O.A. 2-7-95

097 FILED
SID J. WHITE
JUL 5 1995
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

In Re:

Proposed Amendment to Rule 3.202
Fla. R. Crim. P.

CASE NO. 84,273

_____/

COMMENT TO PROPOSED AMENDMENT TO RULE 3.220 FLA. R. CRIM. P.

I. Interest of party filing this comment.

The undersigned attorneys are Assistant Public Defenders with the Public Defender's Office for the Second Judicial Circuit. Mr. Davis has practiced criminal appellate law for the past sixteen years, and has focussed almost exclusively on capital appellate litigation for the past ten years. He has represented over fifty persons sentenced to death before this court and was counsel for Dilbeck v. State, 643 So. 2d 1027 (Fla. 1994). Mr. Kaufman was most recently a clerk for former Chief Justice Rosemary Barkett. He also was a member of the Criminal Procedure Rules Committee and its special subcommittee for mental health discovery in capital cases. He helped draft the proposed rule of discovery in capital cases this court rejected.

II. Summary of comment.

By ignoring the rule drafted by the Criminal Procedure Rules Committee and fashioning its own guidance, this court has postponed but not resolved several significant problems. First, the rule provides no limits to the prosecution's use of

the examination the state's expert made of the defendant. Potential Fifth and Sixth Amendment problems surface without any such controls. Second, the 45 day notification period has no precedent, is unworkable, and is unreasonable. Third, the proposed rule makes no mention about the use the state or court may make of the examination in any subsequent retrial or resentencing. Finally, if the rule intends to level the playing field, the state should bear some concomitant burden to disclose what aggravators it intends to prove.

III. First comment to proposed Amendment to Rule 3.220 Fla. R. Crim. P.

> THE PROPOSED RULE 3.202 FLA. R. CRIM. P. HAS NO PROVISION FOR LIMITING THE USE THE PROSECUTION MAY MAKE OF ANY STATEMENTS MADE BY THE DEFENDANT TO A STATE HIRED OR COURT APPOINTED MENTAL HEALTH EXPERT WHO EXAMINES HIM, THUS RAISING A SIGNIFICANT FIFTH AND POSSIBLY SIXTH AMENDMENT CONCERN.

In Dilbeck v. State, 643 So. 2d 1027 (Fla. 1994), the defendant sought to prohibit a prosecution employed psychiatrist from examining him before the penalty phase of his capital trial began. The trial court allowed the examination, primarily as a matter of fundamental fairness, and this court affirmed that decision.

> Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dilbeck to submit to a pretrial interview with the State's expert. See Burns [v. State, 609 So. 2d 600 (Fla. 1992)]. No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.

Id. at 1030.

The import of the court's ruling in that case was that the State could have its experts examine the Defendant solely to rebut any mental mitigation the Defendant might present. Nothing was said about using that examination or statements the defendant made during it to prove any aggravating factors.

The proposed Rule 3.202 Fla. R. Crim. P. extends discovery to the penalty phase of a capital trial by allowing a mental health expert hired by the prosecutor to examine the defendant if he intends to call his own expert to establish some mental mitigation. It also requires the defendant give the state 45 days notice of what specific mental mitigation he or she intends to prove.

That is, according to Rule 3.202

> (a) Notice of intent to Present Expert Testimony of Mental Mitigation. when in any capital case it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.
> (b) Time of Filing; Contents. The defendant shall give notice of intent to present expert testimony of mental mitigation no later than 45 days before the guilt phase of the capital trial. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by who the defendant expects to establish mental mitigation, insofar as is

possible.

Nothing in the proposed changes to the discovery rule explicitly limits the state's use of it's expert's examination of the defendant or any statements he or she may have made during that evaluation. Nothing limits the prosecutor, during the penalty phase from using the defendant's statements to prove several of the aggravating factors available to justify a death sentence.

Specifically, at least six of the eleven statutory aggravating factors available to the state involve issues of the defendant's mental state or intentions when he committed a murder:

> (c) The defendant knowingly created a great risk of death to many persons.
> (e) The capital felony was committed for the purpose of avoiding or prevented a lawful arrest or effecting an escape from custody.
> (f) The capital felony was committed for pecuniary gain.
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> (h) The capital felony was especially heinous, atrocious, or cruel.
> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Section 921.141(5) Fla. Stats. (1991). Thus, rather than simply rebutting a defendant's mitigation, the state's expert, using statements made by the defendant, can establish many of the aggravating factors that justify a death sentence.

Dilbeck exhibits how that can be done. There, the defendant told Dr. McClaren, the state's psychiatrist, that he had used the money he had to buy a knife rather than alcohol, he had traveled through the woods to avoid detection, and he had bought the knife to use for robbery and kidnapping (T 2611-12). Such statements were relevant to at least the pecuniary gain and avoid lawful arrest aggravators. Obtaining these statements from the defendant and then using them against him surely must have violated the Defendant's Fifth Amendment rights.

Cases from the United States Supreme Court in this area of the law suggest that unless limiting language is added to the amended rule, significant Fifth and Sixth Amendment problems may arise.

In Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) the court ordered a Doctor Grigson to examine the defendant, apparently without counsel's knowledge. At the subsequent penalty phase of Smith's trial, the prosecutor called the doctor as its only witness, and he provided the damning evidence about Smith's future dangerousness, a key consideration in the Texas death penalty scheme. The court found that this testimony violated the defendant's Fifth Amendment right against compelled self-incrimination because during the examination, the psychiatrist had elicited statements from Smith about the underlying crime. Id. at 464, and n. 9 When the expert

went beyond simply reporting to the court

> on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.

Id. at 467.

In Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed. 336 (1987), Buchanan raised an affirmative defense of "extreme emotional disturbance" in the guilt phase portion of his capital murder trial. To support that defense, the defendant introduced evidence of several of his mental evaluations. The state, seeking to rebut this proof, had other evidence introduced. In particular, the evaluation of a Dr. Lange was read. He had examined Buchanan after his arrest for the murder at his and the state's request. The court approved the trial court's ruling allowing Dr. Lange's testimony, and in doing so, it distinguished Smith: "the trial judge had ordered, sua sponte, the psychiatric examination and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial." Id. at 422. Buchanan, on the other hand, had done both. The court also noted that if the defendant had requested an evaluation, the prosecution could rebut whatever was presented "with evidence from the reports of the examination that the defendant requested." Id. Finding no Fifth Amendment violation, the court found

> with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence. Accordingly, the Commonwealth asked Elam to read excerpts

> of Doctor Lange's report, in which the psychiatrist had set forth his general observations about the mental state of petition but had not described any statement by petitioner dealing with the crimes for which he was charged. The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation. Id. at 423-24 (Emphasis in opinion).

Buchanan, thus, was distinguishable from Smith in that Buchanan sought to raise an affirmative mental condition defense in the guilt phase portion of his trial. Also, the examining psychologist's reports, which were read at trial, contained none of the defendant's statements, and they were necessary for a limited rebuttal. Id. at 423-24.

Buchanan, and more appropriately, Smith strongly suggest that without any limits placed on the State's use of its expert's examination or the defendant's statements made during it, serious Fifth and Sixth Amendment problems may arise.

This court has also recognized the Fifth Amendment problems arising from allowing unfettered use of experts. Lovette v. State, 636 So. 2d 1304 (Fla. 1994). In Lovette, the prosecutor called Dr. Robert Berland, a confidential expert Lovette intended to use only during the penalty phase portion of his capital murder trial. As it turned out, defense counsel decided not to call him, but during the guilt portion of the trial, the state called him to rebut statement's made by Lovette. That, this court ruled, violated his Fifth Amendment rights.

> Even though Lovette voluntarily submitted to an examination by Berland, he never called

> Berland as a witness or in any way opened the door for the state to question Berland about any factors of the crimes that Lovette may have told him. Berland testified that he ordinarily gives his patients a Miranda-type warning, but we disagree with the trial court's conclusion that a valid Miranda warning and waiver occurred here. See Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) Lovette at 1308.

IV. Second comment to proposed Amendment to Rule 3.220 Fla. R. Crim P.

THE FORTY-FIVE DAY NOTICE REQUIREMENT IN THE PROPOSED RULE IS UNREASONABLE AND UNWORKABLE.

As currently written, the proposed rule requires the defendant in a capital case to give the prosecution notice at least 45 days before the guilt phase of his trial begins of the mental mitigation he intends to prove. Ostensibly, this will give the state sufficient time to hire its own psychologist or psychiatrist to evaluate the defendant after he has been found guilty of the capital murder. That provision is unworkable and unreasonable for several reasons.

First, as a practical matter, defense counsel often will not have a firm idea forty-five days before trial of what mitigation he intends to present. Trial strategy and tactics, while perhaps known in the broadest outlines that far ahead of trial, frequently take solid form on the eve of trial. The state also has the tendency to wait to the last minute, and this court has occasionally faced issues of tardy disclosure of discovery by the prosecution. See, Esty v. State, 642 So. 2d

1074 (Fla. 1994). Moreover, although competent counsel prepares his penalty phase issues before any trial begins, frequently the plan originally devised for that phase of the trial must be altered because of what was presented in the guilt segment of the trial.

Second, Section 921.141(6) has a nonexclusive list of mental mitigators that adequately alerts the state of the possible mental mitigation available to the defendant. If the defendant has no need for a list of what specific aggravators the state intends to prove, Clark v. State, 379 So. 2d 97 (Fla. 1979), why should the state be given advanced notice of the particular mitigation a defendant anticipates proving? This certainly does not level the playing field. Of course, that list does not include all the mitigation available, but except for mental retardation, most mental conditions having relevance on the defendant's moral culpability for committing a murder tend to fall into the two mental mitigators listed in the statute. Those which don't, such as mental retardation, drug abuse, and alcoholism, require such an extensive history to establish that any reasonable investigation by the state would easily discover these conditions and thereby alert it to their use as mitigation.

Third, the state, as a practical matter, has little trouble finding experts to conduct mental status evaluations, so a 45 day advance notice does little to help it prepare for the penalty phase of a capital trial.

Fourth, the rules governing the defendant's obligation to

disclose discoverable evidence, Rule 3.220(d) Fla. R. Crim. P. and Rule 3.220(j) Fla. R. Crim. P. concerning the continuing duty to disclose adequately protect the state. That is, the defendant has the obligation to promptly disclose witnesses or materials he intends to use at trial both within seven days of receiving the state's discovery, and on a continuing basis. Thus, if the defense decides two days before trial to present any mental mitigation, at that time he should disclose the name of the expert he intends to use to prove it. If the state argues a discovery violation, the procedure established in Richardson v. State, 246 So. 2d 771 (Fla. 1971) should adequately protect its interests. In any event, just as the state need not alert the defendant if it intends to prove he committed a felony murder or a premeditated homicide, he should not have to tell the state what specific mitigation he intends to prove.

Finally, no other rule of criminal procedure, which requires some pretrial notice, demands such lengthy advanced warning. Rule 3.200 Fla. R. Crim. P. demands the defendant give only 10 days warning he intends to present an alibi defense at trial. Rule 3.210 Fla. R. Crim. P. expects the defendant to give the state 30 days notice he intends to raise a battered-spouse syndrome defense. Requiring a defendant to give the state 45 days so it can find an expert it cannot even use until after the completion of the guilt phase of the trial is unreasonable.

In short, the rules of discovery should "level the playing

field," not make the state's job of rebutting any mental mitigation easier. See, Cooper v. State, 336 So. 2d 1133 (Fla. 1976). The forty-five day notification provision requires the defendant to disclose too much too far in advance of trial for no practical reason.

V. A FINAL OBSERVATION

Finally, the court's proposed rule has the appeal of simplicity. This court may believe that the objections raised here can be resolved on a case by case basis. It should resist that approach. This court has tended to apply new rules on a prospective basis only, occasionally denying any relief to "pipeline" cases. Taylor v. State, 630 So. 2d 1038 (Fla. 1994) If a rule of criminal procedure alerts and guides counsel for the state and the defense, it should give as much guidance as reasonably possible so both sides can adequately represent its or their client's interests. Counsel, who are not required to anticipate changes in the law, Knight v. State, 394 So. 2d 997 (Fla. 1981) should not be penalized for not doing that, and for not doing so after the new rule takes effect. While simplicity has many advantages, in this instance, where lives are at stake, this court should provide as much guidance to lawyers and judges as possible.

VI. Recommendation

Thus, we recommend that the proposed Rule 3.202 be amended to reflect that the state may not use any report, evaluation, or test produced by its expert or any statements made by the defendant to its expert to prove any of the aggravating

factors, in any proceeding.

Further, if the defendant alleges that the prosecutor used either what he said or evidence which was derived from what he said to any state hired or court appointed expert, the prosecutor has the burden to show (by clear and convincing evidence) that either this was not so, or that he would have discovered the evidence by other means.

Finally, the forty-five day notification requirement should be eliminated. Instead, the defendant's obligation to disclose penalty phase mental mitigation should be the same as that required under Rules 3.220(d), (j) Fla. R. Crim. P. Whenever, he intends to use an expert in the penalty phase of the capital trial, he should promptly disclose that to the state.

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