

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,659

ROBERT BEELER POWER,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

APPELLANT'S SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

This Supplemental Brief is being filed is pursuant to this Court's Order of August 10, 2000 as to what effect if any this Court's decision in Trepal v. State, 754 So. 2d 702 (Fla. 2000) has on Mr. Power's case.

The following symbols will be used to designate reference to the record in the instant cause:

"R." - record on direct appeal to this Court.

"PC-R." - record on instant appeal.

All other citations will be self-explanatory or will be otherwise explained.

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SUPPLEMENTAL ARGUMENT I

THE FLORIDA SUPREME COURT DECISION IN TREPAL V. STATE, 754 So. 2d 702 (Fla. 2000) DOES NOT APPLY TO THE STATE'S REQUEST FOR ACCESS TO MR. POWER, BUT DOES APPLY TO THE ISSUE OF THE APPLICATION OF THE INTERLOCUTORY APPEAL.

This Court requested supplemental briefing on the effect, if any, of this Court's opinion in Trepal v. State, 754 So. 2d 702 (Fla. 2000) on Mr. Power's case. The Trepal opinion is divided into two areas -- the Court's jurisdiction to entertain interlocutory appeals and whether the State was entitled to discovery of work product of experts who were interviewed by defense counsel. While the issue of interlocutory appeals pertains to Mr. Power's case, the State's request for discovery does not.

I. The State's Request for Access to Mr. Power

A. The Facts in Trepal

Mr. Trepal filed a Rule 3.850 motion alleging Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972) and newly-discovered evidence with respect to the allegations of misconduct at the FBI Crime Laboratory. After Mr. Trepal filed his motion, the State sought to discover the names of confidential experts employed by Mr. Trepal's trial counsel. The State also sought the names of experts who conducted examinations on pieces of evidence used by the State at trial, and any reports, notes, and opinions of those experts. Mr. Trepal

objected on the grounds that the State's request was waived because it had never previously requested these documents. Mr. Trepal argued that the information was protected under the attorney-client and work-product privileges, and that the information sought to be discovered was irrelevant to the pending motion for post-conviction relief. Additionally, at the time the State requested discovery, no evidentiary hearing had yet been granted.

The trial court granted the State's motion and after the interlocutory appeal, this Court affirmed the trial court order. Trepal, 754 So. 2d at 707.

The facts in Mr. Power's case are completely different from Mr. Trepal's case.

B. The Facts in Power

Mr. Power filed an Amended Rule 3.850 Motion on November 23, 1998 in which he raised thirty-eight(38) claims. After a May 6, 1999 hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), the trial court granted Mr. Power an evidentiary hearing on eight of his claims. Among the claims to be heard at evidentiary hearing were whether trial counsel was ineffective for failing to present mitigating evidence, and whether Mr. Power's counsel was ineffective for failing to obtain an adequate mental health and background evaluation of Mr. Power for the penalty phase of trial (PC-R. 569).

On July 6, 1999, the trial court entertained pre-hearing motions. Among them was a State Motion for Order Providing for Pre-Hearing Discovery, in which the State wrote:

3. No mental health experts were called during the defendant's trial, and mental health testimony does not form a part of the record on appeal.

4. Over nine years have elapsed since defendant was convicted. During that period of time defendant has been incarcerated. These are factors which may have alerted defendant's mental state from what it was closer in time to defendant's conviction."

See, State Motion for Order Providing for Pre-Hearing Discovery. This motion was incomprehensible as to what the State was requesting. As a result, it was denied by the hearing court.

The State also filed a motion seeking Access to Defendant to Conduct Mental Health Examination. In support of that motion, the State argued that "in the context of insanity," something that neither Mr. Power nor the State had raised in **any** proceeding or pleading, it was entitled to access to Mr. Power for a mental health evaluation:

"2. In the related context of an insanity defense, Florida law provides that the State and defendant may call experts of their own choosing. Rule 3.216, Fla. R. Crim. P. ("The appointment of experts by the Court shall not preclude the state or the defendant from calling additional expert witness to testify at the trial.") The few appellate decisions addressing the scope of the Rule (and its predecessor rule), have held that the State is absolutely

entitled to a compelled evaluation by an expert of his own choosing. See, e.g. State v. Baist, 660 So. 2d 1144 (Fla. 3rd DCA 1995); State v. Battle, 302 So. 2d 782 (Fla. 3rd DCA 1974). With regard to the issue of the state's right to evaluation of a defendant's mental state, Florida Supreme Court has also stated:

psychiatric evaluations conducted in good faith and with proper authorization are clearly acceptable means for the state to employ, especially when competency or sanity may be in issue." Walls v. State, 580 So. 2d 131 (Fla. 1991).

See, State Motion for Order Granting Access to Defendant to Conduct Mental Status Examination filed on June 22, 1999.

The trial judge rejected both of the State's motions and denied the State an opportunity to conduct a mental status examination of Mr. Power (PC-R. at 20). The State did **not** appeal that ruling. The trial judge then ordered both parties to simultaneously submit witness lists and expert reports by September 7, 1999 (PC-R. 11).

In late September, 1999, two weeks after Mr. Power submitted a witness list and defense expert reports, the State again sought access to evaluate Mr. Power. This time, the State confused mitigation with competency and filed several motions. Among those motions was a Motion to Determine Competency to Assist Collateral Counsel at the Evidentiary hearing, although Mr. Power or his counsel had **never** raised the issue of his competency to proceed in post-conviction, and a Motion to Gain Access to the

Defendant to Conduct a Mental Status Exam. At no time during the seven years of prior post-conviction litigation did the State even suggest that Mr. Power may be incompetent to proceed in post-conviction.

As a basis for these requests, the State relied on the reports disclosed by three defense experts. It argued that because Mr. Power has brain damage and suffered from depression, he may be incompetent to proceed in post-conviction, even though none of the reports questioned Mr. Power's competency. The State also argued "the issue of defendant's competency to waive presentation of his extensive personal history is an entirely new issue where the state should be allowed to take discovery." See, Motion to Reconsider State's Motion for Order Granting Access to Defendant to Conduct Mental Status Examination (PC-R. 594-596).¹

Contrary to her previous rulings, the trial court reversed itself and granted both State motions. On September 28, 1999, Judge Blackwell White ordered that two mental health experts be appointed to evaluate Mr. Power for competency and report their findings at the start of the evidentiary hearing. Judge Blackwell White also authorized the State to compel a mental

¹This was not a new issue at all. In 1987, Dr. James Merikangas, a defense expert hired for Mr. Power's Seminole County case, evaluated Mr. Power and found him to be depressed, that he presented a risk for suicide and that he was in need of psychiatric assistance. (PC-R. At 102). The State had Dr. Merikangas' report in 1987, yet failed to request access or discovery from Mr. Power at that time.

health evaluation of Mr. Power (PC-R.601-602; 605-606; 615).

Unlike Mr. Trepal's case, an evidentiary hearing had been granted in Mr. Power's case. Unlike Mr. Trepal's case, the State sought access to discovery in post-conviction and not at trial. Access to defense experts at trial was never an issue in Mr. Power's case because there were no experts retained by trial counsel.

After the witness lists were provided to the State in Mr. Power's case, the State was aware of each and every witness and expert Mr. Power intended to call at an evidentiary hearing. After the expert reports were submitted to the State, the State knew precisely what the experts' evaluations consisted of and what their findings and opinions were. The reports did not question Mr. Power's competency to assist counsel or proceed in post-conviction.

Unlike Trepal, the State had in its possession the names, addresses and phone numbers of the defense witnesses and experts and the experts' written reports. After the State obtained the names and the reports of the defense witnesses, the State sought to depose the three defense experts and the trial attorneys. The prosecutor argued he was entitled to depose the defense experts because "there's no curriculum vitae. I have no idea what the background is from the report. There's no indication whether they're associated or not with grounds opposing the death

penalty. That's not part of the report." (PC-R. Vol. 2 at 63-65).

The trial court ruled that the State failed to show good cause to depose the defense experts but granted it permission to depose the defense attorneys (PC-R. Vol. 2 at 66). The State did **not** appeal that order.²

In Trepal, the State sought the names and addresses of witnesses, reports and notes of trial experts and their findings, test results and opinions. This information was already provided to the State in Mr. Power's case and thus, the Trepal case does not apply here.

Unlike the Trepal case, the State in Mr. Power's case knew who the witnesses were going to be and who and what the experts intended to say. Moreover, the State had **already received** access to the trial attorneys files in Mr. Power's case and had **already reviewed** those files before the scheduled evidentiary hearing.

Unlike the Trepal case, the State in Mr. Power's case went beyond simply asking for notes and names of experts. The State in Mr. Power's case attempted to create new evidence to be used against Mr. Power. The State attempted to evaluate Mr. Power and create evidence to be used against him at an evidentiary hearing. Unlike the information requested in Trepal, which was scientific

²The only issue the State did appeal was whether it was entitled to obtain Mr. Power's Orange County Jail Medical Records (PC-R. at 617).

evidence and objective, the access and information requested in Mr. Power's case was subjective and intrusive. The State wanted access to Mr. Power's mind. No such access was sought or requested in the Trepal case. The State never sought to compel Mr. Trepal to a mental health evaluation.

Mr. Power retains his Fifth Amendment and privacy rights. Compelling him to undergo a state mental health examination would force him to become a witness against himself and would help the State kill him. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973); accord Estelle v. Smith, 451 U.S. 454 (1981). The privilege against self-incrimination is secured only when a criminal defendant has the right "to remain silent unless he choose to speak in the unfettered exercise of his own free will, and to suffer no penalty...for such silence." Estelle v. Smith, quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964).

C. Mr. Power's interlocutory issues

Mr. Power's case involves two issues. The first issue is whether the State can compel a competency evaluation of Mr. Power based on his ability to assist post-conviction counsel when Mr. Power's attorneys have not asserted that he is incompetent; have not asserted that he is unable to understand the proceedings against him; and have not asserted that he is unable to assist his attorneys in a meaningful way.

Under Carter v. State, 706 So. 2d 873 (Fla. 1998), the State

has not alleged that there are factual matters at issue that require Mr. Power's input. The State only alleged that Mr. Power may be incompetent to proceed in post-conviction after the defense submitted expert reports that showed the existence of mitigating evidence. Those reports detail Mr. Power's mitigating factors of depression and brain damage but do not indicate that Mr. Power is incompetent to proceed. Only after receiving those reports did the State seek to have Mr. Power evaluated for competency to proceed in post-conviction. Therefore, the State's motion was not based on anything in Mr. Power's demeanor that may indicate a competency problem. Instead, the State sought access to Mr. Power because his experts found mitigating evidence. This is not the proper basis for questioning a defendant's competency. It is a back-door attempt to get access to Mr. Power to rebut mitigation evidence. See, Estelle v. Smith, 451 U.S. 454 (1981)(admission of doctor's testimony on dangerousness of defendant on death penalty issue violated defendant's Sixth Amendment right to counsel when, after being indicted and having counsel appointed, he was examined by doctor on competency to stand trial and his statements were the basis for doctor's testimony regarding the death penalty). The State does not have standing in this instance to question Mr. Power's ability to assist his post-conviction counsel. The State fails to provide good cause for relief on this issue.

The second issue in Mr. Power's case is whether the lower court's order compelling that Mr. Power undergo a compelled mental health evaluation by the State should also be quashed and/or reversed. In the seven years of post-conviction proceedings, the State never requested access to evaluate Mr. Power. Moreover, had the State requested access at trial in 1990, it would have been denied because the State was not entitled to conduct a mental health evaluation of Mr. Power at trial. Allowing the State to perform a compulsory mental health examination against Mr. Power now would violate his Fifth Amendment rights by forcing him to become a witness against himself and would aid the State in its effort to kill him. Applying the change of Florida law retroactively would also be an ex post facto application of law.

The issues in Mr. Power's case are not discovery issues. They are issues as to whether the State is entitled to access to Mr. Power. The answer is no. The Trepal case does not apply.

II. The interlocutory appeal issue

Mr. Trepal filed a Rule 3.850 motion in trial court, which denied him relief. When his appeal was pending before the Florida Supreme Court, a report was issued questioning the FBI Crime Laboratory's testing practices. Jurisdiction was relinquished so that Mr. Trepal could conduct discovery and file a new Rule 3.850 motion based on newly-discovered evidence.

In 1998, Mr. Trepal filed an amended Rule 3.850 claiming that the State submitted misleading, inaccurate and perjured testimony about scientific evidence. Mr. Trepal also alleged that a State witness misled the defense about the results of scientific tests in violation of Brady v. Maryland, 373 U.S. 83 (1963). Mr. Trepal also alleged ineffective assistance of counsel based on counsel's failure to discover the newly-discovered evidence.

In response, the State filed a discovery motion seeking, among other things, any and all reports, notes or other writings that concern the hiring of defense experts, their conversations with counsel for the defendant, their findings or test results, and their conclusions.

Mr. Trepal argued that the State's motion should be denied because the discovery request was premature; the State waived the right to the discovery by failing to earlier seek discovery; and that the State was not entitled to the information since Mr. Trepal did not list an expert as a witness at trial and the information remain privileged. The trial court granted the State's discovery request and Mr. Trepal filed an appeal with the Florida Supreme Court.

This Court held that "an expedited appeal with record attachments to challenge interlocutory discovery orders issued during rule 3.850 hearings is necessary to prevent the disclosure

of information that would irreparably harm a defendant and render appellate review inadequate. A pleading that falls within this Court's jurisdiction is therefore needed to address this inequity in capital collateral litigation." Trepal at 705.

This Court held that an initial petition shall be filed within thirty days of the disputed discovery order and the petitioner must attach necessary portions of the record in an appendix, and the respondent may respond pursuant to an order to show cause.

This Court held that its review of interlocutory orders is limited to post-conviction proceedings following imposition of death, and a stay of trial court proceedings will not be automatic on the filing of an interlocutory appeal, but the defendant must request a stay.

In Mr. Power's case, an interlocutory appeal was granted because the trial court's order granting the State access to a compelled examination of Mr. Power would "irreparably harm" Mr. Power and appellate review was required to address this inequity.

Mr. Power orally requested a stay of the proceedings from the trial court. It was denied. Mr. Power then requested a stay in writing. Again, this was denied.

Mr. Power filed a Notice of Appeal in the Circuit Court (PC-R. 607-611) and Motion to Stay Proceedings Pending Interlocutory Appeal in the Florida Supreme Court. On October 8, 1999, this

Court granted a stay pending an interlocutory appeal. One week later, on October 15, 1999, this Court denied the State's Motion to Dismiss the Appeal.

Mr. Power properly applied for and received a temporary stay and this Court properly accepted this issue in an interlocutory appeal. Thus, Mr. Trepal's case, which addresses this Court's ability to entertain interlocutory appeals, applies and is consistent with Mr. Power's case.

CONCLUSION

Mr. Power relies on the arguments in his Initial Brief and Reply Brief. He specifically does not waive any claim or issue previously raised before this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Brief has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on August 18, 2000.

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