IN THE SUPREME COURT OF FLORIDA

ROBERT TREASE,	:	
Appellant,	:	
vs.	:	Case No. 89,961
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

PRELIMINARY STATEMENT

Petitioner will be responding to Issues II, III, and IV as set forth in the Initial Brief and Answer Brief. Petitioner will rely upon the arguments and citations of authority as presented in the Initial Brief for Issues I,V, and VI.

ARGUMENT

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO APPOINT DIFFERENT COUNSEL (AS STATED BY THE APPELLEE).

Appellant argued in his Initial Brief that his court-appointed attorney, Fred Mercurio, should have been relieved of his representation of Appellant by the trial court and that it was reversible error for the trial court to fail to take this action when requested to do so by both Appellant and counsel. As the state concedes, the relationship between counsel and Appellant was not the best, to say the least. As both Briefs have extensively chronicled, (State's Brief at p.49-61; Appellant's Initial Brief at p.33-41) the attorney-client relationship was severely strained. The significant difference of opinion that remains is whether or not the deterioration reached the point where it was impossible for counsel to render effective assistance of counsel to Appellant.

The State argues that by virtue of the fact that a trial occurred that counsel was able to present an effective defense.

(State's Brief, at p. 62) Appellant disagrees. Appellant would suggest that an effective defense would have resulted in a different outcome at trial than a guilty verdict and a death recommendation of 11-1. Appellant does not agree with the State's assertion that defense counsel's cross-examination of key witnesses was capable or that the witnesses presented by the defense, especially in penalty phase, would not have been more effective had there been an adequate attorney-client relationship established between Appellant and counsel.

Defense counsel was largely responsible for creating the actual conflict of interest that arose between Appellant and himself when he chose to make ill-advised comments within the hearing of a jail guard, James Clay. Counsel's statements in Clay's hearing that he did not believe that many of his client's were innocent, and in fact, felt most were guilty coupled with his earlier responses to Appellant that he might work harder on a case if he had evidence that his client was 100% innocent certainly were not caused by or the fault of Appellant. Many of Appellant's concerns were related to his belief that counsel was not working hard enough for him.

Appellant, as is every defendant, is unquestionably entitled to conflict-free counsel. Holloway v. Arkansas, 435 U. S. 475 (1978). Appellant asserted he had a conflict with counsel and counsel, in his written motion seeking withdrawal, asserted a

conflict as well. The right to conflict-free counsel is among those constitutional rights so basic to a fair trial that any infraction regarding it cannot be treated as harmless error. Holloway.

In Cuyler v. State, 446 U. S. 335, 349 (1980), the United States Supreme Court held that the Sixth Amendment right to effective assistance of counsel encompasses the right to representation free from actual conflict. Whether or not conflict exists is a mixed question of law and fact. When a defendant can demonstrate actual conflict, he must also show that the conflict had an adverse effect on his lawyer's representation. Once conflict and adverse effect are shown by the defendant, prejudice is presumed. See also, Lightbourne v. State, 829 F. 2d 1012 (11th Cir. 1987); Oliver v. Wainwright, 782 F. 2d 1521, cert. denied, __ U. S. __, 107 S. Ct. 313, 93 L. Ed. 2d 287 (1986).

The record demonstrates, as argued above and in the Initial Brief, that the disintegration of the lawyer-client relationship caused an actual conflict of interest to develop and, according to defense counsel's Motion to Withdraw, led to an inability on counsel's part to provide effective assistance of counsel. While Appellant has never claimed he was not responsible for part of the problems, it is equally clear that defense counsel was independently and solely responsible for large portions of the problem as well, namely his ill-advised conversation in the jail elevator.

The record also demonstrates that the resulting lack of any attorney-client relationship led to an adverse effect in the trial. Counsel and Appellant did not work well together, in fact, Appellant refused to be present during penalty phase.

Appellant, is thus presumed to be prejudiced by counsel's continued representation of him. His Sixth and Fourteenth Amendment rights to counsel under the United States Constitution were violated. Appellant should be granted a new trial with different counsel.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN THE ADMISSION OF THE TESTIMONY AND PRIOR CONSISTENT STATEMENTS OF THE CO-DEFENDANT HOPE SEIGEL (AS STATED BY THE APPELLEE).

The State's main contention with regard to this issue is that defense counsel, through various incidents, failed to preserve these claims for appellate review. Appellant disagrees with this assertion and maintains that the record is adequately preserved.

The State's first claim is that because the issue of Seigel's background was brought to the trial court's attention by the State when they filed a Motion in Limine to exclude testimony about Seigel and to limit defense counsel's inquiry into the areas referred to in the motion that Appellant is somehow barred from arguing the correctness of the rulings of the trial court with regard to that motion. The State's argument seems to be that

because defense counsel didn't bring up the issue first, he must not have wanted to delve into the areas outlined in the motion and therefore, waived his right to argue the correctness of the rulings of the trial court on them in the direct appeal. The State cites no case law for this proposition and Appellant has been unable to unearth any law which penalizes defense counsel or holds that a waiver occurs when the State is the first on the draw and files a motion to limit what it anticipates the defense will do with one of their witnesses. Obviously, such a rule of law would make no sense and would unfairly and unconstitutionally permit the State to thwart any appellate review on evidentiary matters if they could beat defense counsel to the courthouse door by filing limiting motions.

Further, once the issue was brought to the court's attention and hearings held on it, it would serve no purpose for the defense to file motions arguing the alternative. The main key to whether an issue is preserved for appeal whether or not the objections are sufficiently specific so as to apprise the trial judge of the error and to preserve the record for intelligent review on appeal. Bohannon v. State, 546 So. 2d 1081, rev. denied, 557 So. 2d 35 (Fla. 1990); Wenzel v. State, 459 So. 2d 1086 (Fla. 2nd DCA 1984). At the hearing on the motion, the record is perfectly clear as to the basis for defense counsel's objections to the trial court's limiting ruling. The trial court was aware of the basis for

defense counsel's objections. The written order presented by the court to defense counsel during the trial made it clear that the court was continuing to make the same rulings. There is no question as to what issues are being brought before this Court for review and the record provides sufficient basis for this Court to conduct an intelligent review of the matter.

The State next claims waiver occurred on December 2, 1996, during trial, when the trial court provided defense counsel for the first time with a written order which spelled out the trial court's prior oral ruling with regard to the Motion in Limine. Counsel did advise the court that he had no objection to the order. (Vol. XXII, TR1415) The State contends that this constitutes waiver of any claim. Appellant, however, disagrees. The record does not reflect that defense counsel acquiesced to the correctness of the ruling, merely that he agreed that the written order accurately reflected what the judge had previously ruled.(Vol.XXII,T1416-1419) Agreeing that the written order was an accurate reflection of a prior verbal ruling is not and should not be interpreted as agreeing as to the correctness of the legal basis for that ruling. Thus, factually this situation differs from those cases cited by the State which set forth the standard for procedural bar which arise when a lawyer acquiesces to the ruling of a trial court. (State's Brief, at p. 67-68)

At the hearing on the Motion in Limine held on November 22, 1996, defense counsel certainly did not agree with the State's position or the ruling of the trial court. (Vol.XIV,T260-266) Defense counsel specifically argued to the court that he be allowed to delve into Seigel's background, specifically points 1,2, and 3 of the motion because they went to her credibility and her ability to accurately remember events. (Vol.XIV,T261;265-266) Thus, contrary to the State's assertion that the argument advanced in the Initial Brief is strictly the creation of Appellate counsel, trial counsel also argued to the trial court that this information about Seigel was critical to the defense.

The State next claims that Appellant's brief fails to mention that Seigel put an ad in the paper advertising an escort service under the name of " Luscious Lucinda". This is not correct. The Initial Brief on page 45 specifically references the "Luscious Lucinda" episode. Seigel claimed that Appellant wanted her to do this, yet the record also reflects that Seigel went alone to place the ad, that Trease did not force her to do it, that she was not opposed to doing this type of work or to placing the ad, and that prior to even meeting Trease, Seigel had advertised her willingness to perform the same type of services under the name "Dancing Beauty". The State, however, fails to mention these additional facts in their claim that Appellant counsel omitted facts surrounding this act of Seigel's from the brief.

The State further contends that trial counsel specifically acquiesced to the trial court's ruling regarding the admissibility of Seigel's prior drug use at the time of the incident. Again, the record does not reflect acquiescence as to correctness of the application of the law, but rather only as to counsel understanding what the trial court had ruled and agreeing to abide by that ruling, even if incorrect. The trial court, as argued in the Initial Brief, misapplied the Edwards standard. When faced with the trial court's ruling against him, defense counsel acknowledged that he would abide by the ruling. (Vol.XIV,TR267-268) The record no way reflects that defense counsel agreed with the court as to the court's application of the law. Thus, the issue is properly before this Court for review.

Appellant continues to hold the position that the trial court incorrectly applied the Edwards standard. The cases relied upon by the Appellee in the Answer Brief to support the ruling of the trial court are factually distinguishable from the instant case. For example; in Green v. State, 688 So. 2d 301 (Fla. 1996), the opinion relates that the witness in question had been an alcoholic three years before the incident and denied having had a drink on the date of the crime. There was no evidence to contradict this assertion, and therefore, this Court held that there was no basis for the introduction of the witness' prior drinking problems under Edwards. Likewise, in Tullis v. State, 556 So. 2d 1165 (Fla. 3rd

DCA 1990), the defense was not allowed to question the witness concerning delusions that he had experienced where there was no evidence that the delusions had affected the witnesses ability to observe, remember, recount, or recall the jailhouse conversations that he had had with the defendant. The opinion states that these delusions were not occurring at the time of the conversation between the witness and defendant, in fact they did not begin until six months after the conversation and the last one had occurred a year and a half before the trial. In both Richardson v. State, 561 So. 2d 18 (Fla. 5DCA 1990) and Williams v. State, 617 So. 2d 398 (Fla. 3rd DCA 1993), there was no evidence that the witnesses had used drugs on the day of the crime or in close connection to that day and no evidence that the drug use had affected the minds of the witnesses.

These factual situations are significantly different from that presented in this case. In this case Seigel admitted that she was using drugs continuously and regularly at the time of the homicide. She admitted that smoking marijuana made her "stupid", clearly leaving the implication that cocaine would do no less since is generally considered to be a far more serious drug. Seigel admitted to significant memory problems and on the witness stand often claimed to not remember things that had occurred during the time immediately preceding and after the homicide. Thus, the cases cited by the State are not a basis upon which the ruling of the

trial court can be supported. Appellant submits, that under the Edwards standard, Seigel's drug usage was admissible and the trial court's ruling was incorrect.

B. The prior consistent statement

Appellant, in the Initial Brief, argued that the admission of Seigel's statement to police which led to her and Appellant's arrest should not have been admitted because it did not meet the evidentiary requirements for admission and because defense counsel had not made claims of recent fabrication. The State contends that defense counsel did open the door to admission by levying the accusation of recent fabrication. (State's Brief, at p. 78)

Defense counsel, in arguing against the admission, very specifically told the court that it was his position that Seigel had known all along what her exposure was if she was charged with the murder and that she had lied about her involvement in the homicide from the beginning, not just after she was formally charged or in her trial testimony. (Vol..23, TR1869) All of the reasons cited by the State on pages 78-79 of the Brief which were argued by defense counsel as reasons that Seigel would lie do nothing to undercut counsel's initial claim -- Seigel lied from the beginning to try to avoid arrest and to try to escape the death penalty. Appellant submits that choosing to claim that a witness has been a consistent liar and must continue to do so in order to

achieve her goal of a lesser sentence does not "open" the door to allowing her prior consistent lies to be admitted into evidence.

The State also cites to F.S. 90.801 (2)(b) and Chandler v. State, 702 So. 2d 186 (Fla. 1997), in part for the proposition that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement. While Seigel did testify at trial, the chronology of the witnesses did not render her subject to cross-examination regarding this statement made in Pennsylvania. The statement was admitted in the State's case through a witness other than Seigel after Seigel had testified and after she had been released from the stand. The State did not question Seigel about the statement in Pennsylvania, therefore, the defense, who obviously wanted to exclude the statement, would certainly not open the door to admission by engaging in discussion about it on cross-examination.

The record also reflects that the State initially brought to to the jury's attention the plea agreement and benefits from it that Seigel would enjoy. The defense did not delve into this area first.

The State extensively quotes the case of Shellito v. State, 701 So. 2d 837 (Fla. 1997), in support of their position that the statement was admissible to rebut a charge of recent fabrication. However, the facts in Shellito present a clear claim of recent fabrication, unlike the facts presented in this case. In Shellito

the witness, Bays, testified that the defendant had told him that he had shot someone. Bays testified that after his arrest 20 hours after the homicide on a robbery charge, he told the police what Shellito said. Bays admitted during cross-examination that he was concerned about the charges against him when he made the statement, that he kept evidence about his case under the mattress in his jail cell, and that he had read newspaper accounts of the murder Shellito was charged with while he was in jail. This Court pointed out that the questioning of Bays on cross brought out information which made it appear that Bays had obtained details about the crime from the media and police reports which were not written until after Bays had given the statement. Thus, the calling of the police officer who took the statement from Bays before he would have had access to media and police reports was admissible to rebut the inference that Bays had made this up recently.

In this case there are no facts which support the claim that defense counsel believed that Seigel had recently fabricated her trial testimony such as were present in Shellito. At no time did counsel imply that Seigel had obtained confidential information or had access to anything after the fact. Defense counsel maintained that Seigel was, from the beginning, a liar, who was very aware of the potential penalties she face before her arrest and was willing to say anything from the beginning which would lessen her exposure.

The admission of the prior consistent statement through the police officer was error in this case.

The restriction of Appellant's ability to present his defense and adequately confront the witnesses against him deprived Appellant of his rights to due process, a fair trial, and the confrontation of witnesses under the state and federal constitutions. Appellant is entitled to a new trial.

ISSUE IV

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING EVIDENCE OF ALLEGEDLY BAD ACTS OF TREASE (AS STATED BY THE APPELLEE).

(1) The Tomilson-Bersousek Testimony of Trease's requests for Information Targeting People Who Had Safes Or Money:

The State first appears to claim that this evidence was admissible even though there were no completed acts, relying on the cases of Malloy v. State, 382 So. 2d 1190, 1192 (Fla. 1979) and Swafford v. State, 533 So. 2d 270 (Fla. 1988). Appellant submits that both of these cases are distinguishable from the instant case, and therefore, are without persuasive authority to support the admission of the evidence of Appellant's conversations.

In Malloy the defendant was charged with the murder of two individuals as part of a robbery after an evening of drug use. The State was allowed to admit into evidence that earlier in the evening, Malloy had been an at lounge and two people were arguing

in the parking lot. Malloy told the people to "shut up" and then got out of his car and began to remove a rifle. The incident at the lounge was ruled admissible as "one incident in a chain of chronological events which began at the termination of the party at the Surrett's and 12:30 a.m. and concluded with the delivery of the victim's property to the appellant's bedroom at 5:30 a.m. back at the Surrett premises. In addition, the circumstances of the lounge incident do not establish all the elements of a crime and, consequently, the question of the admissibility of the prior criminal acts is not present." Malloy, at 1192.

Malloy supports Appellant's assertion that the conversations are not admissible as these conversations do not contain all the elements of a crime. Thus, they are inadmissible under Williams rule under the Malloy opinion. Nor do the conversations in the instant case fall within the admissibility test used in Malloy as they are not part of the chronology of the murder. The conversations here occurred with Berousek some five months before the homicide.

In Swafford the defendant was charged with killing a young woman he had abducted from a FINA gas station in Daytona Beach. The woman had been shot nine times, with two shots to the head. The State was permitted to admit evidence that two months after the murder, the defendant and an Ernest Johnson were out, at the defendant's urging, to find a girl and abduct her so they could do

anything they wanted with her. Swafford said not to worry about being caught, because after they were done, he would shoot her twice in the head so there would be no witnesses. At this point Johnson asked if that bothered Swafford, who replied that you got used to it. Johnson and Swafford then went to a parking lot and Swafford selected a victim. As Swafford approached the victim's car and drew his gun, Johnson demanded to be taken back to his vehicle and refused to continue in the plan to abduct and kill a second young woman. Thus, the testimony of Johnson relating to the Williams rule event established that Swafford did much more than talk about what they might do -- a plan was set into motion by Swafford. This Court noted that the Johnson testimony was not admitted to establish that Swafford had committed a separate crime so similar to the charged crime so that it pointed with logical relevancy to Swafford as the perpetrator because it did not refer to a crime that had been committed. Rather, the statement was admissible as an admission of a party-opponent, which was relevant evidence which tended to prove or disprove a material fact in issue. The opinion specifically notes that the two incidents were not sufficiently similar to be admissible under the modus operandi theory of admissibility.

Appellant submits that neither Malloy nor Swafford stand for the proposition that a defendant's conversation alone about committing a crime render it admissible under Williams rule.

Neither, under Swafford, do the conversations with Bersousek and Tomilson have sufficient similarity to the homicide to establish a modus operandi as the State asserts on page 85 of their Brief. There is nothing unique about seeking to burglarize people whom you believe may have something worth stealing.

The remaining cases cited by the State, apparently in support of the modus operandi theory of admissibility on pages 85-86 of the Brief also do not support admissibility in this case. In Ferrell v. State, 686 So. 2d 1324 (Fla. 1986), the victim of the homicide had been robbed two days earlier by the defendant. The basis for admissibility was not modus operandi, but rather that the testimony of the earlier robbery was inseparable from the crime charged and admissible under Sec. 90.402 as necessary to adequately describe the instant offense. It completed the story of the crime for which the defendant was on trial.

Again in Foster v. State, 679 So. 2d 747 (Fla. 1996), the testimony concerning another robbery which had occurred earlier that same day was admitted in the homicide case as inseparable crime evidence. The gun used in the homicide had been used in the earlier robbery, the truck used in the homicide had been obtained in the earlier robbery. This Court held that the testimony concerning the other crime was necessary to establish the entire context in which the crime arose and was necessary in order to

present a complete picture of the criminal episode the defendant was on trial for.

While neither of these cases have anything to do with modus operandi as a basis for admissibility, it is abundantly clear that the testimony of Tomilson and Bersousek was not admissible as inseparable crime evidence. The State, at the trial level, never advanced this theory of admissibility to the trial court. Again, these cases are also distinguishable because the testimony was about completed crimes, not just conversation about possibly committing a crime.

The remaining cases did use modus operandi as the basis for admissibility, however, an examination of the facts of each case reflects that the testimony in this case does not meet the standard of similarity necessary for admissibility under case law. For example, in Hoefert v. State, 617 So. 2d 1046 (Fla. 1993), the victim died as a result of being choked to death and there was evidence consistent with her having had sexual activity. Three other women were called to testify that the defendant had enjoyed choking them while having sex with them and that he obtained sexual gratification from the choking. Two of these women had been choked until they passed out. The evidence of these other chokings was admissible because it was strikingly similar and the defendant had placed into issue the motive because of the lack of trauma to the victim's body. Identity was also an issue.

In Williams v. State, 622 So. 2d 456 (Fla. 1993), the murder victims had ripped the defendant off in his drug business. The evidence admitted was that four months earlier the defendant had sent a hit man off to kill two other former employees who had left his employ to start their own drug business. The modus operandi the State sought to establish was that whenever anyone crossed the defendant in his drug trafficking ring, hie wound have them killed. This Court approved the admission of the other crime evidence given the special circumstances of the facts of the case.

The testimony of Bersousek and Tomilson in this case does not establish a modus operandi. It was general conversation about targeting potential burglary victims. There was no conversation about who, what, where, when, and certainly no conversations about the possibility of murdering the victims.

The final case cited, that of Finney v. State, 660 So. 2d 674 (Fla. 1995), did not deal with the admissibility of evidence in the guilt phase, but instead focused on the use of other crime evidence to support the aggravating factor of pecuniary gain, which the defendant disputed. This Court ruled the evidence of the other crime was not sufficiently similar to warrant admission as the victim in the other crime was not murdered, but found harmless error because there was other evidence to support the finding of the aggravator.

In this case the admission of the testimony solely to buttress the credibility of Seigel is not of sufficient probative value to overcome the tremendous prejudicial impact of the testimony. Given the limitations imposed on the defense's ability to impeach Seigel as argued in Issue II, the admission of this testimony to buttress Seigel only served to heighten the cumulative unfairness of the trial. Appellant is entitled to a new trial free from such taint.

Appellant will rely upon the Initial Brief and the arguments contained therein concerning the admissibility of the testimony concerning his truthfulness, his knowledge of martial arts, and his earlier possession of handmade knives.

CONCLUSION

Based upon the arguments and citations of authority recited herein and in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse this cause for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of August, 2000.

Respectfully submitted,

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