

IN THE SUPREME COURT OF FLORIDA

ROBERT BEELER POWER,

Appellant/Cross-Appellee,

vs.

CASE NO. SC96659

STATE OF FLORIDA,

Appellee/ Cross-Appellant.

_____ /

COURT ORDERED SUPPLEMENTAL BRIEF

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
ORANGE COUNTY, FLORIDA

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

The State will rely upon the statement of the case and facts set forth in its answer brief/initial brief on the cross-appeal.

SUPPLEMENTAL ISSUE

WHAT IS THE EFFECT OF THIS COURT'S DECISION IN TREPAL V. STATE, 754 SO.2D 702 (FLA. 2000) ON THE ISSUES IN THIS CASE?

The State addressed this Court's decision in Trepal in its reply brief on the cross-appeal. (State's Reply Brief at 3). In Trepal this Court articulated the standard of review for non-final orders in post-conviction cases:

Drawing upon the district courts' use of the writ of certiorari to provide an instructive model of how this Court may exercise its jurisdiction in such cases, we hold that to obtain relief an appellant must establish that the order compelling discovery does not conform to the essential requirements of law and may cause irreparable injury for which appellate review will be inadequate.

Trepal, 754 So.2d at 707.

Assuming review before this Court is even appropriate, the appropriate standard of review for every issue presently before this Court is that articulated in Trepal.¹ Although in Trepal this Court was addressing an interlocutory appeal on a discovery issue, there is no reason in law or logic for an interlocutory appeal of

¹This Court earlier denied the State's Motion to Dismiss this appeal which was filed in response to Powers' Motion to Stay The Proceedings.

a non-final order to proceed on a different basis. Appellate review of an order to determine a defendant's competency is not permitted by statute or rule.² Consequently, if this Court has jurisdiction to review this issue in an interlocutory appeal, it should utilize the stringent certiorari standard of review. As such, Powers must demonstrate that the trial court's ruling constitutes a departure from the essential requirements of the law and that he may suffer irreparable harm for which appellate review will be inadequate.

The State has found no case law to suggest that the trial court **must** accept defense counsel's assertion that his or her client is competent and cannot order a competency examination. In this case, counsel's post-conviction allegations appear to suggest that Mr. Powers was not competent to make rational decisions on his own behalf at the time of his sentencing. Moreover, a current post-conviction claim appears to suggest that Powers would not even meet the minimal standard of competency required for execution of his sentence. Based upon this limited record, Powers has not carried his burden of establishing that the trial court departed from the essential requirements of the law in ordering Powers evaluated for competency.

Powers must also show that he may suffer irreparable injury for which appellate review will be inadequate. See *Jaye v. Royal*

²An appeal by the State is permitted for a ruling finding a defendant incompetent. Fla.R.App.P. 9.140(c)(1)(H).

Saxon, Inc., 720 So.2d 214, 215 (Fla. 1998)(noting that certiorari review requires the petitioner to show irreparable harm that cannot be cured on direct appeal). As Powers conceded that the competency examinations occurred before the stay was granted in this case (Appellant's Motion to Strike Answer Brief at 2), he cannot show the possibility of "irreparable harm" if this Court declines to review the lower court's non-final order.³ And, the State notes that Powers has already been interviewed by three defense mental health experts and plans on calling them to support his post-conviction claims.

As for the trial court's order prohibiting the State from reviewing Powers' Orange County Jail medical records [cross-appeal], Trepal provides some guidance aside from confirming the appropriate standard of review. In affirming the trial court's order compelling discovery in Trepal, this Court stated: "To the extent the State seeks irrelevant or privileged material, appellant should file a motion with the trial court seeking the exclusion therefrom from discovery, and the trial court may inspect the material in camera and resolve the issue." (citing Lecroy v. State, 641 So.2d 853, 854 (Fla. 1994)). In this case, the trial court did not even provide for the possibility of an in camera inspection of the requested medical records. In failing to do so,

³"While the motion to stay was pending, the two experts appointed by the court evaluated Mr. Power." (Appellant's Motion to Strike Answer Brief at 2).

the trial court departed from the essential requirements of the law.

The State acknowledges that it carries a heavy burden to show the possibility of irrevocable harm emanating from the trial court's pre-hearing discovery ruling on Powers' Orange County Jail Medical Records. However, without disclosure of these records, the State is being deprived of relevant information which could be used to rebut Powers' post-conviction claims relating to his mental condition. Direct appeal will not provide a suitable remedy as there is no way to gauge the impact of the missing records. See generally Ross v. Hobbs, 705 So.2d 955, 956 (Fla. 2d DCA 1998) ("We hold, therefore, that the trial court, in prohibiting the Rosses from videotaping Barbara Ross's doctor's deposition, departed from the essential requirements of law; this resulted in a material injustice because it prevented the Rosses from using the videotape of the deposition at trial should the case not be amicably resolved. Furthermore, the error cannot be remedied on plenary appeal because there is no way to determine what effect the videotape of the deposition would have on the outcome of the trial should the Rosses choose to place it before the trier of fact."). There is simply no effective means to review the lower court's decision on appeal without an in camera review of the requested records.

CONCLUSION

WHEREFORE, based on the foregoing, and the argument contained in Appellee's Answer Brief and Cross Appeal Reply Brief, the State asks this Honorable Court to deny appellant any relief on his interlocutory appeal and affirm the decision of the circuit court below. The State also asks this Court to overturn the lower court's order quashing the State's subpoena and granting a protective order which precludes the State from examining Powers' Orange County jail medical records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Pamela H. Izakowitz, Post Office Box 3294, Tampa, Florida 33601-3294, this _____ day of August 2000.

COUNSEL FOR STATE OF FLORIDA