IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, PETITIONER,	CASE NO. SC20-1419
v.	L.T. CASE NO. 5D19-590
JOHNATHAN DAVID GARCIA, RESPONDENT.	

SECOND NOTICE OF SUPPLEMENTAL AUTHORITY

The Respondent, by and through the undersigned counsel, submits as supplemental authority the following decisions:

This Court's ruling in *Baptiste v. State*, ___ So. 3d ___, 2021 WL 3778352, SC20-1083 (Fla. Aug. 26, 2021), relevant to the issue of the Court addressing arguments outside those issues on which the Court accepted discretionary jurisdiction.

The Fourth District Court of Appeal's rulings in *Landeverde v. State*, 769 So. 2d 457 (Fla. 4th DCA 2000), and *Pisciotti v. Stephens*, 940 So. 2d 1217 (Fla. 4th DCA 2006), as well as the Third District court of Appeal's rulings in *Shimon v. R.B.*, 318 So. 3d 580 (Fla. 3d DCA 2021), and *J.R. Brooks & Son, Inc. v. Donovan*, 592 So. 2d 795 (Fla. 3d DCA 1992), relevant to the issues on appeal of when someone can assert the Fifth Amendment, when that person's Fifth

Amendment right is violated, and what constitutes irreparable harm eligible for certiorari review.

These issues are discussed throughout the Respondent's Answer Brief on the Merits in response to arguments raised by the Petitioner in its Initial Brief on the Merits. Copies of the decisions are attached to this notice. This notice is provided in accordance with Florida Rule of Appellate Procedure 9.225.

Respectfully submitted,

ROBERT WESLEY
PUBLIC DEFENDER

By: 

Robert Thompson Adams IV
Florida Bar No. 107152
Assistant Public Defender

ATTACHMENTS

Supreme Court of Florida

No. SC20-1083

WILEME BAPTISTE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

August 26, 2021

LAWSON, J.

We accepted review of the Third District Court of Appeal's decision in *Baptiste v. State*, 306 So. 3d 306 (Fla. 3d DCA 2020), because it expressly and directly conflicts with the Fourth District Court of Appeal's decision in *Rubi v. State*, 952 So. 2d 630 (Fla. 4th DCA 2007), on the same question of law. *See* art. V, § 3(b)(3), Fla. Const. The conflict turns on whether a jury charge, requested by defense counsel but argued on appeal to be coercive, is reviewable for fundamental error. For the reasons below, we agree with the

Third District's conclusion in *Baptiste* that the invited error precludes review and disapprove the Fourth District's holding to the contrary in *Rubi*.

BACKGROUND

Petitioner Wileme Baptiste shot three victims and was subsequently charged with one count of second-degree murder, two counts of attempted second-degree murder, and one count of unlawful possession of a firearm by a minor. *Baptiste*, 306 So. 3d at 307. Baptiste was ultimately convicted of the "lesser included offenses of manslaughter with a deadly weapon, two counts of attempted manslaughter, and unlawful possession of a firearm by a minor." *Id.*

Baptiste appealed to the Third District, arguing that "the jury's verdict was coerced by the trial court's issuance of a second, modified *Allen*[1] charge." *Baptiste*, 306 So. 3d at 308. The Third District explained the relevant portions of the trial and highlighted

1. *Allen v. United States*, 164 U.S. 492 (1896). An *Allen* charge is "an instruction that is given when it appears that the jury is having difficulty reaching a verdict." *Blanding v. State*, 298 So. 3d 712, 714 (Fla. 1st DCA 2020).

the fact that Baptiste's counsel requested the jury charge that Baptiste challenged on appeal:

> [H]aving already given an *Allen* charge, and upon being informed that a unanimous verdict had been reached, the court had the clerk read the verdict and poll the jury. One of the jurors, however, denied agreeing with the verdict. After the jury left the courtroom, the court took a recess so that defense counsel could confer with Baptiste. *Thereafter, the defense requested that the jury be sent a note instructing them to continue deliberating, along with the jury instructions and a new verdict form.* The court stressed to the parties that because it had already given an *Allen* charge, it did not intend for the jury to continue to deliberate. The court explained that writing a note with such an instruction might give rise to misinterpretation. Rather, the court advised the parties that it would instruct the jury solely to memorialize on a new form what their verdict was, if they had one. *Defense counsel replied, "that's fine." The court again asked counsel if the parties were in agreement, and both responded affirmatively.* Thereafter, the court instructed the jury in open court that it was giving them a new set of verdict forms and asking them to go back to fill them out. The court advised the jury: "If you have a unanimous verdict, please fill out the verdict accordingly. If you do not have a unanimous verdict . . . we'll bring you back out here." The jury then returned a unanimous verdict for the lesser included offenses of the primary charges, and the firearm count as charged.

Id. at 308 (emphases added) (footnote omitted).

Although the Third District agreed with Baptiste that the charge was coercive, it held that Baptiste was not entitled to relief, explaining:

> Baptiste failed to move for mistrial after the non-unanimous jury poll, or object to the subsequent, modified *Allen* charge . . . . Even if we were to consider this error to be fundamental, Baptiste waived it by agreeing to the modified charge. Because Baptiste cannot invite error and then seek to take advantage of it on appeal, we affirm.

Id. at 309 (citations omitted).

Similarly, in *Rubi*, defense counsel suggested the jury charge that the defendant challenged as coercive on appeal. 952 So. 2d at 632-33. There, however, "[e]ven though defense counsel agreed with the charge," the Fourth District reversed the defendant's conviction based on its conclusion that the coercive charge was "fundamental error, and per se reversible." *Id.* at 635 (quoting *Scoggins v. State*, 691 So. 2d 1185, 1189 (Fla. 4th DCA 1997), *approved*, 726 So. 2d 762 (Fla. 1999)).

We granted review to resolve the conflict between *Baptiste* and *Rubi*. *See* art. V, § 3(b)(3), Fla. Const.

ANALYSIS

To resolve the conflict, we must decide whether a jury charge requested by defense counsel is reviewable for fundamental error when the defendant challenges the charge as coercive on appeal. We review this legal question de novo, *see Daniels v. State*, 121 So.

3d 409, 413 (Fla. 2013), and agree with the Third District that the invited error precludes fundamental error review.

Generally, an alleged error is not reviewable on direct appeal unless the record reflects that trial counsel preserved the issue by lodging a valid, contemporaneous objection and securing an adverse ruling from the trial court. *Walls v. State*, 926 So. 2d 1156, 1180 (Fla. 2006) (citing *State v. Delva*, 575 So .2d 643, 644 (Fla. 1991)). Although unpreserved issues generally may be reviewed for fundamental error, "[f]undamental error is waived where defense counsel requests an erroneous instruction . . . [or] defense counsel affirmatively agrees to an improper instruction." *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012).

More specifically, this Court has explained that:

> [I]nvited error occurs when a party either proposes (i.e., requests) an instruction and therefore cannot argue against its correctness on appeal, or when a party is aware a standard instruction or an instruction proposed by another party is incorrect but agrees to its use anyway and as a result of having affirmatively agreed to the instruction cannot argue against its correctness on appeal.

Allen v. State, 46 Fla. L. Weekly S158, S164 n.4 (Fla. June 3, 2021). In contrast, merely "acquiescing to an incorrect instruction

constitutes a failure of preservation that does not preclude fundamental-error review." *Id.* at S163 n.4.

Here, rather than merely acquiescing to the trial court's jury charge, Baptiste's counsel agreed to the jury charge as an alternative to his own proposed charge, which was arguably even more coercive because it would have instructed the jury to continue deliberations. *Baptiste*, 306 So. 3d at 308. Baptiste's counsel thereby invited the alleged error, precluding fundamental error review on direct appeal. *See Warfel*, 82 So. 3d at 65; *Allen*, 46 Fla. L. Weekly at S161-62. Accordingly, the Third District correctly affirmed Baptiste's convictions.

In contrast, in *Rubi*, after holding that defense counsel invited a coercive jury charge, the Fourth District was wrong to grant relief on the basis that the charge was "fundamental error, and per se reversible." *Rubi*, 952 So. 2d at 635 (quoting *Scoggins*, 691 So. 2d at 1189). Rather, the Fourth District should have held that the invited error precluded fundamental error review. *See Warfel*, 82 So. 3d at 65; *Allen*, 46 Fla. L. Weekly at S161-62.[2]

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2. The Fourth District's decision in *Rubi* also wrongly conflates fundamental error, which applies when an issue is not

Finally, Baptiste urges us to hold that the "waiver of the right to an uncoerced verdict must be made personally by the defendant and cannot be made by defense counsel." However, he did not raise this argument before the Third District, and it is not the conflict issue on which our jurisdiction is based. Accordingly, we do not decide it. *See Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) (explaining that this Court's "authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued").

CONCLUSION

A jury charge, requested by defense counsel but argued on appeal to be coercive, is not reviewable for fundamental error because any error in the charge was invited. *See Warfel*, 82 So. 3d at 65; *Allen*, 46 Fla. L. Weekly at S161-62. Accordingly, we approve the Third District's decision in *Baptiste* to the extent that it is

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preserved, and per se reversible error, which requires preservation. *See Johnson v. State*, 53 So. 3d 1003, 1007 & n.5 (Fla. 2010).

consistent with this opinion and disapprove the Fourth District's decision in *Rubi*.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Third District - Case No. 3D18-2403

(Miami-Dade County)

Carlos J. Martinez, Public Defender, Maria E. Lauredo, Chief Assistant Public Defender, and Shannon Hemmendinger, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida,

for Petitioner

Ashley Moody, Attorney General, Amit Agarwal, Solicitor General, Jeffrey Paul DeSousa, Chief Deputy Solicitor General, and Evan Ezray, Deputy Solicitor General, Tallahassee, Florida; and Michael Mervine, Chief Assistant Attorney General, and Brian H. Zack, Assistant Attorney General, Miami, Florida,

for Respondent

769 So.2d 457
District Court of Appeal of Florida,
Fourth District.

Marshall Guadalupe LANDEVERDE, Appellant,
v.
STATE of Florida, Appellee.

No. 4D99-1879.
|
Oct. 11, 2000.

Synopsis

Defendant was convicted in the Nineteenth Judicial Circuit Court, Martin County, Cynthia Angelos, J., of first-degree murder and burglary of a dwelling. Defendant appealed. The District Court of Appeal, Taylor, J., held that codefendants had Fifth Amendment privilege not to testify.

Affirmed.

Attorneys and Law Firms

***459** Rosemarie Richard of Richard & Richard, Attorneys At Law, P.A., Stuart, and Robert G. Udell, P.A., Stuart, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Melynda Melear, Assistant Attorney General, West Palm Beach, for appellee.

Opinion

TAYLOR, J.

Marshall Landeverde appeals from his conviction of first degree murder and two counts of burglary of a dwelling. He raises three points of error: (1) denial of the motion to suppress his confession; (2) failure to give jury instructions on the independent act theory; and (3) refusal to compel the testimony of his co-defendants. After reviewing the record and carefully considering appellant's arguments on all of these issues, we conclude that the trial court committed no reversible error and affirm the judgments of conviction.

First, we find no error in the trial court's denial of appellant's motion to suppress his confession. The record supports the trial court's determination that appellant initiated conversation with the officer after invoking his rights and that his second statement was voluntary. Second, we determine that the trial court properly declined to give instructions on the independent act theory, because there was no evidence that the co-defendant who shot ***460** the victim acted independently from appellant. Rather, the evidence showed that the shooter acted in furtherance of the burglary and theft in which appellant participated. Third, we conclude that the trial court did not err in refusing to compel the co-defendants to testify at appellant's trial over the co-defendants' assertion of their Fifth Amendment privilege against self-incrimination. We discuss our resolution of this claim more fully below.

FACTUAL BACKGROUND

On January 13, 1998, appellant, Raymond Carver, Israel Cuevas, and Ronald Demedicus drove around looking for a vacant house to burglarize. They came upon the victim's house, which was in a secluded wooded area. They approached the house and knocked. After determining that no one was home, the men entered the house. They noticed black curtains covering the windows and, once inside, saw nothing but marijuana. The four men had unknowingly selected a marijuana growing house. They immediately began removing quantities of marijuana from the house.

The next day, on January 14, the men decided to break in again and steal more marijuana. However, finding that someone was home, they abandoned the plan. On January 15, appellant and Carver re-entered the house. Appellant carried a knife; he knew that Carver was carrying a gun. Appellant remained downstairs cutting marijuana plants and stuffing them in bags while Carver went upstairs. While cutting the marijuana, appellant heard gunshots. Afraid that Carver had been shot, appellant called out to him. Appellant went upstairs and discovered that Carver had shot and stabbed the owner of the home, Christian Giotis. Appellant and Carver left the house with the marijuana and searched the victim's truck for other valuables.

Carver was indicted on a charge of first degree murder. He went to trial and was found guilty of first degree murder and sentenced to a term of life imprisonment. Demedicus was charged with murder and two counts of burglary. He pled no contest to manslaughter and burglary and received a twelve-year sentence. Cuevas was charged with second degree murder and two counts of burglary. Pursuant to a plea agreement, the state nolle prossed the murder count upon Cuevas' no contest plea to the burglaries. Cuevas was placed on two years of community control. Appellant was found guilty by a jury of first degree felony murder and two counts of burglary of a dwelling. He was sentenced to life in prison without parole.

At trial appellant attempted to call co-defendants Carver, Demedicus, and Cuevas as witnesses. Each prospective witness asserted his Fifth Amendment privilege against self-incrimination at a hearing held outside the presence of the jury. Appellant's trial counsel advised the co-defendants that he intended to ask them questions about the Giotis incident and any discussions between them prior to commission of the crimes. Based on his pending appeal, Carver invoked his Fifth Amendment privilege and refused to testify. Demedicus, who had cooperated with the state after entering his plea and filed a motion to modify his sentence, also asserted a Fifth Amendment privilege not to testify. Cuevas did not have any appeals or post-sentencing motions pending at the time of appellant's trial, but he nevertheless refused to testify on Fifth Amendment grounds. The trial court sustained all three co-defendants' invocation of the privilege and denied appellant's motion to hold them in contempt for refusing to testify. Appellant objected, contending that the court's ruling impaired his right under the Sixth Amendment to present witnesses in his defense and that this right overrode the co-defendants' claim of a Fifth Amendment privilege.

DISCUSSION

Testimony of Carver

Both parties agree that under ***461** *Landenberger v. State,* 519 So.2d 712 (Fla. 1st DCA 1988), the trial court properly denied appellant's motion to hold Carver in contempt. *Landenberger* held that "[i]n the absence of a promise of immunity, a convicted felon with an appeal pending has a Fifth Amendment privilege not to testify, *and this privilege continues throughout the pendency of the appeal.*" *Id.* at 713 (emphasis supplied); *see also King v. State,* 353 So.2d 180 (Fla. 3d DCA 1977).

Testimony of Cuevas

Cuevas' assertion of a Fifth Amendment privilege is more problematic. Appellant's trial counsel objected to Cuevas' claim of a privilege, arguing that Cuevas had no reason to fear further prosecution in light of his prior plea and sentence. He urged the trial court to compel Cuevas to testify at appellant's trial.

A criminal defendant has the right to compulsory process to obtain the appearance of witnesses to testify on his behalf. This right is an essential attribute of our adversarial system and a fundamental element of due process of law. *Taylor v. Illinois,* 484 U.S. 400, 407-409, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *State v. Reeves,* 444 So.2d 20, 23 (Fla. 2d DCA 1983) (Sixth Amendment

rights of confrontation and compulsory process are fundamental in nature and obligatory on the states under the due process clause of the Fourteenth Amendment). However, "when the Fifth Amendment guarantee collides with the Sixth Amendment ... the Sixth Amendment right must yield because to require one to incriminate himself in order to afford help to another would be both unwise and unrealistic." *Walden v. State,* 284 So.2d 440, 441 (Fla. 3d DCA 1973); *Talavera v. State,* 227 So.2d 493 (Fla. 2d DCA 1969), *quashed in part on other grounds,* 243 So.2d 595 (Fla.1971). *See also Kastigar v. United States,* 406 U.S. 441, 444-45, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)(The power to compel testimony is subject to the exemption of testimony privileged under the Fifth Amendment)*; Hoffman v. United States,* 341 U.S. 479, 490, 71 S.Ct. 814, 95 L.Ed. 1118 (1951)(The evils of compulsory self-incrimination transcend any difficulties that exercise of the Fifth Amendment privilege may impose upon society in the prosecution and detection of crime)*; United States v. Cuthel,* 903 F.2d 1381, 1384 (11th Cir.1990)(The conflict between a defendant's right to compel testimony and a witness' Fifth Amendment privilege has been resolved in favor of the latter). *See also Brown v. State,* 729 A.2d 259 (Del.1999).

In resolving the conflict between a defendant's right to compel testimony and a witness' Fifth Amendment privilege, the trial court must first determine whether the witness can validly assert a Fifth Amendment claim. In this regard, the trial court must evaluate whether a witness invoking a Fifth Amendment privilege "is confronted by substantial and 'real,' and not merely trifling or imaginary hazards of incrimination." *Marchetti v. United States,* 390 U.S. 39, 53, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968). This is a question of law for the court to decide upon a voir dire examination. *Talavera,* 227 So.2d at 495-6 (footnotes omitted); *ex rel. Feldman v. Kelly,* 76 So.2d 798, 800 (Fla.1954).

Appellant argued that Cuevas had no justifiable fear of self-incrimination because he had already pled to his charges and been sentenced. Counsel for Cuevas countered that his trial testimony could possibly subject him to new criminal charges arising out of the incident. Additionally, he argued that Cuevas' testimony regarding his role in the crimes could result in a greater sentence if he were to violate his community control. If facts previously undisclosed during his plea proceeding were revealed at appellant's trial and then brought forth at his sentencing for revocation of community control, Cuevas could receive a prison term. After reviewing the recent holding of the United States Supreme Court in *Mitchell v. United States,* 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the trial court agreed ***462** that Cuevas could suffer adverse consequences as a result of being required to testify and sustained Cuevas' assertion of his Fifth Amendment privilege.

In *Mitchell,* the Supreme Court resolved the conflict among the federal circuits as to whether a guilty plea waives the privilege against self incrimination in the sentencing phase of a criminal case.[1] The Court held that the privilege does not end upon adjudication of guilt and continues until the sentence has been imposed. "It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege." *Id.* at 326. The Court concluded, however, that this principle applies "to cases in which the sentence has been fixed and the judgment of conviction has become final." *Id.* "If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared." *Id. Mitchell* significantly extended the traditional scope of the Fifth Amendment privilege, declaring that the privilege applies past the possibility of a criminal prosecution and includes situations involving a potential enhancement of sentence.

We begin our analysis of *Mitchell's* applicability to Cuevas' assertion of a Fifth Amendment privilege by inquiring whether a defendant placed on a "straight" term of community control or probation has been "sentenced" such that he loses the right to invoke his or her Fifth Amendment privilege against self-incrimination. Has a defendant who, at sentencing, received only probation or community control been given a "fixed" sentence such that "no adverse consequences can be visited upon the convicted person by reason of further testimony?"

Under Florida law, a probationary period is generally not considered a "sentence." *See State v. Summers,* 642 So.2d 742, 744 (Fla.1994)(citing *Villery v. Florida Parole & Probation Comm'n,* 396 So.2d 1107 (Fla.1980) and Committee Note, Fla. R.Crim. P. 3.790). "A sentence and probation are discrete concepts which serve wholly different functions." *Villery,* 396 So.2d at 1110. Probation is a form of community supervision, with rehabilitation, rather than punishment, as its underlying purpose. *Id.; Martin v. State,* 243 So.2d 189 (Fla. 4th DCA 1971). A defendant is placed on probation if "it appears to the court ... that the

defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law." § 948.01(2), Fla. Stat. (1997). The "penalty" is generally a fine or a sentence of imprisonment or both. *Villery,* 396 So.2d at 1110. When a defendant is placed on probation, the court must *stay and withhold the imposition of sentence* regardless of whether adjudication of guilt is withheld. § 948.01(2), Fla. Stat.; Fla. R.Crim. P. 3.790(a). *Id.*[2]

Chapter 948 draws clear distinctions between the term of a sentence and the period of probation. Thus, in a technical sense, a trial court is not authorized to *sentence* a defendant to probation. *See Lennard v. State,* 308 So.2d 579 (Fla. 4th DCA 1975) (citing *Brown v. State,* 302 So.2d 430 (Fla. 4th DCA 1974)). In *Brown,* we stated:

> A court may impose a sentence of imprisonment or fine upon a defendant found guilty of an offense, or it may withhold sentence in whole or in part and place defendant on probation, but it ***463** cannot sentence defendant to probation, since withholding of sentence or a portion thereof is an indispensable prerequisite to entry of an order placing a defendant on probation.

302 So.2d at 432.

We further explained that:

> If a defendant could be sentenced to probation, there would no judicial recourse in the event the defendant violated his probation. Because the court has already passed sentence, there would be no lawful basis for the imposition of punishment for the violation of the conditions of probation. However, as Chapter 948 envisions, when a sentence or a portion thereof is withheld, there would be a lawful basis for the imposition of punishment for the violation of a condition of probation, namely, the withheld sentence.

Id.[3]

Because an order of probation or community control placement "withholds the imposition of sentence" and is subject to modification, it is not a "fixed" sentence within the meaning of *Mitchell.* While a defendant is on probation or community control, the trial judge retains jurisdiction over the defendant until the period of probation or community control expires. *See Clark v. State,* 402 So.2d 43 (Fla. 4th DCA 1981). If a defendant violates terms and conditions of supervision, the court can revoke the defendant's probation or community control. In such event, the court may "impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control." § 948.06(1), Fla. Stat. (1997). This is so even when a defendant violates terms of probation on which he or she was placed pursuant to a plea bargain. *Bilyou v. State,* 404 So.2d 744 (Fla.1981); *State v. Parrish,* 616 So.2d 1135 (Fla. 3d DCA 1993).

When sentencing a defendant after revocation of probation or community control, a trial court may, under certain circumstances, consider new facts relevant to the underlying offense that were not previously considered by the court at the time it imposed the original sentence. These newly disclosed facts can result in greater sentences without violating double jeopardy principles. For instance, the court can consider prior convictions that were mistakenly omitted from the original sentencing scoresheet. *Roberts v. State,* 644 So.2d 81 (Fla.1994). The trial court can also score victim-injury points upon revocation of community control, even though the original sentence did not reflect such assessment. *Merkt v. State,* 764 So.2d 865 (Fla. 4th DCA 2000); *Echols v. State,* 660 So.2d 782 (Fla. 4th DCA 1995). Further, the court can impose a departure sentence, upon revocation of probation, beyond the one-cell increase permitted by sentencing guidelines for violation of probation, based on a reason that would have supported departure had the judge initially sentenced the defendant rather than placing ***464** him or her on probation. *See Williams v. State,* 581 So.2d 144 (Fla.1991); *Routenberg v. State,* 677 So.2d 1325 (Fla. 2d DCA 1996). These and other sentencing scenarios demonstrate that a probation or community control placement is not a "fixed" or final sentence as contemplated by *Mitchell.*[4] So long as the trial court retains jurisdiction and control over a defendant's ultimate sentence, the defendant retains a legitimate protectable Fifth Amendment interest in not testifying as to incriminatory matters that could yet have an impact on his sentence. *Mitchell* makes its clear that a defendant is entitled to protection from a potential increase in sentence, just as he or she is entitled to protection from being compelled to furnish evidence that could lead to a criminal conviction. The Court noted that, as a

practical matter, a defendant is generally more concerned about the sentence imposed as a result of a conviction than with the conviction itself. *See Mitchell,* 526 U.S. at 327, 119 S.Ct. 1307.

In this case, Cuevas' concern about self-incrimination was real and substantial. Cuevas could have reasonably believed that responding to questions about the Giotis crimes presented a danger since the possibility of a greater sentence following revocation of his community control existed.[5] If the trial court had compelled Cuevas to testify in appellant's trial, his testimony might have produced evidence of his greater participation in the charged crimes, a more extensive criminal history, or other unfavorable sentencing factors undisclosed at the time of his plea and original sentencing.[6] This potential for an enhanced sentence served as sufficient justification for invoking the privilege.

Testimony of Demedicus

At the time of appellant's trial, Demedicus had timely filed a 3.800 motion to modify his sentence. We conclude that the trial court properly denied appellant's motion to hold Demedicus in contempt. Because Demedicus had a pending motion to reduce his sentence, his exposure to incrimination was readily apparent under *Mitchell.* Moreover, a witness who has sought post-conviction relief after having pled to a crime can invoke his Fifth Amendment privilege when called to testify as a defense witness by a co-defendant. *See Ottomano v. United States,* 468 F.2d 269 (1st Cir.1972)(witness/co-defendant had a pending motion to vacate sentence; thus, further incrimination was not "so remote"); *People v. Villa,* 671 P.2d 971, 973 (Colo.Ct.App.1983)("[W]hen a defendant is appealing his conviction, or seeking other post-conviction relief, the privilege [against self-incrimination] continues in order to protect him from the subsequent use of self-incriminating statements in the event relief is granted."); *Ellison v. State,* 310 Md. 244, 528 A.2d 1271, 1276 (1987)("[A] witness who has been found guilty and sentenced on criminal charges is entitled to claim the privilege against self-incrimination with regard to matters underlying those charges while the time for appeal or sentence review is pending."); *State v. Click,* 768 So.2d 417 (Ala.Crim.App.1999)(privilege extended to post-conviction hearing).

***465** For the reasons stated above, we hold that the trial court did not err in refusing to compel the co-defendants to testify at appellant's trial. Accordingly, we affirm appellant's judgments of conviction.

AFFIRMED.

WARNER, C.J. and KLEIN, J., concur.

All Citations

769 So.2d 457, 25 Fla. L. Weekly D2426

Footnotes

1 *See* Anthony J. Phelps, *Applicability of the Fifth Amendment Privilege Against Self-Incrimination at Sentencing: Mitchell v. United States Settles the Conflict,* 38 Brandeis L.J. 107 (1999).

2 *Villery* was superseded in part by the "Correctional Reform Act of 1983," Chapter 83-191, Laws of Florida, providing for split sentencing alternatives. However, *Villery's* holding regarding the statutory and rule requirements for withholding imposition of sentence when a defendant is placed on probation remains intact.

3 We recognize that probation is considered a sentence in those instances when drawing a distinction between the two concepts will result in a more severe punishment. *See Lippman v. State,* 633 So.2d 1061 (Fla.1994)(holding that probation is a sentence for purposes of double jeopardy protection against multiple punishments such as the enhancement or extension of probation conditions); *Van Tassel v. Coffman,* 486 So.2d 528 (Fla.1985)(rejecting distinction between probation and a sentence when the probation order included incarceration as a condition and holding that probationer is eligible for gain time consideration); *Griner v. State,* 523 So.2d 789 (Fla. 5th DCA 1988)(construing probation as a sentence for purpose of allowing credit for prior jail time to defendant confined as a condition of probation). Similarly, probation has been construed as a sentence for purposes of appellate or post-conviction review.

See Larson v. State, 572 So.2d 1368, 1370 (Fla.1991)(construing probation as a sentence in applying the contemporaneous objection rule to appeals of sentences); *State v. Bolyea,* 520 So.2d 562 (Fla.1988)(court ordered probation constitutes "custody under sentence" for purpose of seeking post-conviction relief under Florida Rule of Criminal Procedure 3.850).

4 We do not address whether *Mitchell* would apply to probation imposed as part of a "true split sentence," where a new period of incarceration imposed following a probation violation could not exceed the remainder of the suspended portion of the original sentence of imprisonment. *See Poore v. State,* 531 So.2d 161 (Fla.1988); *Burroughs v. State,* 688 So.2d 416 (Fla. 2d DCA 1997).

5 Statistics compiled by the Department of Corrections, tracking offenders for a year following their admission to probation or community control during the calendar year 1998, show a revocation rate of 34.3% for offenders placed on community control and 20.2 % for offenders placed on probation. These numbers suggest that re-sentencing following revocation is more than a remote possibility or "imaginary hazard of incrimination."

6 We note, however, that Cuevas could not receive a departure sentence based on conduct that could have, but did not, result in a criminal charge and conviction. *See Barr v. State,* 674 So.2d 628 (Fla.1996).

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940 So.2d 1217
District Court of Appeal of Florida,
Fourth District.

Victoria PISCIOTTI, Appellant,

v.

Eugene STEPHENS, Appellee.

Nos. 4D05–3648, 4D05–3649.
|
Nov. 1, 2006.

Synopsis

Background: Sister, who was personal representative of her parents' estates, appealed non-final orders from the Circuit Court, Seventeenth Judicial Circuit, Broward County, Mark A. Speiser, J., directing her to answer deposition questions and to file final accountings, in adversary proceedings brought by brother seeking judgment against sister for funds and other assets wrongfully taken.

The District Court of Appeal, Farmer, J., held that trial court's orders violated sister's Fifth Amendment privilege against self-incrimination.

Reversed.

Stone, J., concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

***1219** Thomas F. Luken, Fort Lauderdale, for appellant.

Douglas R. Bell, Fort Lauderdale, for appellee.

Opinion

FARMER, J.

The personal representative (PR) of her parents' estates has filed separate petitions seeking certiorari review of two probate court orders, directing her to answer deposition questions and to file final accountings. We treat the petitions as appeals of non-final orders. We reverse both on the grounds that they violate her Fifth Amendment constitutional right against self-incrimination.

Victoria and Eugene are sister and brother. Their mother died in May 2001, leaving her entire estate to their father. Four months later father also passed away. His will provided for the equal division of assets between the two children if mother had predeceased him. Sister was appointed PR of mother's estate and, although never formally appointed, also assumed the role of PR of father's estate.

During the administration of the estates, brother uncovered three undisclosed checks—two purporting to have been signed and dated by father after his own death. Around this time, sister also testified at a hearing held on homestead, making

statements regarding the parents' bank accounts. In light of the undisclosed checks and sister's testimony, brother filed adversary proceedings to remove her as PR, accusing her of stealing money by forging signatures on checks and giving false testimony at the hearing. He also sought judgment against her for the funds and other assets wrongfully taken. In an attempt to partially resolve these proceedings, the parties entered into an agreed order wherein sister agreed to resign as PR from both estates.

Thereafter at her first deposition, sister asserted her Fifth Amendment privilege to all questions posed, and brother stated that he may pursue criminal prosecution if she remained silent. She maintained her right to remain silent and, accordingly, he filed a motion to direct her to answer the questions. The trial court ultimately granted brother's motion and ordered sister to testify and file a final accounting of mother's estate and an asset flow of father's estate. At a second deposition, she once again asserted her Fifth Amendment privilege. In response, brother filed another motion directing her to answer and requested that she be held in contempt. The trial court granted the motion and repeated that sister must provide an accounting of both estates. In its order, the court did not review the nature of the deposition questions on a question-by-question basis.

Certiorari lies to review orders compelling discovery in civil cases "over an objection that the order violates the Fifth Amendment privilege against self-incrimination." *McKay v. Great Am. Ins. Co.,* 876 So.2d 666, 669 (Fla. 4th DCA 2004) (referencing *Boyle v. Buck,* 858 So.2d 391, 392 (Fla. 4th DCA 2003)). "The reviewing court must determine whether the trial court's discovery order departed from the essential requirements of law, resulting in harm to the petitioner not remediable on ***1220** plenary appeal." *McKay,* 876 So.2d at 669. The order must violate clearly established principles of law and result in a miscarriage of justice. *Fassy v. Crowley,* 884 So.2d 359, 364 (Fla. 2d DCA 2004) (citing *Combs v. State,* 436 So.2d 93, 95–96 (Fla.1983)).

Sister's first argument on appeal is that the trial court's order requiring her to answer deposition questions violates her Fifth Amendment privilege against self-incrimination, particularly in light of her brother's comments regarding criminal prosecution of her. We agree.

> The Fifth Amendment to the United States Constitution provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V; *see also* Art. I, § 9, Fla. Const. This protection exists primarily to "assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action."
>
> One aspect of the privilege against self-incrimination is a witness's right in a civil proceeding to refuse to respond to a question on the grounds that his answer may tend to incriminate him. *See Kastigar v. United States,* 406 U.S. 441, 444–45, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *DeLisi v. Bankers Ins. Co.,* 436 So.2d 1099, 1101 (Fla. 4th DCA 1983).
>
> During discovery in a civil case, a litigant may assert the Fifth Amendment privilege when the litigant has reasonable grounds to believe that the response to a discovery request would furnish a link in the chain of evidence needed to prove a crime against the litigant.
>
> The Fifth Amendment privilege does not shield every kind of incriminating evidence. Rather, it protects only testimonial or communicative evidence, not real or physical evidence which is not testimonial or communicative in nature. *See Fisher v. United States,* 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). [c.o.]

Boyle, 858 So.2d at 392–93. Moreover, this privilege is a fundamental principle; thus "waiver of privilege will not be lightly inferred, [and] courts will generally indulge every reasonable presumption against finding a waiver." *Jenkins v. Wessel,* 780 So.2d 1006, 1008 (Fla. 4th DCA 2001).

Significantly, in *Magid v. Winter,* 654 So.2d 1037, 1039 (Fla. 4th DCA 1995), we emphasized that:

> "[i]t need not be probable that a criminal prosecution will be brought or that the witness's answer will be introduced in a later prosecution; the witness need only show a realistic possibility that the answers will be used against him."

654 So.2d at 1039; *see also Hoffman v. United States,* 341 U.S. 479, 486–87, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). Moreover, "a trial court order that compels a witness to answer all questions raised, even those which may incriminate the witness, should

be considered overbroad and a departure from the essential requirements of law." *Magid,* 654 So.2d at 1039. Here, given the potentially incriminating nature of the evidence, coupled with brother's professed intent to seek criminal prosecution, sister had reasonable grounds to fear that her deposition testimony could be used as a link in a chain of evidence against her in a later criminal proceeding. *See O'Neal v. Sun Bank, N.A.,* 754 So.2d 170, 171–72 (Fla. 5th DCA 2000) (holding Fifth Amendment properly invoked because "civil litigant has reasonable grounds to believe that direct answers to deposition ... would furnish a link in the chain of evidence and subject him to a perjury ***1221** charge"). Thus, in this case the trial court failed to recognize that there was a reasonable possibility of prosecution, and ultimately applied the wrong law. *See Pillsbury Co. v. Conboy,* 459 U.S. 248, 266, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983); *see also Magid,* 654 So.2d at 1039; *Fassy,* 884 So.2d at 364.

Second, sister argues that the trial court's order requiring her to file final accountings also violates her Fifth Amendment privilege. Generally, the privilege does not apply to documents that are required under the law to be prepared by a PR to carry out a fiduciary duty. In the case of *In re Rasmussen,* 335 So.2d 634, 636 (Fla. 1st DCA 1975), the First District noted:

> "The privilege against self-incrimination is a personal one. The individual and his records are both constitutionally protected. However, this immunity is designed to protect personal documents or papers, or at least those in his possession in a purely personal capacity.... To hold otherwise, would permit a fiduciary to neglect his duties, and then to refuse to comply with a court order, which seeks to compel him to comply, by taking the 'fifth'. We do not mean that an individual serving in a fiduciary capacity is prohibited from asserting his privilege against self-incrimination as to purely personal documents which may be located in the file or records maintained by him in his fiduciary capacity." [c.o.]

Rasmussen, 335 So.2d at 636. Thus, the court reasoned that while the privilege may attach to a PR's personal documents, it does not attach to those documents the PR is required by law to prepare.

Yet given the fundamental nature of the Fifth Amendment's constitutional guarantees, we perceive grave difficulties in applying the privilege to the deposition questions but not to the related final accountings. To refuse to apply the privilege to the order for a final accounting document in this case would have the rather perverse effect of protecting sister from giving testimonial answers conceivably providing a link in the chain of evidence but then refusing the same protection by requiring her to file accountings yielding the same information. Because of the facts and circumstances of this case, we distinguish *Rasmussen.*

Reversed.

POLEN, J., concurs.

STONE, J., concurs in part and dissents in part with opinion.

STONE, J., concurring in part and dissenting in part.
I concur in reversing as to application of the Fifth Amendment to the compelled deposition testimony. However, as to the order directing Appellant to file accountings, I would affirm. *See Wright v. Dep't of Health and Rehabilitative Servs.,* 668 So.2d 661 (Fla. 4th DCA 1996).

All Citations

940 So.2d 1217, 31 Fla. L. Weekly D2735

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Third District Court of Appeal

State of Florida

Opinion filed February 3, 2021.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-1599
Lower Tribunal No. 20-18188

Dani Shimon,
Petitioner,

vs.

R. B.,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Martin Zilber, Judge.

Stok Kon + Braverman, and Robert A. Stok, Joshua R. Kon, and Yosef Kudan (Fort Lauderdale), for petitioner.

Horowitz Law, and Adam D. Horowitz and Elana B. Goodman (Fort Lauderdale); Kuehne Davis Law, P.A., and Benedict P. Kuehne and Michael T. Davis, for respondent.

Before LOGUE, SCALES, and LINDSEY, JJ.

LOGUE, J.

Dani Shimon petitions for a writ of certiorari to quash part of an order requiring him to provide documents in discovery that he contends violates his Fifth Amendment right against self-incrimination. Under the authority of Wahnon v. Coral & Stones Unlimited Corp., No. 3D19-2387, 2020 WL 7049998 (Fla. 3d DCA Dec. 2, 2020), which was not available to the trial court at the time of its ruling, we issue the writ and quash paragraph one of the order under review.

R.B. sued Shimon alleging he sexually battered her on board his boat when it was located in the waters off north Miami-Dade County or south Broward County. R.B. reported the assault to three separate law enforcement agencies: the Hallandale Beach Police Department; the Miami-Dade County Police Department; and the Broward State Attorney's Office. The Hallandale Beach Police closed their investigation noting that the Broward State Attorney declined to prosecute due to "the time delay and the victim's indecisiveness to come forward in the beginning, as well as jurisdictional issues." The Broward State Attorney never filed an information or formally charged Shimon. There is no indication that Shimon was ever arrested or requested to appear in court.

Finding no reasonable danger of prosecution, the trial court entered a blanket order overruling Shimon's Fifth Amendment objection without

addressing each category of the requested documents individually. The order further provided Shimon would be fined $1,000 for each day he failed to produce the documents after the expiration of seven days. Shimon timely filed a petition for certiorari with this Court.

"To grant certiorari relief, there must be: '(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a departure from the essential requirements of the law.'" Fla. Power & Light Co. v. Cook, 277 So. 3d 263, 264 (Fla. 3d DCA 2019) (quoting Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012)). An order compelling testimony in violation of the Fifth Amendment privilege against self-incrimination qualifies as irreparable harm justifying the issuance of a writ of certiorari. See Aguila v. Frederic, 45 Fla. L. Weekly D2043 (Fla. 3d DCA Aug. 26, 2020).

The standard for deciding whether the Fifth Amendment has been properly invoked in a civil proceeding is whether "'the civil litigant has reasonable grounds to believe that direct answers to deposition or interrogatory questions would furnish a link in the chain of evidence needed to prove a crime against him.'" Id. at *2 (quoting Rainerman v. Eagle Nat'l Bank of Mia., 541 So. 2d 740, 741 (Fla. 3d DCA 1989)). The United States Supreme Court "has always broadly construed [the Fifth Amendment's]

protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." Maness v. Meyers, 419 U.S. 449, 461 (1975).

Here, future prosecution of this action is not barred by the statute of limitations,[1] legal immunity from prosecution has not been granted,[2] and the protection against double jeopardy has not been established. The Broward State Attorney's decision not to prosecute was based in part on the conclusion that it had "no reasonable likelihood of conviction." A discretionary decision not to prosecute because of a lack of evidence can quickly be reversed when new evidence comes to light. One can easily envision circumstances in which a disclosure made by Shimon could furnish a link in the chain of evidence needed to prove a crime against him and cause the law enforcement agencies to re-open their investigations. For that matter, the Broward State Attorney's decision not to prosecute hardly prevents the Miami-Dade State Attorney from pursuing prosecution and the

[1] The Hallandale Beach Police Department originally classified this action as a violation of section 794.011(4), Florida Statutes (2019). Because R.B. reported the battery within 72 hours, there is no applicable statute of limitations and the prosecution "may be commenced at any time." § 775.15(13)(a).

[2] A notation in a police report that the State Attorney declined to prosecute is not a grant of immunity.

jurisdictional issues that impacted prosecution in Broward may not apply in Miami-Dade.

In these circumstances, we agree with Shimon that the possibility that a criminal investigation could be re-opened in the future is not so remote as to eliminate his reasonable fear of prosecution. For this reason, he cannot be compelled to give testimony over a claim of his Fifth Amendment right. Wahnon, 2020 WL 7049998, at *4.

Thus, this case presents a classic example of where Shimon's Fifth Amendment privilege against self-incrimination conflicts with R.B.'s right to access the courts. "In these circumstances, the trial court must fashion a remedy that has the least intrusive impact on the assertion of the Fifth Amendment privilege while alleviating the prejudice to the other party and providing a 'just, speedy, and inexpensive determination' of the underlying dispute." Id. (quoting Fla. R. Civ. P. 1.010).

Petition granted in part; order quashed in part.

592 So.2d 795
District Court of Appeal of Florida,
Third District.

J.R. BROOKS & SON, INC., Petitioner,

v.

Lorraine DONOVAN, as Mother and Guardian of the Person of Daniel Donovan, an incapacitated person, and Joseph Donovan, as Guardian of the property of Daniel Donovan, an incapacitated person, Respondents.

No. 91-2616.
|
Feb. 4, 1992.

Synopsis

Parents of shooting victim brought action against company, alleging that company's employees were negligent in shooting the victim. The Circuit Court, Dade County, Ursula Ungaro, J., ordered employees to disclose conversations concerning the identity of the shooter, and employees petitioned for writ of certiorari. The District Court of Appeal held that trial court's blanket order compelling employees to answer all questions regarding conversations involving identity of shooter was overbroad and infringed upon employees' Fifth Amendment rights against self-incrimination.

Quashed and remanded.

Attorneys and Law Firms

***795** Richard A. Sherman, Fort Lauderdale, for petitioner.

Anderson, Moss, Parks, Meyers & Sherouse, and Michael B. Buckley, Miami, for respondents.

Before NESBITT, FERGUSON and GERSTEN, JJ.

PETITION FOR WRIT OF CERTIORARI

PER CURIAM.

Petitioner, J.R. Brooks & Son, Inc., files this petition for writ of certiorari to review a trial court's order compelling discovery. We grant the petition, quash the order, and remand.

Daniel Donovan and Mike Lemus stole a large amount of fruit from petitioner. Upon being informed by a neighbor that the crime had just occurred, several of petitioner's employees, including Murray Bass and Michael Hunt, mounted their pick-up trucks and chased the thieves.

During the course of this high speed chase, Donovan was shot by an unknown person, perhaps one of petitioner's employees. The thieves were eventually apprehended. Charges for the shooting were not filed because investigators could not determine who shot Donovan.

Donovan's parents, respondents, sued petitioner alleging negligence on the part of its employees. Respondents sought discovery to determine the identity of the shooter. During depositions, Bass and Hunt invoked the Fifth Amendment and refused to answer questions regarding: (1) the identity of the shooter; or (2) any conversations involving the identity of the shooter. The trial court overruled these objections, holding that the deponents were required to disclose conversations concerning the identity of the shooter.

Petitioner asserts that the trial judge's order infringes upon the deponents' Fifth Amendment right not to incriminate themselves. Respondents contend that the information sought is exculpatory, not inculpatory, because the questions pertain to whether a third party admitted to the shooting. Thus, respondents argue, that the Fifth Amendment is inapplicable.

***796** The Constitutional privilege against self-incrimination applies to all types of proceedings wherein testimony is given and applies alike to a witness as well as a party who is accused. *State ex. rel. Mitchell v. Kelly,* 71 So.2d 887 (Fla.1954). Furthermore, this Court has previously stated:
It is settled law that the privilege against self-incrimination may be properly asserted during discovery proceedings if the civil litigant has reasonable grounds to believe that direct answers to deposition or interrogatory questions would furnish a link in the chain of evidence needed to prove a crime against him.

Rainerman v. Eagle National Bank of Miami, 541 So.2d 740, 741 (Fla. 3d DCA 1989).

In this case, the trial court's blanket order compelled deponents Bass and Hunt to answer all questions regarding conversations involving the identity of the shooter. This order is overbroad and infringes upon the deponents' Fifth Amendment right. U.S. Const. amend. V. Accordingly, we quash the order, and remand so that the trial court may consider whether each question properly falls within the purview of the Fifth Amendment.

Quashed and remanded.

All Citations

592 So.2d 795, 17 Fla. L. Weekly D396

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CERTIFICATE OF SERVICE

I hereby certify that this original document has been e-filed through Florida's e-filing portal and has been electronically served to the Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399, henry.whitaker@myfloridalegal.com, jeffrey.desousa@myfloridalegal.com, christopher.baum@myfloridalegal.com, and jason.hilborn@myfloridalegal.com on this the 29th day of October, 2021.

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