D/a 8-30-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,760

MARIO D'OLEO-VALDEZ,

Petitioner

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont.)

TABLE OF CITATIONS (Cont.)

OTHER AUTHORITIES

TABLE OF CONTENT (Cont.)

STATEMENT OF THE CASE AND FACTS

MARIO D'OLEO-VALDEZ was charged by Information with trafficking in cocaine. (R.1). On October 21, 1985, prior to trial, the trial judge entered a written order appointing JMH (Jackson Memorial Hospital) to evaluate D'Oleo-Valdez as to competency to stand trial, the need for involuntary hospitalization, and insanity at the time of the alleged offense. (SR.3). An evaluation, dated October 29, 1985 and filed on November 1, 1985, from Dr. Lloyd Miller, a psychiatrist with Jackson Memorial Hospital, concluded that D'Oleo-Valdez was competent to stand trial. (SR.4-6).

In addition to the report by Dr. Miller, D'Oleo-Valdez had obtained the services of Dr. Milton Burglass, a neuropsychiatrist, whose report of October 14, 1985, filed on October 21, 1985, concluded that D'Oleo-Valdez was "not presently able to be of assistance to you [defense counsel] in the conduct of his defense." (SR.1-2). Burglass opined that further examination was needed for a final evaluation. Id. D'Oleo-Valdez, an indigent defendant, was represented by the Public Defender, and had been declared insolvent for cost. (R.3).

Prior to the commencement of trial, defense counsel asserted that he had extreme difficulty in communicating with Mr. Valdez. (T.4). The judge responded that she understood

what counsel was saying, "but we have done it all." (T.4). Defense counsel then indicated he was filing a notice of intent to rely on insanity and to call the psychiatrist as a witness. (T.4). The judge noted that the court had all the reports and defense counsel stated that he had seen only the report of Dr. Miller. (T.5). Defense counsel noted that his expert, Mr. Burglass, found the defendant incompetent. (T.6). Defense counsel than said, "I just think what we should do is allow me to call my psychiatrist at trial, and I will talk to--." (T.6). The judge again permitted that. (T.7).

The trial commenced two days later. D'Oleo-Valdez testified on his own behalf. (R.117-163). He was found guilty as charged, adjudicated and sentenced to 15 years imprisonment and a fine of $250,000 plus $12,500 as a surcharge. (R.12-15).

On appeal from the conviction, the Third District Court of Appeal held:

> Although he made no such complaint below, the defendant now claims error in the fact that the trial court, upon an appropriate suggestion of incompetency to stand trial, appointed only one examiner to render an evaluation rather than the two provided by Florida Rule of Criminal Procedure 3.210. Because the number of examiners is merely a non-fundamental procedural matter -- unlike, for example a total failure to determine competence by failing to secure any expert opinion whatever, Scott v. State, 420 So.2d 595 (Fla. 1982) -- we hold that the failure to bring

> the deviation from the rule to the trial court's attention effected a waiver of the contention. [Citation omitted]. We do not read Graydon v. State, 502 So.2d 25 (Fla. 4th DCA 1987), to hold otherwise. If we are wrong about this, we think Graydon is wrong.

D'Oleo-Valdez v. State, 516 So.2d 1125 (Fla. 3d DCA 1987). The court also noted that "[n]o point is made of the trial court's ensuing determination to that effect," referring to the actual determination of competency. Id. at n.1.

D'Oleo-Valdez then sought discretionary review in this Court, alleging conflict with Graydon v. State, 502 So.2d 25 (Fla. 4th DCA 1987).

POINT INVOLVED ON APPEAL

WHETHER THE LOWER COURT ERRED IN HOLDING THAT A TRIAL COURT'S APPOINTMENT OF ONE EXPERT, AS OPPOSED TO THE TWO REQUIRED UNDER RULE 3.210, FLORIDA RULES OF CRIMINAL PROCEDURE, TO DETERMINE A DEFENDANT'S COMPETENCY TO STAND TRIAL, DOES NOT CONSTITUTE FUNDAMENTAL ERROR?

SUMMARY OF ARGUMENT

A violation of Rule 3.210(b), Florida Rules of Criminal Procedure, regarding the appointment of at least two experts for a competency determination, does not constitute fundamental error. Fundamental error entails a denial of due process. There is no due process right to at least two experts. Hence, the failure to object to the absence of a second expert at the trial court level precludes this issue from being asserted on appeal. Thus, the opinion of the Third District Court of Appeal should be affirmed.

ARGUMENT

THE LOWER COURT CORRECTLY HELD THAT A TRIAL COURT'S APPOINTMENT OF ONE EXPERT, AS OPPOSED TO THE TWO REQUIRED UNDER RULE 3.210, FLORIDA RULES OF CRIMINAL PROCEDURE,TO DETERMINE A DEFENDANT'S COMPETENCY TO STAND TRIAL, DOES NOT CONSTITUTE FUNDAMENTAL ERROR.

Rule 3.210(b), Florida Rules of Criminal Procedure, provides that if the trial court has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court, inter alia, "shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing." In the instant case, the order appointing disinterested experts appointed Jackson Memorial Hospital and only one report, that of Dr. Miller, was furnished to the trial court. The defendant did not object to the absence of a report from a second expert. Thus, when the defendant raised this issue on appeal, the Third District Court of Appeal held that "the number of examiners is merely a non-fundamental procedural matter" and that "the failure to bring the deviation from the rule to the trial court's attention effected a waiver of the contention." 516 So.2d 1125.

Errors in the trial court, other than those constituting fundamental error, are waived unless timely raised in the trial

court. Clark v. State, 363 So.2d 331, 333 (Fla. 1978). Fundamental error "is error which goes to the foundation of the case or goes to the merits of the cause of action." Moreover, "for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process." Ray v. State, 403 So.2d 956, 960 (Fla. 1981). See also, Castor v. State, 365 So.2d 701,704 at n.7 (Fla. 1978); Hargrave v. State, 427 So.2d 713, 715 (Fla. 1983); Fuller v. State, 406 So.2d 1212 (Fla. 2d DCA 1981). Thus, fundamental error requires a due process violation.

When a criminal case raises an issue as to a defendant's competency to stand trial, while there is a right to evaluation and hearing, there is no constitutional due process right to the appointment of two or mroe experts to determine competency. Due process can be fully satisfied through the appointment of just one expert. Thus, a violation of the State's procedural rule would not constitute a due process violation, would not constitute "fundamental error," and would not entitle a defendant to assert such a rule violation on apepal in the absence of timely objection in the trial court. A procedure which does not deny due process of law cannot constitute fundamental error.

Due process, in criminal prosecutions, "must comport with prevailing notions of fundamental fairness." California

v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Procedures followed by states will not violate the due process clause unless the procedures offend "some principle of justice so rooted in the conscience of our people as to be ranked as fundamental." Speiser v. Randall, 357 U.S. 513, 523, 78 S.Ct. 1332, 1 L.Ed.2d 1460 (1958), quoted in Patterson v. New York, 432 U.S. 197, 201-202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

The conviction of an incompetent defendant violates the due process clause. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Weber v. State, 438 So.2d 982 (Fla. 3d DCA 1983); Scott v. State, 420 So.2d 595 (Fla. 1982); Reynolds v. State, 491 So.2d 1314 (Fla. 5th DCA 1986). However, due process does not mandate that a competency evaluation be predicated on two or more expert evaluations. Due process can be satisfied through the appointment of just one expert.

"Experts appointed by the court to ascertain mental capacity are neither prosecution nor defense witnesses, but neutral experts working for the Court, and their findings and opinions are subject to testing for truth and reliability by both prosecution and defense counsel." Parkin v. State, 238 So.2d 817, 821 (Fla. 1970). See also, Chapman v. State, 391 So.2d 744, 746 (Fla. 5th DCA 1980). As a single expert appointed by the court would be a neutral, court witness, there is nothing inherently

flawed, biased or unreliable in such an appointment. Such a process, while violative of the state rule, does not render the process fundamentally unfair. Indeed, even if a second expert were appointed and came to a contrary conclusion, a trial court's conclusion as to competency, based on conflicting testimony and credibility issues, would, for all practical purposes, be beyond the scope of judicial review. Holmes v. State, 494 So.2d 230 (Fla. 3d DCA 1986); Ferguson v. State, 417 So.2d 631, 634-635 (Fla. 1982).

As previously noted, due process entails principles so deeply rooted in the conscience of our people as to be ranked fundamental. Speiser, supra; Patterson, supra. A survey of the incompetency hearing procedures utilized in other jurisdictions clearly reflects that the necessity for appointment of a second expert for evaluation purposes is not fundamental. The overwhelming majority of jurisdictions have statutes or rules which deem competency evaluations adequate if predicated on just one expert's examination and report. 18 U.S.C. §4241(b). ("... the court may order that a psychiatric or psychological examination of the defendant be conducted." 18.U.S.C. §4247(b), further provides that "a psychiatric or psychological examination ... shall be conducted by a licensed or certified psychiatrist or clinical psychologist, or, if the court finds it appropriate, by more than one such examiner."); Ark. Stat. Ann. §5-2-305

(1987) (the court shall appoint at least one expert); Colo. Rev. Stat. §16-8-111 (does not specify any minimum number of examiners); Idaho Code, §§18-211,212 (at least one expert shall be appointed); Iowa Code Ann. §812.3 (does not specify any minimum number of examiners); Ill. Ann. Stat. Ch. 38-204-13(a) (examination by one or more licensed physicians); Kan. Stat. Ann. §22-3302(3) (the court may order a psychiatric examination and commit the defendant, or the court may appoint two physicians to report to the court); Ky. Rev. Stat. Ann. Title 50, §504.100 (the court shall appoint at least one psychiatrist or psychologist); Me. Rev. Stat. Ann., Title 15, §101B (1987 Supp.) (only requires one examiner, and if that report reflects mental disease, the court shall then order further examination); Md. Code Ann. §12-104 (1987 Supp.) (requires only one examination); Mich. Stat. Ann. §14.800 (1026) (does not specify any minimum number of experts to be appointed); Mass. Ann. Laws, Ch. 123, §15(a) (requires appointment of one or more experts); Mo. Ann. Stat. §552.020 (Vernon) (requires appointment of one or more experts); Mont. Code Ann. §46-14-202,203 and 221 (requires appointment of at least one qualified expert); Neb. Rev. Stat. §29-1823 (the court may order such examination as he deems warranted); N.J. Stat. Ann. §2C:4-5(a) (the court may appoint at least one psychiatrist); N.C. Gen. Stat. §15A-1002 (the court may appoint one or more impartial experts); N. Dak. Cent. Code §12.1-04-06 (the court may order examination by a licensed psychiatrist); Okla. Stat.

Ann. Title 22, §1175.3 (does not specify any minimum number of experts); Ohio Rev. Code An. §2945.371(A) (the court may order one or more examinations but not more than three); Or. Rev. Stat. §161.365 (the court may appoint a psychiatrist); R.I. Gen. Laws §40.1-5.3-3 (the court may order examination by one or more qualified physicians); S.D. Codified Laws Ann. §23A-10A-3 (1987 Supp.) (the court may order a psychiatric or psychological report be filed with the court); Tenn. Code Ann. §33-7-301 (1987 Supp.) (the court may order examination by a mental health center or a licensed practitioner); Tex. Code Crim. Proc. Ann., Art. 46.02 (3)(a) (no minimum number of examiners is specified); Utah Code Ann. §77-15-5 (the court may commit the defendant to a facility for evaluation or appoint two or more alienists to examine); Vt. Stat. Ann. Tit. 13, §§4814,4815,4817 (examination by a psychiatrist); Va. Code Ann. §19.2-169.1 (1987 Supp.) (examination by at least one expert); W. Va. Code §27-6A-1 (examination by one or more experts); Wis. Stat. Ann. §971.14(2) (appointment of one or more examiners); Wyo. Stat. §7-11-303 (examination by a designated examiner).

A comparatively small number of jurisdictions, including Florida, require two or more evaluations. Alaska Stat. §12.47.070; Haw. Rev. Stat. §§704-404,405; Ind. Stat. Ann. §35-36-3-1; Cal. Penal Code Tit. 10, Ch.6, §1369; Rule 3.210, Florida Rules of Criminal Procedure; La. Code Crim. Proc. Art. 644; Nev. Rev. Stat. §178.415; N.Y. Crim. Proc. Law §730.20 (McKinney); Pa.

Stat. Ann. §7402; S.C. Code Ann. 44-23-410; Wash. Rev. Code Ann. §10.77.060.[1]

Thus, Florida belongs to the minority of jurisdictions which provide two or more experts. Such a provision exceeds what is constitutionally mandated by due process of law. Indeed, Missouri's statute, noted above, which calls for one or more experts, has been declared "constitutionally adequate to protect a defendant's right not to be tried while legally incompetent." Drope v. Missouri, 420 U.S. 162, 173, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Similarly, in Williams v. Wyrick, 664 F.2d 193 (8th Cir. 1982), the court held that the statute's failure to authorize a second examination at state expense did not violate either the due process or equal protection clauses of the Constitution. Similarly, State v. Israel, 19 Wash. App. 773, 577 P.2d 631 (1978), found that issues related to the appointment of experts for competency determinations can be waived. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), dealt with an indigent defendant's right to psychiatric expert assistance, at state expense, when an insanity issue was raised. The Supreme Court concluded that the assistance of just one expert would suffice:

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[1] Some jurisdictions have not been accounted for above. Some, such as Connecticut or Georgia, do not appear to have any applicable statutes or court rules. As to other jurisdictions, counsel has thus far either not had access to those state's statutes or has been unable to find any applicable statute.

> Many states, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance. This is especially so when the obligation of the state is limited to provision of one competent psychiatrist, as it is in many states, and as we limit the right we recognize today.

When a state voluntarily chooses to provide a defendant greater rights than those constitutionally mandated, the greater right which is provided does not assume a constitutional magnitude. Thus, Florida's Rules of Criminal Procedure provide broad discovery rights, exceeding any constitutional mandate. Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (there is no general constitutional right to discovery). Thus, when a discovery violation occurs, it does not constitute fundamental error, and such error must be preserved in the trial court. Lucas v. State, 376 So.2d 1249 (Fla. 1979); Grimett v. State, 383 So.2d 698 (Fla. 4th DCA 1980); Matheson v. State, 468 So.2d 1011 (Fla. 4th DCA 1985). Similarly, Florida's speedy trial rule provides a defendant with greater rights than the sixth amendment constitutional right to a speedy trial. Gallego v. Purdy, 415 So.2d 166 (Fla. 1982); Cox v. State, 398 So.2d 1028 (Fla. 5th DCA 1980). Here too, a violation of the speedy trial rule, a state procedural rule, does not go to the fundamental fairness of a trial, does not constitute fundamental error, and can be raised on direct appeal only if first raised in the trial

court. Williams v. State, 452 So.2d 657 (Fla. 2d DCA 1984); Oliva v. State, 354 So.2d 1264 (Fla. 3d DCA 1978); Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977). So, too, the provision of Rule 3.210 pertaining to two examinations does not give rise to fundamental error.

Finally, in the instant case, the trial court did have the benefit of two evaluations. Dr. Miller's evaluation was done pursuant to the order dated October 21, 1985. Prior to that date, the defendant had already obtained the services of Dr. Burglass, whose report was filed on October 21, 1985. His report had concluded that the defendant was not presently able to assist defense counsel in the conduct of the defense. The trial court therefore did have the benefit of two evaluations.

Based on the foregoing, the opinion of the Third District Court of Appeal should be affirmed.