IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PEDRO HERNANDEZ ALBERTO, :

Appellant, :

vs. : Case No.SC02-1617

STATE OF FLORIDA, :

Appellee. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO PROCEED PRO SE AT TRIAL WITHOUT A PROPER FINDING OF COMPETENCE AND WITHOUT A KNOWING AND INTELLIGENT WAIVER OF COUNSEL, AND IN FAILING TO HOLD COMPETENCY HEARINGS ON OCCASIONS THROUGHOUT THE PROCEEDINGS.

Appellant relies on the reasons, arguments, and authorities presented in his Initial Brief. In addition, Appellant presents the following in response to Appellee's Answer Brief.

WAIVER OF COUNSEL

"[C]ourts indulge in every reasonable presumption against waiver [of counsel.]" Brewer v. Williams, 430 U.S. 387, 404 (1977), citing Brookhart v. Janis, 384 U.S. 1, 4 (1966) and Glasser v. United States, 315 U.S. 60 (1942). "This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings." Brewer, 384 U.S. at 404, citing Schneckloth v. Bustamonte, 412 U.S. 218, 238-240 (1973) and United States v. Wade, 388 U.S. 218, 237 (1967). The State has the burden of establishing a valid waiver. Brewer, 430 U.S. at 404.

A few months after the incident and Hernandez's arrest, the trial court held a competency hearing and found he was incompetent to proceed (v12:1277; v1:32-43). Dr. Maher had indicated Hernandez: had a major psychiatric disorder, but might be malingering; did not appreciate the charges, the potential penalties, or the legal process; lacked ability to communicate facts to counsel because of poor

English, depression, and a thought disorder; lacked capacity to manifest appropriate courtroom behavior and to testify relevantly; and was incompetent to proceed (v1:32-36). Dr. Saa indicated Hernandez: had poor attention, memory, and thought process; may have auditory hallucinations; may suffer from depression with psychosis; was receiving antidepressant and antipsychotic medications; suffered a head/back injury in 1994; did not understand the charges, potential penalties, or legal process; would be unable to disclose relevant facts to counsel; had capacity for appropriate courtroom behavior; lacked capacity to testify relevantly; and might be malingering, but was not competent to proceed (v1:40-43).

After a short commitment to a State Mental Hospital, the trial court held another competency hearing and found Hernandez was competent to proceed (v1:45-56; 64-67; v3:441-451; v12:1289-1340). Dr. Saa again found Hernandez incompetent to proceed, suspecting he might be malingering, but noting he could be mentally ill and malingering (v1:69-71; v12:1289-1291, 1298-1303). Dr. Saa noted Hernandez claimed not to know the charges against him, the potential penalties, or the roles of the judge, jury, State Attorney, and Public Defender (v1:70).

Dr. Maher now found Hernandez competent, conceding that he might be mentally ill, but asserting assessment was prevented by his refusal to participate in evaluation (v1:66-67; v12:1304-1317). Dr. Maher believed he was malingering, but agreed mentally ill or incompetent persons may malinger (v1:64-66; v12:1306-1311, 1314-1315). Hernandez did not tell Dr. Maher he appreciated the charges, penal-

ties, or other criteria of competence, but Dr. Maher found him competent based on indirect evidence (v12:1311-1313, 1317).

Dr. Balzer, a psychologist at the State Hospital, believed Hernandez malingered, but he conceded a mentally ill person could malinger (v12:1321-1324, 1331-1334). Dr. Balzer and the hospital treatment team believed he suffered from no major psychiatric illness, he was too dangerous for the hospital, and he was competent (v12:1322-1335).

After the determination of competence and until trial, Hernandez was disruptive and disrespectful in court; complained of a lack of medical care and abuse in jail; complained about a lack of contact with his family; sought and was granted discharge of his original counsel; sought and was denied replacement of the second defense team; and refused to communicate with his new defense team (v1:91-92, 94-104, 108-110, 123-127; v4:5-35, 112-114, 118-138; v12:1343-1349, 1414-1420; s1:63-96, 102-110; s2:117-148, 155-156, 161-168, 182-184, 188-195).

At a competency hearing held on the day before trial, the trial court again found Hernandez competent (v4:125-126). Dr. Saa indicated he attempted to evaluate Hernandez, but he would not talk (v4:82, 84-85; v2:278-279). Dr. Saa felt it was improper to render an opinion on competence where Hernandez would not discuss the criteria of competence (v4:85-86; v2:278-279). Dr. Berland indicated Hernandez would not cooperate with an evaluation, and he could not form an opinion about Hernandez's mental illness to a medical certainty, but he believed he suffered a brain injury in an accident,

the accident caused a psychotic disturbance, and he was mentally ill (v4:88-105). Dr. Berland asserted Hernandez may be a crazy playing crazy, he should be hospitalized for evaluation, and he may be too mentally ill to proceed (v4:101-105).

Dr. Maher believed Hernandez was competent and met each of the individual criteria for competence, despite his refusal to discuss the criteria (v2:280-283; v4:39-43, 47-49, 55-75). Dr. Maher asserted Hernandez was suffering from an undiagnosed personality disorder, but his mental illness did not render him incompetent, and his demanding, stubborn behavior and his refusal to cooperate was a voluntary attempt to appear mentally impaired and incompetent (v4:40-42, 58-60, 69-75, 78). However, Dr. Maher was concerned that although Hernandez attempted to appear incompetent, he may be mentally ill (v4:77).

Defense counsel asserted he was perplexed by Dr. Maher's undue reliance on hospital reports, and his failure to engage Hernandez in any direct dialogue about the criteria of competence (v4:106-107, 114-115). Counsel believed it was irrational and incompetent for Hernandez to refuse to cooperate with those seeking to help him (v4:107-108). Dr. Maher originally said Hernandez did not appreciate the charges or the legal process, he spoke English poorly, and he was probably mentally ill, and nothing changed later (v4:109-111, 114-115, 119). Counsel noted Dr. Maher did not assert Hernandez could testify appropriately or responsively, and there were no indications that he could so testify (v4:108, 115-118).

The appellate record does not establish that anyone ever had direct evidence that Hernandez understood the charges, potential penalties, or legal process. Such was merely presumed from his refusal to cooperate with the mental health experts, the attorneys, and the trial court.

At the onset of the trial on August 21, 2001, Hernandez sought discharge of counsel who did not help him, he claimed the trial judge was violating the law, he asserted he was not guilty, he asked to confront a police officer, and he refused to behave or cooperate with counsel (v6:186-189). He was ordered removed from the courtroom (v6:189).

After the examination of prospective jurors was completed, Hernandez was present during selection of the jurors (v7:460-474), He again stated he did not want his attorneys, and now said he would represent himself (v7:471, 474, 478). The jury was sworn and instructed (v7:478-481). The trial court stated the Faretta hearing would be held in the morning (v7:482-483).

Upon the resumption of trial on August 22, 2001, the trial court initiated a Faretta inquiry (v7:488-518). However, Hernandez's responses to the trial court's questions about whether he understood the rights he was waiving were nonresponsive.

The colloquy included: most of the questions from the model colloquy in the comments to Florida Rule of Criminal Procedure 3.111; largely unresponsive replies and complaints unrelated to each question about the waiver of rights; replies to the competence portion of

the inquiry establishing he was 28 years old[1], he had up to six years of education, could not read or write English, he had been diagnosed and treated for mental illness, and he had one prior pro se court experience, appearing in traffic court with an interpreter; assertions of not receiving discovery and paperwork; and denials of repeated pro se requests for time to prepare (v7:488-503, 508-518).

The trial court's specific inquiry into Hernandez's understanding of the charges, potential penalties, or legal process establishes nothing:

> THE COURT: Do you understand the charges against you?
> THE DEFENDANT: That's what I want to make sure of.
> THE COURT: You're charged with two counts --
> THE DEFENDANT: I need the opportunity.
> THE COURT: -- of first degree murder. Do you understand that, sir?
> THE DEFENDANT: I am being accused of two counts of murder?
> THE COURT: Yes. You understand that?
> THE DEFENDANT: I am hearing and I understand the information that is against me, but I need the papers, the discovery, in order to be able to talk --
> THE COURT: Do you understand that the maximum penalty, if you're found guilty of the charges, is either death by electrocution or by lethal injection or life imprisonment without the possibility of parole. Do you understand that, sir?
> THE DEFENDANT: Well, I am not going to say yes, but if you're going to base yourself on the information that the police gave you and the information is incorrect, you're going to base yourself on that information.
> THE COURT: Do you understand that if you are not a citizen of the United States and if you're found guilty, you could be deported from this country, excluded from entering this country

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[1] The criminal report affidavit indicates Hernandez's birth date was January 15, 1963 (v1:17). Dr. Saa noted in 1999 that he was a poor informant who said he was approximately 40 years old (v1:42). The South Florida Evaluation and Treatment Center reported in 1999 that he was 36 years old and "[h]e appeared his stated age" (v1:50, 52). In 2000, Dr. Martinez indicated Hernandez was 37 years old (v1:98). Hernandez's youngest sister indicated she was 32 years old in 2001 (v10:997, 1001, 1003).

in the future and denied the opportunity to become a naturalized citizen?

THE DEFENDANT: I am not guilty, sir, of the accusation that's being made against me.

THE COURT: My question to you -- I would ask that you please respond to the question, sir.

THE DEFENDANT: Could you tell me that question again, please?

THE COURT: Do you understand if you are not a citizen of the United States and you're found guilty, you could be deported from the country, excluded from entering the country in the future and denied the opportunity to become a naturalized citizen?

THE DEFENDANT: From something that I am guilty? As I told you, I am not guilty of such an action.

THE COURT: Do you have any questions about the charges or the possible consequences and penalties if you're found guilty as I have explained them to you?

THE DEFENDANT: What did you say?

THE COURT: Do you have any questions about the charges or the possible consequences and penalties if you're found guilty as I have explained them to you?

THE DEFENDANT: I don't understand that question very well.

THE COURT: Let me ask you some other questions to determine whether you're competent to make a knowing and competent waiver of counsel. How old are you?

(v7:509-511).

The problem in this case is not whether questions were asked which could have established a knowing and voluntary waiver of counsel. The questions asked in the Faretta inquiry were substantially adequate. However, the record does not establish Hernandez understood the risks of self-representation, and there was no knowing, intelligent, and voluntary waiver of counsel.

> To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and

> circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Von Moltke v. Gillies, 332 U.S. 708, 723 (1948).The ultimate test is the defendant's understanding. United States v. Fant, 890 F.2d 408 (11th Cir. 1989); U.S. v. Balough, 820 F.2d 1485, 1487-1488 (9th Cir. 1987) ("Throughout this inquiry, we must focus on what the defendant understood, rather than on what the court said or understood."), cert. denied 525 U.S. 1083 (1999). The trial court clearly erred in finding a literate, competent, understanding, and voluntary waiver of counsel. The cause must be reversed for a new trial.

COMPETENCY TO PROCEED

The State erroneously asserts that "At no time was a defense request for a competency determination denied by the trial court." (Answer Brief at 27), and that the trial court held a proper hearing on the post-guilt phase pre-penalty phase motion to reconsider the competency of Hernandez (Answer Brief at 33-35)[2]. The trial court denied a request for reconsideration of a competency during a hearing on the motion for such, but the hearing was not a proper proceeding

[2] In its statement of case and facts, the State also mistakenly stated "Even after the jury verdict of guilt, the trial court, once again, ordered a competency evaluation, on September 5, 2001. (II/322-326)." However, the order filed on September 5, 2001 was a pretrial order for competency evaluation, not a new post-guilt phase order for competency evaluation (v2:322-326).

to determine competence to proceed pursuant to Florida Rules of Criminal Procedure.

On November 19, 2001, before the penalty phase jury proceeding, the defense moved for reconsideration of competence, based on new more definitive testimony of Dr. Berland that Hernandez was mentally ill and incompetent (v12:1398; v3:334-335). Dr. Berland testified he had now obtained clear evidence of mental illness through a conversation with Hernandez's ex-wife (v12:1401-1407). Dr. Berland asserted Hernandez's behavior during the marriage was consistent with delusional paranoid thinking, he is psychotic, and he is incompetent to proceed (v12:1401-1403).

Hernandez had a due process right to a determination of competency where there was a reasonable ground to doubt his competency. Carrion v. State, Case No. 5D03-3410 (Fla. 5th DCA Nov. 21, 2003); Drope v. Missouri, 420 U.S. 162 (1975).

> If, at any material stage of a criminal proceeding the court of its own motion, or on motion of counsel for the defendant ... has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition ... and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing.

Fla.R.Crim.P. 3.210(b). Sentencing is such a "material stage." Fla.R.Crim.P. 3.214.

The standard for determining whether a competency hearing is required is whether there are reasonable grounds to believe the defendant may be incompetent, not whether he actually is incompetent. Tingle v. State, 536 So. 2d 202, 203 (Fla. 1988). "If a `reasonable

ground' exists, the language of rule 3.210(b) is mandatory." Boggs v. State, 575 So. 2d 1274, 1275 (Fla. 1991). An experts's opinion that a defendant is not competent provides a reasonable ground for a formal competency hearing. See Kothman v. State, 442 So. 2d 357 (Fla. 1st DCA 1983); Boggs v. State, 375 So. 2d 604 (Fla. 2d DCA 1979).

The obligation to hold a competency hearing upon reasonable grounds "is a continuing one." Nowitzke v. State, 572 So. 2d 1346, 1349 (Fla. 1990). "[A] prior determination of competency does not control when new evidence suggests the defendant is at the current time incompetent." Nowitzke, 572 So. 2d at 1349.

The trial court denied the motion and found Hernandez was competent, relying on the prior evaluation of Dr. Maher and the trial court's observations of Hernandez's behavior during the trial (v12:1407-1409). The trial court failed to order Hernandez to be examined by at least two experts who are required to submit written reports prior to the date of a proper competency hearing as required the Florida Rules of Criminal Procedure. See Tingle, 536 So. 2d at 204 ("Under this rule [Fla.R.Crim.P. 3.210], prior to hearing, the defendant will be examined by at least two experts who are required to provide written reports to the court pursuant to Florida Rule of Criminal Procedure 3.212.").

The trial court erred in declaring Hernandez competent relying on past medical reports and the court's observation of him at trial several months earlier. Lane v. State, 388 So. 2d 1022, 1025-1026 (Fla. 1985).

> The finding of competence to stand trial made nine months prior to the hearing does not control in view of the evidence of possible incompetency presented by the experts at the hearing on the motion for continuance. In Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955), reversed, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956), the facts in the lower court opinion reflected that the defendant had no mental disorder a month prior to trial. The United States Supreme Court reversed, requiring the trial court to have a hearing on the sanity of the defendant at the time of trial. Further, the issue of competency to stand trial clearly can be raised any time, including during trial proceedings. ... What activates the need for a competency hearing is some type of irrational behavior or evidence of mental illness that would raise a doubt as to the defendant's present competence. [Citations deleted.]

Lane, 388 So. 2d at 1025-1026. See also Carrion v. State, Case No. 5D03-3410 (Fla. 5th DCA Nov. 21, 2003) ("The judge's subsequent extemporaneous evaluation of competency based on the petitioner's return to school is insufficient to ensure that Mr. Carrion is not deprived of his due process right not to be tried while incompetent."). As in Nowitzke, 572 So. 2d at 1349, the trial court erroneously denied motion for competency hearing "on the basis of an evaluation made three months earlier."

The trial court failed to hold a proper competency hearing before the penalty phase proceedings. "[A] hearing to determine whether a criminal defendant was competent at the time of trial cannot be held retroactively." Carrion v. State, Case No. 5D03-3410 (Fla. 5th DCA Nov. 21, 2003), citing Tingle, 536 So. 2d at 204 and Scott v. State, 420 So. 2d 595, 598 (Fla. 1982). Because Hernandez was entitled to a proper competency hearing prior to the penalty

phase proceedings, the sentence must be vacated and the cause remanded for new penalty phase proceedings if he is properly determined to be competent. Tingle, 536 So. 2d at 204.

ISSUE II

THE TRIAL COURT ERRED IN DENYING THE PRO SE MOTION FOR A CONTINUANCE IN ORDER TO PREPARE FOR TRIAL.

Appellant relies on the reasons, arguments, and authorities presented in his Initial Brief.

ISSUE III

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR A PET SCAN.

Appellant relies on the reasons, arguments, and authorities presented in his Initial Brief.

ISSUE IV

THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION AS TO COUNT ONE.

Appellant relies on the reasons, arguments, and authorities presented in his Initial Brief. In addition, Appellant presents the following in response to Appellee's Answer Brief.

The State asserts the motion for judgment of acquittal was not specific enough to preserve this issue for appeal. Answer Brief at 51. However, as was recently explained by this Court in F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003), this argument is inapplicable

to capital cases. There are two exceptions to the rule that "[a] boilerplate objection or motion is inadequate." F.B., 852 So.2d at 230.

> The first exception is based on the longstanding appellate rule under which, in death penalty cases, this Court is required to review the sufficiency of the evidence to support the conviction. See Fla. R. App. P. 9.140(i). This Court always reviews such cases to determine whether competent, substantial evidence supports the verdict, regardless of whether the issue is preserved for review or even raised on appeal. See, e.g., Brooks v. State, 762 So. 2d 879 (Fla. 2000); Woods v. State, 733 So. 2d 980 (Fla. 1999); Archer v. State, 613 So. 2d 446 (Fla. 1993).

F.B., 852 So.2d at 230.

ISSUE V

THE DEATH PENALTY IS NOT APPROPRIATE ON EITHER COUNT.

Appellant relies on the reasons, arguments, and authorities presented in his Initial Brief.

ISSUE VI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellant relies on the reasons, arguments, and authorities presented in his Initial Brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Kimberly Nolen Hopkins, Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this _____ day of November, 2003.

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Respectfully submitted,

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