IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No.: SC20-178

L.T. No. 1990-CF-2795A

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA,
J. LEE MARSH, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT

FOR APPELLANT:

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Reply Argument

I. THE TRIAL COURT ERRED IN DISMISSING DILLBECK'S NEWLY DISCOVERED EVIDENCE CLAIM AS UNTIMELY

The State filed a 59-page answer brief ("AB") that contains extensive argument on the merits, suggesting that Dillbeck's claim was fully developed and litigated in the trial court. It wasn't. The trial court summarily dismissed the claim without reaching the merits, and Dillbeck was never afforded the opportunity to call his witnesses and have them explain their methods and findings.

Despite this, the State makes a bold assertion that Dillbeck's new evidence of ND-PAE is "merely a twist on the old diagnosis of fetal alcohol effect" (AB 23). The facts have not been sufficiently developed to allow for that conclusion to be reached. However, the expert reports appended to Dillbeck's motion set forth how the new diagnosis of ND-PAE, a mental disorder with specific causative links to behavior (R. 84, 88), differs from the diagnosis of fetal alcohol effects, a medical condition that was diagnosed by a physician at trial and is now referred to as ARND (R. 32, 83). The undersigned is not a medical expert, and while he attempted to explain these differences in his pleadings based on the summary record, any comparison should necessarily be based on testimony from the experts themselves. The trial court's ruling was not based on any finding that the diagnosis of ND-PAE is the same or similar to what was presented at trial.

The answer brief frequently asserts what the State thinks the law should be rather than what the law actually is. *See* Answer Brief p. 9 n.4 ("Newly discovered evidence claims should not be permitted in plea cases. *But see Long v. State,* 183 So. 3d 342, 345 (Fla. 2016) (permitting a claim of newly discovered evidence in a plea case…") Nowhere is this more evident than in the State's reliance on *Hernandez v. State,* 180 So. 3d 978 (Fla. 2015), and *Lebron v. State,* 232 So. 3d 942 (Fla. 2017), which are cited throughout the State's brief. In those cases, this Court held that evidence of quantitative electroencephalogram (qEEG) test results was properly excluded by the trial courts because it did not meet the *Frye*[1] test for general acceptance by the scientific community. The State uses these cases to support its position that the Court should affirm the dismissal of Dillbeck's claim because the evidence would be inadmissible anyway. The State also cites to *Frye* nine times in its brief.

However, Florida no longer follows the *Frye* test. Florida switched to the *Daubert*[2] test last year. *In re Amendments to Florida Evidence Code,* 278 So. 3d 551 (Fla. 2019). The purpose of this change was to adopt a relaxed standard for the admissibility of reliable scientific evidence where "rejection of expert testimony is the exception rather than the rule." *Id* at 553 (citing Fed. R. Evid. 702). Dr. Adler states in his report that he has previously testified about qEEG data in Washington,

[1] *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).
[2] *Daubert v. Merrell Dow Pharmaceuticals,* 113 S. Ct. 2786 (1993).

Oregon, Texas, Arizona, Arkansas, Tennessee, South Carolina, and Utah (R. 234 n.3). Of these states, all but Washington have abandoned *Frye* in favor of *Daubert.*

Under *Daubert,* the relevance and reliability of the scientific evidence takes precedence over its general acceptance in the scientific community, which is now only one factor among several to consider in determining the admissibility of the evidence. *Daubert* at 2794-95. Dillbeck's experts said in their reports that the LORETA method employed in this case to interpret the EEG scans has been shown to be as reliable as PET scans (R. 235). By comparison, *Hernandez* focused almost exclusively on the question of general acceptance of qEEG by neurologists as the linchpin to admissibility.

To the extent reliability was discussed in *Hernandez*, one of the State's main complaints about qEEG evidence was the possibility of invalid data if the test subject was uncooperative. *Hernandez,* 180 So. 3d at 1007. However, in Dillbeck's case, the experts administered a CNS-VS at the beginning of the qEEG testing process specifically to determine Dillbeck's level of participation and cooperation in the testing process and rule out this potential source of unreliability (R. 236). Dr. Adler expressly found that Dillbeck was alert and cooperated and participated in the testing process (R. 156). Thus, the concern in *Hernandez* has been addressed.

Dillbeck must be afforded a *Daubert* hearing and an opportunity to call his witnesses and establish the reliability of his evidence before it can be summarily

discarded under an outdated standard. *Hernandez* did not resolve the question of whether qEEG evidence can meet the *Daubert* standard when there are adequate procedures in place to ensure that the test subject is cooperating, and when the findings and diagnosis are corroborated by other accepted testing methods.

The expert reports contain a disclaimer that the ND-PAE diagnosis was not based solely on the qEEG test results:

> QEEG tests are ancillary tests that are not intended to provide a diagnosis by themselves but are used to evaluate the nature and severity of deregulation in the brain such as in mild traumatic brain injury (MTBI).
>
> * * *
>
> A diagnosis is performed by the clinician, who integrates the medical history, clinical symptoms, neurocognitive tests with the abovementioned brain function tests as well as other information to render a diagnosis.

(R. 145).

In this case, the qEEG results were verified with the CNS-VS, neurocognitive testing, an in-person evaluation, and Dillbeck's complete medical and behavioral history before the ND-PAE diagnosis was rendered (R. 87-88, 150). All evidence pointed to the fact that Dillbeck has deficiencies in specific brain functions that regulate judgment and impulse control, and which were a direct cause of his criminal behavior (R. 88).

The State's brief is littered with references to Dillbeck's IQ scores (R. 11, 12, 24, 25 n.9). However, Dillbeck is not claiming that he has low intelligence or is intellectually disabled. *See Hall v. State,* 201 So. 3d 628 (Fla. 2016) (recognizing intellectual disability as a combination of low intelligence and adaptive functioning deficits manifested in childhood). ND-PAE is a mental disorder that causes people of average intelligence to function at a below-average level, and most people with a fetal alcohol spectrum disorder have average to borderline intelligence, including Dillbeck (R. 89).

The diagnostic criteria for ND-PAE, which differ from both fetal alcohol effects and intellectual disability, are (1) a neurocognitive impairment, (2) a self-regulation impairment, (3) two adaptive impairments, (4) childhood onset, (5) clinically significant distress, and (6) prenatal alcohol exposure with no other suitable explanation for the symptoms (R. 84-85). Low intelligence is not an element of ND-PAE. The fact that Dillbeck has average intelligence is irrelevant to both his ND-PAE diagnosis and the mitigating effect of that diagnosis on his culpability.

The State also cites to Dillbeck's composite BFI (brain function index) score of 6.45, which is on the border between the moderate and low performance zones (AB 11). This is an average of 12 areas of brain function. Dillbeck had average function in 5 of the 12 areas tested and abnormal function in the other 7. The low

scores were in areas related to "executive functioning" (R. 89). Had Dillbeck been afforded an evidentiary hearing, his experts would have testified that these specific deficits directly affected his judgment and impulse control and were a cause of his criminal conduct (R. 88), matters which the sentencing judge found were not established at the original penalty phase (R. 385).

On the issue of timeliness, the State again misstates the law when it suggests the date of publication of the DSM-5[3] or the date that qEEG testing became available is the triggering date for filing a timely claim. When the question of timeliness arose and the trial court requested additional briefing on the issue, Appellant cited numerous cases to support his position that the date of the diagnosis is the triggering date for a new claim (R. 362). Those cases are cited in the initial brief and in Appellant's memorandum of law filed in the trial court (R. 362). The State cites no cases to support its proposed triggering date.

In an abundance of caution, Dillbeck also pointed out that his motion was filed within one year of the initial evaluation by Dr. Sultan on May 10, 2018 (R. 10), as that was the earliest point at which the facts underlying the claim and the possibility of an ND-PAE diagnosis came to light. He did this even though it took nearly a year to obtain all of the doctors' reports. Counsel received the reports on

[3] Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.

May 1, 2019 (R. 9), and filed the motion barely a week later on May 9 (R. 4). Somehow this has been deemed a lack of due diligence.

The State boldly asserts that defense counsel was required to have Dillbeck examined and diagnosed within one year of ND-PAE being recognized in the literature as a mental disorder in 2013 (AB 35), but cites no authority for that position. The same attorney conceded during the *Huff* hearing that she doesn't keep up with changes in the DSM, and that it would be an extraordinarily high burden to place on court-appointed defense counsel (R. 353). No Florida court has ever held postconviction counsel to such a high standard of constructive knowledge of new scientific evidence not in his possession or otherwise informed by information already in hand.

There is no claim to file without the new diagnosis. Studies are not evidence, *see Schwab v. State,* 969 So. 2d 318 (Fla. 2007), and this Court has rejected claims of newly discovered evidence predicated on new testing for an old diagnosis. *See Long v. State,* 271 So. 3d 938 (Fla. 2019) (rejecting claim where diagnoses remained the same as those presented at trial). Even after Dillbeck was evaluated, counsel was forced to wait until the experts rendered their opinions and made the formal diagnosis before he could file a motion. He was not allowed to intervene in the non-capital litigation, nor did he have any authority to make the doctors type their reports faster.

The State accuses counsel of manipulating the restart provision in Fla. R. Crim. P. 3.851(d)(2)(A) by not having Dillbeck evaluated by an expert (AB 34-35). This argument presupposes that defense counsel was aware of the existence of ND-PAE and the possibility that Dillbeck met the diagnostic criteria. He wasn't, nor did the trial court afford the defense a hearing to develop those facts. *Compare Wiley v. Wiley,* 546 So. 2d 1149 (Fla. 4th DCA 1989) (remanding for hearing on issue of due diligence).

Dillbeck alleged in his motion that the facts underlying his claim were unknown to counsel until he was informed of the May, 2018 evaluation done during litigation in Dillbeck's 1979 non-capital murder case (R. 10). As capital registry counsel, the undersigned was prohibited from participating in that litigation. *See* § 27.711(11), *Fla. Stat.* (2019) ("An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during… a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made….)

The State's suggestion that counsel deliberately delayed testing is not supported by the record. Furthermore, the due diligence requirement prevents such abuses by requiring counsel to investigate matters once he's aware of them. *Compare Long,* 271 So. 3d at 941 (affirming denial of newly discovered evidence claim where counsel was aware of diagnoses and failed to diligently pursue claim).

Finally, right on the heels of saying that counsel was obligated to have his client tested for ND-PAE when the diagnosis was first published in the DSM-5, the State claims that the ND-PAE diagnosis was known at the time of the original trial (AB 36). That is patently incorrect. Prior to the publication of DSM-5 in 2013, there was no mental health diagnosis for the central nervous system dysfunction in fetal alcohol spectrum disorders (R. 84).

Conclusion

The order dismissing Dillbeck's newly discovered evidence claim should be REVERSED, and this cause remanded for an evidentiary hearing on the claim.

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Certificate of Service

I HEREBY CERTIFY that I have furnished a true and correct copy of the foregoing initial brief by electronic service to Charmaine Millsaps, Assistant Attorney General, at charmaine.millsaps@myfloridalegal.com; and Eddie Evans, Assistant State Attorney, at evanse@leoncountyfl.gov, on May 12, 2020.

/s/ Baya Harrison
Baya Harrison

Certificate of Compliance

I CERTIFY that the foregoing document was prepared in Times New Roman 14-point font, per Fla. R. App. 9.210.

/s/ Baya Harrison
Baya Harrison