ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

HOWARD VINCENT DECK,

Respondent.

CASE NO. 85,652

DISTRICT COURT OF APPEAL
FIFTH DISTRICT - NO. 93-2623

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

Robert A. Butterworth
Attorney General

Steven J. Guardiano
Senior Assistant Attorney General
FL Bar # 0602396
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

I. CASES:

II. OTHER AUTHORITIES:

STATEMENT OF THE CASE AND OF THE FACTS

On June 11, 1993, Petitioner, State of Florida (the "State") filed an amended information charging Howard Vincent Deck (the "Defendant") with six counts of Sexual Battery upon a Child, two counts of Lewd, Lascivious, or Indecent Acts upon a Child and one count of Forcing or Enticing a Child to Commit a Lewd, Lascivious, or Indecent Act (Vol. VI, R 873-875).

Defendant filed a motion to suppress statements made by him while he was in police custody and being interviewed on August 5, 1992 (Vol. VI, R 776-782). A transcript of the interview is attached to the motion (Vol. VI, R 790-872). Suppression was not based on the state constitutional privilege against self-incrimination under Article I, Section 9 of the Florida Constitution, but on the federal constitutional right to remain silent under Edwards v. Arizona, 451 U.S. 477 (1981) (Vol. VI. R 776-777). In addition, Defendant argued that the statements were not voluntarily made or were taken in violation of the Fifth and Sixth Amendments to the U.S. Constitution and Article I, Section 16 of the Florida Constitution (Vol. VI, R 776-782).

A hearing on the motion to suppress was held on June 15, 1993 (Vols. III & IV, R 252-550). Again, Defendant did not seek suppression based on his state constitutional privilege against

self-incrimination under Article I, Section 9 of the Florida Constitution (Vol. IV, 267-297). Rather, Defendant primarily argued that his statements were not freely and voluntarily given.

On July 26, 1993, the lower court entered an order making the following findings of fact:

> (1) Defendant voluntarily drove himself to the police department;
>
> (2) the interview was not coercive police conduct ('There were NO threats, promises or other improper influences made to the defendant by the police in order to get the defendant to make the statement.");
>
> (3) Defendant was read his Miranda rights and freely and voluntarily waived those rights;
>
> (4) Defendant never refused to answer questions nor otherwise asserted his right to remain silent until the end of the interview (pg. 82 of the transcript);
>
> (5) Defendant never requested access to or the presence of an attorney during the interview;
>
> (6) Defendant's alleged mental condition did not render the statements involuntary as Defendant attended college courses and was an engineer at Martin Marietta with top secret clearance. Defendant talked with the police for approximately 2 hours without having difficulty understanding questions.
>
> (7) Defendant attempted to provide a defense of intoxication during the interview suggesting that he recognized that he was in

> trouble and appreciated the consequences of his conversations with the police.
>
> 8. Defendant, was given food including soda, peanuts, candy and soup throughout the interview. The defendant had his insulin shot **before** going to the police department and wasn't due for an insulin shot till 4:00 p.m. The interview was completed at 12:45.
>
> 9. Defendant's requests to use the bathroom during the interview were not requests to cease the interview under the totality of the circumstances.

(Vol. VI, R 906-909).

The trial judge denied the motion to suppress pages 1-81 of the interview transcript, but granted the motion to suppress from page 82 to the end where Defendant affirmatively requested the interview to cease (Vol. VI. R 906-909). The trial judge did not base his decision on Article I, Section 9 of the Florida Constitution or Travlor v. State, 596 So. 2d 957 (Fla. 1992).

Trial was held over a four day period from July 26-29, 1993 (Vol. VIII-XIV, TT 1-1235). Defendant renewed his objection to admission of the cassette-taped interview "as previously made at my motion to suppress," which was denied (Vol. XI, TT 622, 625). The taped interview was published to the jury (Vol. XI, TT 630-780).

Defendant was convicted on the six counts presented to the jury: three counts of Sexual Battery upon a Child; one count of Attempted

Sexual Battery on a Child; and two counts of Lewd, Lascivious, or Indecent Acts upon a Child (Vol. VI, R 941-946, XIV, TT 1229-1231).

On August 6, 1993, Defendant filed a motion for new trial arguing in part that the trial court erred in admitting his tape-recorded statement over the objections as made in his previous motion to suppress (Vol. VI, R 947-951). On October 19, 1993, the motion for new trial **was** denied (Vol. VII, R 978).

On October 20, 1993, judgment was entered and Defendant **was** sentenced to concurrent life sentences on the sexual battery counts (Counts I, III, V) and seven years incarceration on the other counts (Counts II, VII, & VIII)(Vol. VI. R 967-974). Defendant filed a notice of appeal (Vol. VII, R 980-981).

On one of the points raised on appeal, Defendant argued that the officer's failure to clarify an equivocal request to remain silent: "I don't know. I can't talk about it anymore," (located at Volume XI, TT 734)[1] violated his federal constitutional right to remain silent under Miranda v. Arizona, 384 U.S. 436 (1966). Defendant did not seek reversal based on Article I, Section 9 of the Florida Constitution or Travlor.

On December 22, 1994, the Fifth District Court of Appeal

---

[1]The location of this exchange on the transcript is Vol. VI, R 845.

reversed and remanded for a new trial finding that Owen v. State, 560 So. 2d 207 (Fla. 1990) was controlling in that the officer had not made an inquiry upon Defendant's equivocal request of a Miranda right. On January 3, 1995, the State moved for rehearing or certification on the ground that under Davis v. United States, 512 U.S. 452 (1994), a suspect's equivocal request of a Miranda right does not require an officer to stop questioning the suspect, thereby casting doubt on the continued validity on Owen (and the case on which it relied, Long v. State, 517 So. 2d 664 (Fla. 1987)) .

On February 10, 1995, the Fifth District granted the State's motion for rehearing, withdrew its opinion of December 22, 1994, and ruled that in light of Davis, the officer was not required to clarify Defendant's equivocal invocation of his right to remain silent. The Fifth District noted "that neither Owen nor Lons was predicated upon, or referred to, the right against self-incrimination enunciated under Article I, Section 9 of the Florida Constitution. Nor is any argument in that regard advanced by the appellant herein."

On February 21, 1995, Defendant moved for rehearing or certification and for the first time specified the argument that the officer was required to clarify Defendant's equivocal

invocation of his right to remain silent under Article I, Section 9 of the Florida Constitution and Travlor. Defendant admitted that he had not previously advanced any argument on his right to remain silent under Article I, Section 9. On February 27, 1995, the State responded that the argument was waived because it had not been raised below or on appeal and could not be raised for the first time on rehearing.

On March 24, 1995, the Fifth District granted rehearing, withdrew its February 10, 1995 opinion and ruled that the officer's failure to ask clarifying questions after Defendant's equivocal invocation of his Fifth Amendment right to terminate the interview violated his right against self-incrimination under Article I, Section 9 of the Florida Constitution and the interpretation thereof under Travlor. See Deck v. State, 653 So. 2d 435, 436 (Fla. 5th DCA 1995). The Fifth District expressly acknowledged that Defendant "had failed to raise the argument available to him under Article I, Section 9 of the Florida Constitution at the trial level or his appellate briefs," but felt that it was a fundamental right created by the state constitution and that relief was warranted "in the interests of justice" under Florida Rule of Appellate Procedure 9.140(f). Id.

On March 31, 1995, the State filed a motion for rehearing

and/or certification pointing out that even constitutional errors may be waived; that the failure to make the argument did not constitute fundamental error; and that post-conviction proceedings provided the proper forum for the claims. On April 21, 1995, the Fifth District denied the motion for rehearing.

The State filed a timely notice to invoke the jurisdiction of the Florida Supreme Court and a motion to stay mandate, which was granted. Jurisdictional briefs were filed and on October 20, 1997, this Honorable Court accepted jurisdiction.

SUMMARY OF ARGUMENT

It is undisputed that Defendant did not raise the argument available to him under Article I, Section 9 of the Florida Constitution at the trial level or in his appellate briefs, but for the first time in his motion for rehearing. The Fifth District's decision to reverse Defendant's convictions despite the waiver violated several well-known rules of law: (1) in order for an argument to be cognizable on appeal, it must have been raised in the trial court; (2) constitutional errors which are not of a fundamental character are waived unless timely and properly objected to in the trial court; (3) absent fundamental error, an argument cannot be raised for the first time on a motion for rehearing and appellate courts will not even consider such an issue even if it would have changed the result.

Notwithstanding the waiver, the Fifth District improperly ruled that Defendant's equivocal invocation of his right to remain silent required the officer to terminate further questioning. Police need not ask clarifying questions if a defendant who has received proper Miranda warnings makes an equivocal or ambiguous request to terminate an interrogation after having validly waived his Miranda rights.

ARGUMENT

POINT ONE:

DEFENDANT'S FAILURE TO SPECIFY HIS LEGAL ARGUMENT ON ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AT THE TRIAL LEVEL OR IN HIS BRIEFS WAIVED IT FROM APPELLATE REVIEW.

I. Defendant's Failure to Specify at Trial a Legal Argument on Article I, Section 9 of the Florida Constitution waived it from appellate review.

It is well-established under Florida law that in order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for objection, exception, or motion below. §90.104(1)(a), Fla. Stat. (1997); §924.051(1)(b), Fla. Stat. (1997); Terry v. State, 668 So. 2d 954, 961 (Fla. 1996); Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987); Tillman v. State, 471 so. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Where the argument on appeal is different from the argument asserted at trial, then the argument is waived absent fundamental error.

Here, it is undisputed that Defendant failed to raise the argument available under the Article I, Section 9 of the Florida Constitution at the trial level or in his appellate briefs. This was acknowledged by the Fifth District in its opinion, Deck v. State, 653 So. 2d 435, 437 (Fla. 5th DCA 1995) and conceded by

Defendant in his February 21, 1995, motion for rehearing (wherein he first made an argument predicated on Article I, Section 9 of the Florida Constitution and Traylor v. State, 596 So. 2d 957 (Fla. 1992)) .

A finding of waiver is further supported upon review of Defendant's motion to suppress. In paragraph three, Defendant specified that his statements were taken in violation of his right to counsel as guaranteed by the Sixth Amendment and by Article I, Section 16 of the Florida Constitution (Vol. VI, R 777). In paragraphs two and four of his motion to suppress, Defendant specified that his statements were taken after he expressed a desire to terminate questioning in violation of Edwards; Miranda and the Fifth and Sixth Amendments to the United States Constitution (Vol. VI, R 776-777). Defendant's failure to articulate one Florida Constitutional argument, while specifying a different Florida Constitutional argument, clearly shows that the issue was waived from appellate review.

II. The Failure to Specify a Potential Article I, Section 9, Argument does not Constitute Fundamental Error.

The State acknowledges the 'fundamental error" exception to the foregoing rule, i.e., that in cases of 'fundamental error," appellate courts have the power to address an argument which has

not been raised at trial. Steinhorst. However, the right discussed in Travlor is not of a fundamental nature. Owen v. State, 696 So. 2d 715, 719 (Fla. 1997). Fundamental error is "error which goes to the foundation of the case or goes to the merits of the cause of action." Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994). This Court has repeatedly cautioned that the fundamental error doctrine should be used very guardedly. Id. (quoting from Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970)). "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to the denial of due process." Id. (quoting from State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)).

At most the alleged error was potential constitutional error involving a criminal defendant's privilege against self-incrimination under Article I, Section 9 of the Florida Constitution. This court has repeatedly held that constitutional errors which are not of a fundamental character are waived unless timely and properly objected to in the trial court. Hodses v. State, 619 So. 2d 272 (Fla. 1993) (defendant's failure to object at trial to constitutional deficiency of jury instruction waived constitutional error); Ray v. State, 403 So. 2d 956, 961 (Fla. 1981) ("constitutional error might not be fundamental error, and

because even constitutional rights can be waived if not timely presented."); Clark v. State, 363 So. 2d 331, 333 (Fla. 1978) ("An improper comment on the defendant's exercise of the right to remain silent is constitutional error, but it is not fundamental error."); San or v. ubin, 237 So. 2d 134, 137 (Fla. 1970) ("Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised.")

The State's playing of a tape-recorded statement in which the defendant invoked his right to remain silent does not constitute fundamental error. Simpson v. State, 418 So. 2d 984 (Fla. 1982); Clark v. Stat-e, 363 So. 2d 331 (Fla. 1978); Noble v. State, 543 So. 2d 402 (Fla. 4 DCA 1989). A constitutional error involving the right against self-incrimination, which requires a contemporaneous and specific objection to preserve the issue for appellate review and may be categorized as harmless, is not fundamental error. State v. DiGuilio, 491 So.2d 1129, 1134 (Fla. 1986); Simpson; Clark.

In light of the foregoing authority, it is respectfully submitted that 'trial counsel's failure to specify an Article I, Section 9 argument did not constitute fundamental error. The issue was waived from appellate review and the Fifth District erred by allowing this issue to be raised for the first time on appeal.

111. The Fifth District Erred in Allowing an Argument to be Raised for the First Time on a Motion for Rehearing.

The purpose of a motion for rehearing is to bring to the attention of the appellate court a matter which was "overlooked" or "misapprehended." Fla. R. App. P. 9.330(a). It is well-known that absent fundamental error, an argument cannot be raised for the first time on a motion for rehearing and appellate courts will not even consider such an issue even if it would have changed the result. See Anderson v. State, 532 So. 2d 4, 6 (Fla. 2d DCA 1988) (inevitable discovery doctrine, which was not raised in brief, could not be raised on rehearing); Alvarado v. State, 466 So. 2d 335 (Fla. 2d DCA), rev. denied, 476 So. 2d 672 (Fla. 1985) (question which was not presented to court on direct appeal cannot be raised in a motion for rehearing); Araujo v. State, 452 So. 2d 54 (Fla. 3d DCA 1984) (the court rejected a claim made for the first time on rehearing and scolded the attorney for having the "effrontery" to say that a point was "overlooked or misapprehended" by the court.). See also United States v. Martinez, 96 F.3d 473 (11th Cir. Fla. 1996) (court of appeals does not consider issues or arguments for first time on petition for rehearing); United States v. Fiallo-Jacome, 874 F.2d 1479 (11th Cir. Fla. 1989) (appellant in criminal case may not raise issue for first time in a petition for

rehearing). As previously pointed out, the Article I, Section 9 claim was not fundamental error. Therefore, the Fifth District erred when it addressed the argument for the first time in Defendant's motion for rehearing.

This rule is especially applicable to the instant case because the underlying argument (defense counsel's failure to raise an Article I, Section 9 argument at trial or in his briefs) may be raised in post-conviction proceedings such as Rule 3.850 and habeas corpus*

IV. Consideration and Application of Travlor did not Warrant Addressing a Waived Error.

As pointed out in this Court's recent opinion in Owen, the conclusions set forth in Traylor "were no different than those set forth in prior holdings of the United States Supreme Court" and do "not control our decision in this case." Owen, 696 So. 2d at 719. The Fifth District should have followed Davis v. United States, 512 U.S. 452 (1996) or at the very least certified the question to this Court as other district courts did. Travlor did not warrant consideration of an argument that had not been raised at trial or in the appellate briefs.

V. Rule 9.140(f) did not Provide a Basis to Allow the Court to Review an Argument that had been Waived from Appellate Review.

The Fifth District allowed the waived argument to be raised for the first time on rehearing based on Rule 9.140(f)("In the interest of justice, the court may grant relief to which any party is entitled.") .[2] It is respectfully submitted that Rule 9.140(f) does not supersede well-established rules regarding waiver, especially where alternative post-conviction remedies are readily available to correct the alleged error.

The 'interests of justice" rule has been used by appellate courts to correct fundamental injustices, unrelated to evidentiary shortcomings, which occurred at trial. Tibbs v. State, 397 So.2d 1120, 1126. (Fla. 1981). In State v, Barber, 301 So.2d 7 (Fla. 1974) this Court held that the "interests of justice" rule is inapplicable in those situations wherein post-conviction remedies provide the correct procedural setting to resolve the issue. In the instant case, both Rule 3.850 alleging ineffective assistance of trial counsel and habeas corpus alleging ineffective assistance of appellate counsel provide means by which the issue may properly be resolved in a correct procedural setting. This is especially applicable in the instant case wherein a 3.850 proceeding would

[2]Now Florida Rule of Appellate Procedure 9.140(h).

allow evidence to be taken to determine why the argument was not made (e.g. the context of the statement did not even amount to an equivocal request to remain silent, but a statement reflecting Defendant's shame and embarrassment over his actions), and whether it was a matter of trial strategy (to focus on the alleged involuntary nature of the entire statement).

Finally, even if applicable, the "interests of justice" did not warrant consideration and application of a waived issue. Justice is a nebulous enough concept, but in a capital sexual battery prosecution, where (1) there is no serious dispute that Defendant has repeatedly committed the heinous acts in question; (2) where all recognize the difficulty of retrial of such cases because of the personal cost of a trial to the victim; (3) the existence of post-conviction remedies available to Defendant, it is respectfully suggested that justice lies with maintaining conviction.

POINT TWO:

DEFENDANT'S EQUIVOCAL INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT DID NOT REQUIRE THE INTERROGATING OFFICER TO TERMINATE FURTHER QUESTIONING.

In Owen v. State, 696 So. 2d 715, 719 (Fla. 1997), this Court held that police in Florida need not ask clarifying questions if a defendant, who has received proper Miranda warnings, makes only an equivocal or ambiguous request to terminate his interrogation after having validly waived his or her Miranda rights. See also Davis v. United States, 512 U.S. 452 (1996)(after a knowing and voluntary waiver of rights under Miranda, law enforcement officers may continue questioning until and unless a suspect clearly requests an attorney); Walker v. State, 22 Fla. L. Weekly S537, 541 (Fla. Sept. 4, 1997) ; State v. Almeida, 22 Fla. L. Weekly S521 (Fla. Aug. 6, 1997); State v. Kipp, 698 So. 2d 1204 (Fla. 1997); State v. Skyles, 698 So. 2d 816 (Fla. 1997).

"To require the police to clarify whether an equivocal statement is an assertion of one's Miranda rights places too great an impediment upon society's interest in thwarting crime." Owen, 696 So. 2d at 719. The State's authority to obtain freely given confessions is not an evil but an unqualified good. Id. (quoting from Travlor v. State, 596 So. 2d at 965).

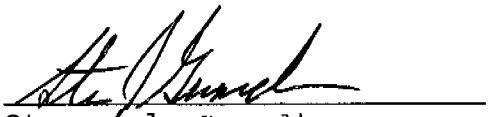
The Fifth District determined that Defendant's request was equivocal and held that under Travlor, the interrogating officer was required to stop questioning and clarify the equivocal request. In light of Davis and Owen, the Fifth District's decision should be quashed and the case remanded for further proceedings.

CONCLUSION

The Petitioner, State of Florida, respectfully requests this Honorable Court to quash the decision of the Fifth District Court of Appeal and reinstate Respondent's convictions and sentences.

Respectfully submitted,

Robert A. Butterworth
Attorney General



Steven J. Guardiano
Senior Assistant Attorney General
FL Bar # 0602396
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Initial Brief on the Merits has been furnished by certified mail, return receipt requested, to counsel for respondent, Richard G. Canina, ✓ The Law Firm of Mitchell & Canina, P.A., 930 s. Harbor City Blvd., Suite 500, Melbourne, FL 32901, this 14th day of November, 1997.

Steven J. Guardiano
Senior Assistant Attorney General