

No. SC95613

**In the
Missouri Supreme Court**

STATE OF MISSOURI,

Appellant,

v.

DAVID K. HOLMAN,

Respondent.

**Appeal from Lawrence County Circuit Court
Thirty-Ninth Judicial Circuit
The Honorable Jack A. L. Goodman, Judge**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

A. Defendant stipulated to the essential facts.

In Respondent's substitute brief, Defendant repeatedly asserts that once he was read the *Miranda* warnings, he "immediately" stated that he would not sign anything without an attorney. (Respondent's Br. 9, 13, 16, 18, 23). As discussed below, this assertion contradicts the facts to which Defendant stipulated at trial, and Defendant is now bound by the facts to which he stipulated.

Generally, an appellate court "reviews a trial court's ruling on a motion to suppress in the light most favorable to the ruling and defers to the trial court's determinations of credibility," *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. banc 2003), and an appellate court "gives deference to the trial court's factual findings but reviews questions of law *de novo*." *State v. Gaw*, 285 S.W.3d 318, 320 (Mo. banc 2009).

Despite the general rule, findings of fact may be set aside on appeal if clearly erroneous. *State v. Antwine*, 743 S.W.2d 51, 66 (Mo. banc 1987) ("[F]indings of fact shall not be set aside unless clearly erroneous."). "[A] finding [of fact] is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (internal quotation marks omitted); see also *Watson v. State*, 475 S.W.2d 8, 12 (Mo.

1972) (“The trial court, as the trier of the facts, is the judge of the credibility of the witnesses, and on appeal we defer to his determination of the credibility unless it clearly appears he has abused his discretion.”).

“Factual issues on motions to suppress are mixed questions of law and fact.” *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000). “An issue of fact is one of primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators.” *Werner*, 9 S.W.3d at 595 (internal quotation marks omitted).

At the suppression hearing, Defendant explained to the trial court that the parties were stipulating to “most of the facts,” and then defense counsel himself recited what those facts were: “[The prosecutor] and I *can agree on most of the facts* and then the question will become what is operative law vis-a-vis *the facts*. And if you will permit me, *I will recite what I think the facts would be.*” (Tr. 2) (emphases added). After defense counsel completed his recitation of the facts, the prosecutor responded, “Yeah, as far as the facts I think you did a very good job on that.” (Tr. 6). The prosecutor then made two factual corrections not relevant to this appeal, and the parties then began argument. (Tr. 6). The parties also separately “stipulated” to the deposition testimony of Deputy Ryan Devost and Detective Melinda McElroy, as well as

the police report prepared by Deputy Devost.¹ (Joint Ex. 1; Joint Ex. 2; Joint Ex. 3).

Disputes as to some factual issues do not suddenly destroy the facts to which the parties did stipulate. The stipulated facts are just that—stipulated facts—regardless of whether any remaining facts are in dispute. Although the parties stipulated as to certain evidence through the joint exhibits, that evidence is distinguished from the facts to which the parties separately stipulated.

¹ On appeal, Defendant now appears to waver as to whether the parties' stipulation was as to what the officers' testimony would be, or as to the facts themselves. *Compare* (Respondent's Br. 7) ("The Circuit Court considered the presentation of deposition testimony presented by defense counsel and the prosecuting attorney."), *with* (Respondent's Br. 7) ("The facts presented to the Circuit Court through . . . the recitation of facts from the attorneys . . . were thus."). As discussed, it is clear from the record that the recitation of facts recited by Defendant were the *facts* to which the parties were stipulating, though the parties also separately stipulated as to the officers' testimony through the joint exhibits.

The parties' exact stipulation to the court, as recited by defense counsel, was as follows:

[Once Defendant becomes emotional,] Deputy Devost believes that it is appropriate to advise [Defendant] of his constitutional rights per *Miranda v. Arizona*. He takes a card from his shirt pocket and recites the warnings pursuant to the department issued card with the *Miranda* warnings on it.

[Defendant] is handcuffed at this point. He has been conversing with Deputy Thorn although Deputy Thorn doesn't record any of their conversation. Deputy Devost then asks [Defendant] to execute the consent to search form. . . .

[Defendant's] response immediately to Deputy Devost's question is "I ain't signing shit without my attorney."

(Tr. 4-5). Thus, Defendant stipulated to the following series of events:

1. Deputy Devost read the *Miranda* warnings to Defendant. (Tr. 4).
2. Deputy Thorn then continued to converse with Defendant. (Tr. 5).
3. Deputy Devost then asked Defendant to sign the consent-to-search form. (Tr. 5).
4. Defendant then responded, "I ain't signing shit without my attorney." (Tr. 5).

Defendant does not directly dispute any of these facts in his brief. In fact, Defendant's brief does not outline what—if any—specific historical facts actually are in dispute.² Rather, Defendant apparently attempts to sidestep facts 2 and 3 detailed above by repeatedly asserting that once he was read the *Miranda* warnings, he “immediately” stated that he would not sign anything without an attorney. (Respondent's Br. 9, 13, 16, 18, 23).

As illustrated above, Defendant's assertion contradicts the facts to which he stipulated at trial. Additionally, Defendant's assertion also contradicts the trial court's findings, as the trial court found that Defendant's remark was uttered in response to the request for consent to search. (L.F. 36-37) (“This court must determine if Defendant stating, ‘I ain't signing shit without my attorney’ in response to the deputy's request that Defendant sign a form giving consent to search precludes law enforcement from initiating

² Defendant broadly claims that the State and Defendant “disagreed about the meaning and effect of [D]efendant's [remark] . . . and the context in which [Defendant] uttered it.” (Respondent's Br. 27). But while the parties disagreed about the legal effect of Defendant's remark, the parties clearly agreed with the context laid out in facts 1 through 4 above.

further questioning.”).³ Defendant also appears to contradict himself. In his statement of facts, Defendant at first concedes that police asked Defendant to sign the consent form only after reading Defendant the *Miranda* warnings, but Defendant then claims that he made his remark immediately after being advised of his constitutional rights. (Respondent’s Br. 9); *see also* (Respondent’s Br. 16) (“I ain’t signing shit without an attorney’ was given as an immediate response to the first question presented by the officer immediately upon the recitation of the *Miranda* warnings.”).

Even if the period of time between the *Miranda* warnings and Defendant’s remark was short, Defendant’s argument would not be aided. The relevant inquiries are whether—in the context of the historical events to which Defendant stipulated—Defendant’s remark was made in response to custodial interrogation and whether the remark was an objective invocation of the right to an attorney for all purposes.

Defendant cites *State v. Abeln*, 136 S.W.3d 803 (Mo. App. W.D. 2004), for the proposition that even where the trial court’s decision is based solely on records, an appellate court defers to the trial court as the finder of fact in

³ The trial court did not make detailed factual findings, and the factual findings contained in its order do not contradict the historical facts outlined in facts 1 through 4 above. (L.F. 36-37).

making its determination of whether the trial court's ruling was supported by substantial evidence. (Respondent's Br. 12). *Abeln* is inapplicable. Here, the parties stipulated to the essential facts, as discussed above. In *Abeln*, the *only* evidence presented to the trial court was stipulated testimony, as the parties did not stipulate to any of the facts themselves. *Abeln*, 136 S.W.3d at 806-07. Here, Defendant is bound by the facts to which he stipulated, even if additional evidence was presented to the trial court.

B. The legal effect of Defendant's remark is not an issue of fact.

Defendant suggests that the meaning of "I ain't signing shit without an attorney" is an issue of fact. (Respondent's Br. 16). But it is not. "An issue of fact is one of primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000) (internal quotation marks omitted). In other words, whether Defendant uttered the words is a question of fact. The legal effect of those words is a question of law.

"The question of whether an accused has invoked the right to counsel is objective." *State v. Harris*, 305 S.W.3d 482, 485 (Mo. App. E.D. 2010); *see also Davis v. United States*, 512 U.S. 452, 458-59 (1994) ("[T]his is an objective inquiry."). "The determination of whether a suspect invoked his Fifth Amendment right to counsel is a question of law." *State v. Benedict*, No.

ED102488, 2016 WL 1579123, at *6 (Mo. App. E.D. Apr. 19, 2016).⁴ “Factual issues on motions to suppress are mixed questions of law and fact.” *Werner*, 9 S.W.3d at 595. The United States Supreme Court has held that “fact-intensive, mixed questions of constitutional law” are subject to “[i]ndependent review[, which] is . . . necessary . . . to maintain control of, and to clarify, the legal principles governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.” *Lilly v. Virginia*, 527 U.S. 116, 136 (1999) (internal quotation marks omitted). Invocation of the right to counsel is widely considered a mixed question of law and fact. *See, e.g., Soffar v. Cockrell*, 300 F.3d 588, 592 (5th Cir. 2002); *State v. Ayer*, 917 A.2d 214, 231 (N.H. 2006); *State v. Rogers*, 760 N.W.2d 35, 47 (Neb. 2009); *State v. Chavarria-Cruz*, 784 N.W.2d 355, 363 (Minn. 2010); *People v. Romero*, 953 P.2d 550, 555 (Colo. 1998); *State v. Jennings*, 647 N.W.2d 142, 147 (Wis. 2002).⁵

⁴ This case is not yet final.

⁵ The Tennessee Supreme Court reviewed caselaw across the country, concluding, “we were unable to find any reported decisions from appellate courts outside of this state that have reviewed the nature of a request for counsel as purely a question of fact.” *State v. Turner*, 305 S.W.3d 508, 514-15

The legal effect of Defendant's remark is not a question of fact. Unlike the remark itself, or the factual context within which the remark was made, the legal effect of Defendant's remark is not a primary or historical fact reflecting external events. *Werner*, 9 S.W.3d at 595. The parties did not stipulate to the legal effect of Defendant's remark; that determination was for the trial court. And, consequently, the legal effect of the words uttered is subject to *de novo* review.⁶

C. A limited invocation does not require an express statement indicating a willingness to continue talking.

Defendant argues that he did not make any affirmative statement that he was willing to proceed on a limited basis without an attorney.

(Tenn. 2010), *abrogated on other grounds by State v. Climer*, 400 S.W.3d 537 (Tenn. 2013).

⁶ Defendant claims that "the parties and the Circuit Court agreed the issue presented . . . was a fact question." (Respondent's Br. 7). Defendant misapprehends the record. The trial court asked, "That is a fact question." (Tr. 24). Defendant responded, "Yes, sir." (Tr. 24). The prosecutor did not respond, and the trial court changed subjects. (Tr. 24). Regardless, even if all parties had operated under the misunderstanding that the issue is one of fact, this Court is not bound by that misunderstanding.

(Respondent's Br. 25). Such an affirmative statement is not necessary to make a limited invocation of the right to an attorney. "The question of whether an accused has invoked the right to counsel is objective." *State v. Harris*, 305 S.W.3d 482, 485 (Mo. App. E.D. 2010); *see also Davis v. United States*, 512 U.S. 452, 458-59 (1994) ("[T]his is an objective inquiry."). An affirmative statement indicating a willingness to speak on a limited basis without an attorney may at times assist in this objective inquiry, but an appellate court can make such an objective determination without such an affirmative statement.

Defendant cites *Connecticut v. Barrett*, 479 U.S. 523 (1987), and *United States v. Quiroz*, 13 F.3d 505 (2d Cir. 1993), for his argument that Defendant did not indicate a willingness to answer questions on a limited basis without an attorney. (Respondent's Br. 24-25). It is true that the defendant in *Barrett* did affirmatively state that he was willing to speak with police. *Barrett*, 479 U.S. at 525. But the *Barrett* court in no way indicated that this fact was essential to its holding. Given that Court's ruling that "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous," *Barrett*, 479 U.S. at 529, the defendant's affirmative statements indicating a willingness to speak were merely further support that the defendant's words were not ambiguous.

The *Quiroz* opinion has been abrogated. *United States v. Quiroz*, 13 F.3d 505 (2d Cir. 1993), *abrogated by United States v. Plugh*, 648 F.3d 118 (2nd Cir. 2011). As explained by the *Plugh* court, the *Quiroz* decision was apparently premised on the notion that “when a custodial officer specifically asks a suspect if he will waive his rights by signing a form and does so in such a way that the accused would interpret a refusal to sign as a negative answer,” the suspect has adequately invoked the right to counsel. *Plugh*, 648 F.3d at 126. The *Plugh* decision abrogated *Quiroz*, explaining that United States Supreme Court caselaw holds that to invoke the right to counsel, a suspect must unambiguously and *actively* invoke the right to counsel by “actually request[ing]” an attorney. *Id.* at 124 (citing *Berghuis v. Thompkins*, 560 U.S. 370 (2010); *Davis*, 512 U.S. at 462)). To the extent that *Quiroz* remains good law, the fact that the defendant in *Quiroz* did not affirmatively state that he was willing to answer some questions was not essential to that court’s holding, just as it was not essential to the *Barrett* court’s holding. *Quiroz*, 13 F.3d at 508-12.

In *United States v. Ivy*, 929 F.2d 147 (5th Cir. 1991), the Fifth Circuit held that the defendant invoked the right to counsel on only a limited basis despite not affirmatively expressing any willingness to continue talking. In *Ivy*, the police asked where the defendant obtained his dynamite. *Ivy*, 929 F.2d at 152. The defendant responded, “I’ll tell you, let me talk to my lawyer

before I answer that.” *Id.* The court held that the defendant had only invoked the right to counsel on a limited basis, and even though the defendant gave no indication that he was willing to continue speaking without an attorney, the court held that it was permissible for police to continue asking the defendant about other topics. *Id.* at 152-53; *see also State v. Uraine*, 754 P.2d 350 (Ariz. Ct. App. 1988) (finding limited invocation although there was no express indication that defendant was willing to continue talking when after officer read defendant the implied consent form, defendant stated he did not want to take breath test until he talked to his lawyer); *State v. Gascon*, 812 P.2d 239, 242 (Idaho 1991) (after stating he would rather talk to a lawyer before making a written statement but providing no express indication that he was willing to continue talking, defendant was questioned again shortly thereafter; court found only limited invocation).

In *United States v. Martin*, 664 F.3d 684 (7th Cir. 2011), the Seventh Circuit rejected an argument similar to what Defendant makes here, that a defendant must affirmatively indicate that he is willing to proceed in a limited manner without counsel. When asked if he would provide a written statement, the defendant in *Martin* responded, “I’d rather talk to an attorney first before I do that.” *Martin*, 664 F.3d at 685. When the defendant was later interrogated, he answered the detectives’ questions. *Id.* at 687. The court held that the defendant’s “invocation of the right to counsel was clearly limited in

its scope to written statements.” *Id.* at 690. “[The defendant] asserts that his case differs significantly from *Barrett* in that he never affirmatively expressed a desire to continue speaking with law enforcement officers without an attorney present. We can infer from [his] actions, however, that he was not unwilling to do so.” *Id.* at 689.

Similarly, the defendant in *Baird v. State*, 440 S.E.2d 190 (Ga. 1994), provided no express indication that he was willing to continue talking with police when he initially referenced an attorney. After police read to the defendant a request-to-search form, the defendant responded, “if this ha[s] to do with a murder investigation, [I] might ought to talk to a lawyer.” *Baird*, 440 S.E.2d at 191. The court concluded that the remark

was made in response to the state’s request to search his vehicle, and was not an assertion of his Fifth Amendment right to counsel during custodial interrogation. Statements made by appellant during his subsequent interview at police headquarters confirm that conclusion. At most, appellant’s reference to counsel was a limited request for an attorney to be present solely during the search of his car.

Id. at 192.

Here, it is also evident from Defendant’s actions that he was willing to speak with the police. Prior to asking Defendant any questions, Detective McElroy read Defendant the *Miranda* warnings again, which Defendant

indicated he understood. (L.F. 20, 36; Tr. 14-15; Joint Ex. 3 at 98). Defendant then proceeded to make statements to the officers. (Tr. 15). Like in *Ivy*, *Martin*, and the other cases referenced above, it is objectively clear here that Defendant was willing to speak with police despite his limited invocation.

Again, “the fundamental purpose of the Court’s decision in *Miranda* was to assure that *the individual’s right to choose* between speech and silence remains unfettered throughout the interrogation process,” *Barrett*, 479 U.S. at 528 (emphasis in original) (internal quotation marks omitted), and Defendant chose to speak. The purpose of the *Edwards* rule is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.” *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). There was no badgering here. No prophylactic purpose would be served by suppressing Defendant’s statements.

CONCLUSION

For the foregoing reasons, and for the reasons outlined in Appellant's substitute brief, the trial court's order granting Defendant's motion to suppress should be reversed, and this case should be remanded to the trial court for entry of an order denying Defendant's motion to suppress.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3115 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2010 software; and
2. That a true and correct copy of the attached brief, was sent through the eFiling system on July 28, 2016, to:

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