IN THE SUPREME COURT OF FLORIDA

GEORGE JAMES TREPAL,

Appellant,

vs. **CASE NO. 94,505**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant George Trepal was convicted in 1991 of first degree murder, several counts of attempted first degree murder, poisoning food or water, and tampering with a consumer product. He was sentenced to death on the murder conviction, and this Court affirmed his convictions and sentences in 1993. Trepal v. State, 621 So. 2d 1361 (Fla. 1993), cert. denied, 510 U.S. 1077 (1994).

The victims were neighbors of Trepal's. The crimes were accomplished by Trepal going to the victims' house, prying the caps off bottles of Coca-Cola, poisoning the Coca-Cola with thallium, and replacing the caps. Peggy Carr, the murder victim, and other members of her family consumed the Coca-Cola and became sick; Peggy ultimately died of thallium poisoning. The evidence against Trepal included a bottle of thallium, a toxic poison unavailable to the general public, that was discovered in Trepal's garage. See, 621 So. 2d 1363-1365.

Due to the nature of the crime, there was a significant amount of scientific evidence presented at trial. Prior to trial, the defense received court approval for a defense expert to examine the scientific evidence in the case; the Polk County Sheriff's Office was directed to transport the evidence to Georgia Tech in Atlanta, Georgia, so that the evidence could be independently tested (DA-R. Vol. 22/5144-45; PC-R. 64). The State requested that the results

of these scientific tests be disclosed pursuant to Florida Rule of Criminal Procedure 3.220(d)(2); the trial court denied this request, finding that the results were protected as work product (DA-R. Vol. 22/5144-45; Vol. 23/5309-5318; 5414). The defense did not present this expert's testimony at the time of trial.

In 1995, Trepal filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. An evidentiary hearing was granted as to some of the allegations of ineffective assistance of counsel raised in that motion. Following the hearing, relief was denied. The appeal from the denial of postconviction relief is pending in this Court. Trepal v. State, Florida Supreme Court Case No. 89,710.

On September 1, 1998, Trepal filed another motion for postconviction relief, raising a claim that newly discovered evidence established that Trepal had been denied an adversarial testing at his capital trial. The claim alleged that information recently obtained from the Department of Justice and the FBI "establishes that misleading, inaccurate, and perjured testimony" and "unreliable and inadmissible scientific evidence" was presented by the State during Trepal's trial (PC-R. 6). It also alleged that "the State's witness affirmatively misled defense counsel as to the results of the scientific testing," concluding that violations of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States,

405 U.S. 150 (1972), had occurred (PC-R. 6). Furthermore, the motion stated that to the extent that defense counsel failed to discover the newly disclosed evidence, Trepal "received ineffective assistance of counsel" (PC-R. 6-7).

Trepal's motion repeatedly characterizes the testimony presented by State witness Roger Martz (the FBI chemist that tested the same scientific evidence which was tested by the defense expert at Georgia Tech) as "unreliable, inaccurate, flawed, and perjurious" (PC-R. 44, 45, 48, 49). The motion states that "no one at trial was aware of this information," and asserts that a new trial was warranted based either on the Brady violation, the ineffective assistance of counsel, or a combination of both theories (PC-R. 49, 50). Furthermore, the motion specifically referenced the prior postconviction motion, the evidence that had been presented in support of that motion, and other evidence "which the jury did not hear," demanding that the court "evaluate all of this evidence, including the putative reasonableness of any strategy decisions which the Court found to exist when denying these [previous] claims, in order to assess the instant motion" (PC-R. 57-59).

Pursuant to these allegations, the State filed a motion to compel Trepal's postconviction attorneys to disclose the names and addresses of any experts used by Trepal at the time of trial to

test the materials which he now complains were not properly tested by the State, as well as any reports, notes, or other writings concerning these experts, their conversations with defense counsel, their findings or test results, opinions, and conclusions (PC-R. 65). The trial court granted the State's motion to compel; however, Trepal filed a Notice of Appeal and obtained a stay from this Court on the discovery order (PC-R. 145-148).

The State elected to proceed with the evidentiary hearing without access to the defense chemistry expert used at trial. After presenting his scientific experts at the hearing, Trepal intended to call one of the trial defense attorneys in order to ask whether the attorney received the notes of the FBI experts about the analysis conducted by the FBI; what the attorney would have done if he had received these notes; and how critical he believed the FBI testimony was to the trial (Appellant's Appendix, pp. 7, 31-33). However, Trepal did not believe that the State could question the attorney about the independent testing that had been secured, or any other actions that may have been taken prior to trial with regard to the questioned substance. When the trial judge suggested that testimony as to the defense tactics and strategy with regard to the FBI testing would open the door to questions about the tactics and strategy actually used at trial, Trepal indicated that he would appeal that ruling. A one-week

recess was granted and Trepal obtained an Order from this Court staying all of the proceedings below. This appeal follows.

SUMMARY OF THE ARGUMENT

Trepal's assertions that the trial court erred in granting the State's motion to compel discovery are without merit. The State did not waive any right to this material by failing to request it during the litigation of Trepal's first postconviction motion, since it was not relevant to the claims presented in that motion. The information is not protected by any attorney-client or work product privilege, since any privilege was waived by the allegations in the postconviction motion. The information may lead to relevant evidence since it may support or refute the allegations in the postconviction motion.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR DISCOVERY.

Appellant Trepal claims that the trial court's order granting the State's motion for discovery information is error because (1) the State waived any right to disclosure of the discovery material by not requesting the material before the instant postconviction motion was filed; (2) the discovery material requested is confidential because it is protected by the attorney-client or the work product privilege; and (3) the discovery material is not relevant to the instant proceeding. A review of the facts in this case and the applicable case law clearly establishes that Trepal is not entitled to relief in this appeal. However, each of his claims will be addressed in turn.

1. The State did not waive the right to the requested material.

Trepal initially submits that the State cannot obtain the requested discovery material because the time for requesting this material would have been during the litigation of Trepal's initial postconviction motion. This is an interesting twist on the claim initially presented to the court below that the State's request must be denied as premature since no evidentiary hearing had been

granted at that time (PC-R. 74). The waiver argument is without merit since there was no reason for the State to request this information during the course of the initial postconviction litigation. In the initial postconviction motion, there was no claim related to the validity of the FBI tests and conclusions with regard to the thallium found in the Coca-Cola in the victims' house and in Trepal's garage. Since this was not an issue, the State had no reason to seek to discover what Trepal's trial expert determined with regard to these substances.

The only cases cited to support Trepal's claim that the State waived any right to these records are Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993), acknowledging that procedural defaults apply to the State as well as criminal defendants, and Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993) and Porter v. State, 653 So. 2d 374 (Fla. 1995), acknowledging that criminal defendants must exercise due diligence in requesting public records. None of these cases even remotely suggest that the State must have telepathically known and requested all documents that might ever be relevant to any potential future claim Trepal may raise, or forever do without such documents. Since the validity of the FBI testing was not an issue until the successive postconviction motion was filed, this claim is without merit.

2. The material is not confidential or protected by any privilege.

Trepal next asserts that the State is not entitled to the requested material because the material is protected by attorney-client and work product privileges. These arguments are similarly unavailing.

A. Attorney-client privilege.

Trepal asserts that disclosure of this material is not required by Reed v. State, 640 So. 2d 1094 (Fla. 1994), or LeCroy v. State, 641 So. 2d 853 (Fla. 1994), because the case is more factually like Lovette v. State, 636 So. 2d 1304 (Fla. 1994). A review of these decisions clearly refutes this claim. The relevant issue in Reed and LeCroy was whether the State was entitled to information otherwise protected by attorney-client privilege once a criminal defendant filed a postconviction motion alleging ineffective assistance of counsel. This is the same issue raised in the instant appeal. The issue in Lovette was whether the State was entitled to present testimony from a defense expert during the defendant's trial when the defendant did not offer the expert, open the door to this testimony, or otherwise waive the attorney-client privilege. Since the issue presented herein is the same issue addressed in Reed and LeCroy and different from the issue decided in Lovette, Trepal's reliance on Lovette is misplaced.

The inapplicability of Lovette is clear for reasons beyond the

mere statement of the issue. For one thing, there is no basis to conclude that the information sought by the State below is even protected by the attorney-client privilege. The existence of the privilege was clear in Lovette, since that case involved the admissibility of statements which Lovette made to a mental health expert pursuant to Florida Rule of Criminal Procedure 3.216. That rule expressly provides that all matters related to an expert "shall be deemed to fall under the lawyer-client privilege." Fla. R. Crim. P. 3.216(a). There is no similar authority to establish a privilege when a scientific expert conducts tests and makes conclusions on a particular substance. In fact, since there is no confidential communication between a criminal defendant and such a scientific expert, it makes no sense to impose an artificial privilege to include the identity, test methods, and conclusions of such an expert. See, Morgan v. State, 639 So. 2d 6, 10 (Fla. 1994) ("*Communications* from a defendant to a confidential expert regarding the specific facts of a crime are indeed privileged," citing Lovette (emphasis added)).

In Rose v. State, 591 So. 2d 195, 197 (Fla. 4th DCA 1991), the district court considered whether a trial court had erred in permitting a medical examiner to testify for the State when he had originally been hired by the defense but the defense had determined not to call him as an expert. In rejecting Rose's claim that his

attorney-client privilege prohibited the State from using the expert, the district court noted that "the assertion of the privilege in the psychiatric witness cases is based on the confidential communications which may be made to the psychiatrist." 591 So. 2d at 197. Since no confidential communications between Rose and his attorney had been passed on to the expert involved, the district court concluded that the trial court had not abused its discretion in permitting the expert to testify, "particularly in light of the defense concession at trial that Dr. Reeves had not used confidential information in formulating his testimony." Id. Since the nature of the expert's role to the defense in Trepal's case would not reasonably suggest that any confidential communications would be involved, information known by the expert should not be assumed to fall within the attorney-client privilege.

Even if a privilege is assumed to exist in this case, it has clearly been waived by the postconviction allegations and by the fact that Trepal intends to call at least one of his prior trial attorneys to testify about these allegations.[1] His intent to ask

[1]Although the motion to compel granted by the trial court which was the basis of the Notice of Appeal in this case was only directed to the defense scientific expert, Trepal succeeded in expanding the scope of this appeal to include any information which the trial defense attorneys possessed with regard to this testing by filing his Emergency Motion during the course of the evidentiary hearing. Therefore, the State's argument will encompass both the information from the expert and the information possessed by the trial defense attorneys.

his attorney what the attorney would have done if he had been aware of the post-trial criticisms directed at State witness Roger Martz would certainly open the door to the State asking the attorney what actually had been done with regard to investigating the subject of Martz' testimony at the time of trial. In Delap v. State, 440 So. 2d 1242, 1247 (Fla. 1983), cert. denied, 496 U.S. 929 (1990), this Court considered whether the attorney-client privilege was violated when the State was permitted to question a public defender investigator that testified as a defense witness in a hearing on Delap's motion to suppress. This Court noted

> As with all privileged communications, the justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public. But when a party himself ceases to treat the matter as confidential, it loses its confidential character. Defendant sought to elicit from Investigator Coppock only testimony which would aid him in having the confession suppressed, while selectively blocking inquiries concerning his state of mind at the time of the confession which were not beneficial to his cause. The trial judge properly overruled defendant's objection to the question.

440 So. 2d at 1247 (citations omitted). In the instant case, the subject matter involved -- whether the defense's Georgia Tech expert would validate the results and conclusions reached by the FBI -- was kept private at the time of trial. But in the postconviction proceeding, Trepal has attacked the validity of the

FBI testing, thereby making the subject matter a public issue and stripping the information of any potential confidentiality to which it might otherwise be entitled. His attempt, like Delap, to selectively block inquiries about the very issue he has raised -- the reliability of the FBI test results -- must be rejected. See also, Morgan, 639 So. 2d at 10 ("Morgan waived the attorney-client privilege by calling Dr. Caddy as his expert"); Watson v. State, 190 So. 2d 161, 167 (Fla. 1966) (questioning defendants as to whether their attorneys had formally complained about police brutality to sheriff's office did not violate attorney-client privilege, since claim of brutality by defendants opened the door for cross-examination), cert. denied, 389 U.S. 960 (1967).

To the extent that Trepal is now attempting to reinstate the privilege waived by the allegations of ineffective assistance of counsel by distancing himself from that particular claim and focusing instead on the Brady issue, the characterization of the particular issue does not matter. His accusation that the State presented false testimony through FBI witness Roger Martz clearly opens the door to what the defense expert found prior to trial upon testing the same materials that Martz tested. "Traditionally, a waiver of a privilege is determined by the behavior of the party seeking to assert the privilege." Alachua General Hospital, Inc., v. Stewart, 649 So. 2d 357, 359 (Fla. 1st DCA 1995). In that case,

the court held that "actions of the plaintiffs who chose the playing field by alleging that negligence took place on the part of doctors practicing in petitioner's hospital constituted a waiver which would allow the hospital to speak to those doctors." See also, Home Insurance Co. v. Advance Machine Co., 443 So. 2d 165 (Fla. 1st DCA 1983) (discovery as to reasonableness of settlement not precluded by attorney-client privilege).

This Court has clearly acknowledged that "[t]he attorney-client privilege is not absolute and 'may be outweighed by public interest in the administration of justice in certain circumstances.'" Turner v. State, 530 So. 2d 45, 46 (Fla. 1987), cert. denied, 489 U.S. 1040 (1989), quoting, Sepler v. State, 191 So. 2d 588, 590 (Fla. 3d DCA 1966). This instant case presents just such circumstances, and demands that this Court affirm the trial court's granting of the State's motion to compel.

Trepal's assertion that the independent pretrial testing "in no way impacts on the proper legal analysis" of his Brady claim (Appellant's Initial Brief, p. 22) is without merit. Apparently, Trepal is not aware that a Brady claim may be defeated by a showing that the defense already knew, or could have discovered with due diligence, the information that it is claiming the State improperly failed to disclose. See, Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992). Therefore, if Trepal had an expert telling his

attorneys prior to trial, “These FBI guys are nuts, this stuff isn’t what they’re saying it is,” that information would clearly impact a claim that the State never told the attorneys that the stuff wasn’t what the FBI said it was.[2]

Trepal offers a hypothetical to demonstrate why privileged information may not be relevant to a Brady claim, suggesting that a defendant’s confession to his own attorney does not lose its confidentiality if the defendant later asserts that the State had information that implicated another (apparently innocent) individual which was not disclosed to the defense. Suppose that, in this hypothetical, the information possessed by the police was that an anonymous caller had stated that the defendant’s brother John had actually committed the crime. Suppose also that, in confessing, the defendant told his attorney that he had called the police and told them anonymously that his brother John had committed the crime. Under Trepal’s analysis, a Brady violation would be proven since the police did not disclose the tip that John had committed the crime, despite the fact that the attorney already had the same information from his client. “Such is not the law.”

Since Trepal raised the issues of the accuracy of the FBI testing and the withholding of information which could allegedly be

[2]At the evidentiary hearing, even Trepal’s experts agreed that the stuff was exactly what the FBI said it was.

used to impeach State witness Roger Martz in this case (as well as ineffective assistance of counsel), he waived any privilege with regard to the scientific testing that was conducted independently by the defense on the same substances tested by the FBI prior to trial. Therefore, the trial court correctly granted the State's motion to compel.

B. Work Product Privilege.

In Reed, 640 So. 2d at 1097, this Court held that Reed's attorney-client privilege was waived when Reed filed a motion for postconviction relief alleging ineffective assistance of counsel. In addition, this Court noted, "[i]n our opinion, such a waiver includes not only privileged communications between defendant and counsel, but also must necessarily include information relating to strategy ordinarily protected under the work-product doctrine." Thus, any work product privilege applicable to this information was waived for the same reasons discussed above relating to the waiver of any attorney-client privilege. Furthermore, this Court has acknowledged that the reasons for confidentiality of work product information dissipate upon termination of the litigation. See, State v. Kokal, 562 So. 2d 324 (Fla. 1990) (work product exemption to public records disclosure expires at conclusion of litigation, i.e., the trial and direct appeal).

In addition, as to the information possessed by the scientific

expert, this information does not meet the definition for the work product exemption to discovery if it does not include legal research or legal opinions, theories, or conclusions. See, Fla. R. Crim. P. 3.220(g)(1). Therefore, the trial court correctly ordered disclosure of this information to the State.

3. The material requested is relevant to the claim raised in the pending postconviction motion.

Finally, Trepal asserts that the State is not entitled to the requested material because it is not relevant to the proceeding below. This information is obviously relevant for the reasons outlined above. The defense scientific expert either agreed or disagreed with the FBI conclusions about the evidence tested prior to trial. This information is clearly relevant to whether the FBI testimony presented was "flawed or inaccurate" as alleged in the postconviction motion; it is also relevant to whether defense counsel possessed information that could have been used to impeach the FBI testimony; it is clearly relevant to whether confidence in the outcome of Trepal's trial has been undermined. It is relevant to a Brady claim to know what information was possessed by the defense attorneys at the time of trial; the source of this information is not significant. Since the Georgia Tech expert possesses information relevant to the pretrial testing and the information possessed by defense counsel at the time, the court

below correctly granted the State’s motion to compel this discovery.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order granting the State's motion for discovery must be affirmed.

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. Regular Mail to Todd G. Scher, Capital Collateral Regional Counsel, 1444 Biscayne Blvd. Suite 202, Miami, Florida 33132, this 8th day of March, 1999.

COUNSEL FOR APPELLEE