047

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 79,222

STATE OF FLORIDA,

Petitioner,

vs.

MICHELLE L. HICKSON,

Respondent.

FILED
SID J. WHITE
MAR 2 1992
CLERK, SUPREME COURT
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AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) ON BEHALF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS continued:

TABLE OF CITATIONS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

On February 6, this Court granted the Florida Association of Criminal Defense Lawyers (FACDL) permission to file an amicus curiae brief on behalf of Respondent.

The FACDL is a not for profit Florida corporation formed to assist in the reasoned development of the criminal justice system. Its statewide membership of about 1,000 includes lawyers who are daily engaged in the defense of individuals accused of criminal activity. The founding purposes of FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, and furthering the education of the criminal defense community through meetings, forums, and seminars. FACDL members serve in positions which bring them into daily contact with the criminal justice system.

FACDL will adopt the record references designations used by Petitioner in the Initial Brief.

STATEMENT OF THE CASE AND FACTS

The FACDL adopts the Statement of the Case and Facts in Petitioner's Initial Brief and the Answer Brief of Respondent.

SUMMARY OF ARGUMENT

The certified question in this case presents an important issue for the practice of criminal law. Although FACDL wants to see this issue ultimately resolved, FACDL believes that: 1) This cause is not currently ripe for adjudication, 2) even if the case is ripe, a resolution of this issue on behalf of the State requires a substantial amendment of the Discovery Rules and this Court should not re-write the Discovery Rules by deciding this case. This matter should be handled as an amendment to the Rules of Criminal Procedure. This Court in Burns v. State, 16 FLW S389, n. 7, Supreme Court, May 16, 1991, took this position on the issue of whether the State could compel the defendant (in a death case) to submit to a psychiatric examination to rebut mitigation offered during penalty phase (no rule exists, therefore, matter is referred to Criminal Rules Committee).

This case is not ripe for judicial review because the State concedes that it could use the results of a compelled examination of Respondent only to rebut defense expert testimony. There was no ruling below that Respondent would be able to introduce such a defense. If this Court reverses the First District's opinion and permits a compelled examination, Respondent's right against self-incrimination could be violated, if the defense is ruled inadmissible at trial. The trial court made no findings that the defense expert would be qualified in the field of battered-woman syndrome nor was there a finding that the factual predicate existed for the defense. A compelled

examination before such a ruling could result in a violation of self-incrimination rights. See Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

If the State is to prevail in this cause, this Court will have to amend substantially the Rules of Criminal Procedure. The Discovery Rules simply do not allow a compelled examination of defendants (unlike the broad provision in the Civil Rules of Procedure, Rule 1.360), except in insanity cases. This Court should not amend the Rules by deciding this case - such an amendment should come through the rule process so that all interested parties can have their input and the Court can consider the consequences of such amendment to all future cases and factual situations.

If this Court decides to reach the merits of this cause, then it should follow the decision of the First District. The First District correctly found that Henry v. State, 574 So.2d 66 (Fla. 1991) (deciding that a defendant could be compelled to submit to a psychiatric examination in an insanity case) did not apply to this cause. See Parkin v. State, 238 So.2d 817 (Fla. 1970). The defense of battered-woman syndrome does not involve a mental defect nor does the defense necessarily rest upon subjective mental state disclosures by a defendant. Moreover, in an insanity defense, the defendant admits all the elements of the offense, unlike the defense of self-defense - which is a defense of avoidance. The out-of-state cases relied upon by the trial court should not be persuasive. Unlike Florida, those states do not easily allow discovery depositions. Therefore, the

examination of the defendant could assist the State in knowing what specific facts the defense will rely upon at trial. In this case, there is no need for the State to examine Respondent. The State has fully deposed the defense expert and the state expert can testify to all the matters which the defense will rely upon at trial.

ARGUMENT

ISSUE I

IS THE DEFENDANT'S CONSTITUTIONAL PRIVILEGE AGAINST TESTIMONIAL EXAMINATION WAIVED WHEN A DEFENSE PSYCHOLOGIST TESTIFIES ABOUT THE CIRCUMSTANCES GIVING RISE TO THE ALLEGED "BATTERED-SPOUSE SYNDROME" BASED IN PART ON DEFENDANT'S STATEMENTS TO SUCH WITNESS WHICH HAVE BEEN FULLY DISCLOSED TO THE PROSECUTION BEFORE TRIAL?

A. Certiorari was an appropriate vehicle to review the pretrial order compelling Appellant to submit to a psychiatric examination.

Petitioner initially argues that the First District Court of Appeal improvidently granted certiorari in this cause. According to Petitioner, certiorari was inappropriate because: 1) There has been no "violation" (Respondent has not been examined and the State has not introduced any evidence against her), 2) any resultant injury could be addressed on appeal. Petitioner ignores all the applicable case law in this area. Each of the five District Courts of Appeal have ruled that certiorari is an appropriate vehicle to review a pretrial order either granting/denying discovery. See Suburban Propane v. Estate of Pitcher, 564 So.2d 1118 (Fla. 1st DCA 1990); Pearce v. Doral Mobile Home Villas, Inc., 521 So.2d 282 (Fla. 2d DCA 1988); South Florida Blood Service, Inc. v. Rasmussen, 467 So.2d 798 (Fla. 3d DCA 1985); Hartford Accident Indem. v. SCP Co., 515 So.2d 998

(Fla. 4th DCA 1987); M.S.S. by Blackwell v. DeMaio, 503 So.2d 1384 (Fla. 5th DCA 1987). The pretrial order was an order which compelled discovery - the psychiatric examination of Respondent.

Discovery orders can meet the test for certiorari: a departure from the essential requirements of law which may cause continuing harm or result in a miscarriage of justice. Combs v. State, 436 So.2d 93 (Fla. 1983). In West Volusia Hospital Authority v. Williams, 308 So.2d 634 (Fla. 1st DCA 1975), the First District directly considered the question of whether a writ of certiorari was a proper vehicle to review a discovery order:

> "We have not overlooked Respondent's contention that common law certiorari is not an appropriate remedy and that we are without jurisdiction. It is well established that interlocutory orders rendered in connection with discovery proceedings may be reviewed by common law certiorari where the Petitioner can demonstrate that the order complained of was rendered by the court in excess of its jurisdiction, or that the order does not conform to the essential requirements of the law and may cause material injury through subsequent proceedings for which remedy by appeal will be inadequate. Sub judice once the incident reports (accident reports in a hospital) are produced the harm is done and an appeal following judgment is not only an inadequate remedy but no remedy at all." 308 So.2d at 636.

Florida courts have resolutely held that discovery orders are subject to certiorari review because once the harm is done from either granting/denying discovery, the subsequent appellate review of the trial cannot cure the error. A discovery order can affect trial strategy and trial preparation. Appellate

review cannot adequately remedy the harm caused by the pretrial discovery order because the trial has already occurred based upon the alleged erroneous discovery order. If the discovery had been different, then the trial preparation and strategy would have also been different. For this reason, appellate review cannot cure the harm from an improper discovery order. Therefore, all of the District Courts of Appeal have decided that discovery orders are subject to certiorari review. This Court should adhere to those holdings.

B. The issues presented by the certified question are not currently ripe for adjudication.

Although the First District Court properly granted review by certiorari, the order compelling a psychiatric examination of Respondent, FACDL, as amicus curiae, submits that the question presented is not ripe for adjudication. Petitioner, the State of Florida, concedes that it can only rebut psychiatric testimony by Respondent; the State argues that it needs its own psychiatric examination to rebut the potential defense psychiatric testimony at trial. However, at this point, the defense of battered-woman syndrome is only a potential defense. Respondent below unquestionably intends to offer such a defense. However, there has been no ruling below that Respondent will actually be able to introduce such a defense.

The First District Court of Appeal in Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982) held that the

battered-woman syndrome could be the proper subject of expert testimony, if the defense established the qualifications of the defense expert, the extent to which the expert's methodology is generally accepted within the relevant scientific community and that the subject matter can support a reasonable expert opinion. 409 So.2d at 806.

Although the members in FACDL have a great interest in the issues presented by this case, FACDL sincerely believes that this Court should not decide a case which is not ripe for judicial review and issue an advisory opinion. There has been no finding in this case that Dr. Krop could qualify as an expert - there has been no finding that the battered-woman syndrome defense would be admissible in this case. Moreover, there has been no finding that the factual predicate exists to support the presentation of such a defense to the jury.

The State has conceded that it can use its expert testimony only to rebut defense expert testimony. (Petitioner's brief pg. 6, 12). Petitioner argued in its brief, "the State recognizes that it cannot use the results of its expert examination as a sword to affirmatively prove guilt. Rather, it can only use such testimony as a shield to rebut the testimony of Dr. Krop." (Petitioner's brief, page 12). The trial court did not rule that Respondent's proposed defense of battered-woman syndrome would, in fact, be admissible. If this Court permits a state psychiatrist to examine Respondent and the defense is later found to be inadmissible, then Respondent's rights against self-incrimination would have been violated.

The United States Supreme Court in Estelle v. Smith, 451 U.S. 454, 468 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359 (1981) held that a defendant may not be compelled to respond to a state psychiatrist if the defendant neither initiates a psychiatric evaluation (pursuant to a state rule on intent to rely upon insanity) nor attempts (or by implication cannot) to introduce any psychiatric evidence: If Respondent is unable to present the defense of battered-woman syndrome, the State will strategically have the benefit of an examination of Respondent - even if the State cannot introduce the statements directly against Respondent. If the statements included elements of the crime, then the State could produce other evidence to rebut them. This ability to investigate and rebut Respondent's statements (without proof of the defense) would violate Respondent's right against self-incrimination. Consequently, the State would have the tactical benefit of an examination of Respondent without Respondent being able to rebut this fact, if the defense is ruled inadmissible or the defense expert is found not to be qualified.

FACDL respectfully submits that the parties below and the First District Court of Appeal simply put "the cart before the horse." Although FACDL wants to see a definitive ruling in this area of the law, a sensitive constitutional issue like this one should not be adjudicated until it is ripe for review. Additionally, if this Court reverses the First District and permits the examination of Appellant - the entire trial below could be tainted if the defense is ruled inadmissible.

Petitioner noted in its brief that it would challenge the admissibility of Dr. Krop's testimony by the use of a Motion in Limine. (Petitioner's Initial Brief, pg. 13). Consequently, this Court should either remand this case for a determination of whether the defense of battered-woman syndrome is available in this case or, if the Court decides to reach the merits and rules that the State can examine Respondent, such an examination cannot occur until after a preliminary ruling by the trial court that such a defense will be available at trial.

The First District correctly followed the law as it presently exists in this State. Therefore, this Court should decline to answer the certified question. If the State wishes to change the holding of this cause, it should propose an amendment to the Criminal Rules.

C. If this Court decides to reach the merits, the First District correctly decided that there is no express authority to permit the State to require a defendant to submit to a psychiatric examination based upon a mere intention to offer defense expert testimony on the issue of the battered-woman syndrome.

1. There is no express authority in the Criminal Rules for the examination of the defendant by a state psychiatrist under the circumstances of this case: This Court should not amend the Discovery Rules by deciding this case.

Unlike the Rules of Civil Procedure (Rule 1.360), there is no general provision in the Criminal Rules of Procedure for the compelled examination of the defendant by an expert employed by the State. The provisions of Article I, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution obviously prohibit such a general provision. Rule 3.220(c), Florida Rules of Criminal Procedure, allows the examination of the defendant concerning certain non-testimonial matters, (e.g., line-up, fingerprints, handwriting and reasonable physical or medical inspection of the body).

Rules 3.210, 3.211 and 3.216, Florida Rules of Criminal Procedure, permit the compelled examination of a defendant who either raises the defense of insanity or when there is reason to believe that the defendant is incompetent to stand trial. If this Court reverses the holding of the First District Court of Appeal, it will effectively amend the Rules of Criminal Procedure. This Court should not effectively amend the rules by deciding in this case that a compelled examination of Respondent is appropriate.

Given the important and sensitive constitutional issues in this case, this Court should only amend the Rules of Discovery by the formal rule making-amending process of this Court. In Burns v. State, supra, this Court approved of the referral of a similar issue (compelled examination of a defendant in a death case to rebut mitigation evidence) to the Rules Committee - this Court did not address the question. Such a process will allow input from all the interested parties and permit the Court to make a rule decision which would affect all possible future

contingencies and not merely the exigencies of this particular case. FACDL is concerned that a decision in this case which amends the Rules of Discovery will have ramifications which extend far beyond the boundaries of this cause. A decision which, in essence, amends the Rules of Discovery, but is limited to the factual context of this cause, will undoubtedly lead to more litigation. If this Court affirms the First District, then such concerns would not be present as the current status of the Rules would remain intact. If the State wishes to then amend the Rules, it should use the established procedures for amendment of the Rules.

FACDL does not question the inherent power of this Court to interpret and construe the Rules of Criminal Procedure. However, given the importance of the issues in this case, (if the State prevails, the rule of compelled examination in insanity cases will be extended for the first time to non-insanity cases where guilt is not admitted), prudence requires that the Court not amend (by adding a completely new provision) the Rules of Criminal Procedure by mere judicial opinion. Such an important decision should be made after due consideration of the position of the Bar, the Criminal Rules Committee and other interested groups.

2. The First District correctly decided this case under Henry v. State, 574 So.2d 66 (Fla. 1991) and Parkin v. State, 238 So.2d 817 (Fla. 1970).

If this Court decides to reach the merits of this cause, it must decide whether the rationale of Henry, supra, and Parkin, supra, applies to this case. As there is no direct authority for the compelled psychiatric examination of the defendant in a battered-woman syndrome case, the authority for such an examination must be found by analogy elsewhere. The trial court relied upon authority from other jurisdictions and Henry v. State, supra, to support the order of the compelled psychiatric examination of Respondent. The out-of-state cases, State v. Briand, 547 A.2d 235 (N.H. 1988) and State v. Myers, 570 A.2d 1260 (N.J. Ct. App. 1990) both held that there was inherent authority for trial courts to order a psychiatric examination of the defendant in a battered-woman syndrome case. Both cases drew an analogy between compelled examination in insanity cases and battered-woman's syndrome. The trial court in this case also drew an analogy between insanity psychiatric examinations as approved of in Henry and a compelled examination in this case.

The holdings in Briand and Myers should not be persuasive in this case because New Hampshire and New Jersey do not liberally permit discovery depositions in criminal cases. New Jersey permits depositions only when it is likely that a material witness will be unable to testify at trial. See Rule 3:13-2, New Jersey Rules Governing Criminal Practice. In 1988, the year of the Briand decision, New Hampshire ended its procedure of depositions upon demand. Presently, in New Hampshire, depositions can be taken upon agreement or upon a showing of necessity. The trial judge has wide discretion in permitting/denying

depositions. See New Hampshire. RSA 517. In Florida, such depositions permit the State to examine the defense expert to determine his opinion and the underlying factual basis for it. The State was able to do just that in this case. (See Appendix I - Copy of deposition of Dr. Krop - defense expert). In states without discovery depositions, the need for an examination of the defendant is unquestionably greater than in a deposition state.

In this case, there is simply little, if any, need for a psychiatrist to examine Respondent personally. The state expert can read the deposition and prepare to rebut it. As insanity - with its attendant judgments of mental capability and competence - is not at issue in this case, the need for a face-to-face interview is not great. See Parkin v. State, supra, for a discussion of the need for a personal examination in an insanity case.

The United States Supreme Court in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) and Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906 (1987) wrote that:

> "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting proof of an issue that he interjected into the case. Accordingly, several courts of appeal have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist." 107 S.Ct. at 2917.

The United States Supreme Court approved those Court of Appeal rulings that held that if a defendant introduced

psychiatric evidence, the State could rebut with evidence from the reports of the examination that the defendant requested. Under the facts of this case, the State can effectively rebut the proposed defense testimony without an examination of Respondent. Expert testimony in this case will unquestionably involve the general characteristics of the battered-woman syndrome and whether Respondent, by her actions, exhibited enough of those characteristics to fall within the syndrome. The defense in this case does not call for an opinion of the cognitive and rational processes of Respondent's mind.

The evidence in this case would be about a syndrome, like Post-Traumatic Stress or Child Sexual Abuse, and the obvious key to the establishment of such a defense is proof of the physical manifestations of the syndrome. The State can easily rebut such proof in this case by a review, by the state expert, of the deposition of Dr. Krop, the defense expert. If the State was unable to depose Dr. Krop, then its position would be stronger. However, given the open discovery process in Florida, the reasoning of the New Hampshire and New Jersey courts is not particularly persuasive in this case. The First District, in its opinion below, found that a denial of the Motion to Compel Examination would not preclude or prejudice the use of state psychiatric testimony to rebut Dr. Krop's testimony.

The trial court below also relied on this Court's opinion in Henry v. State. In Henry, this Court decided whether it was proper for the trial court to strike Henry's insanity defense because he refused to cooperate with the court-appointed

psychiatrists who tried to examine Henry. The Court upheld the striking of the insanity defense and noted:

> "We disagree that the rule, public policy, or the constitution prevent such an action in this case, it is undisputed that parties in a civil case can require another party to submit to a medical or psychiatric examination, so long as the examination is pertinent to an issue in the suit. See Florida Rules of Civil Procedure 1.360. We see no reason why, as a party, the State should not have the same right. The prosecutor bears the burden of proving sanity beyond a reasonable doubt, if a defendant seeks to pursue an insanity defense, the state should have an equal opportunity to obtain evidence relevant to that issue." 574 So.2d at 70.

The First District properly distinguished Henry from the present case: 1) The battered spouse syndrome, in relation to self-defense, does not place in issue a defective mental state of the accused, 2) the defense does not necessarily rest on any subjective mental state disclosures by defendant. The First District found that the expert testimony on the syndrome would relate to illumination of the general pattern of typical reactions as that pattern may relate to the circumstances of this case. The First District also found that Henry was specifically limited to insanity. This Court in Parkin, supra, also underscored this difference. "There is a differentiation of the issue of insanity from that of guilt-in-fact. The insanity plea and the guilty plea raise separate issues on which different kinds of evidence may be introduced ... self-incrimination is not directly an issue in cases such as this, simply because the question to be resolved is

not guilt or innocence, but the presence or absence of mental illness." 238 So.2d at 820-21.

The First District then found that the only other possible authority for a compelled examination of Respondent was State v. Rhone, 566 So.2d 1367 (Fla. 4th DCA 1990). The issue in Rhone, supra, was whether the defense could compel a psychiatric examination of the victim of a crime. The Rhone court held that the movant must demonstrate extreme and compelling circumstances which would implicate due process if the examination is not allowed. The First District implicitly found that the Rhone standard did not apply to this case. Given the extensive information the State learned from Dr. Krop's deposition, there are simply no extreme and compelling circumstances which require a compelled examination in this case.

CONCLUSION

For the reasons previously stated, this Court should decline to answer the certified question. If the Court wishes to address the merits, it should follow the opinion of the First District and answer no to the certified question.

Respectfully submitted,

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ROBERT HARPER, JR., CHAIRMAN
AMICUS COMMITTEE, FACDL

GEORGE TRAGOS, PRESIDENT
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to Assistant Attorney General Gypsy Bailey, at the Office of the Attorney General, Department of Legal Affairs, The Capitol Building, Tallahassee, FL 32399-1050, Attorney for Petitioner and Thomas Fallis, Esquire, 343 East Bay Street, Jacksonville, FL 32202, Attorney for Respondent, this 28th day of February, 1992.

James T. Miller

JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS