IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant, Case No. SC08-1963

vs.

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Oscar Ray Bolin, Jr., will rely upon the summary of the case and facts as set forth in the Initial Brief. This Reply Brief will address the State's claims in each of the issues.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM I WHERE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE LAY OPINION TESTIMONY OF STATE WITNESS DANNY FERNS THAT HE OBSERVED BLOOD ON THE GRASS AT THE APPELLANT'S HOME ON THE DAY AFTER THE CRIME WHERE FERNS WAS NOT QUALIFIED TO TESTIFY AS TO THE IDENTIFICATION OF BLOOD AND THE TESTIMONY CORROBORATED THAT OF THE STATE'S KEY WITNESS WHOSE CREDIBILITY WAS VITAL TO THE STATE'S CASE.

In the Initial Brief, Mr. Bolin argued that a lay witness could not testify that a substance observed by the lay witness was blood. This argument was predicated on Section 90.701 (Fla. Stat. 2001) of the evidence code which addresses lay witness opinion testimony and this Court's opinion in Gantling v. State, 40 Fla. 237, 23 So. 857 (Fla. 1898). The evidence code requires specific prerequisites prior to the admission of opinion testimony by lay experts and specifically excludes lay opinion testimony when the

opinion is one which requires specialized knowledge. This Court, in Gantling, unequivocally held that a lay person may not opine that a substance they observe is blood, although they may describe the physical characteristics of what they observe. The State's response in the Answer Brief fails to address either the evidence code or Gantling, but appears to attempt to mislead this Court with an argument that Gantling has been overturned in a manner that can only be described as disingenuous.

The Answer Brief states "Lastly, this Court has noted on many occasions the identification of blood by lay witness."[Answer Brief p. 24], indicating that lay witness identification of blood has been specifically authorized by this Court. Following this statement are citations to five cases with a brief statement in parenthesis about the presence of blood and how it was purportedly identified. Not one of these cases stands for the proposition the State argues the cases support. None of these cases have held that a lay witness may testify that it is their opinion that a substance they observe is blood. Further, the State's position is clearly refuted by other decisions of this Court and the district appellate courts, a fact the State has failed to acknowledge in their brief.

The five cases cited by the State on page 24 of the Answer Brief have two things in common: (1) in each case the reference to blood was contained only in the factual summary in the beginning of the opinion with no references to the evidentiary basis for the testimony and (2) no appellate issue was raised before this Court in any of those five cases which addressed whether or not a lay witness could give opinion testimony that a substance was blood. The reference in the factual outline of an appellate opinion does not provide a basis for the State to claim that this Court has approved of the admission of lay witness testimony, for to do so would require this Court to hold that information contained in a factual summary of an opinion that may not even amount to dicta can become the law of the case and expressly overrule prior opinions from the Court on a specific issue.

Whether or not a statement in an appellate court's opinion setting forth a factual summary of the lower court proceedings of a case rises to the level of dicta is highly questionable. Undersigned counsel could find no case which would support the position that the factual summary of an opinion constitutes even dicta. However, if this Court were to consider the outline or summary of the evidence

portion of an appellate opinion to be dicta, there would be no support for the State's position that such dicta operates to overturn an express decision on a specific issue of this Court.

Dicta is defined by Black's Law Dictionary as "Opinions of a judge which do not embody the resolution or determination of the court. Expressions in Court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases." Blacks Law Dictionary, Fourth Edition (1989), p. 408; Beem v. Beem, 311 So.2d 387 (Fla. 4th DCA 1975). Thus, a statement by the court in an opinion that is not necessary to the resolution of the issues presented in the case is dicta. Soto v. State, 711 So.2d 1275 (Fla. 4th DCA 1998). In Schmitt v. State, 590 So.2d 404 (Fla. 1991), dicta was identified as statements in an opinion for which there is no elaboration, the statement is not part of the holding, it was not briefed, and not necessary to the resolution of the case. Under this definition of dicta, statements in the appellate opinion which summarize of the facts of the case cannot even really be considered dicta. The State's Answer Brief fails to acknowledge that in the cases cited for the proposition

that a lay witness can opine that a substance is blood do not address that issue, but contain only statements in the preliminary factual summary that a victim was found in a pool of blood [Davis v. State, 586 So.2d 1038, 1040 (Fla. 1991)] or the defendant was seen at some point with blood on his clothes [Thorp v. State, 777 So.2d 385, 386 (Fla. 2000); Rose v. State, 774 So.2d 629, 632-633 (Fla. 2000); King v. State, 390 So.2d 315, 317 (Fla. 1980)] or that blood was observed on the floor [Moody v. State, 418 So. 2d 989 (Fla. 1982)]. These factual statements in the opinion summarizing the evidence from the trial do not qualify as dicta, yet even if these type statements were to qualify as dicta, the statements would still not rise to the level of a direct reversal of Gantling as the State argues has occurred.

Facts recited in an opinion which are not part of the arguments in a case are, at best, dicta. Adams v. Aetna, 574 So.2d 1142 (Fla. 1st DCA 1991). Dicta is not the holding of a case. Even if considered to be dicta, this Court's statements in an opinion which summarize the facts adduced from the evidence at trial are not the holding of the Court. If the factual summaries are dicta, the State's position that Gantling was overruled by dicta is completely

unsupported by the law. So the State's argument must rest on the proposition that the factual summaries in a case can constitute the holding of a case, and did so in the five cases cited in the Answer Brief on page 24. This position is wholly without merit.

A holding is the decisional path or path of reasoning a court uses to reach its decision. In order to constitute the "holding" of a case, the language of the opinion must be addressed to (1) an issue that is actually decided by the court, (2) must be based on the facts of the case, and (3) must lead to the judgment of the court. State v. Yule, 905 So.2d 251 (Fla. 2d DCA 2005). Under this definition of a "holding", no argument can support the position that the statements in the factual recitation portion of an opinion can constitute the "holding" of a case unless those statements later meet the three-part threshold requirement. In none of the five cases cited by the State did this occur; thus there is no holding from this Court that a lay witness can give opinion testimony that a substance is blood.

Only one of five cases cited by the State even addressed an issue related to lay witness opinion testimony. In Thorp one of the primary issues was whether

or not a lay witness, a jail house snitch, could testify that it was his opinion that the defendant's statement that he and another man "did a hooker" meant, in street parlance, that the defendant had killed the prostitute. This Court held that the lay witness could not offer opinion testimony, noting that the testimony of the jail house snitch had the effect of converting the defendant's admission to a crime into a confession of murder. This Court affirmed that a lay witness may not give opinion testimony. At no point did this Court address whether or not a lay person properly testified as an expert that blood was observed on the defendant's clothes.

The remaining four cases do not even contain issues that addressed lay witness opinion testimony on any subject. In Rose the issue before this Court was a Giglio claim related to the State's failure to disclose a deal with two lay witnesses.

The State's citation in the Answer Brief to Moody v. State, 440 So. 2d 989 (Fla. 1982), is obviously incorrect, as that citation refers to two cases from Louisiana.[Answer Brief, p.24] Of the 48 cases identified by Westlaw as containing "Moody" in the case-style, Moody v. State, 418 So.2d 989 (Fla. 1982), is probably the case

the State is relying upon. Moody v. State, 418 So. 2d 989 (Fla. 1982), contained a similar statement to that referred to in the Sate's brief where in the factual summary the Court observes that there was "blood on the floor". However, the issues on appeal in Moody related to voir dire, the jury instructions, and the penalty phase. Ultimately, reversal for a new penalty phase was ordered. The only other reference in Moody to blood is a second statement in the factual summary that blood found on Moody's pants was the same type as the victims. This statement leads to a logical conclusion that some scientific testing, likely serology, was done and the results of that scientific testing were admitted as evidence. If not, we must conclude that the serological blood type can now also be discerned by mere observation and does not require scientific testing. This Court did not address whether or not a lay witness can testify that a substance is blood, so there is no holding on this issue in Moody.

Similarly, no issue regarding lay witness opinion testimony was presented in King v. State, 390 So.2d 315 (Fla. 1980). The factual summary contains a statement that blood was observed on the defendant's pants without

reference to the source of this testimony. There is an additional reference in the factual summary that indicates that scientific testing on blood was done and evidence of the results of this testing was admitted into evidence based on the further statement in the factual summary that the defendant's blood type was found in the vaginal washings from the victim. Again, no appellate issues addressed lay witness opinion testimony on matters which require scientific testing in King.

Undersigned counsel could find no case where this Court has specifically addressed and overruled Gantling. The State has failed to cite to any case directly overruling Gantling, but chooses to make the argument that Gantling has been overruled in a manner that is not supported in law or fact. Statements contained in a factual summary of an appellate opinion arguably do not even constitute dicta. Even if such statements rose to the level of dicta, none of the cases cited by the State contain a holding by this Court which overrules Gantling because none of those five cases addressed the issue presented in Gantling or in this case- whether or not a lay witness may opine that a substance they observe is blood.

This Court has explicitly stated that it does not

intentionally overrule itself *sub silentio*. In Puryear v. State, 810 So.2d 901 (Fla. 2002), this Court stated explicitly that if this Court makes an express holding and if, in a subsequent case, there appears to be dicta contrary to that express holding in the first case on the same issue, the lower courts are to apply the express holding of the former decision until and unless this Court expressly and specifically overturns the former decision. Applying Puryear to this case the only conclusion that is supported by law and fact is that Gantling remains the law from this Court. There is no opinion from this Court subsequent to Gantling which addresses the same issues directly. There is no subsequent case which contains contrary dicta and there is no subsequent opinion from this Court expressly overruling Gantling. This Court does not overrule itself *sub silentio*, therefore Gantling is the controlling authority.

The State's argument to this Court must be that the statements made in the factual summaries of the five cases cited on page 24 of the Answer Brief have overruled Gantling *sub silentio.* This argument is not based on law or fact and is absolutely contrary to the precedent of this Court. In addition to presenting an argument that is not

supported by the decisions of this Court, the State has failed to acknowledge or bring to this Court's attention case law from this Court that is in direct opposition to the arguments advanced in the Answer Brief.

The State has failed to rebut Mr. Bolin's position that trial counsel's failure to object to lay witness opinion testimony which "absolutely" identified a substance as blood was deficient performance. The prejudice to Mr. Bolin from this error has been thoroughly addressed in the Initial Brief and it is not necessary to repeat those arguments in this Reply Brief.

ISSUE II

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM TWO, THE FAILURE OF DEFENSE COUNSEL TO CALL OSCAR RAY BOLIN, SR. AS A WITNESS WHO WOULD HAVE TESTIFIED THAT THE RED SUB-STANCE SEEN IN THE GRASS BY DANNY FERNS WAS PAINT THAT HE HAD USED ON CARNIVAL EQUIPMENT

The second issue on appeal is whether or not trial counsel was ineffective for failing to call Oscar Ray Bolin, Sr. as a witness during the guilt phase. Bolin, Sr. would have testified that he often used spray paint on his carnival equipment. Bolin, Sr. would have testified that in November, just prior to leaving for North Carolina for carnival work, he used red spray paint to paint equipment

in the grass in the area that Danny Ferns testified he "absolutely saw blood".

The State argues that trial counsel made a tactical decision to forgo Bolin, Sr. because Swisher evaluated Bolin, Sr.'s credibility and determined he would not be a good witness. The State's claim is not supported by trial counsel Swisher's testimony.

Swisher testified that Bolin, Sr. and his wife Gertrude were considered as penalty phase witnesses, but it was not felt they had much to offer. Swisher offered his opinion that neither was very smart and they were hillbillies, but he did not testify that he had questions about their credibility. Bolin, Sr. had testified in the prior trials and his credibility had not been destroyed. While he was Mr. Bolin's father, Mr. Swisher felt comfortable enough with using family members as witnesses to call Gertrude as a guilt phase witness and to present testimony that utilized the work product of Mr. Bolin's wife. At no time did Swisher state that he interviewed Bolin, Sr. about the paint issue and found his credibility on this point to be doubtful. Swisher actually testified that he couldn't recall ever talking to Bolin, Sr. about the paint. If Swisher didn't talk to Bolin, Sr. about the

painting, Mr. Swisher could not, and did not, testify that he found credibility issues with Bolin, Sr. on this point.

The State has failed to present a persuasive argument to counter Mr. Bolin's claim that trial counsel Swisher even considered this area of testimony at the time of trial. There is no competent substantial evidence from the hearing to support a conclusion that Swisher made a tactical decision at the time of trial. The evidence is to the contrary.

Whether or not Mr. Bolin was prejudiced by this omission has been addressed in the Initial Brief and Mr. Bolin will rely upon that analysis.

CONCLUSION

Based on the responsive arguments contained in the Reply Brief in conjunction with the arguments, citations of law, and other authorities set forth in the Initial Brief, Mr. Bolin respectfully requests that this Court reverse the order of the trial court denying relief.

Respectfully submitted,

_____
ANDREA M. NORGARD
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the forgoing has been furnished by U.S. mail to the Office of the Attorney General, ASA Stephen Ake and ASA Katherine Diamandis, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607, this ____ day of November, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style font used in the Reply Brief is 12-point Courier New, in compliance with Fla. R. app. P. 9.210(a)(2).

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