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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT PEOPLES,

Petitioner,

v. Case No. 77,851

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND EIGHTEENTH JUDICIAL CIRCUIT
BREVARD COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitation of the case and facts with the following additions:

Although there was an objection when the tapes at issue were offered into evidence, the objection was that they were "hearsay." (R 208) Later, counsel stated that he wanted to "renew my objections previously made in the pre-trial motions regarding these tapes and also I have (an) additional objection, a failure to produce Virgilio to testify as to the consent." (R 211) When the tapes were actually published to the jury, counsel again mentioned his "previous objections." (R 431-432) The only written motion in the record filed by the defense is a motion in limine to preclude reference to the controlled substance as dilaudid. (R 7-12, 620)

At the outset of the trial, defense counsel made the following ore tenus motion concerning the Virgilio telephone calls:

> Now, at the time he was arrested, my client invoked his fifth--fourth amendment rights--I mean fifth amendment rights and he basically refused to speak without a lawyer. He invoked his fifth amendment rights. ...
>
> Also at the time the telephone conversations were made, he had a lawyer. And the police officers knew he had a lawyer, Therefore, in terms of constitutional grounds, the monitoring of the calls by the police, the encouragement of this person, made him an agent and therefore the conversation was

> made, is a functional equivalent of interrogation. ...
>
> Then the other one is once you have a lawyer and sixth amendment right not to be interrogated outside the pesence of your lawyer--In this particular case, I think in the Information had not yet been filed, is that correct?
>
> (Prosecutor) That's correct. ...
>
> **(Defense** Counsel) The lack of information is not material. That's the constitutional basis. (R 12-14)

At no time did counsel refer to the Florida Constitution or cite a single Florida case on this issue. The only constitutional rights invoked at trial were federal constitutional rights.

SUMMARY OF ARGUMENTS

The district court's decision below correctly holds that pursuant to the Sixth Amendment, the right to counsel does not attach until formal charges have been filed. Since Peoples had not been charged when these statements were made, there is no Sixth Amendment violation in their admission in evidence at trial.

Even though not preserved at trial, Peoples' state constitutional right to counsel was not infringed. The right to counsel under Article I, Section 16 does not attach until the person becomes an accused under Article I, Section 15. Only after the prosecutor has made the decision to initiate formal charges can the person be "informed of the nature and cause of the accusation" and "furnished a copy of the charges". This court has held that the right to counsel does not attach until formal charges have been filed.

Contrary to the position of the fourth district, the post-arrest rules of criminal procedure do not by their terms or history provide the right to counsel at some time earlier than the filing of charges. The post-arrest rules arise from the Fourth and Eighth Amendments and do not implicate Sixth Amendment rights, Entitlement to pretrial release and the availability of counsel in that determination is wholly separate from attachment of counsel for adversary judicial proceedings. These rules are nonadversarial. These rules "do not accelerate the time when the right to assistance of counsel attaches so as to prohibit fruther

police investigation utilizing surreptitious means to elicit the information. These rules merely specify the point in time in the proceedings at which the state pays for counsel for those who are unable to afford private counsel." Peoples v. State, 576 So.2d 783, 788 (Fla. 5th DCA 1991). The fifth and first districts have reached the correct result on this issue.

Even if the tapes were improperly admitted in this case, any error is harmless beyond and to the exclusion of any reasonable doubt.

The trial court did not abuse its considerable discretion in disallowing defense counsel to question Tom Sawyer about an eighteen year old conviction because counsel did not possess a certified copy of the judgment of conviction. Any error is harmless in light of the other evidence before the jury concerning Sawyer's possible motive for fabricating testimony and his extensive knowledge of and participation in the drug trade.

POINT ONE

THE DISTRICT COURT CORRECTLY RULED THAT THERE WAS NO VIOLATION OF PEOPLES' RIGHT TO COUNSEL.

After Petitioner had been released on bond but before the information had been filed, codefendant Virgilio telephoned Peoples and permitted the authorities to record their conversations. Peoples contends that the admission of these tape recordings at trial violated his Sixth Amendment right to counsel and also violated his right to counsel under Article I, Section 16 of the Florida Constitution.

As related above in the statement of the case and facts, the sole claim at trial was that Peoples' federal constitutional rights had been violated. No mention was made of any Florida case, nor was the state constitutional protection invoked in any manner. Respondent respectfully suggests that the only issue on this point which is preserved for review is Peoples' Sixth Amendment right to counsel.

The United States Supreme Court has repeatedly held that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges. A few months ago, the United States Supreme Court held in McNeil v. Wisconsin, ___ U.S. ___ , 111 S.Ct. 2204, 2207, 2208-2209, ___ L.Ed.2d ___ (1991):

> The Sixth Amendment...does not attach until a prosecution is commenced, that is, "at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment,

> information, or arraignment.'" United States v. Gouveia, 467 U.S. 180, 188, **104 S.Ct. 2292, 2297,** 81 L.Ed.2d **146** (1984)(quoting Kirby v. Illinois, 406 U.S. 682, ***689,*** 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972)(plurality opinion)).
>
> * * *
>
> The purpose of the Sixth Amendment counsel guarantee--and hence the purpose for invoking it--is to "protec[t] the unaided layman at critical confrontations" with his "expert adversary" the government, after "the adverse positions of government and defendant have solidified" with respect to a particular crime. Gouveia, 467 U.S., at **189.**

Last term, in the case of Illinois v. Perkins, ___ U.S. ___ , **110** S.Ct. 2394, 2399, 110 L.Ed.2d 243 (1990), the Court again reiterated the rule that the Sixth Amendment applies only after formal charges have been filed. "After charges have **been filed,** the Sixth Amendment prevents the government from interfering with the accused's right to counsel. In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable." Id. (emphasis added, citation omitted). See also, Moran v. Burbine, 475 U.S. 412, **106** S.Ct. **1135,** 89 L.Ed.2d 410 (1986).

The actual formation of the attorney/client relationship does not in and of itself trigger Sixth Amendment protections. This precise argument was rejected by the Court in Moran v. Burbine, supra., and Maine v. Moulton, 474 U.S. 159, **106** S.Ct. **477, 88** L.Ed.2d 481 (1985). In Moulton, the Court noted that

incriminating statements made after securing legal counsel but before initiation of formal charges were admissible because the Sixth Amendment right to counsel had not attached. In Moran, the defendant argued that even though he had not been formally charged, the Sixth Amendment nevertheless protected him because he had retained an attorney. "The right to noninterference with an attorney's dealings with a criminal suspect, he asserts, arises the moment that the relationship is formed, or, at the very least, once the defendant is placed in custodial interrogation. We are not persuaded." Moran v. Burbine, 475 U.S. at 429, 106 S.Ct. at 1145. The Court held that this argument was expressly rejected by precedent and "all but foreclose(d)" by the Moulton decision. Further, the argument is illogical.

> As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation. More importantly, the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor....By its very terms, it becomes applicable only when the government's role shifts

from investigation to accusation. Moulton v. Burbine, 475 U.S. at 430, 106 S.Ct. at 1145-1146.

The Court observed that even though the attorney's task was much more difficult once a confession had been elicited, the mere possibility that the encounter may have important consequences at trial is insufficient to trigger the Sixth Amendment. "As Gouveia made clear, until such time as the "'government has committed itself to prosecute, and...the adverse positions of government and deendant have solidified'" the Sixth Amendment right to counsel does not attach." Id.

In this case it is undisputed that Peoples had not been formally charged at the time that the conversations took place. Therefore, his Sixth Amendment claim has no merit. The District Court of Appeal, Fifth District, correctly interpreted this uniform line of precedent from the United States Supreme Court to determine that no violation of the Sixth and Fourteenth Amendment had occurred in this case.

Equally unavailing is his Fifth Amendment claim. Miranda v. Arizona 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1964), and its progeny apply only to custodial interrogation. Peoples was not in custody when these statements were made. Miranda warnings are not constitutionally required, but rather, are a safeguard against the possibility that the coercive circumstances of custodial interrogation might threaten the exercise of the Fifth Amendment privilege. Michigan v. Tucker, 417 U.S. 433, 444, 94 S.Ct. 2357, 2364, 41 L.Ed.2d 182 (1974). This purpose is not

advanced by application of the prophylactic rule to a person like Peoples who is not in custody. No reasonable person in Peoples' position would believe that he was in custody. Berkemer v. McCarthy, 468 U.S. 420, 422, 104 S.Ct. 3138, 3141, 82 L.Ed.2d 317 (1984) The telephone conversations were not conducted in an unfamiliar atmosphere or coercive environment. Minnesota v. Murphy, 465 U.S. 420, 433, 104 S.Ct. 1136, 1145, 79 L.Ed.2d 409 (1984). The mere fact that the purpose of the conversations was to elicit incriminating responses from Peoples does not trigger the need for Miranda warnings. Id. Of the record citations relied upon to support the claim that Peoples in fact asserted his right to silence, one is argument of counsel, one is the defendant's testimony which occurred after the tapes were admitted, and one is ambiguous at best. (R 12, 247, 477-481) Moreover, since he was talking with his codefendant, whom he had no idea was cooperating with the police, there was no coersion or compulsion to confess. Illinois v. Perkins, supra.

If Peoples is to prevail, it must be pursuant to his right to counsel under the Florida Constitution. Respondent contends that this issue is not preserved for review. At no time did his trial counsel invoke his rights under the Florida Constitution. It is well established that in order to preserve an issue for appellate review, the same specific legal argument must have been presented to and determined by the lower court. Bertolotti v. State, 514 So.2d 1095 (Fla. 1987); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). When an objection is made on one ground before

the trial court, no new or different grounds can be raised on appeal. Steinharst, supra. However, the state recognizes that the district court addressed this issue, and therefore, presents the following arguments.

Article I, Section 15(a), of the Florida Constitution states:

> No person shall be tried for capital crime without presentement or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court...

Under the Florida Constitution, prosecutions or adversary judicial proceedings cannot commence until an information or indictment is filed. The use of the word "person" in section 15(a) is in contrast to the use of the word "accused" in Article I, Section 16. The right to counsel under section 16 does not attach until the person has become an accused under section 15. Article I, Section 16(a) states:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both.,.

How can a person against whom formal charges have not been filed be "informed of the nature and cause of the accusation" and even more impossible, "be furnished a copy of the charges"? It is

well established that only the prosecuting officer may initiate formal charges by way of information or grand jury presentment. See, State v. Bloom, 497 So.2d 2 (Fla. 1986). Therefore, only after the prosecutor has decided to file charges, to formally initiate judicial proceedings, that a "person" becomes an "accused", entitled to the umbrella of protections provided in Article I, Section 16.

This interpretation is not only in harmony with the plain meaning of the Constitution, it also comports with prior decisions of this court. In Keen v. State, 504 So.2d 396, 400 (Fla. 1987), a confession was obtained even though Keen had not been taken before a judicial officer within twenty-four hours of his arrest. This court rejected the claim that the admission of this statement was barred due to a violation of Keen's right to counsel because "at the time the statement was made formal charges had not been filed against him and, therefore, adversary proceedings had not yet commenced." Id., (citation omitted) See also, Perkins v. State, 228 So.2d 382 (Fla. 1969).

Even though the Florida Constitution does not support the contention that the right to counsel does not attach until formal charges have been filed and a "person" becomes an "accused", the fourth district held that the rules of criminal procedure provide the right to counsel at some time prior to the formal initiation of adversary judicial proceedings. The state suggests that neither the plain meaning of the post-arrest procedural rules nor their historical origin supports the claim that the sight to counsel attaches at first appearance.

The district court's decision below correctly states that Peoples had reached the point in Florida's procedure where he had been afforded first appearance under Florida Rule of Criminal Procedure 3.130, and a non-adversary preliminary hearing under rule 3.133(a). He had not been charged by indictment or information under rule 3.140. Peoples v. State, 576 So.2d 783, 787 (Fla. 5th DCA 1991). The fifth district acknowledged conflict with the decision in State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984), where a taped conversation between the defendant and a police detective which took place one day after first appearance was suppressed. The Douse court relied upon the first appearance rule, and held by a two to one split that even though the Sixth Amendment right to counsel had not attached because Douse had not been charged, Douse's right to counsel had "attached" under Florida's Constitution at first appearance. The fifth district held:

> We are unable to avoid conflict with Douse. The Douse court stated that the Florida Constitution guarantees the right to assistance of counsel in all criminal prosecutions. The court stated further:
>
> > Rule 3.130, Fla.R.Crim.P., in turn, states that the right to assistance of counsel attaches at least as early as the defendant's first apeparance which should occur within twenty-four hours of arrest. Thus, in this case the incriminating statements made one day after Douse's first appearance were elicited after his right to counsel attached under Florida law.

> Id. at 1185. While the court cites article I, section 16 of the Florida Constitution in support of its conclusion, the words found there--"to be heard in person, by counsel or both"--provide no stronger rights than are found in the Sixth Amendment to the United States Constitution where an accused has the right "to have assistance of counsel for his defence." Furthermore, the word "attaches" does not appear in rule 3.130, Florida Rules of Criminal Procedure, notwithstanding the Douse court's insistence that the rule "states that the right to assistance of counsel attaches at first appearance...." Id. (emphasis added).
>
> Whether Peoples was represented by private or public counsel is irrelevant to the determination of when Peoples' right to counsel attached under the Florida Constitution. Clearly, a suspect has the right to counsel in any criminal proceeding at any time and, if entitled to appointed counsel, "when he is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committing magistrate, whichever occurs earliest." Fla.R.Crim.P. 3.111. Rule 3.130(c)(1) Flroida Rules of Criminal Procedure, provides for the determination of entitlement to and appointment of counsel prior to first appearance. The above-cited rules do not accelerate the time when the sight to assistance of counsel attaches so as to prohibit further police investigation utilizing surreptitious means to elicit information. These rules merely specify the point in time in the proceedings at which the state pays for counsel for those who are unable to afford private counsel.

Peoples v. State, 576 So.2d at 787-788. The first district has subsequently aligned itself with the fifth district's position on this issue. Phillips v. State, 16 F.L.W. 2311 (Fla. 1st DCA August 30, 1991)(Question certified)

Entitlement to pretrial release and the availability of assistance of counsel in that determination is wholly separate in a constitutional sense from attachment of counsel for adversary judicial proceedings. Article I, Section 14 states that unless a person is charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident, the person charged with a crime is entitled to pretrial release on reasonable conditions. The rules of criminal procedure 3.130 through 3.133(a) implement these constitutional rights against unreasonable seizure and excessive bail. The right to counsel guaranteed by the Sixth Amendment is different from the procedural rights, including counsel, stemming from the Fourth and Eighth Amendments.

Rule 3.130 requires that arrested persons not already released must be brought before a magistrate within twenty-four hours of arrest. The purpose of first appearance is to provide a hearing on whether the arrested person should be released or detained prior to trial. Under Rule 3.130(c)(1), counsel may be appointed "for the limited purpose of representing the defendant only at first appearance..." Likewise, subsection (4) permits the arrested person to waive counsel at first appearance, but that waiver is limited only to the first appearance and "shall in no way be construed to be a waiver of counsel for subsequent proceedings." The right to counsel established by rule 3.130 is solely for the purpose of providing assistance in obtaining release from detention after arrest. It prevents the state from

holding arrested persons for an unreasonable period of time when there is no good faith intent to prosecute. These rules are nonadversarial and do not implicate the right to counsel under Article I, Section 16.

Rule 3.133 is also a nonadversarial preliminary proceeding at which time a probable cause determination is made. Usually, this takes place at first appearance, "...but the holding of this determination at said time shall not affect the fact that it is a nonadversary proceeding." The standard of proof for detaining the arrested person is the same for issuance of an arrest warrant. Rule 3.133(a)(3) Moreover, the defendant need not even be present. If the right to counsel has attached at this time and adversary judicial proceedings commenced (despite the express use of the term nonadversary) then the defendant's presence would be required, not optional as the rules state.

The historical origin of these rules further supports the position that they are not the commencement of adversary judicial proceedings where the right to counsel attaches. In 1972, the court substantially revised the rules of criminal procedure and added the first appearance rule. In re Fla. R. Crim. P., 272 So.2d 65 (Fla. 1972). The committee notes and author's comments indicate that the purpose of this new procedure was to meet the bail requirements of Article I, Section 14. The counsel provided at first appearance is for the purpose of pretrial release only.

The other historical basis for the rule 3.133(a) is the challenge in federal court to Florida's post-arrest procedures,

which resulted in the United States Supreme Court decision in Gerstein v Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). This court immediately amended the first appearance rule to comport with this decision. In re Florida Rules of Criminal Procedure, 309 So.2d 544 (Fla. 1975) The Gerstein Court made it clear that the probable cause determination is addressed to pretrial custody only and is not a critical stage of the proceeding which requires appointment of counsel.

Gerstein and the rules created in response are grounded solely Fourth and Eighth Amendments. First appearance and preliminary hearings are nonadversarial and are limited to the issue of pretrial release. These hearings occur prior to the initiation of judicial proceedings by a formal charging document. These rules by their terms and history do not herald the initiation of adversary judicial proceedings, and the fourth district incorrectly ruled to the contrary. The right of an accused under Article I, Section 16 to counsel does not arise until after the state has filed charges as required by Article I, Section 15(a). See also Keen v. State, supra.

Neither the Florida Constitution nor the post-arrest rules of criminal procedure support the holding of Douse. The right to counsel recognized in the Sixth Amendment and Article I, Section 16 of the Florida Constitution attaches only after formal charges have been filed and a "person" becomes an "accused". AS recognized by the first district in Phillips, supra, by aligning the right to counsel in section 16 with the Sixth Amendment

requirement of a formal charging document, the proper balance is achieved between competing societal interests. Police investigations should not be hampered before the decision has been made to prosecute. There is no basis in law or logic for the fourth district's position.

Finally, even if this court finds that the right to counsel attaches at some time before the initiation of adversary judicial proceedings, nevertheless Peoples cannot prevail because the admission of the statements in this case are harmless error at best. State v. DiGuilio, 497 So.2d 1129 (Fla. 1987); Milton v. Wainwright, 497 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972). The tape recordings contain nothing incriminating; the crimes were not discussed. Peoples repeatedly opined that he believed that the conversations were being recorded because Virgilio was calling from the jail. At least one of the conversations was cumulative to the testimony of Tom Sawyer, who was present when the call took place. Moreover, there was overwhelming evidence of guilt apart from these tapes. Peoples and his cohorts were observed by the police committing the crime, after being tipped off by the pharmacist. They were arrested at the scene. Peoples' fingerprints were found on prescriptions seized from the vehicle in which they were riding at arrest. There is no reasonable possibility that the nonincriminating tape recordings in any way affected the verdict.

POINT TWO

THERE WAS NO SIGNIFICANT LIMITATION ON THE CROSS-EXAMINATION OF CODEFENDANT TOM SAWYER.

Tom Sawyer, Peoples' codefendant, had an eighteen year old conviction. The state moved in limine to preclude examination concerning this 1972 conviction on the ground that it was too remote in time to be admissible and on the ground that defense counsel did not have certified copies of the judgment. In resolving this issue below, the district court held that although the first ground was inapplicable in a criminal trial, the trial court's ruling was correct. §90.610(1)(a), Fla.Stat. (1987).

> The attorney who seeks to introduce evidence of a prior conviction should have knowledge of the prior conviction and should possess a certified copy of the judgment of conviction. King v. State, 431 So.2d 272 (Fla. 5th DCA 1983); Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982). While defense counsel argued that neither he or the state attorney could obtain a copy of the federal conviction, we are unwilling to relax the Cummings rule and substitute for it a rule excusing certified copies of federal convictions because they may be difficult to obtain. ...
>
> (I)t is hoped records of the United States have not reached the degree of inaccessibility as have Cuban records. Peoples v. State, 576 So.2d at 789.

The district court further held that any error was harmless in this case as "there was other incriminating evidence in the instant case" apart from the testimony of Sawyer. Id. Respondent contends that these rulings were entirely correct.

The admission or rejection of impeaching testimony is within the sound discretion of the trial court. See, Welty v. State, 402 So.2d 1159 (Fla. 1981); Strickland v. State, 498 So.2d 1350 (Fla. 1st DCA 1986). The jury was fully apprised of the negotiations between Sawyer and the state, which provided a possible motive to fabricate testimony. His knowledge of the street value of Dilaudid and his admission that he had bought and used the drug at least a hundred times belies the portrayal by the petitioner that Saywer was a poor, innocent "all-American" boy recently lured into the drug trade. On cross-examination, the defense fully explored the benefits Saywer received for his testimony and revealed that he had track marks on his arms from injecting drugs.

The trial court did not abuse its discretion in refusing to admit the evidence of an eighteen year old conviction. Any error was harmless in light of the other negative facts relating to Sawyer's motives and credibility. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1987).

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to hold that under the state and federal constitutions, the right to counsel does not attach until formal charges have been filed, and otherwise affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on the merits has been furnished, by delivery to the box in the Fifth District Court of Appeal to Assistant Public Defender Brynn Newton counsel for petitioner at 112 A Orange Avenue, Daytona Beach, FL 32114, this 30th day of September, 1991.

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