047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,091

PAUL VINCENT WEIR,
a/k/a Peter Vincent Weir

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT' S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, Paul Vincent Weir, the criminal defendant and appellant below will be referred to as "Petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

The following symbols will be used:

"PA" Petitioner's Appendix

"PIB" Petitioner's Initial Brief

STATEMENT OF THE CASE

A motion in limine was filed on September 24, 1990, and argued on September 26, 1990, five days before trial commenced. The Petitioner sought a pretrial ruling on the motion in limine, which included a challenge to the admission of electronically recorded statements made by the victim of a stabbing at the emergency room of the hospital, where the victim later died. The trial judge deferred ruling on the motion until the week trial was to commence, citing the need to hear testimony from a doctor not then available. The order granting the motion in limine was entered on the second day of trial. The Respondent then filed a Petition for Writ of Common Law Certiorari in the Fourth District Court of Appeal seeking reversal of the trial court's mid-trial ruling. An emergency stay was issued and the trial was postponed. The Fourth District Court of Appeal accepted certiorari jurisdiction and issued the Writ, reversing the trial court and certifying the following question as one of great public importance:

> WHETHER A DISTRICT COURT OF APPEAL HAS CERTIORARI JURISDICTION TO REVIEW AN ORDER GRANTING A CRIMINAL DEFENDANT'S MOTION IN LIMINE FILED PRIOR TO TRIAL BUT NOT ACTUALLY RULED ON UNTIL TRIAL COMMENCED, AT THE TRIAL JUDGE'S DIRECTION, WHERE SUCH ORDER POSES POTENTIALLY IRREPARABLE HARM TO THE STATE BECAUSE APPEAL OR RETRIAL ARE NOT AVAILABLE IN THE EVENT OF AN ACQUITTAL?

STATEMENT OF THE FACTS

On October 30, 1989, Petitioner was arrested and charged with second degree murder (PA 1). On December 12, 1989, an information was filed charging Petitioner with second degree murder in violation of Florida Statute, 782.04(2) (PA 2-3). On September 24, 1990, Petitioner's counsel filed a motion in limine to exclude a dying declaration made by the victim at the hospital's emergency room (PA 5-7). The dying declaration consisted of the following:

> "And what happened? You left the bar, and which way did you come? Did you walk over to his house with him?
>
> Are you still awake or what?
>
> I'm asking you, how did you get over there?
>
> Al, talk to me. Stay awake."
>
> "Answer. I can't make it. I can't."
>
> "You can't?"
>
> "Answer. I can't."
>
> All right, I'll let the doctors work on you (PA 11-12).

On September 26, 1990, the trial court entertained pre-trial motions (PA 8-32). The motion in limine, however, was postponed since the State's witness, a doctor, was not available to testify (PA 14). The trial court stated that he could not rule on the motion without first hearing the testimony of the doctor and he would decide the motion during the course of the trial on the merits (PA 14, 23). Defense counsel stated that

"whenever it is going to be done, at lunchtime or whatever, that would be fine", but expressed concern regarding preparation of his opening statement (PA 23). Defense counsel further stated that he would stipulate to a statement of facts if the State prepared them (PA 26). The record does not reflect, however, whether this suggestion was accepted by the State. The trial court also suggested that the State call the unavailable physician and inquire as to whether he would be available to testify the following afternoon (PA 25). Although the State expressed some doubt as to the doctor's availability, the record does not reflect that the prosecutor failed to call the witness as requested (PA 25-26, PIB 6).

On October 2, 1990, the trial court granted the motion in limine, ruling that the dying declaration exception to hearsay in Florida is unconstitutional (PA 73-78, 83-88).

SUMMARY OF ARGUMENT

The district court was correct in accepting certiorari jurisdiction to review a ruling on a pre-trial motion in limine when said ruling was, out of necessity, reserved until mid-trial. A departure from the essential requirement of the law occurred which caused Respondent to suffer material injury where Respondent would not have had a full, adequate, and complete remedy by appeal after final judgment.

The dying declaration exception to the hearsay rule is constitutional and does not violate the First, Sixth, and Fourteenth Amendments to the United States Constitution nor Article I, Sections 3, 9 and 16 of the Florida Constitution.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN ACCEPTING CERTIORARI JURISDICTION TO REVIEW THE ORDER GRANTING THE PETITIONER'S PRETRIAL MOTION IN LIMINE

Certiorari review may be taken from pretrial orders in criminal cases where it is established that the lower court deviated from the essential requirements of the law and the injury suffered is one for which there will be no adequate remedy by appeal after final judgment. State v. Pettis, 520 So.2d 250 (Fla. 1988); Wilson v. State, 520 So.2d 566 (Fla. 1988). If this avenue were not available, the State would be deprived of appellate review of non-final orders which could, in essence, negate the State's ability to prosecute. If forced to proceed, and if the defendant were acquitted, double jeopardy would then bar the State from further recourse. Thus, the harm caused would be irreparable.

In the case sub judice, the motion in limine was filed prior to trial. The order on the pretrial motion, however, was not rendered until after trial commenced.

The Fourth District Court of Appeal held that since the trial court found section 904.804(2)(b), Florida Statute (1989) to be unconstitutional and in violation of the First, Sixth and Fourteenth Amendments of the United States Constitution as well as Article I, Sections 3, 9 and 16 of the Florida Constitution, this ruling barring the dying declaration effectively precluded Respondent from refuting Petitioner's theory of self-defense as there were no other witnesses to the

stabbing. Clearly, compelling circumstances warranted the exercise of certiorari review.

The State may seek review of interlocutory pre-trial orders by common law certiorari. See, State v. Brea, 530 So.2d 924 (Fla. 1988). Respondent respectfully submits that this Court should extend the State's right to review rulings on pre-trial motions although said rulings are made during trial.

In the case sub judice, Respondent's physician witness was not available to testify due to the religious holiday. For reasons of judicial economy, the trial judge decided to begin the trial and after hearing the physician's testimony then ruled on the motion only two days into the trial. Petitioner would have this Court render a ruling which would require a trial judge to rule only before trial commences without any exceptions. Respondent submits that on occasion in the interest of justice and judicial economy, the trial court will be required to defer ruling on pretrial motions until after trial has commenced. Since the motion was filed and argued prior to trial, and the trial court departed from the essential requirements of the law, the Respondent would not have had a full, adequate, and complete remedy by appeal after final judgment.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN ISSUING A WRIT OF COMMON LAW CERTIORARI REVERSING THE TRIAL COURT'S ORDER.

Petitioner requests that this Court decide whether the district court erred in reversing the trial court's order finding Florida Statute, 904.804(2)b) unconstitutional. Respondent submits that the district court certified only the jurisdictional question to this Court and vehemently objects to Petitioner's "bootstrapping" this argument to the certified question. Nevertheless, if this Court, within its discretion, addresses this issue, Respondent disagrees with Petitioner's averments and contends that the district court did not err in reversing the trial court's order finding the dying declaration exception to the hearsay rule unconstitutional.

The trial court held section 90-804(2)(b) of the Florida Evidence Code unconstitutional on three grounds. The first was that it violated the Establishment Clause. As set forth in Johnson v. Presbyterian Homes of the Synod of Florida, Inc, 239 So.2d 256 (Fla. 1970), a statute should be given a reasonable interpretation. No literal interpretation should be given which leads to an unreasonable conclusion. The trial court's holding, that allowing a dying declaration into evidence establishes religion, is an unreasonable conclusion. The theory behind the reliability of dying declarations, that a person does not want to die with a "lie on their lips", has as its basis the moral principle that lying is wrong. Religion shares many

concepts with societal morals, but each moral issue that society enforces does not establish religion. The trial judge's ruling would apply equally to every major crime. The murder statute would also be unconstitutional since there is a religious commandment against murder. Any theft legislation would also be unconstitutional because there is a religious commandment forbidding stealing.

The reason for allowing dying declarations as an exception to the hearsay rule is to promote the general welfare of society by admitting reliable evidence at trial . This is a valid consideration even though religious interests may indirectly benefit. Indeed, in order to be unconstitutional, the primary purpose of the legislation must be to establish religion. Johnson, supra.

The trial court improperly ruled that a person on his death bed is more interested in vengeance than in contemplating his own fate or the future of his family and friends. The record, however, fails to reflect a vengeful motive on the part of the victim herein.

The trial court ruled that dying declarations violate the Confrontation Clause. This ruling is also erroneous as a matter of law. This section of the Florida Evidence Code specifically deals with declarant unavailability.

> The confrontation clause is not violated in criminal cases where hearsay evidence is admitted because it qualifies as a dying declaration exception to the hearsay rule or was prior testimony given by a witness subject to cross-examination.

Ehrhardt, Florida Evidence §802.2 (2d Ed. 1984) citing Mattox v. U.S., 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed 409 (1895).

Lastly, the trial court held that dying declarations are unconstitutional because they are hearsay and therefore unreliable.

Section 90.804(b)(2), Florida Evidence Code states:

> The following are not excluded under §90.802, provided that the declarant is unavailable as a witness:
> (b) In a civil or criminal trial, a statement made by a declarant while reasonably believing that his death was imminent, concerning the physical cause or instrumentalities of what he believed to be his impending death or the circumstances surrounding his impending death.

Section 90.103(2), Florida Evidence Code: "shall apply to criminal proceeding relating to crime committed after the effective date of this code. . ." In re: Fla. Evidence Code 376 So.2d 1161 (Fla. 1979), the Florida Evidence Code is both substantive and procedural in nature, and is construed as Rules: In re: Amendment of Fla. Evidence Code, 497 So.2d 239 (Fla. 1986).

The decision rendered by the trial court meets the standard for review by this Court as set forth in State v. Gillespie, 227 So.2d 550 (Fla. 2d DCA 1969). In Gillespie, the court held that review by certiorari is appropriate when the order sought to be reviewed is shown to be a substantial departure from the essential requirements of law, or when the state is at peril of prejudice.

Petitioner meets both requirements set forth in Gillespie, supra. The use of a dying declaration has long been an exception to the hearsay rule:

> Statements of an unavailable declarant made while he believed that death was imminent are admissible under Section 90.804(2)(b) if the statements concerned the causes of what he believed to be his impending death or the circumstances of the impending death. Ehrhardt, Florida Evidence §804.3 (2d Ed. 1984) See also Weinstein, Evidence §804(b)(2)[01]; McCormick, Evidence §§ 281-287 (2d Ed. 1972); 5 Wigmore, Evidence §§ 1430-1452 (3d Ed. 1940. .

The trial court held that section 90.804(2)(b) of the Florida Evidence Code was unconstitutional per se. The transcript of the proceeding illustrates several issues. The trial court knew that the dying declaration exception has been recognized as a valid exception to the hearsay rule:

> THE COURT: Would it be appropriate for me to rule on something to be unconstitutional when every state in the Union and every level of federal court has recognized the dying declaration as a valid exception to the hearsay rule? (PA 60)

The trial judge seemed predisposed to this ruling since the trial judge himself provided the case law to the defense concerning the constitutionality of dying declarations:

> MR. DAY: Correct. What I am doing, Judge, and because I was looking through your cases and because we started this morning at 8:30, I wasn't able to type up a motion, but I am going to type up a motion and ask you to allow me to make an oral motion now to be followed up by a written motion, and that is asking you to declare that portion of the hearsay statute which deals with dying declarations as unconstitutional,

> specifically number one, that it violates the establishment clause of the U.S. Constitution, because what it does - -
>
> * * *
>
> Actually, Your Honor, you were the one that recognized these and you gave me the research and now I have formulated the arguments. (PA 54, 61)

It is clear from the transcript that the trial judge assumed or was not concerned if the State met all the prerequisites for the admissibility of the dying declaration.

> THE COURT: I'm saying take as a given that you can establish in this case that the victim in this case is aware of impending death so that all the criteria are met. Is this not a conclusive presumption of validity? In other words, is there any requirement that the State when offering the dying declaration must establish a predicate which includes evidence of the decedent's appreciation for the need to be truthful at such a traumatic time as one enters the end of one's mortal life? (PA 67)

The court then ruled that section 90.804(2)(b) is unconstitutional per se. The trial court, by so holding, refused to enforce laws validly promulgated by the Supreme Court and in so doing prejudiced the State and caused a miscarriage of justice. Ser-Nestler, Inc. v. General Finance Loan Company of Miami Northwest, 167 So.2d 230 (Fla. 3d DCA 1964) holds:

> In affirming the judgment appealed, we should not be misunderstood as approving the trial judge's conclusion that Rule 2.12(b), supra, is unconstitutional for the reason that we are of the view that he was without authority to nullify a rule promulgated by the Supreme Court of this state. The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of

> authority, they remain inviolate. This is not to say that a trial court is without authority to construe the rules in applying them to given cases, but this authority does not extend to nullification of the rules. See Strong v. Clay, Fla. 1951, 54 So.2d 193.

The trial court departed from the essential requirements of the law by failing to follow the plain language of §90.804(b)(2). "The plain language of the rules promulgated by the Supreme Court of Florida are binding upon the trial and appellate courts." State v. Battle, 302 So.2d 782 (Fla. 3d DCA 1974).

This Court, in State v. Lott, 286 So.2d 565, 566 (Fla. 1973) held:

> The trial court is bound by the decisions of this Court just as the District Courts of Appeal follow controlling precedents set by the Florida Supreme Court. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Sub judice, the trial court erred in failing to observe Rule 3.191(b)(1), which rule the state attorney had fully complied with, and in finding that this Court had abused its discretion in promulgating said rule. Rules of practice and procedure adopted by this Court are binding on the court and clerk as well as litigants and counsel. Bryan v. State, 94 Fla. 909, 114 So.773 (1927); Esch v. Forster, 99 Fla. 717, 127 So.336 (1930); Vilsack v. General Commercial Securities Corp., 106 Fla. 296, 143 So.250 (1932); Kinsey v. State, 179 So.2d 108 (Fla. App. 1965).

The trial judge's ruling overlooked a most fundamental principle of law - the principle of stare decisis. Since the Supreme Court promulgated rules of evidence, the trial court's ruling is an improper attempt to "overrule" the Supreme Court's ruling on the constitutionality of 90.804(2)(b). State v. Dwyer, 332 So.2d 333 (Fla. 1976) holds:

> Stare decisis is a fundamental principle of Florida law. It played an important part in the development of English common law and its importance has not diminished today. Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise. In the case of Hoffmman v. Jones, 280 So.2d 431 (Fla. 1973), this Court set forth the principle that:
>
> ". . . a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida. In the event of a conflict between the decision of a District Court of Appeal and this Court, the decision of this Court shall prevail until overruled by a subsequent decision of this Court."
>
> Following Hoffman, supra, this principle was extended to the trial court level in State v. Lott, 286 So.2d 565 (Fla. 1973). The Court said:
> "The trial court is bound by the decisions of this Court just as the District Courts of Appeal follow controlling precedents set by the Florida Supreme Court."
>
> The principle was recognized by the Second District Court of Appeal in Hill v. State, 302 So.2d 785 (2nd DCA 1974).
> ". . . whether we agree with the decision of the Supreme Court . . . we must follow it. To quote our erstwhile brother, Judge Mann, in Johnson v. Johnson, Fla.App. [2nd Dist.] 1973, 284 So.2d 231, we receive the interpretation of the law 'from our Supreme Court, agreeing with some, disagreeing with some, following all . . .'".

Therefore, in the case sub judice the rule of stare decisis dictates that the lower court should not have ruled §90.804(b)(2) unconstitutional.

CONCLUSION

The Supreme Court has adopted the Florida Evidence Code as procedural and substantive rules. The principle of stare decisis requires all lower courts to follow the rules promulgated by the Supreme Court. Only the Supreme Court is vested with this rule making power. The trial court departed from the essential requirements of law by failing to follow the law as set forth by the Supreme Court. The trial court improperly usurped the exclusive Article V, powers of the Supreme Court by ruling section 90.804(2)(b) of the Florida Evidence Code unconstitutional.

Wherefore, Respondent requests that this Honorable Court uphold the district court's ruling that the dying declaration section of the Florida Evidence Code is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been forwarded, by United States Mail, to: DIANE M. CUDDIHY, ESQUIRE, 201 S.E. 6th Street, Suite 730, Fort Lauderdale, Florida 33301, this 6th day of March, 1991.

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