ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,849

DCA CASE NO. 96-704

MATTHEW CULLEN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

The petitioner, MATTHEW CULLEN, was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, MATTHEW CULLEN will be referred to by name or as "petitioner" or "appellant," while the State of Florida will be referred to as "respondent" or "prosecution."

The symbol "R" will designate the index on appeal, and the symbol "TR" will designate portions of the transcripts of the proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On June 15, 1993, the prosecution filed a criminal information against the petitioner which charged him with attempted first degree murder, attempted armed robbery, and burglary with an assault within an automobile, all involving victim Henry Allen. (R. 5-7). Prior to trial, the petitioner filed a motion to suppress his statements to the police. (R. 32-38). On September 15, 1995, the trial judge, the Honorable Jennifer Bailey, conducted a hearing on the petitioner's motion to suppress.

The parties agreed on certain facts for the purposes of the motion to suppress. (TR. 3-7). The parties agreed that the petitioner had been arrested on July 20, 1993, for carrying a concealed firearm, that the Dade County public defender had been appointed to represent the petitioner at his first appearance on August 1, 1993, and entered a plea of not guilty on the petitioner's behalf on August 20, 1993, and that, while the petitioner was pending trial on the carrying a concealed firearm charge, Metro Dade Police Detective Starkey went out to Metro West Detention Center, initiated contact with the petitioner, and transported the petitioner to the police station where he

questioned the petitioner about the instant case, which was not related to the carrying a concealed firearm charge. (TR. 3–7).

The petitioner and Detective Starkey then proceeded to testify at the hearing. (TR. 7–19, 60–66). Both witnesses agreed that the interview had been initiated by Detective Starkey and that the petitioner had not asked to speak to Starkey before he arrived at Metro West. (TR. 9, 63). Starkey testified that the petitioner waived his Miranda rights twice prior to his questioning at the police station. (TR. 64). The prosecution later introduced the petitioner's written waiver of Miranda, dated September 30, 1993, into evidence at trial, (R. 95), and the transcript of the petitioner's statement to Starkey, dated September 30, 1993, reflects a conversation in which the petitioner acknowledges a waiver of his Miranda rights. (R. 101–103).

The petitioner argued that the petitioner's pre-questioning waivers were irrelevant, since the police had violated his Fifth Amendment non-offense specific right to counsel pursuant to Arizona v. Roberson[1] and McNeil v. Wisconsin,[2] by attempting to question the petitioner without first contacting the petitioner's counsel. (R. 35–38, TR. 24–60). After considering these arguments, the trial court denied the petitioner's motion to suppress, finding that "[t]here was nothing in this record" to support the claim that the petitioner had asserted his Fifth Amendment right to counsel. (TR. 70–71).

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[1]: 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

[2]: 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).

Prior to trial, the petitioner filed a motion for reconsideration of the trial court's ruling on the motion to suppress and supplemented the record with the petitioner's "Invocation of the Right to Counsel," file stamped August 9, 1993. (R. 54, *55-56).* The trial court allowed the invocation form to be made part of the record in the motion to suppress and upheld its prior ruling, citing the cases of Trodv v. State, 559 So. 2d 641 (Fla. 3d DCA 1990) and Sapp v. State, 660 So. 2d 1146 (Fla. 1st DCA 1995) as precedential authority for this ruling. (TR. 77-99). The trial court re-addressed its ruling on the petitioner's motion to suppress a final time prior to sentencing, when the petitioner filed a motion for a new trial citing the case of State v. Guthrie, 666 So. 2d 562 (Fla. 2d DCA 1995), as new authority for the suppression of his statements to the police. (TR. 193-195). The trial court recognized that the Guthrie case supported the petitioner's position but stated that "this is an extreme unsettled area of the law" and that "the Supreme Court is going to have to rule on this issue.'' (TR. 936). The trial court then denied the petitioner's motion for a new trial and upheld the earlier denial of the petitioner's motion to suppress. (TR. 937).

After various pretrial delays, the case proceeded to trial by jury on December 4, 1995. (TR. 1-227). The trial and jury deliberation lasted six (6) days and culminated in a jury verdict of guilty of attempted second degree murder, a lesser included offense of the original charge in count one, guilty of attempted armed robbery, and guilty of burglary with an assault within an

automobile. (R. 186-88, TR. 921-23). The trial court deferred sentencing until January 30, 1996, and, on that dated, sentenced the petitioner to concurrent terms of 25 years in state prison on each of the petitioner's three convictions, with one three year minimum mandatory. (TR. 188-89, 196-99).

The petitioner filed a direct appeal from the judgment and sentence of the trial court. (R. 210-11). The Third District Court of Appeal affirmed the trial court's decision to deny the petitioner's motion to suppress. (R. 212-15). The Third District rejected the petitioner's argument that the police had deprived him of his Fifth Amendment right to counsel in taking the statement from him and chose to follow the First District Court of Appeal's decision in Sam v. State, supra--as apposed to the Second District Court of Appeal's decision in State v. Guthrie, supra--as providing the correct interpretation of the United States Supreme Court's decision in McNeil v. Wisconsin, supra. (R. 212-215). The Third District noted that it would not find a violation of the petitioner's Fifth Amendment right to counsel where he attempted to invoke that right "outside the context of custodial interrogation." (R. 214). The Third District noted the conflict between this opinion and State v. Guthrie, supra, and certified the case for review by this Honorable Court. (R. 214).

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DENYING THE PETITIONER'S MOTION TO SUPPRESS STATEMENTS, WHERE THE POLICE-INITIATED INTERROGATION OF THE PETITIONER VIOLATED THE PETITIONER'S RIGHT TO COUNSEL UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

SUMMARY OF THE ARGUMENT

The District Court erred in affirming the trial court's decision to deny the petitioner's motion to suppress. Since the petitioner had specifically invoked his Fifth Amendment right to counsel when he signed an invocation of rights form after his court appearance on a felony charge, the subsequent police-initiated interrogation of him was invalid. The petitioner had been in continuous custody following his invocation of his right to counsel, **and** his subsequent waiver of his right to counsel was invalid, since the waiver was the product of uncounseled police interrogation and the petitioner's Fifth Amendment right to counsel was non-offense specific. Due to the fact that the petitioner's statement to the police formed the cornerstone of the prosecution case against the petitioner, the error in allowing the statement to be used as evidence against the defendant in this trial was not harmless error, and this Honorable Court should reverse the petitioner's conviction and remand the case for a new trial.

ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DENYING THE PETITIONER'S MOTION TO SUPPRESS STATEMENTS, WHERE THE POLICE-INITIATED INTERROGATION OF THE PETITIONER VIOLATED THE PETITIONER'S RIGHT TO COUNSEL UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It has been the law since the United States Supreme Court's bellwether opinion in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that the prosecution may not use statements stemming from the custodial interrogation of a defendant unless it demonstrates the use of procedural safeguards effective to protect the defendant's privilege against self-incrimination.[3] Subsequent United States Supreme Court decisions have demonstrated a consistent recognition of and deference to and accused's right to prevent police interrogation through an assertion of that person's Fifth Amendment right to counsel.

The Miranda rule was refined and emphasized in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The defendant in Edwards was arrested pursuant to a valid warrant, was instructed as to his rights at the police station, and, after some discussion, indicated that he wanted to talk to a lawyer. The police terminated his interrogation, but the following morning the

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[3]: Actually, more than half a century before Ernesto Miranda strode to the center stage of federal jurisprudence, this Honorable Court had declared that no defendant could be interrogated until the police "caution the prisoner, to put him on his guard, and to inform him as to his rights on the premises.'' Coffee v. State, 6 So. 493, 496 (Fla. 1889). Such a defendant must be told that "he need not say anything to criminate himself, and what he did say would be taken down and used as evidence against him. Green v. State, 24 So. 537, 538 (Fla. 1898).

police returned to his cell and informed him of his rights again. After listening to a taped statement of another suspect, the defendant agreed to waive his rights and be interviewed. The United States Supreme Court held that, when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated custodial interrogation, even if he has been again advised of his rights. An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication with the police. Edwards v. Arizona, 451 U.S. at 484-85.

The Miranda-Edwards line of authority was further developed in Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Roberson was arrested at the scene of a just-completed burglary. The arresting officer advised him of his Miranda rights, and Roberson chose to invoke those rights; this invocation was duly noted on the arresting officer's report. Three days later, Roberson was approached by a different officer seeking to interrogate him about an unrelated burglary. The second officer was unaware of Roberson's earlier invocation of rights. The second offices obtained a rights waiver farm from Roberson and, subsequently, a confession to the second burglary. The admissibility of this confession was the issue before the United States Supreme Court. The Court had no difficulty in concluding

that Miranda-Edwards created a bright line test: once a defendant has invoked his rights, police are charged with constructive knowledge of that invocation and must respect it. Such a defendant cannot be interrogated by any officer about any crime unless the defendant himself initiates the interrogation in question.

In Minnick v. Mississippi, 498 U.S. **146,** 111 S.Ct. **486, 112** L.Ed.2d 489 **(1990),** the United **States** Supreme Court once again reaffirmed the principle espoused in the above-described line of cases. The Minnick Court held that, once a defendant has invoked his rights, he cannot be approached by police even after he has had an opportunity to consult with--and has consulted--legal counsel. In summarizing the foregoing line of United States Supreme Court caselaw, (now Chief) Justice Kogan noted:

> [When a suspect invokes his rights] the police cannot initiate further contacts with the ... suspect, even if the latter is given Miranda warnings and purports to waive the Fifth Amendment right. [Citations omitted]. This restriction applies to **all** law enforcement agents and agencies, even if they have no actual knowledge that the right has been asserted.

Traylor v. State, 596 **So.** 2d 957, **981** (1992)(Kogan, **J.,** dissenting on other grounds)(emphasis in original).

The United States Supreme Court opinion of McNeil **v.** Wisconsin, **501** U.S. **171,** 111 S.Ct. **2204, 115** L.Ed.2d **158** (1991), is consistent with the line of cases dealing with the Fifth Amendment right to counsel. McNeil was arrested pursuant to a warrant charging him with armed robbery in a Milwaukee suburb. He had an initial appearance before a Milwaukee County judge, at which

he was represented by an attorney from the Wisconsin Public Defender's Office. McNeil did not file any sort of written invocation of his rights, did not invoke his rights under the Fifth Amendment, and, in fact, did make any kind or invocation of rights, oral or written; McNeil simply accepted the representation of the public defender at his first appearance.

McNeil was remanded to custody on the warrant. Over the course of the ensuing four or five days, he was approached three times by police officers investigating crimes committed in Caledonia, Wisconsin. On all three occasions, McNeil waived his Miranda rights and made statements to the police--he was subsequently charged with the Caledonia crimes. McNeil's attorneys made the improbable claim "that his courtroom appearance with an attorney for the [suburban Milwaukee] crime constituted an invocation of the Miranda right to counsel, and that any subsequent waiver of that right during police-initiated questioning regarding any offense was invalid. McNeil v. Wisconsin, 501 U.S. at 174 (emphasis in original).

The United States Supreme Court quite properly made a short shrift of this argument. The appointment of counsel at first appearance constitutes the invocation of Sixth Amendment rights to counsel. "The Sixth Amendment right, however, is offense specific. It cannot be invoked once for all future prosecutions. . . ." Id. at 175. By contrast, the Fifth Amendment/Miranda right to counsel "is not offense specific: Once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be

re-approached regarding any offense unless counsel is present." Id. at 177, citing Arizona v. Roberson, supra (emphasis in original).

In the instant case, the petitioner was arrested for carrying a concealed firearm and brought before the court for a first appearance on August 1, 1993; at that time, the court appointed counsel to represent the petitioner. The petitioner subsequently invoked his right to counsel "pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution" via a written form which was served upon the Office of the State Attorney and filed with the trial court on August 9, 1993. (R. 54). Despite this invocation of rights, on September 30, 1993, the police initiated questioning of the petitioner by transporting him form his cell in the local jail system to the police station. The police made no effort to contact the petitioner's attorney or to honor the petitioner's invocation of his Fifth Amendment right to counsel before questioning the petitioner. One hour after their first contact with the petitioner, the police obtained a written waiver of Miranda rights and five hours after the written waiver obtained a transcribed statement. This statement was eventually used as evidence at trial in this case.

The District Court erred in affirming the trial court's decision to allow the prosecution to introduce evidence of the September 30, 1993, questioning of the petitioner and his statement to the police on that date. The police actions violated the petitioner's Fifth Amendment right to counsel under the United

States Supreme Court cases discussed supra, as well as well-reasoned lower court Florida caselaw. Although the petitioner did sign a written waiver of his Miranda rights on September 30, 1993, this waiver was invalid, since it was the product of police-initiated questioning conducted in the absence of the counsel that the petitioner had earlier invoked. The trial court should have granted the petitioner's motion to suppress this statement from evidence in this case, and the failure to do so amounted to reversible error.

In the recent case of State v. Guthrie, 666 So. 2d 562 (Fla. 2d DCA 1995), review granted, Supreme Court Case #87,331 (1996), the Second District Court of Appeal upheld a trial court decision to grant a motion to suppress in a situation virtually identical to that in the present case. See also, Fason v. State, 674 So. 2d 916 (Fla. 2d DCA 1996). Guthrie was arrested for grand theft auto and on an out-of-state warrant. He was taken to a first appearance hearing where he signed an invocation of rights form substantially similar to the one executed by the petitioner in the instant case. Later that day, two detectives came to the jail and asked to speak to Guthrie about an open case involving child sex abuse. Guthrie signed a written rights waiver and subsequently confessed to the sex crime.

The Guthrie court rejected the argument that a suspect cannot invoke the Fifth Amendment right to counsel until the state begins custodial interrogation and noted that "[a] defendant, having declared in plain terms that he does not wish to be questioned

without the assistance of his attorney, could be removed from the jail, taken to an interrogation room without notice to counsel, and required to insist on the right to counsel while facing alone the authority of the State." 666 So. 2d at 563. The Guthrie court cited Arizona v. Roberson, supra, and held that "[c]ustodial interrogation triggers a defendant's right to counsel and there is no logical reason why the right to counsel could not be validly invoked upon the defendant being placed in custody." Id.

The Guthrie court noted conflict with First District Court of Appeal's decision in Sapp v. State, 660 So. 2d 1146 (Fla. 1st DCA 1995), review granted, Supreme Court Case #86,622 (1996) and certified the conflict to this Honorable Court. Guthrie, 666 So. 2d at 562. In its Sam opinion, the First District Court of Appeal found that accused's unambiguous assertion of his Fifth Amendment right to counsel did not prohibit subsequent police-initiated questioning, since the accused in question **had** invoked his Fifth Amendment right to counsel "outside the context of custodial interrogation." Sapp, 660 So. 2d at 1149-1150. As noted supra, the court in State v. Guthrie engaged in pointed criticism of the court reasoning. Nevertheless, the Third District Court of Appeal decided to follow Sapp in affirming the trial court's order denying the petitioner's motion to suppress in this case.

The District Court erred in electing to follow Sapp v. State, supra, and affirm the trial court's ruling in this case, since, as noted by the court in State v. Guthrie, supra, the **Sapp** court employed faulty logic in reaching its decision which, as noted in

Guthrie, "seriously undermines the clearly established right to counsel during custodial interrogation under the Fifth Amendment to the United States Constitution." Guthrie, 666 So. 2d at 563 (citations omitted). The District Court should have followed the lead of Guthrie v. State and the United States Supreme Court precedents noted in that opinion and reversed the trial court's decision. Thus, the petitioner respectfully requests that this Honorable Court reverse his conviction and remand this matter to the District Court with a mandate that it order a new trial in which the petitioner's statements to the police will be suppressed from evidence.

CONCLUSION

Based on the foregoing argument and citations of authority, the Third District Court of Appeal's decision should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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ICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via U.S. Mail to the Assistant Attorney General Sandra S. Jaggard, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 6th day of March, 1997.

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