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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

APPELLANT,

vs.

DUANE OWEN,

APPELLEE.

CASE NO. 85,781

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

State of Florida was the petitioner in the trial court and will be referred to herein as "petitioner" or "the state". Duane Owen was the respondent in the trial court and will be referred to herein as "Owen" or "appellee."

STATEMENT OF THE CASE AND FACTS

Owen rejects the state's assertion that this Court found his statements to be equivocal. However the opinion speaks for itself:

> "The state urges that on the totality of the circumstances, we should affirm the ruling below. Counterposed to this argument is the well established rule that a suspect's equivocal assertion of a Miranda right terminates any further questioning except that which is designed to clarify the suspect's wishes. See Long v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1754, 100 L. Ed. 2d 216 (1988), and cases cited therein; and Martin, where although there was no violation of the fifth amendment by continuing questioning after an equivocal invocation of Miranda rights, the court held that the continued questioning was reversible error under Miranda. Given this clear rule of law, and even after affording the lower court ruling a presumption of correctness, we cannot uphold the ruling. The responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning which could only be clarified."

Owen v. State, 560 So.2d 207, 211 (Fla. 1990). If this point was still unclear, any lingering confusion should have been dispelled from Owen's second capital conviction:

> "We note that Owen's equivocal responses to questioning that resulted in reversal of his convictions in the Del Ray killing took place after he confessed to the present crimes and are irrelevant here. Owen v. State, 560 So. 2d 207 (Fla. 1990), cert. denied, 498 U.S 855, 111 S.Ct. 152, 112 L. Ed 2d 118 (1990).

Owen v. State, 596 So. 2d 985, 987 n. 3 (Fla. 1992).

ARGUMENT

ISSUE

DO THE PRINCIPLES ANNOUNCED IN DAVIS APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR; THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE.

I. Owen argues that the Fourth District Court of Appeal erred in accepting jurisdiction as the petition presented by the state did not establish the requirements for issuance of a writ. Before the district court, the state filed both a notice of appeal as well as a petition for writ of certiorari. Owen filed a motion to dismiss the appeal, acknowledging that the proper avenue for review was a petition for certiorari rather an appeal. The district court treated the state's appeal as a petition for writ of certiorari. The state argued that a wri od certiorari should be granted because the nonfinal order of the trial court constituted a substantial departure from the essential requirements of the law. Absent review by certiorari, the state would suffer injury throughout subsequent proceedings, for which there would be no adequate remedy after final judgement. The district court determined that the requirements for issuance of the writ were present if the court were certain that United States v. Davis, 512 U.S. __, 114 S.Ct. 2550, 129 L. Ed. 2d 362 (1994) were the law in Florida. State v. Owen, 654 So. 2d 200, 201 (Fla. 4th DCA 1995). The district court also recognized that it did not have the power to overrule a prior opinion of this Court, consequently the court appropriately certified the question. Id, at 201. Brunner Enterprises v. Dept. of Revenue, 452 So. 2d 550 (Fla. 1984)(an appellate court is without power to

overrule precedent from the supreme court; certification to a higher court is appropriate).

II. Owen argues that the "law of the case" doctrine precludes reconsideration of Owen v. State, 560 So. 2d 207 (Fla. 1990). The state's reliance on Davis is unpersuasive because there are factual differences between Davis and the instant case which demonstrate that Davis would not alter the outcome of Owen. As demonstrated below, the differences between and Davis are either inconsequential or nonexistent. Had Davis be determined prior to Owen the result of the case would have been different.

II. a. The first difference relied upon by Owen to bar reconsideration by this Court is that Davis addressed how police should respond to a defendant's equivocal request for an attorney, whereas Owen addressed how the police should respond to a defendant's equivocal request to remain silent. Appellee seizes on this difference in an attempt to create a fatal distinction; yet, Owen fails to explain the importance of it. The holding of Davis, however, centers on what is required of police officers in determining whether a defendant has asserted any right under Miranda.[1] Whether the equivocal response relates to the right to remain silent or to the right to an attorney is not germane to the discussion. Coleman v. Singletary, 30 F. 3rd 1420, 1424 (11th Cir. 1994):

> Because we are bound to follow the Supreme Court's holding in Davis, our decision creating a duty to clarify a suspect's intent upon an equivocal invocation of

[1] Miranda v. Arizona, 384 U.S. 436, 16 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

> counsel are no longer good law. Furthermore, we have already recognized that the same rule should apply to a suspect's ambiguous or equivocal references to the right to cut off questioning as to the right to counsel.

See also Martin v. Wainwright, 770 F. 2d 918, 924 (11th Cir. 1985)(same rule should apply to equivocal invocation of right to silence as to right to counsel), modified on other grounds, 781 F. 2d 185 11th Cir. 1985), cert. denied, 479 U.S. 909, 107 S.Ct. 307, 93 L. Ed 2d 281 (1986). This Court has also applied the same rule to ambiguous or equivocal invocations of the right to remain silent and to the right to counsel. In overturning Owen's confession, this Court relied upon Martin; Miranda v. Arizona, 384 U.S. 436, 16 S.Ct. 1602, 16 L. Ed. 2d 694 (1966); Edwards v. Arizona, 41 U.S. 477 (1981); Long v. State, 517 So. 2d 664, 666 (1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1754, 100 L. Ed. 2d 216 (1988) and the cases cited therein. All of those cases, except for Martin, involved an equivocal request for an attorney rather than an equivocal request to cut off questioning. Consequently, Owen's illusory distinction does not preclude application of Davis to the instant case.

II. b. The next factual difference involves dicta in Davis wherein the Court recognized that, although clarifying questions are not required, they may often times be good police practice. Davis, 129 L. Ed. 2d at 373. Owen theorizes that this recognition means that if Davis had been decided prior to his appeal, his confession would still have been suppressed. Appellee misses the point. This Court felt compelled to suppress Owen's confession because clarifying questions were not asked.

This Court opined that such questions were required by Edwards. Absent that requirement, Owen's statements were voluntary and admissible. Owen at 210. Davis makes it crystal clear that such clarifying questions are not required. Equivocal responses will not preclude further questioning. More to the point, the absence of clarifying questions will not mandate that subsequent statements be suppressed. Davis is squarely on point and directly at odds with the rationale of the majority in Owen. Appellee's argument to the contrary is incorrect.

c. Owen further attempts to distinguish Davis by arguing that this Court did not find Owen's two statements to be equivocal. This statement is either a veiled attempt to relitigate this Court's clear factual findings to the contrary, or appellee simply misinterprets those findings. Without demonstrating that there is a material change in the evidence or facts to warrant reconsideration of this Court's factual findings, relitigation of those facts is barred. Henry v. State, 649 So. 2d 1361, 1364 (Fla. 1995). To the extent that Owen simply misinterprets this Court's findings, again, the opinion is clear:

> However, when police inquired about a relatively insignificant detail, he responded with "I'd rather not talk about it." Instead of exploring whether this was an invocation of the right to remain silent or merely a desire not to talk about the particular detail, the police urged him to clear up matters. He was soon responding with inculpatory answers and asking questions of his own. After further exchanges and a question on another relatively insignificant detail, Owen responded with "I don't want to talk about it." Again instead of exploring the meaning of the response, the police pressed him to talk.

Owen, 560 So. 2d at 211 (emphasis added). Appellee's contention that the statement "I don't want to talk about it" is unequivocal again misses the point. Of course that statement taken in a vacuum and out of context appears to be clear. However, the ambiguity as explained by this Court revolves around what subject the defendant does not wish to talk about. The confusion is in the meaning of the word "it." Id at 211. Owen's claim that this Court did not find his statements equivocal is incredible and totally contradicted by the opinion.

III. Owen attacks the state's assertion that Haliburton v. State, 476 So. 2d 192, 194 (Fla. 1985) is distinguishable from the instant case. In Haliburton, the gravamen of this Court's concern was that the defendant's waiver was not knowingly and intelligently given. The taint to that waiver was the direct result of police misconduct. The police ignored a court order and withheld from Haliburton the fact that an attorney was waiting to see him. Haliburton, 476 So. 2d at 193-194. The basis for suppression of Haliburton's confession was not due to a technical violation of Miranda. It was premised on a violation of fairness and due process. Id; Jones v. State, 528 So. 2d 1171, 1175 (Fla. 1988)(Haliburton requires suppression of a confession when police ignore a court order to make defendant available to his lawyer); Harvey v. State, 529 So. 2d 1083, 1085 (Fla. 1988)(police conduct ignoring court order violates state due process clause). There was never a finding in Haliburton, as there was in the instant case, that Haliburton's confession was voluntary. Owen's reliance on Haliburton is misplaced.

IV. Owen accuses the state of being insensitive to the procedural safeguards established in Miranda and Traylor v. State, 596 So. 2d 957 (Fla. 1992), because the state is allegedly asking this Court to relax those measures. Again, appellee misses the point. The major emphasis in Traylor is the primacy of state law for purposes of determining the voluntariness of a confession:

> The basic contours of Florida confession law were defined by this Court long ago under our common law. We recognize the important role that confessions play in crime-solving process and the great benefit they provide; however, because of the tremendous weight accorded confessions by our courts and the significant potential for compulsion--both psychological and physical--in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing--coercion. We defined the abiding standard for determining the admissibility of a confession nearly a century and half ago: "To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, uninfluenced by fear or hope. To exclude it as testimony, it is not necessary any direct promises or threats be made to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true position, and exert an improper and undue influence over his mind." Simon v. State, 5 Fla. 285, 296 (1853). The test is one of voluntariness, or free will, which is determined by an examination of the totality of the circumstances surrounding the confession.

Traylor, 596 So. 2d at 964. That is not the issue presently before the Court. The issue in the instant case is whether this Court will continue to apply an interpretation of a federal procedural rule now that the United States Supreme Court has

determined that interpretation to be incorrect. The state constitution is not implicated in any way, nor does Traylor address this issue. The rule in Davis is simply a limitation on the scope of Miranda. As noted in the state's initial brief, this Court has continued to adopt such limitations after Traylor. (See initial brief pg. 19). In State v. Craig, 237 So. 2d 737, 738-740 (Fla. 1970) this Court rejected the Fourth District's determination that equivocal responses by a defendant require the cessation of questioning. Davis reaffirms that position.

V. Finally, Owen cannot establish any prejudice should this Court grant the writ. He claims that the practical effect of granting the writ in this case would lead to the lack of finality in cases that involve prolonged litigation. Reinstatement of Owen's conviction would obviously undermine his reliance on this Court's original opinion. However, Owen was never fully relieved from the possibility of another capital conviction given the fact that the state is preparing to retry him for this murder absent his voluntary confession. This is not a situation where Owen has gone through the rigors of a retrial. Prejudice requires a showing of something more than a reliance on the original judgement. Ritter v. Smith, 811 F. 2d 1398, 1402, 1405 (11th Cir. 1987)(obvious relief felt by defendant by order vacating death sentence not sufficient prejudice to preclude reinstatement of sentence even though case was final).

The state has sufficiently demonstrated that the doctrine of "law of the case" should not preclude reconsideration of this case by this Court. Brunner Enterprises, supra. Application of Davis to Florida confession law and to the instant case does not

offend the state constitution. To the contrary, application of Davis is consistent with this court's adoption of other limits on the application of Miranda. The continued application of an erroneous interpretation of a federal rule of procedure would create a manifest injustice in the instant case.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court answer the certified question in the affirmative. The state also requests that this Court apply United States v. Davis, supra, to the instant case, reinstate Owen's confession, conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carey Haughwout, Esquire, 324 Datura Street, Suite 250, West Palm Beach, Fl. 33401, this 11th day of September, 1995.

CELIA A. Terenzio
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