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INTRODUCTION

The appellant was the Respondent in the District Court and Defendant in the trial court. The Appellee, State of Florida was the Petitioner in the District Court and Plaintiff/Prosecution in the trial court. The parties will be referred to as Defendant and prosecution or state, respectively. The Record in this case, the Appendices attached to the State's Petition before the District Court will be referred to by the Exhibit Number and page number. References to the Appendix of Appellant will be by the letter "A" and appropriate page number. All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The defendant was charged in the trial court with the offenses of Sexual Battery and Battery (Appendix B).

The defendant filed a Motion for Expert Psychological Examination of the Complainant, M G (Appendix C). In his Motion, the defendant listed several facts found during his investigation (Appendix C, p. 1-3) which pointed towards the mental and emotional instability of M G .

The defendant's Motion then came before the trial court for hearing (Appendix D). During the State's argument (Appendix D, p. 9-18), it's focus was not that the facts uncovered by the defendant as towards Ms. G were not true, but that they did not rise to the level of being strong and compelling reasons of an examination of Ms. G . The trial court considered the defendant's factual allegations (based on sworn testimony) and stated:

"On the other hand, it certainly seems to me that regardless of what Dr. Newman says what's consistent -- what isn't consistent certainly he wasn't there and the testimony of these people as to this witness's emotional state, if nothing else, that this defendant has been charged with a first degree felony, a very serious first degree felony, and that if in fact the person making the charges is fantasizing and is not in touch with reality that that would violate his right, and if he has no way of finding that

out someone can go out and, you know, based on what's in this motion, what you told me is the depositions, someone could be emotionally or mentally unstable and believe this happened and there could be some evidence that could have ... might be consistent with something else and next thing you know the defendant, because he can't find out an expert opinion whether or not there is fantasy, he could be convicted of the crime".

(Appendix D, p. 21-22)

In order to balance the concerns of both parties the Court ordered the examination:

But the report is going to be submitted to the Court, in camera with no copies to either counsel.

(Appendix D, p. 23)

The trial court duly entered an Order on defendant's Motion (Appendix A).

The state filed its Petition for Writ of Certiorari (Camejo Appendix A)

The defendant filed his Response to the Rule to Show Cause which was issued (Camejo Appendix B).

The District Court of Appeals, Fifth District issued an opinion granting the state's Petition for Writ of Certiorari (Camejo Appendix C).

The defendant filed a Motion for Rehearing/To Certify Question (Camejo Appendix D)

The District Court certified to this Honorable Court the following question:

What Standards Should The Trial Court Follow
In Ordering and Compelling Witness To Undergo
Pretrial Medical and Psychiatric Examinations;
And, What Standard of Review Should The
Appellate Court Apply In Such Cases?

This Review follows.

SUMMARY OF THE ARGUMENT

The Standard to be applied by a trial court in ordering and compelling witnesses to undergo pretrial psychiatric examinations is whether the movant has shown compelling evidence demonstrating extraordinary and unusual facts and circumstances which point towards the complainant's mental and emotional instability.

The Standard of Review to be applied by an appellate court is whether, considering all the facts before it, the trial court abused its discretion in ruling upon a Motion to Compel the Psychiatric Examination of this witness.

QUESTION PRESENTED

WHAT STANDARDS SHOULD THE TRIAL COURT FOLLOW
IN ORDERING AND COMPELLING WITNESSES TO
UNDERGO PRETRIAL MEDICAL AND PSYCHIATRIC
EXAMINATIONS; AND, WHAT STANDARD OF REVIEW
SHOULD THE APPELLATE COURT APPLY IN SUCH
CASES?

ARGUMENT

WHAT STANDARDS SHOULD THE TRIAL COURT FOLLOW
IN ORDERING AND COMPELLING WITNESSES TO
UNDERGO PRETRIAL MEDICAL AND PSYCHIATRIC
EXAMINATIONS; AND, WHAT STANDARD OF REVIEW
SHOULD THE APPELLATE COURT APPLY IN SUCH CASES

The District Court in the instant case held that "Florida law accords with the majority rule in other jurisdictions that trial courts have the inherent power to order psychological examinations (Camejo Appendix C). The petitioner agrees with this proposition and agrees that Florida law up to date supports such a conclusion.

The District Court went on to state:

These examinations have been historically ordered in other jurisdictions, where one of three situations exists: (a) uncorroborated, testimony of victim; (b) competency of victim is in question; and (c) the victim's credibility is at issue.

(Camejo Appendix C, p. 10)

and,

Of course the mental competency of a victim/witness would always be a valid reason to order such an examination in a criminal prosecution. See, generally, Goldstein v. State, 447 So. 2d 903 (Fla. 4th DCA 1984). And lastly,

credibility may be a reason to order such an examination, but only if there is strong and compelling evidence, Coe; Denkins.

In summary, we conclude that Camejo failed to demonstrate any compelling or extreme circumstances which could establish the need for a psychological evaluation of the victim. None of the bad characteristics and acts detailed in the motion provide strong evidence of the victim's psychological propensity to be. Further the defense has various alternative means to attack the victim's veracity without resorting to introduction of testimony of an expert based on a psychological examination of the victim. Using the balancing test and considerations set forth in Maday and Delaney, the victims interests and rights far outweigh those of Camejo, who will be little prejudiced by denying the examination.

(Camejo Appendix C, p. 11)

As noted by the Petitioner in his Motion for Rehearing (Camejo Appendix D), the District Court did consider Petitioner's allegations:

The allegations which the defense argued demonstrate the victim's mental instability were:

- 1) the victim was arrested for domestic violence and after beating and biting her mother;
- 2) a former boyfriend stated the victim had formed a fantasy future of marriage and a life with him;
- 3) the victim had a previous domestic dispute with another live-in boy friend resulting in her being beaten;

4) statements from a former boyfriend that the victim was loud and wild when drinking; and

5) that the victim hit her ex-boyfriend's car with a shovel or stick, and on another occasion put a shovel through the windshield of a car belonging to a woman who dated the victim's ex-boyfriend.

(Camejo Appendix C, p. 3)

The District Court, however failed to take into consideration numerous other instances pointing to the Complainant's mental and emotional instability (See, State Appendix C, p. 1-3). Two former boyfriends, Jeffery Deeter and Scott Moser both gave statements as to the Complainant's emotional instability. The Complainant bit her mother leaving a scar. The Complainant had a propensity for violence with her boyfriends. The Complainant had attempted suicide. Eda Medina, who knew both the defendant and complainant testified that they had lived together as boyfriend and girlfriend and had intimate relationships.

The defendant submits that by sworn testimony and statements in the trial court, he showed compelling testimony concerning extraordinary and unusual facts and circumstances which pointed towards the Complainant's mental and emotional instability. In the trial court, the State did not refute or contradict these allegations. Indeed, as to the Complainant putting a shovel through Mr. Deeter's windshield, the State commented that: "It probably did happen" (Camejo Appendix B, p. 4). The prosecutor himself admitted that the concerns demonstrated by the

defendant may show the Complainant to be "flighty" (Camejo Appendix B, p. 4).

The defendant submits that the standards a trial court should follow in ordering and compelling witnesses to undergo pretrial psychiatric examinations should require that the movant present compelling testimony concerning extraordinary and unusual facts and circumstances sufficient to raise a reasonable concern in the trial court that the Complainant may be mentally or emotionally unstable.

The District Court (Camejo Appendix C, p. 7) listed six factors to consider. The defendant submits that the factors listed are certainly factors to be considered but that the trial court's determination as to whether to order an examination should not be limited only to these factors. Especially when considering such a non-physical entity as the human mind, and, recognizing the ability of trial courts to discern what facts circumstances are truly extraordinary and unusual, the defendant submits that all relevant factors should be considered.

But, even using the District Court's criteria, the defendant submits that Complainant's examination was warranted:

- 1) The examination was to be psychological, not physical. As the complainant had told Dr. Weinberger that she had attempted suicide (State Appendix C, p. 2), it is conceivable/likely that complainant had previously undergone a psychological examination so that this would not be a new or unnerving experience.
- 2) Age. The complainant was not of tender years.
- 3) The state presented no evidence to the trial court nor is

there anywhere shown that the examination would unduly affect the complainant.

4) The probative value goes to both the competency and credibility. The facts shown by defendant in the trial court bring both concerns into question. It cannot be overlooked that the incident in question happened in the house where the defendant and complainant had lived together, intimately as boyfriend and girlfriend according to Eda Medina (State Appendix C, p. 3). There were no witnesses except the two parties. Both competency and credibility were concerns which had to be addressed.

5) Remoteness in time. Years did not intervene between the incident in question and the examination request.

6) Evidence already available for defendant's use. No evidence would prove as valuable in both discerning and questioning the complainant's competency and credibility as a psychological examination. Cross-examination may not prove effective if the witness is truly emotionally disturbed. The witness may believe a fantasy so completely that it becomes real to her. It cannot be expected that the State would not seek to limit or exclude the evidence and testimony the defendant would seek to introduce as to complainant's past irrational behavior. Only an examination by a neutral court-ordered expert can provide the dispassionate evidence necessary to make a reasoned determination as to the twin questions of competency and credibility.

In finding that a psychological interview of a complainant was warranted, the court in Gray v. State, 19 Fla. L. Weekly D1665

(Fla. 1st DCA 1994) recently stated:

Here, appellant requested an interview, not an intrusive examination, by his expert. The victim was no longer of tender years, and there was no testimony that the evaluation will result in any physical or emotional detriment to the victim. The probative value of the examination was heightened by appellant's inability to otherwise refute the state's expert's testimony regarding subjective observations. Given the seriousness of the allegations, the limited scope of appellant request for an interview rather than a more intrusive examination, the state's use of expert's testimony which was based in part on subjective observations that would be difficult to refute absent and independent interview, and the showing that the victim may have made false allegations due to his emotional instability, the trial court abused its discretion in denying appellant's request for a personal interview of J.D.

(p. 1668).

Here, too, there is no showing the examination will be intrusive. The complainant is not of tender years. There is not testimony that the examination will result in any physical or emotional detriment to the victim. The defendant has shown that the Complaint may have made false allegations due to her emotional instability. The defendant submits that here, too, an examination is warranted. See, also, State v. Rhone, 566 So. 2d 1387 (Fla. 4th

DCA 1990); Easterday v. State, 256 N.E. 2d 901 (Indiana 1970).

The defendant further submits that the standard of review to be applied by appellate courts when reviewing the rulings of trial courts on such motions is abuse of discretion.

In Wilk v. State, 217 So. 2d 610 (Fla. 3d DCA 1969), the Court considered the standard of review on this issue and stated:

That ruling was one within the sound judicial discretion of the court, and abuse of discretion was not shown.

(p. 11)

In Pagan v. State, 599 So. 2d 744 (Fla. 3d DCA 1992), the Court considered the question and stated:

The question of whether to order an additional psychological examination of the victim by a court-appointed expert is addressed to the sound discretion of the trial court. The record here does not reflect any circumstance that would call for the court to obtain a second expert opinion.

(p. 745)

The same question was considered by the Court in Government of the Virgin Islands v. A., Leonard, 922 F. 2d 1141 (3d Cir. 1991) in which the court stated:

While the magistrate did not make findings of fact that does not mean that he did not exercise his discretion. Fact finding involves a determination of the accurate historical record. On the other hand the exercise of discretion concerns the determination of what should be

done once the facts are ascertained. Here the magistrate accepted the facts proffered by appellant but concluded that they did not justify an order for the examinations. The determination was an exercise of discretion which we cannot disturb unless we find the discretion was abused, which we do not.

(p. 1143)

Here, too, the defendant submits that the standard to be applied on appellate review of a ruling on a motion for psychological/psychiatric evaluation of a witness should be whether, considering all the facts before it, the trial court abused its discretion in making its determination.

Applying this standard, the defendant respectfully submits that the trial court did not abuse its discretion in ruling upon the facts before it, that the complainant in this case should undergo a psychiatric evaluation.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the appellant Respectfully submits that Question Certified by the District Court should be Answered:

The Standard to be applied by a trial court in ordering and compelling witnesses to undergo pretrial psychiatric examinations is whether the movant has shown compelling evidence demonstrating extraordinary and unusual facts and circumstances which point towards the complainant's mental and emotional instability.

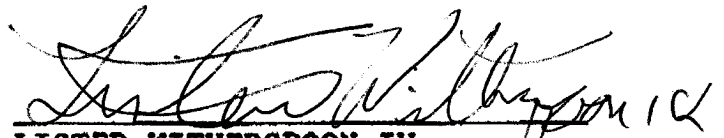
The Standard of Review to be applied by an appellate court is whether, considering all the facts before it, the trial court abused its discretion in ruling upon a Motion to Compel the Psychiatric Examination of a witness.

Applying these standard to the instant case, the ruling of the trial court must be Affirmed or this Petition will be denied his right to Due Process of Law under the United States and Florida Constitutions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Stewart G. Stone, Assistant State Attorney, 100 E. 1st Street, Sanford, Florida 32771, at the Office of Norman Wolfinger and Robert Butterworth, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, on this 2 day of September, 1994.

Respectfully submitted,


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