IN THE SUPREME COURT OF FLORIDA

GEORGE TAPLIS,
Petitioner/Appellant,

vs.

STATE OF FLORIDA,
Respondent.
_____/

S.Ct. Case No. 89,721

5th DCA Case No. 96-2467

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

MICHAEL W. WOODWARD
Florida Bar Number: 0058531
Attorney for Petitioner
KEYSER & WOODWARD, P.A.
Post Office Box 92
Interlachen, Florida 32148
(904) 684-4673 Fax: 684-4674

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND OTHER AUTHORITIES

SUMMARY OF REBUTTAL ARGUMENT

The state's argument that the Court should not entertain a defendant's petition for certiorari in regard to a trial court's non-final order ignores the fact that in this case it was the state, not the defendant, that petitioned for certiorari review of the trial court's limine order. The Fifth District's opinion quashing the trial court's limine order merits review by this Court because it set a questionable precedent that would remain in force even if Mr. Taplis were to be acquitted at trial.

"Tampering" is not limited to intentional criminal tampering but logically includes any intermeddling, even inadvertent, that is likely to result in the alteration of evidence. The state's argument that there is nothing to show any probable tampering conspicuously ignores undisputed facts that show not merely probable but actual known incidents of tampering likely to have resulted in material alteration or contamination of the evidence.

The evidence at issue is not the car but rather a sample of gasoline-tainted carpet and debris found in its exposed interior long after the fire. The cases cited by the state do not hold, as the state misrepresents, that such evidence must be admitted.

The state's argument that the state's failure to preserve potentially exculpatory evidence is not a proper basis for the trial court's declining to admit the evidence at issue in this case is irrelevant. The trial court's ruling was based on the lack of integrity of the state's inculpatory evidence, not the state's failure to preserve potentially exculpatory evidence.

REBUTTAL ARGUMENT

I.

THE STATE'S JURISDICTIONAL ARGUMENT IGNORES THE FACT THAT IT WAS THE STATE, NOT THE DEFENDANT, THAT PETITIONED FOR CERTIORARI REVIEW OF THE TRIAL COURT'S LIMINE ORDER.

In its merits brief, the respondent, State of Florida ("the state") first argues that "certiorari review of a trial court's non-final order may not ordinarily be had...." (Page 9.) Indeed, one case cited by respondent tells us that "[e]ven when the [trial court's] order departs from the essential requirements of the law, there are strong reasons militating against certiorari review." *Martin-Johnson, Inc. v. Savage, 509 So.* 2d 1097, 1100 (Fla. 1987). While this may be a good argument that the Fifth District Court should have denied the state's petition before that court for certiorari review of the circuit (trial) court's order granting Taplis's motion in limine, it is inapplicable to the current posture of the parties in the instant case.

That is because it was the state, not Taplis, that sought certiorari review of the trial court's order. The state, having initiated that process, now tries to argue that this Court has no jurisdiction to allow Taplis to challenge its result, a District Court opinion that if allowed to stand sets a binding precedent for all the trial courts under it. As another case cited by the state points out, that is why there is a big difference between the reviewability of a trial court's non-final order and the reviewability of an appellate court's reversal of that order:

> Is the decision of a circuit court reversing a county court's order granting a motion to dismiss reviewable on certiorari before a district court? We conclude that it is.
>
> No certiorari review may ordinarily be had of a trial court order denying a motion to dismiss because the party has available to it an eventual plenary appeal of the final judgment. This must be distinguished, however, from the situation where a county court grants a motion to dismiss and a circuit court, sitting in its appellate capacity, reverses. The decision of a trial court denying dismissal affects only the immediate parties and they can seek eventual redress through plenary appeal of the final judgment. When a circuit court reverses a county court order of dismissal, on the other hand, the circuit court is acting in its appellate capacity and its decision is binding on all county courts within the circuit. The decision thus affects parties outside the original litigation.

Fieselman v. State, 566 So. 2d 768, 770 (Fla. 1990).

The posture of the parties in *Fieselman,* which began with the state's appeal of the trial court's dismissal of the criminal charge against Fieselman, is much like that of the parties in the instant case; the difference is that in *Fieselman* the trial court was a county court and so the initial review was by a circuit court, whereas in the instant case the trial court was a circuit court and the state obtained its certiorari review, and reversal, from a district court. In both cases a questionable appellate precedent was set, a precedent meriting review by a higher court, a precedent that would otherwise remain in controlling force even if the defendant were subsequently acquitted at trial. Thus in the instant case the decision of the Fifth District reversing the circuit (trial) court's order granting Taplis's limine motion is properly reviewable, as this Court has already determined, under the Court's discretionary conflict jurisdiction.

TEE STATE'S ARGUMENT IGNORES UNDISPUTED FACTS THAT SHOW ACTUAL TAMPERING.

The state's brief offers two different definitions of "tampering," one from a law dictionary and one from Section 918.13[1] of the Florida Statutes, the section dealing with intentional, purposeful, and hence *criminal* evidence tampering. However, the state's brief did not offer, nor is Taplis aware of, any basis whatever to believe that Peek v. *State, 395 So.* 2d 492 (Fla. 1980), or any other case adduced in this cause has ever adopted or incorporated 918.13's special definition of tampering into its holdings on the issue of the admissibility of evidence of questionable integrity. None of the cases cites that section or in any way indicates that it is only intentional felonious tampering that would suffice to render evidence inadmissible.

Unlike a criminal tampering case, in which the conduct of the tamperer is the issue, or a suppression case, in which the conduct of the police is the issue, in the instant case and the relevant cases adduced in the briefs the essential issue is the integrity of the evidence itself, not the identities or motives of the tamperers. This is consistent with the first, and much broader, definition of "tampering" found in the dictionary entry: "To meddle so as to alter a thing. . .." BLACK'S LAW DICTIONARY 1456 (6th ed. 1990).

---

[1]The state's brief actually cites Section 913.13, evidently a typographical error.

It is, logically, the alteration--or the likelihood of alteration --of evidence, and not the meddler's state of mind, that renders evidence incompetent and inadmissible. Taplis has never argued that the various incidents of meddling that occurred in this case were done with any criminal intent. Rather, Taplis has argued, and the facts show, that some tampering definitely occurred, other tampering probably occurred, and that material alterations to the vehicle's interior, and thus quite probably to the proffered evidence, resulted.

In its persistent assertion that the record shows no evidence of any probability that tampering occurred, the state's argument sedulously avoids mention of the most obvious example of known tampering with condition of the vehicle's interior. It is undisputed that the tow operator who winched the burned car up onto his truck then gathered up all the debris from the fire scene and threw it into the car's interior.' (Transcript of August 7, 1996, limine hearing 46-47.) This certainly altered the condition of the car's interior and is likely to have introduced gasoline-contaminated debris into it.

The state's "sealed carpet" argument likewise persists in ignoring the undisputed fact that the sample in which gasoline was found included some unidentified debris lying loose on top of the (possibly intact, possibly cracked) carpet crust, which is consistent with the debris--and gasoline--having been deposited there after the fire. (Transcript 88, 90-91, 101-102, 104.)

'Although omitted from its argument, the state's brief does acknowledge this incident in its statement of facts. (Page 2.)

III.

THE STATE'S ARGUMENT MISIDENTIFIES THE EVIDENCE AT ISSUE AND MISCHARACTERIZES AND MISAPPLIES THE HOLDINGS OF CASE LAW REGARDING ADMISSIBILITY OF EVIDENCE.

The state's chain-of-custody argument assumes, and indeed explicitly asserts, that the disputed evidence in this case is the car itself. That is not correct. The evidence whose admissibility is in dispute is a sample of carpet, padding, and unidentified debris removed from the car five weeks after the fire. In essence, the evidence in dispute is really the small quantity of gasoline that was found in that sample. That is because the state wants to use the presence of gasoline found in the car's interior to prove its theory that Mr. Taplis placed that gasoline there five weeks earlier in order to burn the car.

The dispute is not about whose car it is or who was driving it when it caught fire. Of course the car is clearly linked to Taplis; he has never disputed that. The issue is whether, given all the changes--alterations--of condition the car's interior had been subjected to during those five weeks, the gasoline evidence could properly be linked to or admitted against Taplis. Sure it was the same car, but that does not mean its interior's condition or contents were the same. The trial court properly found that the risk (probability) that the gasoline's presence was the product of contaminative tampering, rather than of any act of Mr. Taplis, was so great that the gasoline evidence's probative value was substantially outweighed by the danger of unfair prejudice. (August 8, 1996, Order Granting Motion in Limine, page 2.)

In its effort to find some basis for its claim that the trial court committed error by declining to admit that gasoline evidence, the state has misrepresented prior holdings of this court. The state's brief (page 12) represents the holding of *Branch* v. State, 685 So. 2d 1250 (Fla. 1996), as being "blood evidence admitted after being discovered in car abandoned in airport parking lot." In fact, the issue of the admissibility of that evidence was not raised in *Branch,* nor did the Court address it in any way. The opinion's introductory recital of the facts merely mentions in passing that such blood evidence, which was positively linked to Branch's victim by DNA, was among that which had been adduced at trial. Id. at 1252. Mr. Branch raised nine issues on appeal, but the admissibility of that evidence was not one of them, and the *Branch* court makes no comment on the matter.

Similarly, the state's brief (pages 12-13) misrepresents the holding of *Cherry* v. *State,* 544 So. 2d 184 (Fla. 1989), as being "blood and fingerprint evidence admitted after being discovered in car abandoned in a wooded area." Again, the issue of the admissibility of that evidence was not raised in *Cherry,* nor did the Court address or opine upon it in any way. Again, *Cherry's* introductory recital of facts merely catalogs that evidence as being among that which had been presented at trial. *Id.* at *185.* In any event, the admissibility of evidence that is positively linked to a defendant by blood type and fingerprints is hardly relevant to the admissibility of evidence like the instant case's gasoline, the origin of which is unknown.

IV.

THE STATE'S ARGUMENT LARGELY IGNORES THE FACT THAT THE TRIAL COURT'S RULING WAS BASED ON THE LACK OF INTEGRITY OF THE STATE'S INCULPATORY EVIDENCE, NOT THE STATE'S FAILURE TO PRESERVE POTENTIALLY EXCULPATORY EVIDENCE.

Several pages of the state's brief are devoted to the argument that the state's failure to preserve potentially exculpatory evidence is not a proper or sufficient basis for the trial court's declining to admit the evidence at issue in this case. This line of argument is moot and irrelevant, as the August 8, 1996, Order Granting Motion in Limine makes it quite plain that the trial court's ruling was based on the lack of integrity of the state's inculpatory evidence, not on the state's failure to preserve potentially exculpatory evidence. Therefore Taplis, although initially raising both issues in his motion in limine before the trial court, has not relied upon or argued the latter point in his appellate arguments.

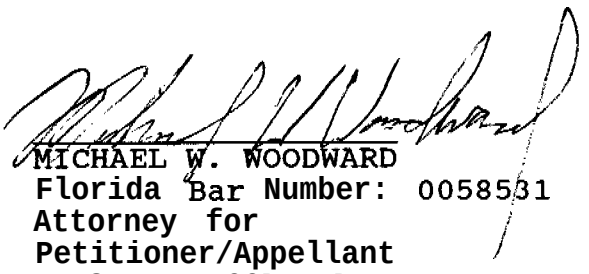
The cases cited by the state in support of its exculpatory evidence argument are thus inapplicable to the issues now before this Court. *Houser* v. State, 474 So. 2d 1193 (Fla. 1985), for example, deals with the preservation of blood samples *after* they had been tested. *Id.* at 1195. In the instant case the problem with the state's carpet/debris/gasoline evidence is the lack of preservation --and thus the probability of contamination--before it was tested, before the sample was even obtained. Taplis has no reason to question the integrity of the chemist's test results; the problem is the lack of integrity of the sample on which the tests were performed.

CONCLUSION

For the reasons set forth in the Petitioner/Appellant's initial brief on the merits and above, the Petitioner/Appellant, George Taplis, respectfully requests that this Honorable Court quash the opinion of the district court, reinstate the order of the trial court granting Taplis's second motion in limine, and remand this case to the trial court for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32399-1050; to Ann M. Childs, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; and to Garry L. Wood, Assistant State Attorney, Post Office Box 1346, Palatka, Florida 32178 by U.S. mail on this 28th day of July, 1997.



MICHAEL W. WOODWARD
Florida Bar Number: 0058531
Attorney for
Petitioner/Appellant
KEYSER & WOODWARD, P.A.
Post Office Box 92
Interlachen, Florida 32148
(904) 684-4673 fax: 684-4674