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Recent Developments: Ballard v. State: A Defendant's Statement, "You Mind if I Not Say No More and Just Talk to an Attorney about This," Was an Unambiguous and Unequivocal Invocation of the Defendant's Sixth Amendment Right to Counsel, Which Required the Interrogation to Cease and Rendered Inadmissible All Statements Obtained Thereafter

Kayleigh Toth

RECENT DEVELOPMENT

BALLARD V. STATE: A DEFENDANT'S STATEMENT, "YOU MIND IF I NOT SAY NO MORE AND JUST TALK TO AN ATTORNEY ABOUT THIS," WAS AN UNAMBIGUOUS AND UNEQUIVOCAL INVOCATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, WHICH REQUIRED THE INTERROGATION TO CEASE AND RENDERED INADMISSIBLE ALL STATEMENTS OBTAINED THEREAFTER.

By: Kayleigh Toth

The Court of Appeals of Maryland held that the defendant's statement, "You mind if I not say no more and just talk to an attorney about this," was an invocation of the defendant's right to counsel. *Ballard v. State*, 420 Md. 480, 24 A.3d 96 (2011). Specifically, the court held that a reasonable police officer would have concluded that the defendant's statement was an unambiguous and unequivocal request to speak to an attorney. *Id.* at 491, 24 A.3d at 102.

On December 27, 2007, police took Warren Lee Ballard ("Ballard") into custody after they discovered a murder victim's cell phone SIM card in his possession. Police administered proper *Miranda* warnings, which Ballard waived, before Detective Kaiser began a video-taped interrogation. During the interrogation, Ballard said to Detective Kaiser, "You mind if I not say no more and just talk to an attorney about this." Detective Kaiser responded by stating, "What benefit is that going to have?" Ballard replied, "I'd feel more comfortable with one." Despite this exchange, Detective Kaiser continued the interrogation and Ballard eventually made incriminating statements revealing his involvement in the murder.

Ballard filed a motion to suppress the incriminating statements from his interrogation arguing his initial statement to Detective Kaiser unequivocally and unambiguously invoked his right to counsel. However, the Circuit Court for Wicomico County denied Ballard's motion to suppress on the basis that his statement was ambiguous, equivocal, and did not sufficiently invoke his right to counsel. Thus, Detective Kaiser was not required to cease questioning. Ballard then filed a motion to reconsider the suppression ruling. During argument on the motion to reconsider, the circuit court listened to Ballard's recorded interview with Detective Kaiser. The court again denied Ballard's motion to suppress relying on the context, inflection, and tone of Ballard's statement rather than the typed words on paper. The court

found that Detective Kaiser properly continued questioning. Ballard subsequently proceeded to trial on an agreed statement of facts and the court found him guilty of second-degree murder and lesser charges.

On appeal, the Court of Special Appeals of Maryland agreed that the statement at issue was an ambiguous and equivocal statement that failed to invoke Ballard's right to counsel. The Court of Appeals of Maryland granted Ballard's petition for a writ of certiorari to consider whether his statement was sufficient to invoke the right to counsel.

The Court of Appeals of Maryland began its analysis by recognizing that to invoke the right to counsel, the accused must make the request in a manner that a reasonable police officer would interpret to be a desire to speak with an attorney. *Ballard*, 420 Md. at 490, 24 A.3d at 102 (citing *Davis v. U.S.*, 512 U.S. 452, 459 (1994)). The court further explained that the interrogation must stop if at any time the individual states that he wants an attorney. *Ballard*, 420 Md. at 489, 24 A.3d at 101 (citing *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966)). The purpose for this "bright-line" prohibition against continued questioning is to prevent authorities from badgering, over-reaching, or wearing down an accused to the point at which he incriminates himself despite his earlier request for counsel. *Ballard*, 420 Md. at 489, 24 A.3d at 101 (citing *Smith v. Ill.*, 469 U.S. 91, 98 (1984)).

The court proceeded to compare Ballard's statement to statements made in prior cases that were deemed insufficient invocations of the right to counsel. *Ballard*, 420 Md. at 491-92, 24 A.3d at 103. Specifically, the court discussed that a reasonable police officer could conclude that the statement, "Where's my lawyer?," merely reflected the suspect's curiosity concerning the location or appointment of his lawyer. *Id.* (citing *Matthews v. State*, 106 Md. App. 725, 737-38, 666 A.2d 912, 917 (1995)). In addition, the court reasoned that the statement, "Maybe I should talk to a lawyer," inferred only that the suspect might want a lawyer, which does not require cessation of questioning. *Ballard*, 420 Md. at 492, 24 A.3d at 103 (citing *Davis*, 512 U.S. at 462). Similarly, the statement, "Should I get a lawyer," also constituted an ineffective assertion of the right to counsel. *Ballard*, 420 Md. at 492, 24 A.3d at 103 (citing *Minehan v. State*, 147 Md. App. 432, 443-44, 809 A.2d 66, 72 (2002)). Unlike these statements, the court held that Ballard's statement, "You mind if I not say no more and just talk to an attorney about this," was an unambiguous and unequivocal invocation of a defendant's right to counsel, and the trial court erroneously denied Ballard's motion to suppress. *Ballard*, 420 Md. at 494, 24 A.3d at 104-05.

After examining the content and format of Ballard's statement, the court found that "You mind if..." was similar to an accused stating that he would rather have an attorney, which courts previously held was an unambiguous assertion. *Ballard*, 420 Md. at 493, 24 A.3d at 104 (citing

State v. Harris, 305 S.W.3d 482 (Mo. Ct. App. 2010)). The court interpreted "You mind if..." as a colloquialism in this context to mean that Ballard's statement was a polite expression seeking to determine if Detective Kaiser "mind[ed]" if Ballard spoke to an attorney rather than seeking his permission. *Ballard*, 420 Md. at 493, 24 A.3d at 103. Even if taken for its literal meaning, a reasonable police officer could only interpret Ballard's statement as unquestionably asking for a lawyer, simply doing so in deferential terms. *Id.* at 493, 24 A.3d at 103-04.

While the court's holding did not require a suspect to "speak with the discrimination of an Oxford don," the suspect must articulate a statement that a reasonable officer would construe to be a request for counsel. *Ballard*, 420 Md. at 490, 24 A.3d at 102 (citing *Davis*, 512 U.S. at 459). The court suggested that, "good police practice" would include asking clarifying questions when a suspect makes an ambiguous reference to an attorney. *Ballard*, 420 Md. at 490, 24 A.3d at 102 (citing *Davis*, 512 U.S. at 461).

The Court of Appeals of Maryland concluded its analysis by stating that had a reasonable police officer interpreted Ballard's statement as a vague assertion of the right to counsel, his follow up remarks would resolve the ambiguity. *Ballard*, 420 Md. at 494, 24 A.3d at 104. The court considered Ballard's second statement, "I'd feel more comfortable with one," in response to the officer asking why he wanted a lawyer, to clarify any doubt as to the defendant's desire to speak with counsel. *Id.* However, the court emphasized that Ballard's first statement, on its own without further explanation, represented an unambiguous and unequivocal desire to speak with counsel that should have ended the interrogation. *Id.*

In *Ballard*, the Court of Appeals of Maryland broadened the protections given to suspects in custodial interrogations. Practitioners must pay particular attention to statements made by suspects during interrogations, taking into consideration colloquialisms attendant to the English language in order to distinguish between ambiguous and unambiguous requests for counsel. In reaching its decision, the *Ballard* court acknowledged the need to protect defendants who, under the stress and intimidation of an interrogation, experience difficulty speaking assertively and use equivocal terms unintentionally. Since the ultimate goal of police officers and prosecutors is to acquire admissible evidence, their failure to clarify a suspect's statements could result in a reversed conviction and remanded trial. Not all criminal suspects are aware of the intricacy of the protections provided to them and *Ballard* burdens all parties with the task of guaranteeing these protections.