposed to engage in an interrogation of a suspect. She quickly briefed Miller on the allegations and the fact that the defendant had waived his Miranda rights. 10-3-05 Hearing RP 66-67, 94.

Detective Miller went into the interview room and introduced himself. The defendant confirmed that Barnes had informed him of his Miranda rights. Miller asked if the defendant wanted Miller to repeat those rights. However, the defendant said that would not be necessary, and that he was willing to talk with Miller. 10-3-05 Hearing RP 95-96.

Miller mentioned that it might be easier for the defendant to speak with a male detective about the allegations. The defendant responded that he had never had a sexual relationship with S.K., only a father-daughter type of relationship. At that point, Miller pointed out that law enforcement would be able to have S.K.'s pants tested to determine whether the defendant had ejaculated on her as S.K. had claimed. The

defendant responded that such lab results would come back indicating that it was his ejaculate on her pants. He then admitted that he actually had engaged in sexual relations with the victim. 10-3-05 Hearing RP 97-98.

Miller asked the defendant to explain his version of events on tape. The defendant responded that he did not know how much trouble he was in and maybe he should contact an attorney. 10-3-05 Hearing RP 99; Finding of Fact No. 9 in CP 158-162. Miller responded that he could not give the defendant legal advice and asked if the defendant wanted Miller to read the Miranda rights to him again. The defendant responded that he already understood his rights. Miller then stated that the ball was in the defendant's court. 10-3-05 Hearing RP 99-100; Finding of Fact No. 9 in CP 158-162. He also informed the defendant that if he did not wish to give a taped statement, he could instead give a written statement or just tell Miller his side of the story. The defendant responded that he would tell Miller about it. 10-

3-05 Hearing RP 100; Finding of Fact No. 9 in CP 158-162.

Miller then asked the defendant to simply tell his side of the story. The defendant stated that his sexual relationship with S.K. had started when she was 14 years old. He explained that it began when they would wrestle together. He then started touching her over and under her clothing. Miller asked if there had been any sexual intercourse. The defendant responded that there were two incidents of sexual intercourse with S.K, that he had also showered with her but no sexual acts occurred at those times, and that he had performed oral sex on her and had S.K. perform oral sex on him about once a month. 10-3-05 Hearing RP 101. The defendant made no further reference to an attorney. 10-3-05 Hearing RP 102; Finding of Fact No. 9 in CP 158-162.

Miller's interview with Radcliffe lasted about 10 to 15 minutes. The defendant never asked that questioning stop and never refused to answer a question. Radcliffe remained cooperative and

cordial throughout the interview. 10-3-05 Hearing RP 102. During the interview, Miller made no promises or threats to induce the defendant to speak with him. 10-3-05 Hearing RP 102-104.

At the end of the interview, Miller left the room and reported to Barnes what the defendant had told him. Trial RP 104. This occurred at about 9 or 9:15 that morning. The defendant was then booked into the Thurston County Jail. 10-3-05 Hearing RP 69. Miller completed a report concerning the defendant's admissions at about 11 that same morning. 10-3-05 Hearing RP 105; Ex. 2. He then did a supplemental report on November 24, 2004, to detail his conversation with the defendant at the point in the interview when Radcliffe brought up the subject of an attorney. 10-3-05 Hearing RP 106-107; Ex. 3.

On October 3, 2005, a CrR 3.5 hearing was held before the Honorable Judge Richard D. Hicks in this case. With regard to the defendant's admissions to Detective Miller, the court found that Detective Barnes had fully informed the

defendant of his Miranda rights prior to any questioning and that the defendant had then made a knowing, intelligent and voluntary waiver of those rights, and then voluntarily spoke with Barnes for about 10 minutes. 10-3-05 Hearing RP 176, Conclusion of Law No. 1 in CP 158-162. The court also found that when Detective Miller entered the room, the defendant confirmed that he understood his Miranda rights, that he had waived those rights, and that he did wish to speak with Miller.

The court further found that all of the defendant's responses to Miller thereafter were voluntary. 10-3-05 Hearing RP 177-178, 185; Conclusion of Law No. 2 in CP 158-162.

The court then addressed the defendant's reference to an attorney in his interview with Miller. The court ruled that the defendant's admissions before he made that reference were admissible. 10-3-05 Hearing RP 178. The court then determined that the defendant had made an equivocal reference to his right to an attorney. 10-3-05 Hearing RP 183, 185; see also 10-21-05

Hearing RP 19, 22-23 and 11-4-05 Hearing RP 4-5.

The court ruled that Detective Miller was obliged in response to that equivocal reference to clarify whether the defendant was requesting the assistance of an attorney before resuming his interrogation. The court noted that the exchange that took place between Miller and the defendant at that point, wherein Miller asked if the defendant wished his rights read to him again, the defendant responded that he understood his rights, and then Miller's stated that the ball was in the defendant's court, was insufficient to satisfy the requirement in the law for clarification in that situation. Consequently, the court ruled that the admissions made by the defendant after his reference to an attorney were not admissible at trial in the State's case-in-chief. 10-3-05 Hearing RP 179-185.

Subsequently, the State filed a motion to have the court reconsider its ruling with regard to the CrR 3.5 hearing on the basis of a recently filed opinion of the Court of Appeals,

Division One, in State v. Walker, 129 Wn. App. 258, 118 P.3d 935 (2005), *review denied* in 157 Wn.2d 1014, 139 P.3d 350, and the ruling of the United States Supreme Court in Davis v. United States, 512 U.S. 452, 461, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), as discussed in Walker, *supra*. A hearing on that motion took place on October 21, 2005.

Judge Hicks noted that the United States Supreme Court had held in Davis, 512 U.S. at 461, that after a suspect has knowingly and voluntarily waived his Miranda rights, a law enforcement officer may continue questioning unless and until the suspect makes a clear and unequivocal request for an attorney. The court then found that the holding in Davis was controlling in the present case, and therefore Miller had acted properly during his interview with Radcliffe. The court ruled that the defendant's admissions after his equivocal reference to an attorney were admissible at trial. 10-21-05 Hearing RP 27-28; Conclusion of Law Nos. 3 and 4 in CP 158-162.

C. ARGUMENT

1. The trial court properly ruled that the defendant made an equivocal reference to his right to an attorney in his interview with Detective Miller after a proper advisement of *Miranda* rights and after the defendant had knowingly, intelligently, and voluntarily waived those rights and that Miller acted lawfully in his response to the defendant's equivocal reference to his right to an attorney.

On appeal, the defendant contends that the trial court erroneously relied upon the United States Supreme Court's decision in Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) in finding that Detective Miller had responded appropriately to the defendant when the defendant made an equivocal reference to his right to an attorney.

In response, the State contends that the trial court followed the proper legal authority in deciding that no constitutional right of the defendant had been violated in the interview, and that the defendant's admissions during this interview were properly admitted into evidence at the trial.

In State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), the Washington Supreme Court considered what the Fifth Amendment to the U.S. Constitution required police to do in response to an equivocal reference by a suspect to his right to an attorney during police questioning, after that suspect had been properly informed of his Miranda rights and had waived them. In Robtoy, during questioning, the defendant had made the statement: "Maybe I should call my attorney". This was determined to have been an equivocal reference to Robtoy's right to an attorney. Robtoy, 98 Wn.2d at 40-41.

In the absence of any clear directive on this point from the United States Supreme Court, the Washington court sought guidance from the decision of the United States Court of Appeals for the Fifth Circuit in Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979). In Nash, the United States Court of Appeals had held that when a suspect makes an equivocal reference to his right to an attorney, interrogation must cease and questioning must be confined to clarifying the suspect's wishes

concerning an attorney until those wishes had been clarified. Nash, 597 F.2d at 517-518.

The Washington Supreme Court, in Robtoy, chose to adopt the Nash rule. In reaching this decision in Robtoy, the Washington Supreme Court was solely concerned with the requirements of the Fifth Amendment to the United States Constitution.

There was no suggestion that the court was looking to the Washington Constitution as the source for its decision, nor was there any suggestion that the state constitution would call for any different result than the federal constitution in this regard.

The United States Supreme Court did not address the issue of how law enforcement should respond to an equivocal request for counsel until its decision in Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). In that case, a member of the United States Navy was interviewed by agents of the Naval Investigative Service (NIS). Davis was informed of his Miranda rights and he then waived those rights. During

the interview that followed, Davis made the statement: "Maybe I should talk to a lawyer". The Supreme Court found Davis's statement about an attorney to have been an equivocal reference to his right to an attorney, and considered what law enforcement response to such an equivocal reference was constitutionally required.

In this case we decide how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the Edwards prohibition on further questioning.

Davis, 512 U.S. at 454-455.

The Supreme Court analyzed this case on the basis that the Fifth Amendment's self-incrimination clause applies to military interrogations and the admissibility of statements in military courts-martial to the same extent that the Fifth Amendment applies to state and federal prosecutions. Davis, 512 U.S. at 457. The Court then noted that state and federal courts had developed three separate approaches to the constitutional requirements placed upon law enforcement when a suspect makes an ambiguous or

equivocal request for counsel. One approach was to require that all questioning cease at that point. Another approach was to rule that questioning need not cease until the defendant had made an unequivocal invocation of a Miranda right.

The third approach, as in Washington, was to require that interrogation cease except for questions designed to clarify the defendant's wishes. Davis, 512 U.S. at 456.

In Davis, the Supreme Court firmly rejected the rule previously adopted by the Washington court in Robtoy, supra, and instead held that under the Fifth Amendment, if a suspect makes an equivocal reference to the right to an attorney after having been informed of his Miranda rights and having waived them, law enforcement officers may continue questioning the suspect until that suspect makes a clear request for an attorney.

. . . We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the

interviewing officers to clarify whether or not he actually wants an attorney. This was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

Davis, 512 U.S. at 461-462.

In the years subsequent to the Davis decision, the Washington Supreme Court has not squarely faced the U.S. Supreme Court's rejection of the rule enunciated in Robtoy, supra.

In State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996), Aten was informed of her Miranda rights and asked if she wished to waive them. She responded, "I really do, but I think I better have an attorney present just to see if maybe, ah, I might be messing up somewhere along the line." The interviewing officer then stopped the interview. For the next 40 minutes, two officers responded to questions Aten put to them, but did

not attempt to clarify Aten's earlier reference to an attorney. Then, Aten asked that the recorder be turned back on, offered to talk to officers, and signed a waiver of rights. Aten, 130 Wn.2d at 651-652.

On appeal, the Washington Supreme Court treated Aten's reference to having the assistance of an attorney as an equivocal reference to that right. A plurality of four Justices applied Robtoy, supra, without any mention of the U.S. Supreme Court's decision in Davis, supra, and found that, despite the lack of any clarification, the initiation of further questioning by Aten herself and her subsequent waiver caused her further statements to be admissible. However, Aten's conviction was reversed because the corpus delicti was not established independent of Aten's statements. Aten, 130 Wn.2d at 666, 668.

Another four Justices concurred in the decision. However, those four Justices took the position that the U.S. Supreme Court's decision in Davis, supra, was controlling and determinative on

the issue of whether the procedures followed in Aten's interview had violated her constitutional rights, and that the plurality opinion had been mistaken in applying Robtoy, supra. Aten, 130 Wn.2d at 668-669.

A ninth Justice dissented, taking issue with the ruling regarding corpus delicti, and obviously supporting the admissibility of Aten's statements, but never referring to what significance Davis v. United States had in all of this. Aten, 130 Wn.2d at 670-673. Thus, the decision in Aten, supra, did nothing to clarify the issue of whether Davis v. United States is controlling law in the state of Washington.

It is important to keep in mind, as was mentioned above, that the rule enunciated by the Washington Supreme Court in Robtoy was based on an interpretation of the U.S. Constitution's Fifth Amendment rather than on any independent analysis of the equivalent provision in the Washington State Constitution. Robtoy, 98 Wn.2d at 39-41. The Fifth Amendment states, in part,

that no person "shall be compelled in any criminal case to be a witness against himself". Article I, section 9 of the Washington Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself". The Washington Supreme Court has consistently held the protections afforded by Article I, section 9 are coextensive with, and not broader than, the protections of the Fifth Amendment. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994); State v. Earls, 116 Wn.2d 364, 374-375, 805 P.2d 211 (1991); State v. Wethered, 110 Wn.2d 466, 472-473, 755 P.2d 797 (1988); State v. Franco, 96 Wn.2d 816, 829, 639 P.2d 1320 (1982); State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); State v. Mecca Twin Theater & Film Exchange Inc., 82 Wn.2d 87, 91, 507 P.2d 1165 (1973); State v. Moore, 79 Wn.2d 51, 57, 483 P.2d 630 (1971).

In the present case, the defendant has not provided any basis to find that Article I, section

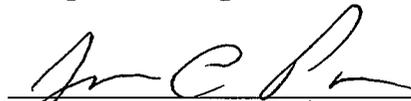
9 of the Washington Constitution should be interpreted any differently in the present context. Therefore, the decision of the United States Supreme Court in Davis v. United States is controlling here. The trial court in the present case did not err in following Davis and finding that there was no constitutional violation in Detective Miller's interview with the defendant.

D. CONCLUSION

Based on the arguments set forth above, the State respectfully requests that this court affirm the defendant's convictions in this case.

DATED this 5th day of May, 2008.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY