IN THE SUPREME COURT OF FLORIDA

JOHN TROY,

Appellant,

v. CASE NO. SC04-332

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, STATE OF FLORIDA

_____

CROSS REPLY BRIEF OF APPELLEE

_____

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No. 0134101
Concourse Center #4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
Phone: (813) 287-7910
Fax: (813) 281-5501

COUNSEL FOR APPELLEE

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SUMMARY OF THE ARGUMENT

CROSS APPEAL ISSUE I: The State preserved the issue for appellate review and put the lower court on notice of the desire to have an expert examine the defendant. This Court should rule that the mere failure to give timely notice does not deprive the trial court of ordering an evaluation to insure a level playing field.

CROSS APPEAL ISSUE II: Fairness requires that where the defendant chooses to give a portion of his statement made to a law enforcement officer that the court be allowed to hear and consider the entirety of the defendant's statement to put the matter in context. Appellant's introduction of a portion results in a waiver of his previously-gained right to suppress the statements.

ARGUMENT

CROSS APPEAL ISSUE I

WHETHER THE LOWER COURT ERRED IN DETERMINING THAT THE STATE'S FAILURE TO TIMELY FILE ITS WRITTEN NOTICE OF SEEKING THE DEATH PENALTY PURSUANT TO RULE 3.202 REQUIRED THAT THE STATE NOT BE PERMITTED TO HAVE ITS EXPERT EVALUATE THE DEFENDANT PRIOR TO PENALTY PHASE AS COMMANDED BY GONZALEZ V. STATE, 829 SO. 2D 277 (FLA. 2D DCA 2002).

Appellant Troy first contends that the State's complaint on cross-appeal that the State was improperly denied the opportunity to have its expert evaluate the defendant because of the failure to timely file its written notice seeking the death penalty and the trial court's reliance on Gonzalez v. State, 829 So. 2d 277 (Fla. 2d DCA 2002) has not been adequately preserved for appellate review because the lower court granted the State's pre-trial motion to compel discovery. Troy also contends that the prosecution's articulated objection at the Spencer hearing was untimely. The State respectfully submits that the State's complaint below adequately apprised the lower court that the discovery rules should be interpreted to insure a level playing field as intended by Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994) and other cases and that the State's and the lower court's hands had been tied by Gonzalez.

The State submits that the record adequately demonstrates the issue was properly preserved in the lower court. At the Spencer hearing on November 21, 2003, for example, prosecutor

Ms. Riva represented:

> MS. RIVA: That's correct, Judge. I would, however, like to make a record regarding evidence that we may have presented had the Court ruled differently regarding certain motions to compel, and I could go ahead and do that now.
>
> THE COURT: Sure, go ahead.
>
> MS. RIVA: I had already raised this issue, Judge, so I won't belabor it, but I want to make sure I put a document into evidence. This is regarding the inability to have a State expert examine the defendant for a psychological evaluation. We had hired a doctor, Dr. Meyers, to review records that we had in our possession regarding the defendant. However, he was not able to actually perform an examination, and this Court's hands were tied because of the Second DCA case of State versus Gonzales. I want to get a cite for that. Actually, it is Gonzales V. State. I don't have the actual case cite, but I have the case number, 2D-021646. And the issue involved the State giving late notice of its intent to seek the death penalty, thereby, according to the rule and according to the case of Gonzales, precluding the State from being able to have this examination done.
>
> What I wanted to do is just be sure that I placed on the record an objection to the Gonzales case and that the State did seek to have this further evidence done.
>
> (emphasis supplied)(R X, 1682-1683).

The State respectfully submits that the Spencer hearing was not the first time the prosecution complained about the Gonzalez ruling. After the jury returned with its guilty verdict, at a hearing on August 22, 2003, prosecutor Riva asserted below:

MS. RIVA: Judge, I first would like to take up the issue of any expert witnesses that the defense may plan to call. I am aware that when the State filed its motion to compel, any defense witnesses, the Court did enter an order on that motion to compel, specifically citing the case of Gonzales, which is a Second District Court of Appeal case.

The State's position was at that time and still remains that we oppose the ruling in Gonzales obviously. We know that the Court is required to follow the ruling in Gonzales; however, the State feels that it has been prejudicial to not have the expert witnesses in advance of the guilt phase. But that being said, now that we have completed the guilt phase, under the rule and even under Gonzales, the State's position is we are entitled to receive the expert witnesses that the State -- excuse me, that the defense may rely upon in the penalty phase.

(emphasis supplied)(R XXVI, 2238-2239).

* * *

THE COURT: Is the defense resisting that?

MR. TEBRUGGE: Judge, in my opinion, this is an entirely unclear and ambiguous state of the law on this point, and therefore, I will abide by whatever ruling the Court makes on that point. As the Court knows, the prosecution did not file their notice of intent to seek the death penalty under rule 3.202 and that's the rule that specifically provides for the disclosure of expert witnesses. It's basically been my position all along that if you don't comply with rule 3.202, you don't get this type of discovery.

THE COURT: Okay. I think the case does talk about that though, doesn't it?

MS. RIVA: Well, the case, Judge, talks about getting this discovery pre-guilt, and the argument the defense made in Gonzales was it is work product because it may not ever come to pass. Now we are post-guilt, pre-penalty, and certainly the State is

> entitled at this point to know the witnesses. What we are foreclosed from doing is having our own expert examine the defendant.
>
> THE COURT: Well, I think my reading of that case was that the penalty was for the State on the guilt phase. And I think it makes sense to have at least disclosure of the names of the witnesses at this point. So I'm going to order that expert witnesses' names be disclosed to the State.
>
> MR. TEBRUGGE: I am giving the prosecution that document right now, Your Honor. I'll give the Court the document as well so that you can refer to it and file it with the clerk. (R XXVI, 2239-2240).

While there may be some ambiguity, taken in totality it appears that the prosecutor was continuously objecting to the Gonzalez preclusion of mental health examination and asserting that the State had been prejudiced, a contention repeated at the Spencer hearing.

This Court should take the opportunity presented in the instant case to address whether Gonzalez was correctly decided.

As to the merits, Appellant Troy maintains that with the adoption of Rule 3.202, such decisions as Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994); Elledge v. State, 706 So. 2d 1340 (Fla. 1997); Kearse v. State, 770 So. 2d 1119 (Fla. 2000); and Davis v. State, 698 So. 2d 1182 (Fla. 1997) are now irrelevant. Appellee disagrees. The legitimate policy reason of Dillbeck to maintain a level playing field for consideration of mental health expert witnesses at penalty phase remains. Rule 3.202 itself does not provide any specific sanction on the State for

failure to timely file the notice of seeking the death penalty. This Court should reject the argument approved in Gonzalez that

> . . . having to undergo a mental examination, which the rule would require after conviction, would cause irreparable damage that cannot be cured on appeal from a final judgment of conviction. (829 So. 2d 277, 279).

This Court should consider the State's violation of the notice requirement of this procedural rule as it does similar violations of other procedural rules, i.e., that a defendant must show resulting prejudice for the violation of the timing provisions of a rule. See Richardson v. State, 246 So. 2d 771 (Fla. 1971); Morgan v. State, 453 So. 2d 394 (Fla. 1984); Miller v. State, 632 So. 2d 243 (Fla. 3d DCA 1994); Slaughter v. State, 330 So. 2d 156 (Fla. 4th DCA 1976). Where, as here, the State was merely untimely in filing its notice of seeking the death penalty, the lower could should retain discretion to order a mental health evaluation by the State's expert to ensure a level

playing filed endorsed by Dillbeck.[1]

CROSS APPEAL ISSUE II

WHETHER THE LOWER COURT INCORRECTLY REFUSED TO CONSIDER THE TESTIMONY OF DETECTIVE GRODOSKI AT THE SPENCER HEARING THAT WAS BENEFICIAL TO THE STATE AND IN FAILING TO FIND THE AVOID ARREST AGGRAVATOR.

The issue presented by the Spencer hearing testimony of Detective Grodoski is one of fairness. Prior to trial the defense successfully moved to suppress Troy's statements to law enforcement officers. The statements were voluntary but

[1] In a footnote Appellant contends that the State relies on procedural default arguments in Issue IV that are "sandbagging." Troy argues that the proffer of Galemore's testimony was adequate because the trial judge indicated he understood the witness would say they take strong measures to keep drugs out of prison but small amounts get in from time to time and that the State had no objection to the proffer. (Reply Brief, pp. 13-14). Appellee disagrees that there has been any sandbagging. Indeed, the State acknowledged in its brief at page 64 that Galemore would say small amounts of drugs get in from time to time but they take strong measures to keep them out, and that the court accepted this proffer. If that is all Galemore had to say, Appellee acknowledges his proffer is before the court. What the State was arguing at pages 64 and 65 of the brief with the citation to Kormondy v. State, 845 So. 2d 41 (Fla. 2003) and other cases is that this Court cannot discern the substance of Galemore's testimony -- if any -- on the frequency and extent of drug use in prison (either on death row or general population) and the success or lack thereof in preventing it. If the State erroneously presumed that Appellant was arguing Galemore had more to say than he did, we apologize for the error.

obtained in violation of Arizona v. Roberson, 486 U.S. 675 (1988). Indeed, the defense elicited at the Spencer hearing that Appellant answered all questions and did not terminate questioning (R X, 1736). But having succeeded in the effort to suppress the State's use of Appellant's admissions at trial, the defense then sought unfairly to obtain the beneficial results of it without exposure to proper challenge. Troy sought first of all to be allowed to make an allocution statement to the jury, ostensibly to declare his remorse – but without the usual requirement of taking an oath and being subject to cross-examination whereby the jury could discern his veracity and credibility. No legitimate explanation has been put forward why Mr. Troy should be awarded immunity from cross-examination. If legal scholars are correct in labeling cross-examination the greatest engine ever invented for discovering the truth, simply to abandon it merely to accommodate this Defendant (or his trial counsel who acknowledged that allowing cross-examination would be devastating to his client's interest) makes no sense at all. This Court has previously refused to recognize a defense privilege to escape cross-examination when submitting mitigation evidence. See Johnson v. State, 608 So. 2d 4, 10 (Fla. 1992); Chandler v. State, 702 So. 2d 186 (Fla. 1997).

Distressed that the trial court refused to recognize his to-date unrecognizable right to submit an unchallengeable favorable

version of events, the defense selected the next tactic of submitting a limited and selective snippet of Troy's conversation with law enforcement officers at the jail. Again he sought to leave an incomplete and inaccurate impression. In essence he hoped to repeat only favorable words of the Defendant given through Detective Grodoski and at the same time insisting that Grodoski not reveal other admissions of Troy that provide a fuller and more complete explanation.

Appellee submits that Troy's use of Grodoski at the suppression hearing constituted a waiver and an abandonment of his previously-earned right to preclude the State from introducing the suppressed statement in its case in chief at trial. The doctrine of fairness and completeness mandates that the judge should have considered the totality of Troy's admissions to Grodoski, including his acknowledgement that he killed Bonnie Carroll for the purpose of witness elimination.

Appellant argues that the rule of completeness applies only to writings or recorded statements. But as Professor Ehrhardt has observed:

> Although the language of section 90.108 does not cover testimony regarding part of a conversation, a similar consideration of the potential for unfairness may require the admission of the remainder of a conversation to the extent necessary to remove any potential for prejudice that may result from the original evidence being taken out of context.

Ehrhardt, Florida Evidence, § 108.1, p. 54 (2005).

See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("whole of conversation"); Louette v. State, 152 Fla. 495, 12 So. 2d 168, 174 (Fla. 1943)("entire conversation or admission"); Eberhardt v. State, 550 So. 2d 102 (Fla. 1st DCA 1989); Guerrero v. State, 532 So. 2d 75 (Fla. 3d DCA 1988); United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987); Johnson v. State, 653 So. 2d 1074, 1075 (Fla. 3d DCA 1995)(the rule of completeness extends not only to the same conversation but to other conversations that in fairness ought to be considered to accurately perceive what has transpired).

In the instant case Appellant called Detective Grodoski in essence to repeat what the Defendant had stated. Certainly if Troy himself had been called to the stand to testify that he had expressed remorse and acknowledged his responsibility at the county jail, the State would have been allowed to cross-examine and challenge his credibility concerning whether his expression of remorse was sincere and whether his acknowledgement of responsibility was as complete as the defense urged. Instead of having Troy testify, the defense elicited a portion of Troy's comments through Detective Grodoski. It is only fair to use cross-examination to elicit the more complete information Troy provided law enforcement officers. See Chandler v. State, 702 So. 2d 186, 195-196 (Fla. 1997)(noting that all witnesses who

testify during a trial place their credibility in issue and that cross-examination is not confined to the identical details testified to in chief but extends to its entire subject matter and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief, citing Geralds v. State, 674 So. 2d 96 (Fla. 1996) and Coco v. State, 62 So. 2d 892 (Fla. 1953)).

The evidence adduced at the Spencer hearing amply demonstrated the presence of the avoid arrest-witness elimination aggravator. Troy told Detective Grodoski about tying victim Bonnie Carroll with an extension cord, that he thought she would call the police if he let her go and that he knew he would have to eliminate her (R X, 1703). Appellant thought that his seventeen months for a drug violation would now turn into seventeen years imprisonment (R X, 1703-04). Troy stated that he cut her and thought he had killed her, that he dropped his knife and was able to get the piece of glass away from her and stab her with that glass (R X, 1704). At one point he stabbed her enough so that he thought she was dead. He then went to get her purse, money and keys in the kitchen. When he heard a noise coming from the bedroom he armed himself with a kitchen knife, walked back into the bedroom and found Bonnie trying to get up off the floor. He couldn't believe that she wasn't dead. He went in and stabbed her some more. He thought

he cut her throat at that time (R X, 1704-05). He had to eliminate her so she wouldn't be a witness, to stop her from talking once she got out (R X, 1708, 1728).

Appellant in the instant case by choosing to use Detective Grodoski as the conduit to repeat a self-serving portion of his admissions waived his prior Constitutional objections to the use of his statements knowing – just as Chandler did – that cross-examination would extend to include the matters omitted on direct examination.

Troy's attempt to show through the testimony of Detective Grodoski at the Spencer hearing that Appellant had accepted full responsibility for his criminal conduct and was remorseful (by isolated and selective admissions) was an incomplete and inaccurate portrayal. The trial court was entitled to hear and evaluate and weigh his manipulative conduct after the defense chose to present a portion of it.

Appellant argued below that "the fact that at the first opportunity the defendant confessed is a significant mitigating circumstance" (R X, 1700). Tempering the idea that Troy eagerly and immediately sought to accept total culpability is the fact that Troy denied a request to put his statement on tape because he needed to have something for his attorney to work with (R X,

1708).[2] After the defense pursued on re-direct examination Troy's statements to the officer pertaining to drug use, the prosecutor on cross-examination of Detective Grodoski elicited that Appellant said he felt that Paxil was part of the reason why this happened, that he had seen a news program that Paxil causes users to be violent and that the officers "should check it out" (R X, 1716). Thus, while acknowledging some personal

[2]Appellee notes that the trial court even after choosing not to consider the portion of Detective Grodoski's testimony that was favorable to the State at the Spencer hearing (R X, 1635-36), still rejected in part as mitigation Troy's alleged cooperation with police:

> Part of this mitigating circumstance is not supported by the evidence. He did not confess guilt to law enforcement the first chance he got. Troy's first opportunity to confess was mid-afternoon on September 12, when he was stopped by the Naples police in the car he stole from Tracie Burchette. At that time his focus was obfuscation not cooperation.
>
> He was interviewed and video taped by Officer Angell at the arrest site. At that time he was conjuring a story about how he had borrowed the car with Burchette's consent and was in the area looking for an apartment. He was trying to manufacture a plausible explanation for being in someone else's car.
>
> It is true that he dropped the charade later once the detectives let him know he was connected to Burchette's beating and Bonnie Carroll's murder, but this did not occur at his first contact with police. He offered to plead guilty to all charges, provided the State would drop the death penalty, but as to this mitigating circumstance the court assigns it little weight. (R X, 1642).

responsibility, Troy also wanted to blame drugs and others.

As to remorse, while it is true that remorse can be mitigating, insincere expressions of remorse would be less so. The trial court was entitled to hear all the circumstances about his expressed remorse to judge its validity. Troy was not crying and didn't show such physical symptoms of illness or vomiting (R X, 1736). In any event, at the conclusion of the Spencer hearing, Appellant made his own statement in allocution to the trial court, at which time he declared that from the beginning it had been his intention to take full responsibility for what he did and that he had "mixed emotions about even getting the confession suppressed with my attorney" (R X, 1739). The trial court subsequently dealt with this potential mitigator in the Sentencing Order (R X, 1644-45).[3]

[3] The trial court acknowledged there was record support for expressed remorse as a mitigator and that Troy spoke directly to the issue at the Spencer hearing. The court noted however that although he had told Debra Troy that he felt remorse immediately after the attack on Bonnie Carroll, it did not keep him from brutalizing Tracie Burchette a few hours later. Troy's "pattern is to commit an atrocity and then say he feels remorse over it" (R X, 1645). In the meeting with Melanie Kozak, he was not distraught but acted normally -- another day for doing drugs. His behavior with Tracie Burchette did not indicate any remorse for Bonnie Carroll. His mindset was the same as before -- get money any way he could and get out of town. When first arrested and interviewed he expressed no remorse; he only invented a cover story to explain his possession of Tracie Burchette's stolen car. In short, the trial court concluded: "His remorse is the kind that is inspired by an arrest. While he has expressed remorse, the court finds it is not sincere in a meaningful sense for the purpose of mitigation. The court assigns it little weight." (R X, 1645).

The courts have acknowledged that a statement inadmissible because taken in violation of a defendant's Miranda rights can be introduced to impeach the defendant when he testifies at trial; the privilege against self-incrimination does not include the right to commit perjury. See Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975); Washington v. State, 432 So. 2d 44, 46 (Fla. 1983). See also Michigan v. Harvey, 494 U.S. 344 (1990)(extending rationale of Harris v. New York to cases where defendant's statement had been obtained in violation of the Sixth Amendment right to counsel); United States v. Havens, 446 U.S. 620 (1980)(illegally seized evidence admissible to contradict defendant's statements made during cross-examination). Troy's statements made to law enforcement officers at the jail were voluntary; indeed the defense emphasized through Detective Grodoski at the Spencer hearing Appellant's cooperation and willingness to answer the officer's questions (R X, 1736).

The Court should determine that the doctrine of fairness and completeness permits the use of Troy's statements to rebut his alleged remorse and cooperation and in addition to substantively prove the aggravating factor of avoid arrest through witness elimination.

CONCLUSION

Irrespective of the disposition of the cross-appeal issues, this Court should affirm the judgment and the sentence of death imposed by the trial court in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P. O. Box 9000, Drawer PD, Bartow, Florida 33831, this 18th day of October, 2005.

CERTIFICATE OF FONT 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,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT J. LANDRY
Assistant Attorney General
Florida Bar No. 0134101
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813) 287-7910
(813) 281-5501 Facsimile

COUNSEL FOR APPELLEE