

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,045

NEWTON C. SLAWSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA**

**SUPPLEMENTAL REPLY BRIEF BY THE
CAPITAL COLLATERAL REGIONAL COUNSEL**

**MARK S. GRUBER
ASSISTANT CCRC-MIDDLE
FLORIDA BAR NO: 0330541
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544**

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ARGUMENT

Introduction

Argument I of the initial supplemental brief criticized the report of Dr. Afield. The report is located at R. Supp. 445. Dr. Afield had been appointed by the lower court as a tie breaker after two experts split on the issue of Slawson's competency to make a knowing, intelligent and voluntary waiver of his rights to collateral counsel and collateral proceedings. Unlike the other two experts who examined Slawson, Dr. Afield evidently had never seen Slawson before. Because the lower court did not take any evidence on the competency issue, the only input from Dr. Afield on the record in this case is his report. The report says nothing about Dr. Afield's qualifications and experience. It does not reflect that Dr. Afield did anything other than speak with Slawson; there is no indication that Dr. Afield reviewed anything from any other mental health experts, reviewed any records, conducted any testing, or conducted any investigation of the factual circumstances of the case or of the defendant's background other than to accept what Slawson told him at face value. The report contains a history of the subject evidently based solely on what Slawson said, and the history contains none of the clinically significant information which appears in the other reports and at various other places in the record.

Nevertheless, the judge found Slawson to be competent after receiving this

report and after conducting a hearing of sorts. The entire hearing consisted of the following:

PROCEEDINGS

MR. MCNEIL: Page 22, Newton Slawson.

THE DEFENDANT: Good morning. Your Honor.

THE COURT: Good morning, Mr. Slawson. Did you get a copy of the third doctor's report?

THE DEFENDANT: Yes, ma'am.

THE COURT: They had conflict and I appointed a third doctor to evaluate Mr. Slawson. Dr. Afield has performed that evaluation and finds he's not only competent, but perfectly competent. I like that.

Counsel for the State, do you stipulate to the findings of the doctors' report?

MS. VOLLRATH: State would be willing to stipulate. Your Honor. I haven't spoken with CCR to know what their position is.

THE COURT: They don't represent Mr. Slawson.

Mr. Slawson, do you stipulate to the findings of the doctors' reports?

[THE DEFENDANT:] Yes, ma'am.

MS. DRESSEL: If I may get my name on the record. It's Abbey Dressel from CCR. It's our interpretation that the waiver of September 28 is now nullified and we are

essentially back as we were on September 28th because that remand effectively nullified your order and Mr. Slawson's waiver.

I would also like to say that Dr. Afield's evaluation is inadequate on its face pursuant to your order and the Florida Rules of Criminal Procedure and it is not consistent with Carter, if I can just get that on the record.

THE COURT: All right, I will, based upon the doctors' reports' findings -- two are already filed in the court file. Let me see them.

Well, refresh my memory. I know Dr. Maher found him incompetent. Dr. –

MS. VOLLRATH: Dr. Merin.

THE COURT: I can see the report in my mind. I just couldn't see the name. Dr. Merin found him competent. Dr. Afield has found him competent. And based upon these doctors' reports, I am finding Mr. Slawson competent to have waived his right to counsel and to withdraw his pleas, and I will send an order to the Florida Supreme Court. I guess that's it. You can take these cases off the docket for whenever they were set.

MS. VOLLRATH: March 26th, I believe.

THE CLERK: 24th and 26th.

THE COURT: Strike them from the docket.

MS. DRESSEL: May I also note for the record that the doctors aren't here.

THE COURT: Excuse me?

MS. DRESSEL: May I also note for the record, as I know it will go up on appeal, that the doctors are not here and have not been asked to be here to discuss their findings.

THE COURT: That's true.

MS. VOLLRATH: I would like to clarify that. I have called both Dr. Afield and Dr. Merin and they were out of the state and could not be present today. I had not been able to reach Dr. Manor's office this week, but a request was made for them to be here.

THE COURT: Well, not by the Court. I didn't want them here. I have their reports.

THE DEFENDANT: Your Honor, if I may?

THE COURT: Sir.

THE DEFENDANT: As I recall from the order of the Supreme Court, it was only to determine if I was competent to make a knowing withdrawal, a knowing waiver –

THE COURT: Right.

THE DEFENDANT: -- of my rights to collateral appeal. I don't recall any part of that order negating any part of my order granting a written motion. I don't see why this person is here from CCR. She does not represent me, does not speak for *me*, and I object to her presence. I object to her speaking.

THE COURT: Well, you can't unring a bell. She already spoke, so -- but your objection is noted. I'm not considering them as your counsel and I'm not considering her comments as representing you.

THE DEFENDANT: Thank you.

THE COURT: So I will send an order to the Supreme Court on these findings.

Madam clerk, I'll need the order that I got from the Supreme Court so I know what I'm responding to.

THE CLERK: Okay.

THE COURT: All right.

THE CLERK: Yes, ma'am.

THE COURT: Thank you. Now he can go back to his --

THE DEFENDANT: Motion to return to death row.

THE COURT: Granted.

THE DEFENDANT: Thank you.(R.Supp. 150 – 154).

Likewise, the written order finding the defendant competent (R. Supp. 147) does not contain any findings of fact other than the ultimate conclusion, or any reasons for the decision. Argument II of the initial supplemental brief was styled: “The competency hearing conducted below did not satisfy the requirements of Pate v. Robinson and constituted a denial of due process.” In its answer brief the state titled the issue (Issue II), “Whether the trial court denied due process in following the Court’s mandate.” Either way, the issue is whether the trial court could have and should have

conducted an adversarial evidentiary hearing on Slawson's competency to waive collateral counsel and further collateral proceedings. The state does not appear to take the position that such a hearing was, in fact, conducted, although the state cited the Faretta-type hearing that had been conducted prior to any of the mental health evaluations at length. The state's argument on this point appears to urge two points: 1) that an adversarial hearing on Slawson's competency is not needed, and 2) that this Court's mandate did not authorize such a hearing.

I. Need for an evidentiary hearing.

The state cited a number of cases in which this Court has permitted capital defendants to waive collateral counsel and collateral proceedings without having had a full evidentiary hearing on competency. Two of them, Sanchez-Velasco v. State, 702 So.2d 224 (Fla. 1997) and Durocher v. Singletary, 623 So.2d 482 (Fla. 1993), establish the procedure to be used when a capital defendant expresses a wish to waive collateral proceedings. The following language appears in both:

If the Faretta-type evaluation raises a doubt in the judge's mind as to the defendant's competency, the judge may order a mental health evaluation *and determine competency thereafter*. [Emphasis added].

Moreover, as noted by the state in its answer brief:

[R]eports are merely advisory to the trial judge. Muhammad v. State, 494 So.2d 969, 973 (Fla. 1986), cert denied, 479 U.S. 1101 (1987). *Where there exists a conflict between reports that have been received, it is the function of the trial judge to resolve the dispute.* Castro v. State, 24 Fla. L. Weekly S411, 412 (Fla. Sept. 2, 1999). [Emphasis added]. (Answer Brief, p. 28,).

In Sanchez-Velasco at least ten mental health evaluations had been conducted over the course of the case and all of them contained the conclusion that the defendant was competent. This Court noted the presumption of competency and the lack of anything except speculation about the defendant's possible incompetency in Durocher, but remanded the case for a Faretta-type inquiry and potentially a competency evaluation anyway. In Hamblen v. State, 527 So.2d 800 (Fla. 1988), also cited by the state, competency was not addressed as an issue except for the following observation: "Hamblen had a constitutional right to represent himself, and he was clearly competent to do so." Id. The state also cited Gilmore v. Utah, 429 U.S. 1012 (1976), but in Hamblen this Court cited Chief Justice Burger's concurrence in Gilmore for the following point:

The United States Supreme Court denied an application for stay of execution filed on his behalf, stating that he had made a knowing and intelligent waiver of all federal rights that he might have asserted after his sentence was imposed and that *the state's determination of his competence to waive such rights was "firmly grounded."* [Gilmore, 429 U.S. 1012, 1015, 97 S.Ct. 436,438. 50 L.Ed.2d 632][emphasis added].

Clearly there are times when the competency of a defendant who wishes to waive collateral proceedings is not or is no longer in dispute, and times when it is. The state's reliance on cases where the competency issue had been satisfactorily resolved is somewhat circular. When there is no real issue as to competency, then arguably a hearing on the issue is not necessary. While the cases cited, Durocher and Sanchez-Velasco in particular, provide guidance on what to do about competency issues, by their terms they were cases where competency was not an issue. As noted in the initial brief, this case has gone one step past that point. The lower court did conduct the Faretta-type inquiry described in Durocher and Sanchez-Velasco, although the court decided not to obtain a competency evaluation. The case was then remanded for a competency determination. The competency issue was squarely before the lower court, and its decision and the way in which it reached it are now before this Court.

II. Interpretation of this Court's mandate.

The state also argues that, “Because this Court’s order remanding this case specified the purpose of the remand as securing a mental health evaluation, the court below could not exceed the scope of this directive.” (Answer Brief, p. 33). Therefore, the state argues, the trial court did what it was supposed to do, no error occurred, and any remand by this Court for an evidentiary hearing would be an improper exercise of its rule making authority within the context of a specific appeal. *Id.* The state does not cite any authority for the proposition that this Court cannot announce a rule in a specific case.

Actually, the language of the remand was as follows:
After reviewing Slawson’s case, this Court finds it necessary to remand to the circuit court for Slawson to undergo a mental health evaluation to aid in determining his competency. After such a mental health evaluation is conducted, Judge Allen shall once again determine whether Slawson is competent to make a knowing, intelligent, and voluntary waiver of his collateral counsel and proceedings. If Judge Allen finds that Slawson is competent to make a knowing, intelligent, and voluntary waiver, then she shall report that finding to this Court. If Judge Allen finds that Slawson is not competent to make a knowing, intelligent, and voluntary waiver, she shall report that finding to this Court as well.

This direction is entirely consistent with the language of all of the relevant cases cited by both parties in this proceeding in that it envisions a mental health evaluation conducted by one or more mental health professionals followed by a competency

determination made by the lower court. While the state accurately notes that there are no cases establishing a need for a full blown adversarial evidentiary competency hearing every time a defendant wishes to waive collateral counsel and collateral proceedings, it does not follow from either the case law or this Court's specific mandate that the trial court could do nothing other than obtain a competency report and forward the results to this Court. The fact that Judge Allen was required to make a competency determination plus the fact that she was confronted with conflicting reports necessarily implied the need for some sort of fact finding and decision making process. The judge clearly had both the obligation under the mandate¹ to resolve the factual conflicts in the reports and the discretion to conduct a fair hearing in order to do so. The question is whether the record here reflects an abuse of discretion in that, as argued in the initial brief, the judge merely counted noses without even addressing any of the factual issues raised by the conflicting reports. Cf Castro v State, 1999 WL 685712, 24 FLW S411 (Fla. Sept. 2, 1999) No. 91, 216 (application of abuse of discretion standard).

CONCLUSION AND RELIEF SOUGHT

The record with regard to competency in this case is simply inadequate. The

¹In this context it is worth noting the judge's comment: "Madam clerk, I'll need the order that I got from the Supreme Court so I know what I'm responding to."

experts' reports conflict and the lower court did not conduct any sort of competency hearing other than to count the score. This cause should be remanded for a full dress adversarial hearing. The scope of the hearing should not be limited just to competency. Either Hamblen should be revisited, or special counsel should be able to investigate and present mitigating evidence regardless of whether it relates to the competency issue.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Reply Brief by the Capital Collateral Regional Counsel, which has been typed in Times New Roman, Size 14 Font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record and to Newton Slawson on this 20th day of October, 1999.

MARK S. GRUBER
ASSISTANT CCRC
FLORIDA BAR NO: 0330541
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 CORPOREX PARK DRIVE, SUITE 210
TAMPA, Florida 33619-1136
(813) 740-3544

Copies furnished to:

The Honorable Diana M. Allen
Circuit Court Judge
Hillsborough County
Courthouse Annex 122
800 East Kennedy Blvd.
Tampa, Florida 33602

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607

Mike Kotler and Chris Watson
Assistant State Attorneys
Office of the State Attorney
Hillsborough County
Courthouse, Fourth Floor
800 East Kennedy Boulevard
Tampa, Florida 33602

Newton Slawson
DOC# 119658; P1201S
Union Correctional Institution
Post Office Box 221
Raiford, Florida 32083