D.A. 8-29-9 Dec 7

SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
DEC 2 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Nos. 85,585 & 85,801

IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.220 (h)

COMMENTS OF KATHERINE FERNANDEZ RUNDLE, THE STATE ATTORNEY FOR THE ELEVENTH JUDICIAL CIRCUIT AND MICHAEL J. SATZ, THE STATE ATTORNEY FOR THE SEVENTEENTH JUDICIAL CIRCUIT, TO PROPOSED RULE 3.220(p)(3) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE

Katherine Fernandez Rundle, State Attorney for the Eleventh Judicial Circuit, and Michael J. Satz, State Attorney for the Seventeenth Judicial Circuit, by and through the undersigned counsel, offer the following comments to the proposed amendment to Rule 3.220(p)(3) of the Florida Rules of Criminal Procedure, set forth in this Court's opinion in the above case, rendered on September 12, 1996 and published in The Florida Bar News on October 1, 1996:

1. This Court is considering adding subsection (p)(3) to Fla.R.Crim.P. 3.220, which states as follows:

> In capital cases, if the prosecutor intends to seek the death penalty, the court shall order the disclosure of aggravating and mitigating circumstances to be relied upon in good faith at trial.

Although the amendment on its face appears to attempt to bring order into the realm of capital litigation, the reality of such litigation requires this Court to reject said amendment for a number of reasons.

2. The amendment as written appears on its face to apply to both the prosecution and the defense, because it requires the disclosure of both aggravating **and** mitigating circumstances to be relied on. In that the State will not be relying on any mitigating circumstances, the disclosure requirement must also apply to defendants. What is missing from the amendment is when that disclosure is required to be **made and** what sanctions should be applied to the party who fails to make that disclosure.

3. Undersigned counsel submits that the proposed rule would have no effect on providing notice ***to*** the parties as to which aggravating and mitigating circumstances will be relied upon at the penalty phase. In reality, competent defense counsel will have already determined which aggravating factors the State will argue apply in a particular case. Unlike the defense, the State is limited by the death penalty statute **as** to what aggravating circumstances it can rely on in requesting that the death penalty be imposed. This Court has long held that the statute, sec. 921.141(5), Fla. Stat., provided sufficient notice to defendants as to what aggravating circumstances the State would be relying on. See Clark v. State, **379** So.2d **97** (Fla. **1980);** Sirici v. State, **399** So.2d **964** (Fla. **1981);** Preston v. State, 444 So.2d **939** (Fla. **1984);** Gore v. State, 475 So.2d 1205 (Fla. **1985).** The general rules of discovery[1] will allow the defense the opportunity to discover whether the defendant has prior convictions, or was under a sentence of imprisonment at the time of the homicide, or whether the victim was a law enforcement officer or a child under the age of eleven, Discovery will also allow the defense the opportunity to

[1] There is no question that the discovery rules apply to the sentencing proceedings. See Elledae v. State, **613** So.2d **434** (Fla. **1993);** State v. **Clark, 644** So.2d **556** (Fla. 2d **DCA** 1994).

determine if the homicide could be considered heinous, atrocious or cruel, or was committed during the course of one of the enumerated felonies, or was cold, calculated and premeditated or was committed for pecuniary gain.

4. The same is generally true with the mitigating circumstances. Although the defense is not limited by statute, but only by their imagination, to what they can bring **forth** in mitigation, the State through discovery can determine generally what mitigating circumstances the defendant will be relying on. The enactment of Fla.R.Crim.P. **3.202,** which requires a defendant to file twenty days (20) days before trial, a Notice of Intent to Present Expert Testimony of Mental Mitigation, listing the statutory and nonstatutory mental mitigating circumstances that the expert will testify to, see Amendments to Florida Rule of Criminal Procedure 3.220, 674 So.2d 83 (Fla. 1996), has been a great aid in allowing the State to discover the mitigating circumstances that the defendant will rely on. Thus, the proposed amendment to Rule **3.220** has no practical effect in informing either side as to what aggravating and mitigating circumstances **will** be relied upon at the penalty phase.

5. The only effect that this rule will have, is to begin the erosion of this Court's prior opinions in State v. Donner, 500 So.2d **532** (Fla. 1987); Reno v. Person, 497 So.2d 1 (Fla. 1987); and State **v.** Bloom, 497 So.2d 2 (Fla. 1987), which held that the trial court cannot determine pretrial, that death is not appropriate. That is clearly the intent of the drafter of the proposed rule. In a memorandum, dated October 14, 1996, from the Honorable O.H. Eaton, Jr., to the Criminal Procedure Rules Subcommittee III, which reviewed this proposed rule, Judge Eaton stated that there is concern among trial judges

about the "considerable waste of resources and time in preparing mitigating circumstances when the likelihood of the death penalty being imposed is remote." See Memorandum, attached as Exhibit "1." That may **also** be, according to Judge Eaton, the intent of this Court, when he stated that "the Supreme Court is unanimous in it intention to require disclosure of aggravating and mitigating circumstances so that cases in which the death penalty is not likely to be upheld will not get to Tallahassee. All seven justices have expressed this on at least two occasions." See pp. **2-3** of Memorandum. To further Judge Eaton's expressed desires, the Subcommittee on October **26,** 1996, voted, 4 to 1, to send for consideration, to the full Criminal Rules Committee, a new rule, 3.221, which would require, upon a defendant's request a pretrial evidentiary hearing to determine whether the death penalty should be an issue at trial. **A** copy of the proposed rule 3.221 is attached hereto as Exhibit "2." Thus, there is no longer any doubt that the intention of the drafter of the proposed rule is to unconstitutionally remove the discretion of whether to seek the death penalty from the prosecutor and place it in the domain of the judiciary.[2]

6. Donner, Bloom and Person are all predicated on the principle that under article 11, section 3, of the Florida Constitution, the determination of whether to seek the death penalty pretrial, is solely within the discretionary function of the prosecutor, and cannot be interfered with by the judiciary. State v. Bloom, supra, **497** So.2d at **3.** Furthermore, this Court held in Bloom that such a pretrial procedure would be unconstitutional without any statutory authority to do so. Id. Such a holding requires **an** inherent finding by this

[2] Other than pointing out the fact that the proposed rule 3.221 is clearly unconstitutional, the undersigned counsel will not go into the long litany of other problems with this rule at this time, but will **file** such comments at the appropriate time if the rule is approved by the **full** Criminal Rules Committee.

Court that a pretrial determination is substantive and not procedural, and thus, any attempt to create such a pretrial rule must come from the Legislature and not by way of a rule of procedure promulgated by this Court.

7. Prosecutors are aware that requesting that the death penalty be imposed in a case requires very serious consideration of all of the factors inherent in the crime as well as who the defendant is. When the State decides to proceed to trial with the death penalty at issue, it does so in good faith because it has been held that if a trial court finds in a post-trial inquiry that there was no basis or the State's pursuit of the death penalty was not in good faith, a new trial can be ordered if jurors were excluded during the trial solely for their views on the death penalty. Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990); Reed v. State, 496 So.2d 213 (Fla. 1st DCA 1986). Thus, this Court should not implement this proposed rule if the ultimate goal of the rule is to interfere with the prosecutorial function.

8. Another problem with the proposed rule, is that it gives no guidance as to when that disclosure is required to be made. Under Fla.R.Crim.P. 3.202, the State is required to file a Notice of Intent to Seek the Death Penalty within forty-five (45) days after arraignment if the State wants to take advantage of the provisions of the rule. Since the proposed rule uses the language of "if the prosecutor intends to seek the death penalty," it is unclear if the proposed amendment to Rule 3.220, requires the filing of the notice of aggravating circumstances at the same time as the filing of the Notice of Intent to Seek the Death Penalty under Rule 3.202. Similarly, the proposed rule provides no guidance as to when the defendant is required to disclose his or her mitigating

circumstances. The lack of clearly defined time limits may lead trial courts to enter orders which are in conflict with time provisions of Fla.R.Crim.P. 3.202. A copy of such an order from the Seventeen Judicial Circuit, and the State's Motion for Court to Reconsider, is attached hereto as Exhibit "3."

9. The proposed rule is also silent on what sanctions can be imposed for a violation of the rule. Undersigned counsel assumes that because this is a discovery rule, the requirements of Richardson v. State, 246 So.2d 771 (Fla. 1971), would be the appropriate procedural mechanism to be utilized to determine what sanctions under subsection (n) should be imposed for a violation of the rule. This is where reality comes into play. This rule will only be applied to the State, and will only result in the exclusion of the consideration by the jury and perhaps, also the judge, of relevant aggravating circumstances. There may be circumstances when the State may initially omit in its notice an aggravating circumstance, for example a contemporaneous prior felony which does not become an aggravating factor until the defendant is convicted of the crime at trial, or if due to interpretations of an aggravating factor in opinions by this Court, a factor which the State believed might not apply, is later determined to apply because of a recent decision by this Court. A trial court, however, may decide to exclude consideration of that aggravating factor because of the State's failure to include that factor in its notice. The State, unlike the defendant, has no real pretrial appellate

remedy[3]. Since "death is different," Gregg v. Georgia, 428 **U.S. 153, 188, 96** S.Ct. 2909, **2932 (1976);** State v. Dixon, 283 So.2d **1, 17** (Fla. 1973), judges will not sanction the defendant[4] by excluding the presentation of any mitigating circumstance, regardless of how willful the violation or how procedurally prejudiced the State might be. The trial court will be rightfully concerned about any death sentence being reversed by this Court on direct appeal, or that there will later be a meritorious claim of ineffective assistance of counsel, which will entitle the defendant to a new sentencing hearing. Thus, in reality, this rule will not achieve its purpose of insuring that both sides have adequate notice of the factors to be presented and argued at the penalty phase.

10. In reality, the proposed rule will not accomplish its desired intent. It will result in more unneeded work for prosecutors who are already heavily burdened under the present discovery rules, without any real reciprocal requirements by the defense. It is simply unnecessary. There are presently more than sufficient procedural safeguards in the discovery process to fully protect a capital defendant's right to a fair trial, including **at** the sentencing hearing. **As** recently stated by Chief Justice Kogan, "There's **an** old maxim: If it ain't broke don't **fix** it, **and** it ain't broke." Blankenship, Gerald Kogan -

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[3] The State would have to petition the district court of appeal for a writ of common law certiorari. See Gore v. State, 614 So.2d 1111 (Fla. 4th **DCA 1992).** Petitions **for** writ of certiorari are not commonly granted and it is often difficult to meet the higher standard of State v. Pettis, 520 So.2d 250 (Fla. 1988) of proving not mere error, but a miscarriage of justice and **a** departure from the essential requirements of the law. It is further complicated by the fact that it will be a district court of appeal, which is not familiar with death penalty issues, deciding the issue, rather than this Court.

[4] Maybe defense counsel might be sanctioned, but undersigned counsel has not seen or heard of such a case in which defense counsel has been held in contempt for violating the rules of discovery. If it happens, it is rare compared to the number **of** violations that counsel **has** witnessed and seen go unsanctioned.

Chief Justice of the Supreme **Court of** Florida, **70** Fla.Bar.J. Vol. 9, **p.13, 18-19** (Oct. **1996).**

Wherefore, the undersigned respectfully request that this Court reject the adoption of the proposed Rule of Criminal Procedure 3.220 (p)(3).

Respectfully submitted,

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State Attorney for the Eleventh Judicial Circuit

BY: _____

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BY: _____

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Circuit Court
Eighteenth Judicial Circuit of Florida

COUNTIES OF BREVARD AND SEMINOLE

O. H. EATON, JR.
CIRCUIT JUDGE

SEMINOLE COUNTY COURTHOUSE
SANFORD, FLORIDA 32771
(407) 323-4330
EXT. 4238

MEMORANDUM

TO: SUBCOMMITTEE III

FROM: JUDGE O.H. EATON, JR.

SUBJECT: NEW RULE 3.220(p) (Disclosure of Aggravating/Mitigating Circumstances)

DATE: OCTOBER 14, 1996

I hots that we have a telephone conference scheduled for October 17, 1997, at 2:00 p.m. for *the* purpose of discussing proposed rule 3.220(p).

I would like to bring you up to date on the history of this rule prior to our conference

As you know, the Supreme Court has ruled in many cases that the State Attorney does no have to disclose aggravating circumstances to be relied upon during the penalty pl_se o a capital trial. I am not sure why that is the rule but it is. This has caused concern among trial judges who are used to hawing the issues to be tried and it has caused considerable waste of resources and time in preparing mitigating circumstances when th likelihood of the death penalty being imposed is remote. The Supreme Court has been reversin death penalty cases regularly where proof of aggravation is weak and

EXHIBIT "1"

vast mitigation is present, Justice McDonald once told me that the Supreme Court spends 40% of its time on 7% of its cases and that 7% is capital cases.

In a published order dated May 4, 1995, the Supreme Court considered the problem of disclosure of mental mitigation during the penalty phase of a capital trial and requested the Criminal Procedure Rules Committee "to consider, for possible inclusion in its regular four year cycle of proposed rules changes, the suggestions of the Honorable O. H. Eaton, Jr., concerning tho need for (1) a rule requiring tho defendant and the state to file a statement of the issues *to* be tried in the penalty phase of a capital trial and (2) a pretrial procedure, similar to summary judgment that would allow the trial court to determine whether the death penalty is an option based on the aggravating and mitigating factors alleged to exist in a capital case." Amendments to Florida Rule of Criminal Procedure 3.220, 654 So.2d 915 (Fla. 1995).

In that same order, Justice Anstead agreed and stated "I agree completely with the suggestions of the state trial judges that more attention needs to be addressed to pre-trial procedures for tho penalty phase of a capital trial."

The Rules Committee took no action on this request. In fact, it was not even referred to a subcommittee for action. Accordingly, when we passed the new discovery deposition rule, I filed a comment with the Supreme Court on behalf of tho Florida Conference of Circuit Judges suggesting the inclusion of the language we now have to discuss.

The Supreme Court is unanimous in its intention to require disclosure of aggravating and mitigating circumstances so that cases in which the death penalty is not

likely to be upheld will not get *to* Tallahassee. All seven of the justices have expressed this on at least two occasions.

The language I have proposed allows trial judges to require tho disclosure at a pretrial conference. I am flexible as to how tho disclosure should be requited. It may bo better to require the disclosure some time after arraignment instead of at a pretrial conference.

The proposed rule reads as follows:

"In capital cases, if the prosecutor intends to seek the death penalty, the court shall order the disclosure of aggravating and mitigating circumstances *to* be relied upon in good faith at trial."

I look forward to discussing this issue with you on Thursday.

3.221. PROCEDURES RELATING TO THE DEATH PENALTY

(a) PRETRIAL EVIDENTIARY HEARING *TO* DETERMINE DEATH PENALTY ISSUES. In a capital case, upon motion of the defendant, the court shall conduct a pretrial evidentiary hearing to determine whether the death penalty should be an issue at trial. At such hearing the court may take evidence and consider affidavits, depositions, or testimony to establish statutory aggravating circumstances and statutory and non-statutory mitigating circumstances. If the court finds from the evidence presented that the mitigating circumstances substantially outweigh the aggravating circumstances, the death penalty shall not be an issue at trial and the case shall proceed as a non-capital case. The state shall be given at least twenty days notice before the hearing on the motion.

(b) Disclosure of Aggravating and Mitigating Circumstances. Upon conviction in a capital case, if the prosecutor intends to seek the death penalty, the court shall order the disclosure of aggravating and mitigating circumstances to be relied upon in good faith during the penalty phase.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

TIMOTHY MATTIER,

Defendant.

CASE NO: 96-2277 CF-10-A

JUDGE SCHAPIRO

ORDER RELATING TO PENALTY PHASE OF CAPITAL CASES

Effective October 1, *1996,* Rule 3.220 of the Rules of the Criminal Procedures was amended by the Florida Supreme Court. This amendment is found *at* Volume 21, page S369, Florida Law Week of September 20, 1996. Subsection (p) of said Rule relates to Pretrial Conferences, and states:

"(I) The trial court may hold 1 or more pre-trial conferences, with trial counsel present, to consider such matters as will promote fair and expeditions trial. The defendant shall be present unless the defendant waives this in writing.

(2) The court may set, and upon the request of any party shall set, a discovery schedule, including a discovery cut-off date, *at* the pre-trial conference.

(3) In capital cases, if the prosecutor intends to seek the death penalty, the court shall order the disclosure of aggravating and mitigating circumstances to be relied upon in good faith at the trial."

Based on the foregoing amendment to Rule 3.220, the Court orders the *State* within

EXHIBIT "3"

10 days of the Court rendering this order, to file a written response to the Defendant(s), stating whether or not the State is seeking the death penalty as to a charged defendant. In the event the State is seeking the death penalty, then the State will disclose in writing which statutory aggravating circumstances it intends to rely upon, in the event the trial of this cause reaches a penalty phase. The State will also provide each defendant with a list of witnesses, including rebuttal witnesses, which it intends to present at a penalty phase of said trial.

Within 10 days of a Defendant receiving the State's written response, each Defendant will provide a written response to the State, containing a listing of all statutory and non-statutory mitigating circumstances which each defendant intends to rely upon, in the event a penalty phase of the trial is reached. Each Defendant will also provide the State with a list of Witnesses which are to be presented in support of each statutory and non-statutory mitigating circumstance, and which will be presented in rebuttal to any of the State's statutory aggravating circumstances.

The parties are further ordered to notify the Court in writing when they believe that discovery has been completed, in order that the Court may set a discovery cut-off date, pursuant to the above rule.

DONE AND ORDERED in Chambers, Broward County Courthouse, Fort Lauderdale, Florida, this 7th day of October, 1996.

SHELDON M. SCHAPIRO
SHELDON M. SCHAPIRO
Circuit Court Judge
A TRUE COPY

CC:
Tomas Cazel, Esq.
Tim Donnelly, Esq., Assistant State Attorney

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA

Plaintiff

vs.

TIMOTHY MATTER

Defendant

CASE NO, 96-2277CF10A

JUDGE: SCHAPIRO

MOTION FOR COURT TO RECONSIDER AND RESCIND ORDER RELATING TO PENALTY PHASE OF CAPITAL CASES

COMES NOW the State of Florida, by and through its undersigned Assistant State Attorney, and hereby files this Motion for Court to Reconsider and Rescind Order Relating to Penalty Phase of Capital Cases and would show as follows:

On October 8, *1996,* the State of Florida received an Order Relating to Penalty Phase of Capital Cases dated October 7, *1996,* in reference to the above *case.* Said Order was issued Sua Sponte without any Notice of a hearing or pretrial conference to the State of Florida and/or the Defendant.

In the Order, the Court directs the State of Florida and the Defendant to disclose aggravating and mitigating circumstances, if the State intends to seek the Death Penalty. However, sub-section

(p)(3) of Rule 3.220 of the Rules of Criminal Procedure, which the Court relies upon as the basis for its Order, is for comment only and not yet in effect, As the Florida Supreme Court stated in *In re: Amendment to Florida Rule of Criminal Procedure 3.220(h) and Florida Rule of Juvenile Procedure 8.060 (d)*, Nos. 85,585 and 85,801 (Fla. September 12, *1996)* [21 Fla. L. Weekly S369]:

> We have included one amendment to rule 3.220 not addressed in our December 21 opinion. At the suggestion of the Honorable O.H. Eaton, Jr., Circuit Judge, we have added proposed subdivision (3) to Rule 3.220 (p), Pretrial Conference, The proposed amendment reads:
>
> > In capital *cases,* if the prosecutor intends to seek the death penalty, the court shall order the disclosure of aggravating and mitigating circumstances to be relied upon in good faith at trial.
>
> This amendment is included for comment only and will not become effective until after the Criminal Procedure Rules Committee reviews the proposed amendment and files comments for this Court's further consideration. The Committee shall file its comments within ninety days from the date of this opinion. Interested parties also may file comments on the proposed change within the ninety-day period,

Additionally, even if subsection (p)(3) were in effect, certain directives within the Court's October 7,1996, Order *are* in conflict with Florida Rule *of* Criminal Procedure 3.202 as amended in *Amendment* to *Florida Rule of Criminal Procedure* 3.220- *Discovery (3.202 - Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial)*, 674 So.2d 83, (Fla. 1995).

WHEREFORE, the State of Florida respectfully requests this Honorable Court to Reconsider and rescind its October 7, 1996, Order Relating to Penalty Phase of Capital Cases.

I HEREBY CERTIFY, that a copy was furnished by U.S. Mail/Hand-delivered on this 9th day of October, 1996, to;

Respectfully Submitted,

Michael J. Satz
STATE ATTORNEY

Thomas Cazel, Esq.
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By: Timothy L. Donnelly

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TELEPHONE (305) 547-0100

November **22,1996**

Sid White
Clerk, Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1925

Re: Amendment to Florida Rules of
Criminal Procedure **3.220** (h)
Case Nos: ***85,585*** & **85,801**

Dear Mr. White:

Please find enclosed the original and seven copies of the Comments of Katherine Fernandez Rundle, the State Attorney for the Eleventh Judicial Circuit and Michael J. Satz, the State Attorney for the Seventeenth Judicial Circuit, to Proposed Rule 3.220(p)(3) of the Florida Rules of Criminal Procedure and an original Request for .Oral Argument.

Thank you for you attention to this matter,

Sincerely,

KATHERINE FERNANDEZ RUNDLE
State Attorney

By: Penny H. Brill
Penny H. Brill
Assistant State Attorney