IN THE SUPREME COURT OF FLORIDA

DANIEL LEE DOYLE)
Appellant,) CASE NO: 62,212
vs.)
STATE OF FLORIDA,)
Appellee.)
)

REPLY BRIEF OF APPELLANT

Appeal from the Circuit
Court, 17th Judicial Circuit,
in and for Broward County,
Florida
Judge Leroy H. Moe

MICHAEL D. GELETY, ESQUIRE
Attorney for Appellant
727 Northeast Third Avenue
Suite 301
Fort Lauderdale, Florida 33304
Telephone: (305) 524-3110

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

POINT II

B.

Regarding Appellant's contention that the evidence elicited at the Motion to Suppress at the trial was insufficient to demonstrate a knowing and intelligent waiver of Appellant's constitutional rights under the Fifth Amendment, Appellant would refer this court to the case of BeConingh v. State, ___So.2d___; F.L.W. Vol. 7, No. 42, 11/5/82, P. 497, wherein this court affirmed the suppression of a statement given by BeConingh while she was in the hospital following a murder while in an emotional and confused state. Reiterating the holding of Reddish v. State, 167 So.2d 858 (Fla. 1964), wherein it was held that "If for any reason the suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him", this court went on to find that the trial court correctly concluded that BeConingh's mental and emotional distress prevented her from effectively waiving her rights and that she did not make the statement voluntarily or knowingly. "Waivers of constitutional rights not only must be voluntarily voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." P. 498; See also Brady v. United States, 397 U.S. 742 (1970). It should be noted that BeConingh had received advice by an attorney to remain silent before giving the statement in question, where the

Appellant in the instant matter never was able to contact his attorney before the statements were elicited from him, and that DeConingh requested that the deputy taking the statements return to her and in fact DeConingh initiated further contact with the officer. Certainly the testimony regarding Appellant's low mental ability, the presence of brain damage, and the various effects of the stressful situation on Appellant were as compelling as the factors found in DeConingh, and it logically follows that Appellant in the instant matter was incapable of a knowing and voluntary waiver of his constitutional rights under the Fifth Amendment, making statements in question inadmissible before the jury.

C.

Supplementing the factual matters found in the record to support Appellant's contention of his request for assistance of counsel before any statements were made, is the case of State v. Garcia, ___So.2d___; F.L.W. Vol. 7, No. 43, 11/12/82, P. 2319, wherein the trial court's suppression of a statement made by Garcia was affirmed as Garcia was interrogated for approximately 10 hours before polygraph examination and the resultant concession was given. During the course of such interrogation, Garcia twice tried to call his attorney, but such attorney could not be reached by Garcia. Upon his return, Garcia was asked by

the interrogating officer whether he wanted to continue to speak, and Garcia agreed to talk to such officer, resulting in the statement at issue. Clearly, there was no testimony regarding Garcia being intellectually inferior, nor is there any testimony regarding Garcia having emotional problems, with both factors being prominent in the instant appeal. However, based upon the teachings of Edwards v. Arizona, ___U.S.___, 101 S.Ct. 1880 (1981), it is readily apparent that Appellant's attempt and desire to contact his long-standing attorney is much more indicative of his invoking of his right to counsel than was Garcia's two attempts to contact an attorney. Also important is the fact that Garcia agreed to continue the interrogation without the benefit of the attorney, where Appellant in the instant matter continued to make it clear that he would like to speak to his attorney although he was out of town relenting only after further interrogation. (Tr. Vol. I, P. 39-40).

Consequently, the record on appeal supports the intention of Appellant that, within his limited ability to do so, Appellant requested an attorney and attempted to have an attorney present before statements were given, and did not initiate further contact once said request was made known to the police officers as is required in Edwards, supra. Wherefore, a new trial is mandated due to the error of the trial court in allowing the resultant statements to come before the jury.

POINT V

C.

Regarding the trial court's improper failure to find the mitigating factors dealing with Appellant's mental and emotional abilities, his ability to appreciate the criminality of his conduct or to conform his conduct to the requirement of law, the state contends that it was within the province of the trial court to weigh the expert and lay testimony presented in the case and that the judge was entitled to conclude that the testimony should be given little or no weight in the decision regarding both the existence of the mitigating factor and in the ultimate decision of imposing the death penalty. (Appellee's Brief, P. 36). However, this position cannot be supported by logic as the trial court finds itself in a position of accepting and relying upon the testimony of Dr. Krieger and Dr. Eichert regarding their opinions of Appellant's ability to understand and waive his rights under Miranda, yet reject totally the unrebutted and unequivocal testimony by the same doctors when presented in support of Appellant's position at the sentencing phase of the trial. While Appellant would certainly agree that the trial court has discretion when weighing the credibility and believability of various witnesses, Appellant also maintains that such discretion must be exercised in a consistent manner and to avoid capricious and unfair results.

In Quince v. State, 414 So.2d 185 (Fla. 1982), this court dealt with the mitigating factor involving the inability of Quince to appreciate the criminality of his conduct in a factual context similar to that in the instant case, yet with glaring differences. In Quince, the trial court found that the mitigating factor involving the inability to appreciate the criminality of the conduct did in fact exist, but that the factor deserved little weight. (P. 186) Although the experts that testified in Quince agreed that Quince was not of normal intelligence, the exact degree to mental impairment could not be conclusively established. Four of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with the mental capacity. The fifth expert that testified found that Quince lacked the ability to appreciate the criminality of his act, and compared his mental abilities to those of an 11 year old. This comparison, using age equivalency, was sharply questioned by one expert, and essentially rejected by another. In contrast to the instant case, the experts testifying on behalf of Appellant, DOYLE, were not in conflict, and were in fact unanimously in accord regarding Appellant's emotional problems, below average intellectual capacity and various other psychological factors relevant to the mitigating factors involved.

In affirming the sentencing procedure in Quince, this court held that:

> This is not a case in which the trial judge failed entirely to take the defendant's mental condition into account. The trial judge demonstrated in his sentencing order his close consideration of this very factor. P. 187.

Quince, unlike the instant Appellant, disagreed with the weight that the trial judge accorded the mitigating factor, since his trial judge found that the substantial impairment mitigating factor did not outweigh the three aggravating factors. P. 187.

> The trial judge was not unreasonable in failing to give great weight to this mitigating factor, which he nevertheless did find to exist, in the light of the contrary evidence, the trial judge clearly did not ignore every aspect of the medical testimony. P. 187.

Obviously, the trial judge in the instant matter did ignore the aspects of medical testimony regarding the mitigating factors dealing with substantial impairment despite the fact that there was no contradictory evidence as there was in Quince. The trial court in the instant matter erred by not finding either one or both of the mitigating factors to exist in the instant matter based upon the expert medical testimony elicited at the sentencing phase of the trial, and further erred in imposing the death sentence in light of the serious emotional problems suffered by Appellant as well as the diminished mental capacity of the Appellant.

Respectfully submitted,

Norman O'Rourke for

MICHAEL D. GELETY
Attorney for Appellant
727 N.E. Third Avenue
Suite 301
Fort Lauderdale, Florida 33304
Telephone: (305) 524-3110

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant, DANIEL LEE DOYLE, has been furnished to RUSSELL BOHN, Assistant Attorney General, Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, 33401, this 3 day of February, 1983.

Norman O'Rourke for
MICHAEL D. GELETY