

SUPREME COURT OF FLORIDA

CASE NO.: SC01-2113

LOWER TRIBUNAL NO.: 00-8117-CFA

RICHARD MCCOY A/K/A JAMIL RASHID,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Fourth Judicial Circuit
In and For Duval County, Florida

REPLY BRIEF OF APPELLANT, RICHARD MCCOY
A/K/A JAMIL RASHID

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**ARGUMENT IN RESPONSE TO ARGUMENT PRESENTED IN
ANSWER BRIEF**

In this Reply Brief, the Appellant, Richard Lee McCoy, a.k.a. Jamil Rashid, will be referred to as “the Appellant,” “the Defendant,” or “Mr. McCoy.” The Appellee, State of Florida, will be referred to as “the Appellee,” or “the State.”

References made in this brief to the Record on Appeal, including references to the trial testimony and other transcribed proceedings, will be designated by the symbol (RA-), followed first by the volume and then the page of the Record on Appeal. References to the Appendix to this brief will be designated by the symbol (AP-). References to the State’s Answer Brief will be designated by the symbol (S-)

This Reply Brief is intended to address points raised by the State in its Answer Brief, which we feel require a response over and above that which we raised in Appellant’s Initial Brief.

**First Issue on Appeal: Whether the Trial Court Erred in Admitting The
Audiotape Conversation Between the Defendant and Zsa Zsa Marcel.**

Although the State asserts that we contended that the audiotape was not authenticated, this is simply not true. (S- 20) There has never been an assertion that the

audiotape was not authenticated. What we are alleging is that the audiotape is, for all intents and purposes, inaudible, and that the typewritten transcript of the tape which was presented to the jury when the tape was played, was never authenticated by anyone.

While we do not quarrel with the standard of review being that of “abuse of discretion,” we respectfully submit that the only way that this Honorable Court can determine whether or not the trial court abused its discretion is to listen to the same audiotape on the same audio equipment and in the same courtroom as did the trial judge. We have filed a separate motion requesting that this Honorable Court do so, and the Court has indicated that the Court has deferred consideration of same until after the briefs are filed.

Second Issue on Appeal: Whether the Trial Court Erred in Permitting the Jury to View an Unauthenticated Transcript, Prepared by the State Attorney, of the Audiotape Conversation Between the Defendant and Zsa Zsa Marcel.

A. The Question of the Admissibility of the Typed Transcript was Preserved for Appellate Review

The State argues that the issue of the admissibility of the unauthenticated typed transcript was not preserved for appellate review. (S-24), and cites the cases of United States v. Rosenthal, 793 F. 2d 1214, 1237-1238 (11th Cir. 1986) and Garrett v. State,

639 S.W. 2d 18 (Tx. App. 1982) in support of this proposition.

We respectfully disagree. The law of the State of Florida regarding the use of typewritten transcripts of audiotapes was clearly and precisely set forth in Martinez v. State, 761 So. 2d 1074 (Fla. 2000).

While the Martinez decision set forth the guidelines for trial courts for the use of transcripts of an audiotape at trial, nowhere in the decision does it say that an accused must either submit his own typed transcript, or forever be barred from objecting to the State's transcript on appeal. Such a requirement is illogical.¹ Mr. McCoy's defense counsel was presented with a virtually inaudible tape. If the State's position is accepted as valid, Mr. McCoy was then placed in the position of having to create a transcript virtually out of thin air, or forever remain silent and without appellate remedy when the State introduced an inaccurate, unauthenticated transcript to the jury. While Martinez said that there should be an attempt by the court to obtain a stipulation from the parties as to the accuracy of the transcript, Martinez, at 1086, it

¹Taken to its logical extreme, the State could theoretically present a trial court with an hour long audiotape in which not more than a few words are discernable to the human ear. The State could then present its own version of a transcript (unauthenticated as to accuracy) where an accused is alleged to have admitted to multiple felonies. While the defense can't hear the tape, under the State's theory, the defense would still be obliged to create its own transcript, or forever be barred from objecting to the authenticity of the State's transcript. This would not be law—it would be Alice in Wonderland.

does not say that if the defense fails to produce its own version, then the State's version must be accepted.² The State's reference to United States v. Rosenthal, 793 F. 2d 1214, 1237-1238 (11th Cir. 1986) and United States v. Llinas, 603 F. 2d 506 (5th Cir. 1979) and Garrett v. State, 639 S.W. 2d 18 (Tx. App. 1982) is misplaced. First of all, federal authority and Texas authority is not the law of the state of Florida on this issue. Martinez is the law. Second, both the Rosenthal and Llinas courts placed the burden of coming forward with a transcript on the defense only after the trial court unsuccessfully attempted to obtain a stipulation as to the contents of a proposed transcript. Sub-judice, the trial court never attempted to obtain such a stipulation, despite the admonition of Martinez to attempt to obtain a stipulation as to the contents of a proposed transcript. Third, none of the authority cited by the State speaks to the issue raised in this appeal, to wit, that the questioned transcript was never authenticated.

Prior to trial, defense counsel filed two motions to have the audiotape, along with the typewritten transcript, declared inadmissible. (RA-I-47-49), and (RA-II-242-246). The first motion, filed December 11, 2000, some five months prior to the trial,

²Indeed, although the State complains that the defense did not present its own transcript, the State, in virtually the same breath, argues that stipulations regarding transcripts are "simply not realistic in hotly contested capital cases." (S-26)

states, in pertinent part, "... Although the State has provided defense counsel with a transcript, it appears that the transcript omits portions of the conversation, declares other portions to be inaudible, and misinterprets or speculates about the words spoken in other parts of the conversation." (RA-I-47-¶1) Plainly stated, the defense filed this written motion, well in advance of trial, claiming that the transcript was not accurate. The defense also argued in its motion that "[defense] counsel has listened to a copy of that tape on different machines, and finds a large portion of it to be inaudible." (RA-I-47-¶1) At the hearing on the motion, approximately one month before the trial, defense counsel again argued, "And the transcript that the prosecutor has prepared omits portions of the conversation, in addition to declaring portions of it inaudible. And that it misinterprets or speculates about words spoken in other parts of the tape." (RA-V-866). The trial judge then ruled, unequivocally, that the tape would be admitted in evidence, and that the transcript could be given to the jury as a demonstrative aid. (RA-V-898-899).

Defense counsel renewed his objection to the tape and the inaccurate transcript at the trial. For when the State moved the tape in evidence, defense counsel stated, "That's the tape? With the same objection that we raised prior to trial." "And, Your Honor, I would object to the use of the transcript for the same reasons that were raised in the pretrial motion, that so much is inaudible." (RA-X-756-757) (emphasis supplied)

The facts in Correll v. State, 523 So. 2d 562 (Fla. 1988), and Pomeranz v. State, 703 So. 2d 465 (Fla. 1997), cited in the State’s brief, are different from those in the case of Mr. McCoy. In neither of those cases did defense counsel renew their objections at trial. In Correll, the State sought to introduce similar fact evidence of a prior bad act of the accused toward the victim. The trial court denied a defense pre-trial motion in limine, but the defense failed to object at the time of the introduction of the testimony at trial. In Pomeranz v. State, 703 So. 2d 465 (Fla. 1997), the defense filed a motion in limine to exclude reference to a prior robbery committed by Pomeranz where the same gun was used as in the robbery and murder in Florida. Prior to trial, the judge denied the motion in limine, and ruled that evidence of the Alabama robbery could come in under certain conditions, to wit, the evidence could not be made a feature of the trial; the State could not use the word “robbery” when referring to the Alabama crime; and the State would not be permitted to elicit sympathy for the victim from the jury. During the course of the trial, and before a different judge than the one who ruled on the motion in limine, Pomeranz’ lawyer emphasized to the jury that Pomeranz was a robber, not a killer. When the Alabama robbery came into evidence, the new trial judge did not enforce the restrictions placed on the State by the predecessor judge. Since this was effectively a new ruling, and since there was no objection to this evidence at trial, this Honorable Court ruled that the issue had not

been preserved for appellate review.

In the case of Mr. McCoy, the trial court had ample opportunity to consider the issue which is on review— whether or not the transcript was an accurate representation of that which was on the audiotape. In fact, at the pre-trial motion hearing, Judge Dearing asked the prosecutor, “ Is your live witness, voice one, going to fill in any of the blanks for us?” To which the prosecutor replied, “Judge, she has helped prepare the transcript. We have had her listen to the tape and try to help us. It’s my understanding that she has done the best she can in trying to discern what portions were inaudible.” (RA-V-894) Unfortunately, no one ever “filled in the blanks” or otherwise offered testimony as to whether or not the transcript was an accurate, authentic typewritten reproduction of that which was on the audiotape.

In announcing his ruling that the typed transcript could be used by the State and given to the trial jury as a demonstrative aid, Judge Dearing told defense counsel, “You can of course argue that the transcript is not accurate and ask the jurors to be bound by what they hear on the tape rather than what is in the transcript. And I would expect you to do that.” (RA-V-899) Thus, the trial court had a full and fair opportunity, both before trial and during trial, to consider the issue in question— the use of the unauthenticated transcript as a demonstrative aid. If anything, the facts in the case of Mr. McCoy are more analogous to those in Thomas v. State, 1991 Fla. App. LEXIS

8574, (Fla. 1st DCA 1991), as modified by Thomas v. State, 599 So. 2d 158 (Fla. 1st DCA 1992), in which the Court of appeals held that where a trial judge makes an unequivocal pretrial ruling on an evidentiary issue, and that where trial objections, though never made, would have been futile, the issue is preserved for appellate review. Of course, the facts of Mr. McCoy's case militate much more strongly in favor of appellate review than those in Thomas, because Mr. McCoy's counsel filed a written motion contesting the use of the transcript prior to trial, verbally argued against the use of the transcript at the pretrial hearing, and then renewed his motion, if only by reference, at the trial itself.

B. The Typewritten Transcript of the Audiotape was Never Authenticated

The State actually contends that Ms. Marcel did authenticate the typewritten transcript of the audiotape. (S- 26-27) Such an assertion is grossly incorrect. For as we pointed out in our initial brief, the only question ever directed to Ms. Marcel by the prosecutor relative to the typewritten transcript was,

Q-“Did you later help prepare a transcript of the tape?”

“ A- “Yes, I did.” (R-X-756)

Ms. Marcel was never asked whether the transcript accurately reflects the conversations on the audiotape. She was never asked the circumstances surrounding her helping to prepare the transcript, such as who she was helping, what input she had,

or whether or not she agreed with the contents of the typewritten transcript which was utilized by the jury. In fact, the transcript of the audiotape was given to the jury without any attempt by the prosecutor to authenticate anything about it, much less the accuracy of its contents.

Black's Law Dictionary³ defines "authentic" as "genuine; true; real; pure; reliable; trustworthy; having the character and authority of an original; duly vested with all necessary formalities and legally attested; competent, credible, and reliable as evidence." How can the State seriously argue that the naked statement, "I helped prepare it" serve to satisfy the evidentiary predicate that the typed transcript was "competent, credible, and reliable as evidence?"

The case of Hunt v. State, 746 So. 2d 559 (Fla. 1st DCA 1999)⁴ gives a good

³Black's Law Dictionary, Revised Fourth Edition, West Publishing Company, 1968, page 168.

⁴Cited by the State in its Answer Brief for the proposition that there is no requirement that the person who prepares the transcript also authenticate it. We do not quarrel with that legal principal. Our point is that, in the case at bar, no one authenticated the transcript. No one testified that it accurately depicted the conversation on the audiotape. The Hunt v. State authentication was as follows:

Q. And have you previously reviewed... this video with that transcript?

A. Yes, ma'am.

Q. How many times?

A. About four or five times at least?

example of appropriate authentication of a typed transcript. It is a far cry from the “I helped prepare it” sub judice.

While we agree that the standard of review for admissibility of evidence is that of abuse of discretion, a trial court’s discretion is limited by the Rules of Evidence. cf. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992). Florida Rule of Evidence §90.901 provides, “Authentication or identification of evidence is required as a condition precedent to its admissibility.” (Emphasis supplied) Sub-judice, no attempt was made to authenticate the typewritten transcript. If evidence is unauthenticated, it is inherently unreliable. Hadden v. State, 690 So. 2d 573 (Fla. 1997), and should certainly not be the linchpin on which the Defendant’s death penalty conviction is hung.

Q. And did you look at the phrases that are on the transcript and compare them to what’s on this tape?

A. They were accurate ma’am.

Q. Were they a fair and accurate depiction of what was spoken on September 22, 1998?

A. Yes. ma’am.

Q. Additionally, you testified that you know [the other employees’] voices. Did you compare the voices on this tape with how its placed on that transcript to the words?

A. Yes, ma’am.

Q. And was it a fair and accurate representation of who spoke the phrases.

A. Yes, ma’am.

C. The Admission of the Typed Transcript was Not Harmless Error

The State argues that the admission of the transcript of the audiotape was harmless error. (S-27) In fact, the act of publishing the typed transcript to the jury on the State's case in chief had an enormous impact on the outcome of the case.

First, it is highly doubtful that anyone who listened to the audiotape without the typed transcript would have been able to discern much of anything. A review of the transcript prepared independently by two different trained court reporters⁵, on two separate occasions, clearly establishes the fact that the audiotape, standing alone, would have been of little or no use to the jury. (RA-V-875-889); (RA-X-758-773)(AP-IV); (AP-V) Second, the typed transcript introduced to the jury numerous facts about Mr. McCoy that the jury would never have known during the State's portion of the guilt phase, or, or quite conceivably during the entire trial. First, the jury learned that Mr. McCoy had a criminal history unrelated to the subject offense. In no less than three places in the typewritten transcript, Mr. McCoy is quoted as saying that he is on probation. These words were completely inaudible on the audiotape. To a reasonable juror, these references to Mr. McCoy's probationary status could only mean that Mr. McCoy must have committed a criminal act, or acts, in the past. Mr. McCoy's "bad character" was thus placed before the jury on the State's case in chief.

⁵Presumably without the benefit of the unauthenticated typed transcript.

Then, the typewritten transcript describes a gun fight which Mr. McCoy had with a “crack dealer” where, the transcript said, “Hugh”⁶ shot someone else. This insinuates to the jury that Mr. McCoy hangs around with a violent criminal element. Then there is a reference to “how I get money..” an apparent reference to other illegal methods whereby Mr. McCoy wrongfully acquired money in the past. Thus, even before the State rested its case in chief, the jury learned that Mr. McCoy was on probation, that he was involved with a crack dealer and another shooting, and that he supports himself through illegal enterprises. Without question, had the transcript not come into evidence, the jury would not have known these things during the State’s case in chief. However, since the transcript did come into evidence, the jury was given the strong sense that Mr. McCoy was, at the very least, a bad person, or, at the most, a gun-toting convicted felon.⁷ Such information, without question, must have had a serious effect on Mr. McCoy’s decision to take the stand in his own defense. If all the State had was the videotape, which showed virtually nothing, the audiotape which, absent the typed transcript revealed nothing, and the dubious fingerprint testimony and the testimony of Ms. Marcel, both of which were shaken to their very foundations on

⁶Or was it “You shot him” – referencing Ms. Marcel,” rather than “Hugh shot him” - referencing some unknown person named Hugh.

⁷The discussion revolving around “no statute of limitations on murder” certainly didn’t enhance the impression given of Mr. McCoy to the jury.

cross examination, it is quite conceivable that Mr. McCoy would never have taken the stand and the jury would never have learned that he was a convicted felon. For while the State argues that the critical admission on the tape—“that I went inside the place...” was harmless because Mr. McCoy took the stand and admitted making the statement anyway, the State’s analysis ignores the critical question of whether Mr. McCoy would have taken the stand at all if the jury wasn’t already disposed to believe that Mr. McCoy was a bad person because of the information contained in the typed transcript. As a tactical matter, the admission of the typed transcript left Mr. McCoy with virtually no viable choice— for all intents and purposes, he had to take the stand.

Third Issue on Appeal: Whether the Trial Court Erred in Denying the Defendant’s Motion for Judgment of Acquittal Made at the Close of the State’s Case and Renewed after the Close of the Evidence in that the Evidence against the Defendant was Insufficient to Sustain a Conviction.

Mr. McCoy was convicted entirely on circumstantial evidence. Although the State argues that this is a direct evidence case based on the videotape and what the State terms a “partial confession” on the audiotape, (S-38) this is simply not the case. No one testified that the person on the videotape was Mr. McCoy. Indeed, there is no question but that the face of the perpetrator could not be seen. This is not the case of an eyewitness with poor eyesight, as the State contends. (S-37) The State’s reference

to Mr. McCoy's "partial confession" was made on the defense case, not the State's. The defense motion for judgment of acquittal was obviously made before Mr. McCoy ever took the stand.⁸ This is a case with an "eyewitness" whose eyesight is so bad that he can't make an identification at all. The only evidence against him was (1) latent fingerprints; (2) a videotape surveillance film of the robbery where the perpetrator's features were indistinguishable; (3) a virtually inaudible audiotape wherein, allegedly, inculpatory statements were made; and (4) testimony of a convicted liar who, motivated by the promise of a reward, gave a testimonial account of alleged admissions of guilt on the part of the Defendant which was inconsistent with the forensic evidence in this case.

While the State argues that the fingerprints on the plastic bag could only have been placed on the bag at the time of the robbery, the State's strategy of exclusivity of internal use was belied by the evidence. In fact, the plastic bag on which the questioned fingerprints were found contained, as did all of such plastic bags utilized by ABC, ABC Liquors' name and address. This fact alone certainly contradicted the State's theory that these plastic bags never left the ABC Liquors internal system. It was further revealed, that this so-called ABC Liquors "policy" of keeping these plastic

⁸Also, as we have previously argued, Mr. McCoy probably never would have taken the stand in the first place had not his "bad character" been brought before the jury through the use of the unauthenticated typed transcript.

bags in the manager's office for internal use was not written down as a "policy" anywhere. It was also brought out that these plastic bags were not only handled by store managers, but also were transported by ABC Liquors truck drivers to ABC Liquor stores all over the State of Florida; that several of the ABC Liquors employees in the subject store were relatively new and, in fact, one such employee had her first day on the job the day before the robbery and was certainly unfamiliar with this unwritten "policy." The testimony was also elicited that ABC Liquors employees may well have been unfamiliar with this unwritten policy, and that ABC Liquors employees had in the past been terminated for various incidents of non-compliance with ABC Liquors' rules and procedures. (RA-X-697-698); (RA-X-636-637); (RA-IX-591-595); (RA-IX-586)

Fourth Issue on Appeal: Whether the Trial Court Erred in Allowing State Witness Zsa Zsa Marcel to Testify Since Her Testimony Was Tainted by Virtue of Being Motivated Not Only By A Promise of a Financial Reward, But Also By A Promise To Shield Her From Prosecution For An Unrelated Felony.

The Appellant stands on the arguments raised in his Initial Brief.

Fifth Issue on Appeal: Whether the Trial Court Erred in Restricting Defense Counsel's Cross Examination of the State's Chief Witness, Zsa Zsa

Marcel.

While the State argues in its Answer Brief that the trial court did not abuse its discretion in limiting the defense's cross examination of the State's star (and only fact) witness, we respectfully disagree. While the admission or rejection of impeaching testimony is within the sound discretion of the trial court, the discretion is not unbridled. Whenever a witness takes the stand, he or she places his credibility in issue. Cross-examination of such a witness in matters relevant to credibility, bias, or motive ought to be given a wide scope in order to delve into a witness's story, to test a witness's perceptions and memory, and to impeach the witness. Russ v. City of Jacksonville, 734 So. 2d 508 (Fla 1st DCA 1999) The defense should be given wide latitude in bringing out relevant and important facts bearing on the trustworthiness of crucial prosecution testimony, especially where the cross examination is directed at a key prosecution witness (such as Zsa Zsa Marcel). Truman v. Wainwright, 514 F. 2d 150 (5th cir. 1975); Stripling v. State, 349 So 2d 187 (3rd DCA 1977), cert. denied, 359 So. 2d 1220 (Fla. 1978). There is little that could be more relevant, in cross examining the state's key witness, than her bias or motive in testifying. Blair v. State, 371 so. 2d 224 (Fla. 2d DCA 1979). The right of full cross examination is absolute, and the denial of that right clearly constitutes fundamental, constitutional, and reversible error. Coxwell v. State, 361 so. 2d 148 (Fla. 1978).

The trial judge erred when he precluded defense counsel from exploring Ms. Marcel's animus toward the Defendant by asking her about the enormous telephone charges fraudulently placed on Defendant's father's bill; the trial judge clearly committed reversible error when he refused to let the defense cross examine Ms. Marcel about her motive (her fear of inculpation in the Lee's Chicken robbery) in testifying against the Defendant.

Sixth Issue on Appeal: Whether the Trial Court Erred in Basing the Defendant's Death Sentence on the Aggravating Factor of Cold, Calculated, and Premeditated.

The Appellant stands on the arguments raised in his Initial Brief.

Seventh Issue on Appeal: Whether the Trial Court Erred in Sentencing the Defendant to Death Inasmuch as Florida's Death Penalty Statute is Unconstitutional

The Appellant stands on the arguments raised in his Initial Brief.

CONCLUSION

For the reasons set forth above, as well as in our initial Brief, it is clear that Mr. McCoy did not receive a fair trial, and that justice requires that Mr. McCoy's death sentence be lifted and that he be given a new trial.

Dated this _____ day of October, 2002, at Jacksonville, Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief of Appellant, been furnished to Harry L. Shorstein, Esquire, State Attorney for the Fourth Judicial Circuit of the State of Florida, Room 600 Duval County Courthouse, Jacksonville, Florida 32202, and to Robert A. Butterworth, Attorney General of the State of Florida, The Capitol, PL-01, Tallahassee, Florida 32399-1050, by United States Mail, attention, Assistant Attorney General Charmaine M. Millsapps, by United States Mail, first class, postage prepaid, this _____ day of October, 2002.

A T T O R N E Y

**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS OF
FLORIDA APPELLATE RULE 9.210**

The undersigned attorney for the Appellant, Richard McCoy, hereby certifies that the above and foregoing is a computer generated brief which has been prepared and is submitted in Times New Roman 14-point font in compliance with the above stated Florida Appellate Rule.

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