ORIGINAL

IN THE SUPREME COURT OF FLORID

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MAR 1 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v. FSC No. 87,486

BRIAN WALTER KIPP,

Respondent.

_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The respondent, Appellant down below, appealed his conviction and sentence for second degree murder and robbery based upon the trial court's failure to suppress his statements to police.

In December **1992,** Respondent and a companion were in Georgia using credit cards issued to someone by the name of James Boyington, driving a car registered to Boyington, and staying in **a** hotel room under the name of Boyington. James Boyington had been murdered in Zephyrhills, Florida. Georgia authorities took Respondent into custody and interrogated him on two occasions. Kipp v. **State,** No. 94-00091 slip. **op.** at **2 (2d DCA** January 19, **1996).**

Respondent was given his full Miranda warnings prior to the first interview with Georgia authorities and waived these rights. (R. 233-234). Respondent was reminded **of** his constitutional rights prior to the second interview with Georgia police. (R. **196,** T. **440).**

The Second District's opinion states that Respondent was not again informed of his Miranda rights prior to the second interrogation. Kipp, slip op. at 3. However, the record indicates that Respondent was reminded of his rights prior to the second interrogation and waived these rights,

Q. You still understand your rights that were read to you earlier?

Do you still understand what your rights are?

A. Yeah.

Q. **Are** you still willing to waive your rights and talk to us, answer questions?

A. (No audible response).

(R. 196).

Respondent's response is clarified by Detective Bank's testimony during the suppression hearing. During defense counsel's cross-examination, the detective was asked the following:

Q. And then Mr. Kipp is asked again by Detective Dawes in your presence, I believe: Are you still willing to waive your rights and talk to us as requested? And Mr. Kipp says: Sure.

A. Yes, sir.

(T. **440).**

The Second District determined that Respondent received sufficient Miranda prior to the first interrogation. However, the court determined that during the second interrogation Respondent either equivocally or unequivocally invoked his right to remain silent, and the detectives disregarded his requests and continued questioning him. Kipp, slip. **op.** at 3. The Second District held that the second interrogation carried over to taint the third interrogation later conducted by Florida

detectives. Kipp, slip. Op. at 4. However, during the interview, Respondent stated:

A. And I probably - think I shouldn't probably say any more.

Q. Okay.

Q. That's all you want to say?

A. Except I'd like to have a cigarette and a soda, maybe please.

Q. Sure. We can get you something to drink.

A. (Inaudible) I can tell I'm (inaudible) any trouble. Right. I was in deep trouble that night.

Q. Well, may I?

Q. Certainly.

Q. Actually, let's clear this up. You're not Mr. Boyington, right? We do know that. We have established that. It's Mr. Kipp?

A. Mr. Kipp has two Ps.

(R. 198-199)

The detective then stated as follows:

Q. You told me just a few minutes ago that that's all you had to say. Now, are you telling me again that you want to waive your rights and--

A. I'm telling you that I didn't rob anybody.

Q. Okay.

A, (Inaudible) no thief.

Q. Well, I mean, you know, without -- if you want to tell me what happened, I'll be glad to listen to you. If you would rather not talk, then I understand that. I don't have any problem with that. Whatever you want to do.

A. I just want to tell you that I didn't rob anybody. (Inaudible) robber. I'm just tired.

(R. 200-201).

The Second District determined that it was error to allow into evidence Respondent's statements obtained during the second and third interrogations. Kipp, slip. **op.** at **6.**

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Fla. R. App. P. 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

Petitioner, the State of Florida, alleges conflict between the holding in the instant case and this Honorable Court's decision in Traylor v. State, 596 So. 2d 957 (Fla. 1992) and the Fourth Districts's decision in State v. Owen, 654 So. 2d 200 (Fla. 4th DCA), review granted, 662 So. 2d 933 (Fla. 1995).

ARGUMENT

THE DECISION OF THE SECOND DISTRICT IN THIS **CASE** EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN TRAYLOR **V.** STATE, 596 ***So.*** 2d 957 (Fla. **1992)** AS WELL **AS** THE FOURTH DISTRICT'S DECISION IN STATE **V. OWEN,** 654 ***So.*** 2d 200 (Fla. 4th DCA), review granted, **662 So.** 2d **933** (Fla. **1995).**

The Second District's opinion states that Respondent's confession was obtained in violation of Traylor v. State, **596 *So.* 2d 957** (Fla. 1992), and the trial court erred in failing to suppress this evidence.

The State respectfully submits that the opinion in the instant case is in conflict with this Court's opinion in Traylor, especially in light of the decisions in Davis v. United States, ___ U.S. ___, **114 S.** Ct. **2350,** 129 **L.** Ed. 2d 362 **(1994)** and State v. Owen, **654 *So.*** 2d **200 (Fla.** 4th DCA), review granted, **662 *So.*** 2d **933** (Fla. **1995).**

Under Davis, for Federal Fifth Amendment purposes, police questioning may continue until and unless **a** suspect unequivocally invokes his right to remain silent. In Owen, the Fourth District acknowledged that the Florida Supreme Court relied heavily on federal law when it determined the admissibility of the confession in Traylor. The Fourth District accordingly certified the following question:

DO THE PRINCIPLES ANNOUNCED **BY THE** UNITED STATES

SUPREME COURT IN DAVIS **APPLY** TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR?

Owen is currently pending in the Florida Supreme Court, Case No. **85, 781**. Deck v. State, 653 ***So.*** 2d 435 (Fla. 5th **DCA** 1995) is similarly pending in the Florida Supreme Court, **Case** No. 85, 652. In light of the foregoing, the State respectfully submits that the Second District's opinion misapprehends Respondent's second interrogation by Georgia police.

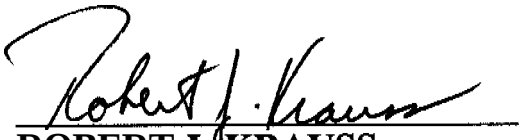
The Second District's opinion states that at various points during the interview, Respondent either equivocally or unequivocally invoked his right to remain silent. Respondent's requests were at best equivocal. Any equivocal requests were properly clarified by the Georgia detectives. The detective's questioning **was** proper pursuant to Tram. Accordingly the state contends that this opinion expressly and directly conflicts with the decision of this Honorable Court **and** other district courts of appeal. Even assuming the Georgia police did not follow Traylor, the standards set forth in Traylor should be reconsidered in light of Davis and **Owen.**

CONCLUSION

In light of the foregoing facts, arguments, and authorities, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction under art. **V,** Section 3(b)(3), Fla. Const., to resolve the conflict outlined above.

Respectfully Submitted

ROBERT A. BUTTERWORTH
ATTORNEYGENERAL



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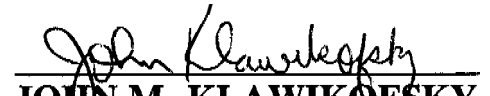

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy **of** the **foregoing has** been furnished by **U.S. mail** to **A.** R. Mander, 111, Esquire, **14217** Third Street, Dade City, Florida 33525 on this 28th day of February **1996.**

John Lawhon
OF COUNSEL FOR PETITIONER

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION *AND*, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

BRIAN WALTER KIPP,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 94-00091

Opinion filed January 19, 1396.

Appeal from the Circuit Court for Pasco County; Wayne L. Cobb, Judge.

A.R. Mander, III, of Greenfelder, Mander, Hanson, Murphy & Dwyer, Dade City, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and John M. Klawikofsky, Assistant Attorney General, Tampa, for Appellee.

DANAHY, Acting Chief Judge.

In Florida, when a suspect is undergoing a custodial interrogation and equivocally indicates that he wishes the interrogation to cease, thus invoking his right to remain silent under

Article I, Section 9, of the Florida Constitution, the interrogating officer must terminate further questioning except that which is designed to clarify the suspect's wishes. ~~Traylor v. State~~, 596 So. 2d 957 (Fla. 1992), and ~~Deck v. State~~, 653 So. 2d 435 (Fla. 5th DCA 1995). But see ~~Davis v. United States~~, ____ U.S. ____, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (for Federal Fifth Amendment purposes questioning may continue until and unless the suspect unequivocally invokes his right). The appellant argues that the only evidence used to convict him of murder and robbery was obtained in violation of his Florida constitutional right. We agree and reverse.[1]

In December 1992, while police were investigating the murder of James Boyington in Zephyrhills, Florida, suspicion fell on the appellant and a companion who were in Georgia using credit cards issued to Boyington, driving a car registered to Boyington, and staying in a hotel room under the name of Boyington. Georgia authorities took the appellant into custody and began interrogating him. They began their first interrogation at 9:30 p.m. by informing the appellant of his Miranda rights. The appellant freely spoke to them but gave little useful information except that he maintained he was Boyington. The interrogation ended

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[1] The appellant also contends that it was error to admit a gruesome videotape of the victim's body taken just before the autopsy was conducted and that the trial court erred in failing to determine whether the appellant's relinquishment of his right to testify was done knowingly and voluntarily. We find no error in these points raised and affirm as to them.

arid the appellant was allowed to return to his cell to sleep. Several hours later, at 3:50 a.m., the detectives woke him and commenced a second interrogation without again informing him of his Miranda rights. The appellant, at the **beginning** and at various other points during **the** interview, either equivocally or unequivocally invoked his right to remain silent.[2] The detectives **disregarded** his request to terminate the interrogation and continued questioning him, eventually eliciting a confession that the appellant was involved in the events leading up to Boyington's death.

A third interrogation occurred around 8:00 a.m. when detectives from Florida arrived. **The** Florida detectives re-Mirandized the appellant **arid** he repeated the incriminating statements made during the second interrogation. At the appellant's trial for the murder of Boyington no detective who interviewed the appellant testified, but the tapes made of the three interrogations were played to the jury. The jury found him guilty of murder in the second degree and of robbery.

We find that during the first interrogation no error occurred because the appellant was properly informed of his rights and waived them. The problem in this case begins with

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[2] The appellant and the state dispute whether this invocation of his right to remain silent was equivocal or unequivocal. We assume for purposes of this opinion that it was an equivocal invocation of his right to remain **silent**, If it was an unequivocal invocation of his right to remain silent, no one disputes that clear error occurred.

the second interrogation and carries over to taint the third one as well, Inasmuch as the incriminating evidence was obtained during these latter two interrogations in violation of ~~Traylor~~, the trial court erred in failing to suppress this evidence.

when the appellant, undergoing a custodial interrogation, made his first equivocal invocation of his right to terminate the questioning during the second interrogation, the Georgia detectives continued the questioning without clarifying this equivocal invocation of his right to remain silent. ~~Traylor~~; ~~Owen v. State~~, 560 So. **2d** 207 (Fla.), ~~cert. denied~~, 498 U.S. **855** (1990); ~~**Deck v. State**~~. This was a violation of Traylor. **The** Florida detectives, although they properly informed the appellant of his rights before they began questioning him for the third interrogation, were the unwitting recipients of the Georgia detectives' violation of the appellant's ~~Traylor~~ rights,

The Traylor Error committed during the second interrogation carried over into the third interrogation. **As** the Florida Supreme Court explained in ~~Gore v. State~~, 599 So. 2d 978 (Fla.), **cert. denied**, 113 S. Ct. 610 (1992), when a suspect exercises his right to remain silent, this does not create a per **se** proscription of indefinite duration upon any further questioning by any police officer on any subject. Id. at 981, n.5 (citing Michigan v. Mosley, 423 U.S. *96*, 102-03, *96* S. *Ct.* 321, 326, 46 **L. Ed. 2d** 313 (1975)). If the right to remain silent had been **"scrupulously honored"** when it was first invoked,

then the statements subsequently made pass the first threshold of the test for voluntariness. In Gore, the first invocation of the right to remain silent had been "scrupulously honored" by the federal officials who first interrogated him. Therefore, when the Florida officials interrogated him seven days later and informed him of his Miranda rights, the statements Gore made after he waived those rights were properly admitted into evidence.

The scenario of Gore is not similar to the scenario in the instant case. The appellant's invocation of his right to remain silent at the beginning of the second interrogation was not "scrupulously honored" so the evidence obtained during the third interrogation must be considered involuntarily given as well, especially since the third interrogation took place on the heels of the second and under the circumstances here. See Henry v. State, 574 So. 2d 66 (Fla. 1991) (outlining the various factors to consider in determining the voluntariness of statements subsequently given after the right to remain silent has been invoked). The purpose of Miranda is to prevent "repeated rounds of questioning to undermine the will of the person being questioned." at 70 (quoting Michigan v. Mosley). We conclude that the appellant's will was seriously undermined during both the second and third interrogations by the continued questioning of the detectives disregarding his equivocal invocation of his right to remain silent. Traylor.

Thus, it was error to allow into evidence the appellant's statements obtained during the second and third interrogations.

Since the taped statements were the only evidence of the appellant's involvement in this crime, we further conclude that the state has not carried its burden under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), to show the error was harmless. Accordingly, we reverse the judgment of guilt, vacate the sentence, and remand for a new trial with the incriminating evidence from the second and third interrogations suppressed.

PARKER and FULMER, JJ., Concur.