IN THE SUPREME COURT OF FLORIDA

CLOTILDE ESTELA MENNA,

Petitioner,

v. Supreme Court Case No.: SC01-2174

STATE OF FLORIDA, DCA Case No.: 5D01-387

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Clotilde Estela Menna is charged by indictment with first degree murder for the shooting death of her husband, Glauco Menna, on January 21, 2000. (Record on appeal, page 83, hereinafter R 83)

On August 31, 2001, Petitioner filed a Motion in limine to exclude evidence of her failure to submit to a gunshot residue test on the night of the murder. (R 85-94) The state filed a response. (R 95-98) A hearing was held on this and other motions on November 9, 2000. (R 1-39) Detectives Thomas McCann and Richard Lallement testified at the hearing. The order was entered on January 25, 2001, granting the motion in limine. (R 103)

The trial court found as fact that two detectives met with the defendant at the hospital after her husband's death. "She was not in custody at the time. The Detectives testified that they informed her that they would like to perform a non-invasive swabbing of her hands to eliminate the possibility that she recently fired a gun." (R 103) The detectives specifically testified that they told her they wanted to eliminate her as a suspect. (R 13, 25) Detective Lallement asked her whether she

had killed her husband, and she answered, "Yes, I mean, no." (R 27) She appeared nervous. (R 27)

"They stated that technicians would be there shortly and would be able to conduct a brief gun shot residue test for this purpose. Neither detective informed her that her refusal could be used against her in court nor did they tell her that it would not be used against her in court. Likewise they did not inform her that
she was required by law to take the test, which indeed she was not.
She asked to call her attorney but could not reach him. Detective
McCann testified that shortly after this conversation she refused
to take the test, and visited the bathroom several times and came
out drying her hands, apparently having washed them." (R 103)

The trial court reviewed the cited cases, and suppressed the evidence, finding "...there is no indication that Mrs. Menna had any inkling that the refusal to take the test was anything other than a safe harbor..." (R 104)

The appellate court accepted these factual findings, but concluded that the trial court did not apply the correct law to this case, citing Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995). The District Court of Appeal, Fifth District, granted the petition for writ of certiorari, finding

that the trial court departed from the essential requirements of law in suppressing the evidence of Petitioner's refusal to submit to a gunshot residue test. This evidence was relevant to her consciousness of guilt because "the record in this case shows that she was told that the proposed test could clear her from prosecution; the converse of that eventuality would be the possibility, if not probability, of prosecution for murder, surely an adverse consequence." State v. Menna, 793 So.2d 1029, 1032 (Fla. 5th DCA 2001)

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in this case even though the district court "certified conflict" because there are significant factual differences between this case and Herring, infra. Herring was not told that there were any adverse consequences for refusing to submit to the gunshot residue test. He was not told that the test was painless, short, and non-invasive. He was not told that it provided scientifically reliable evidence. Here, Petitioner was informed that the test was non-invasive, painless, and brief. Petitioner could not reasonably believe that refusing the gunshot residue test was a "safe harbor" because she was told that if the test was negative, that would provide reliable evidence in the future to rebut the contention that she was a plausible suspect. "(T)he record in this case shows that she was told that the proposed

test could clear her from prosecution; the converse of that eventuality would be the possibility, if not probability, of prosecution for murder, surely an adverse consequence." State v. Menna, 793 So.2d 1029, 1032 (Fla. 5th DCA 2001). Just like a driver who knows that refusing to submit to a test for intoxication can result in the adverse consequence of the loss of his driver's license, the adverse consequence of not being exonerated as a suspect in this case makes the refusal to submit to the test admissible as relevant to consciousness of guilt. The district court's decision was correct and should be affirmed in all respects.

ARGUMENT

THE CASE RELIED UPON BY PETITIONER IS NOT IN CONFLICT OR IT HAS ALREADY BEEN OVERRULED SUB SILENTO BY THIS COURT

This Court may exercise its discretionary jurisdiction to review a district court opinion which is certified to be in direct conflict with a decision of another district court of appeal. Art. V, § 3(b)(4), Fla. Const. However, exercise of this jurisdiction is discretionary. Respondent acknowledges that the decision in this case states: "We certify conflict with Herring." State v. Menna, 793 So.2d 1029, 1032 (Fla. 5th DCA 2001). The State contends that despite this language, this Court need not exercise jurisdiction in this case for two reasons. First, the two cases are distinguishable on their facts, and second, because this Court has already resolved this question such that the holding of Herring v. State, 501 So.2d 19 (Fla. 3d DCA 1986) no longer has any continuing vitality. Respondent therefore requests this Court to decline to exercise its discretionary jurisdiction in this case.

The issue in this case is whether the pre-arrest refusal to submit to a gunshot residue test is admissible to demonstrate consciousness of guilt. The Herring decision held that where the defendant did not know that her refusal to take the test was anything but a "safe harbor" and she was never apprised of any adverse consequences of taking the test, the refusal was not relevant to consciousness of guilt.

Herring can be distinguished from this case because here, Respondent was told that the gunshot reside test could exonerate her, and by inference, the inverse was also true: if the test was positive, she could be prosecuted for murdering her husband. The fifth district's decision noted this critical distinction between the two cases. The refusal in this case was therefore relevant to her consciousness of guilt because "the record in this case shows that she was told that the proposed test could clear her from prosecution; the converse of that eventuality would be the possibility, if not probability, of prosecution for murder, surely an adverse consequence." State v. Menna, 793 So.2d 1029, 1032 (Fla. 5th DCA 2001). Unlike Herring, this Petitioner was informed that the gunshot residue test was painless, short, and non-invasive. Unlike Herring, this Petitioner was told that the test provided scientifically reliable information that could refute future claims that she was a plausible suspect in the murder. Since the facts of this case are distinguishable from Herring, then there is no conflict between the decisions such that this Court should exercise jurisdiction.

Respondent continues to contend that the cases do not conflict because Herring has in effect been overruled by this Court in Occhicone v. State, 570 So.2d 902 (Fla. 1990), cert. denied, 500 U.S. 938 (1991), and rejected by the district courts in State v. Burns, 661 So.2d 842 (Fla. 5th DCA 1995), pet. for review dismissed, 676 So.2d 1366 (Fla. 1996) and Wilson v.

State, 596 So.2d 775 (Fla. 1st DCA 1992). Whether viewed as a basis for declining jurisdiction or rejection on the merits, the conclusion is the same: this case was properly decided under applicable precedent.

In Occhicone v. State, 570 So.2d 902, 905 (Fla. 1990), this Court ruled that evidence of Occhicone's post-arrest refusal to submit to a hand swab test was admissible to refute his claim of diminished capacity, and that his reliance upon Herring was misplaced.

In a concurring opinion, Justice Grimes, joined by Justice Ehrlich, explained that Herring was incorrectly decided "because Herring is based on an erroneous premise." Occhicone v. State, 570 So.2d at 908. Occhicone's refusal to take the test was admissible not because it was introduced to refute diminished capacity, but because there is no constitutional right to refuse to take the hand swab test. Just as he could have been required to submit to fingerprinting, photographing or blood tests, he could have been compelled to undergo the hand swab test, and having refused to take the test, evidence of this fact was admissible for any relevant purpose. "Unlike the case where Miranda warnings are given which

advise the defendant that he has the right to refuse to make a statement, Occhicone was not told that he could refuse the hand swab test. There was no misleading assurance. The fact that the police chose not to force him to take the test when he did refuse

is irrelevant." Id.

In the interium, the fifth and first district courts have followed Justice Grimes' concurrence. State v. Burns, 661 So.2d 842, 849 (Fla. 5th DCA 1995), pet. for review dismissed, 676 So.2d 1366 (Fla. 1996). Burns' refusal to perform physical, non-testimonial field sobriety tests was admissible because the refusal to take the test was not protected by any constitutional privilege. The Burns court noted that the Supreme Court of Florida has held that in pre-arrest situations such as the case at hand, the defendant's refusal to take a test that does not require a testimonial response is admissible as relevant to show consciousness of guilt. State v. Taylor, 648 So.2d 701 (Fla. 1995).

The fifth district has long adhered to this rule. In State v. Sowers, 442 So.2d 239 (Fla. 5th DCA 1983), the court held that the introduction of evidence that a defendant refused to submit to a chemical test for intoxication did not violate either the state or federal constitution, relying upon South Dakota v. Neville, 459 U.S. 553 (1983).

The first district follows this rule as well, and rejected the Herring analysis in Wilson v. State, 596 So.2d 775 (Fla. 1st

DCA 1992). In cases where there is no compelled communication, but instead, simply non-communicative tests, there is no fifth amendment privilege at issue. A defendant is not told that he has a right to refuse the test, and so there is nothing unfair about admitting that refusal to submit to the test because the refusal was not induced by "misleading assurance." The first district adopted Justice Grimes' reasoning, and held that since there was no

constitutional privilege against taking a test, it follows that there is significant probative value in refusing to take such a test.

Despite its repudiation by this Court in Occhicone and the decisions of the first and fifth districts, Petitioner contends that the rationale of Herring is still viable because it was utilized by this Court in State v. Taylor, 648 So.2d 701 (Fla. 1995). The court below considered this argument: "The key question posed by the instant petition is whether our prior opinions in Burns and Sower are in conflict with, and therefore superceded by, the opinion of the Florida Supreme Court in Taylor. Can Taylor be reconciled with the view expressed in the special concurrence of Justice Grimes in Occhicone?" State v. Menna, 793 So.2d at 1032.

In Taylor, this Court held that the refusal by a DUI suspect to submit to a pre-arrest field test was admissible in evidence as relevant to consciousness of guilt. Taylor had not been misled by the police into believing that refusal was a "safe

harbor free of adverse consequences" because he knew that he could lose his license to drive by refusing to take the breath test. Taylor does not cite to Herring. "Moreover, there is nothing in the Taylor opinion that could be construed as a repudiation of the special concurrence by Justice Grimes in Occhicone or of our prior opinions in Burns or Sowers." State v. Menna, 793 So.2d at 1032.

This conclusion was entirely correct. In this case, there was evidence that Petitioner Menna was repeatedly told that by submitting to the gunshot residue test, she could be eliminated as a suspect. The inverse of that advice was obvious: if the test was positive, she would be a suspect and could be prosecuted for murdering her husband. This as an adverse circumstance, to be sure. Therefore, this case does not conflict with Herring or Taylor. Petitioner could not reasonably believe that refusing the gunshot residue test was a "safe harbor" because she was told that if the test was negative, that would provide reliable evidence in the future to rebut the contention that she was a plausible suspect. It may be unfair to inform a suspect that he may refuse to speak, and then later hold that silence against him. However, there is no unfairness in admitting the refusal to submit to a test when the suspect is told that the non-invasive, brief test could conclusively eliminate him as a suspect.

In reply, Petitioner attempts to distinguish this line of cases by suggesting that she does not dispute the fact that

admission of the evidence of refusal to submit to a test is not in violation of either the state or federal constitution. Rather, Petitioner alleges that the evidence is simply irrelevant to consciousness of guilt where the defendant is not advised of adverse consequences. This argument is misplaced because it goes to the weight and not the admissibility of the evidence. Where, as here, the defendant is repeatedly told that she could be eliminated as a suspect if she submits to the test, yet the test is refused, that refusal is relevant to consciousness of guilt because reasonable people would want to be eliminated from suspicion. A fair inference is that the test was refused because the defendant knew that the result would be positive and therefore incriminating. There is no unfairness in admitting this refusal because "if a defendant knows that his refusal carries with it adverse consequences, the hypothesis that the refusal was an innocent act is far less plausible." Herring v. State, 501 So.2d at 20.

It is not required that the defendant know the exact nature of the adverse consequences. The knowledge by a driver that refusal to submit to a chemical test for intoxication can cause him to lose his license is a sufficient adverse consequence to admit the refusal as relevant to consciousness of guilt. Therefore, in this case, the knowledge that one could be exonerated as a suspect by submitting to the painless, non-invasive gunshot residue test if it proved to be negative is sufficient motivation to take the test such that the refusal is

likewise admissible. The hypothesis that the "refusal was an innocent act is far less plausible" under these circumstances. Id.

Finally, Petitioner alleges that the district court should not have granted relief and issued the writ of certiorari because the trial court's suppression of evidence was at best merely erroneous. The standard of review on a petition for writ of certiorari is whether there has been a departure from the essential requirements of law. Combs v. State, 436 So.2d 93 (Fla. 1983). The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law. Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995). The district court correctly found that the failure of the trial court to follow controlling precedent warranted certiorari relief. The failure to follow the controlling principle of law is grounds for certiorari review. Ivey v. Allstate Insurance Co., 774 So.2d 679 (Fla. 2000).

This Court should decline to accept jurisdiction in this case even though the district court "certified conflict with Herring" because there are significant factual differences between this case and Herring. Herring was not told that there were any adverse consequences for refusing to submit to the gunshot residue test. He was not told that the test was painless, short, and non-invasive. He was not told that it provided scientifically reliable evidence. Here, Petitioner was

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CONCLUSION

Based on the arguments and authorities presented herein, Respondnet respectfully requests this Court to decline to exercise its discretionary jurisdiction, or in the alternative, to accept jurisdiction and affirm in all respects the decision of the District Court of Appeal, Fifth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Brief has been furnished by U.S. Mail to Michael J. Snure,

counsel for Respondent, 1150 Louisiana Avenue, Suite 1, P.O. Box 2728, Winter Park, FL 32790, this 30th day of November 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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Cases

Other Authority