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trial, defense counsel filed a letter from psychiatrist Milton Burglass:

I am unable to formulate a final diagnostic impression of [Valdez] at this time. It is my professional opinion that he requires inpatient hospitalization to undergo a complete psychiatric evaluation and determination of competency. I therefore recommend that you petition the Court for an order to that effect. [S.R. 2].

The trial court ordered Jackson Memorial Hospital to examine Valdez after concluding:

It appearing unto this Court that there are reasonable grounds to believe that defendant is not mentally competent to stand trial, or that defendant may have been insane at the time of the commission of the alleged offense, it is CONSIDERED, ORDERED AND ADJUDGED that defendant be examined as to the issues of competency to stand trial, need for involuntary hospitalization, insanity at the time of the alleged offense. [S.R. 3].

Dr. Lloyd Miller, a psychiatrist from the forensic service at Jackson Memorial Hospital evaluated Valdez and concluded Valdez was sane at the time of the offense and mentally competent to stand trial (S.R. 4-6).

The trial court did not conduct a formal hearing on competency. A semblance of a hearing occurred on the morning of trial, after defense counsel expressed his frustration in dealing with Valdez whom he characterized as irrational and unable to understand the proceedings (T. 4-6). The trial court responded that the report showed Valdez was "fine" (T. 5). At this point, defense counsel indicated his intent to rely on the insanity defense, but his only witness Dr. Burglass was unavailable.

Defense counsel asked to postpone the trial and the trial court refused (T. 4-9).

The case proceeded to trial upon the testimony of two detectives and Valdez. The detectives observed Valdez at the airport carrying two pieces of luggage (T. 60-72, 90-100). Another man who had been at the ticket counter came over to Valdez and gave a ticket to him. When the two men walked outside toward the parking lot, the detectives confronted them (T. 65-68). A narcotics dog indicated the baggage Valdez was carrying contained contraband (T. 70-71). Through a Spanish language interpreter, Valdez testified that the bags did not belong to him and he was unaware of their contents (T. 123-133).

The jury found Valdez guilty of trafficking in cocaine, and the trial court sentenced him to the mandatory fifteen year term and \$250,000 fine (R. 13-16). On appeal, Valdez sought new trial upon the trial court's failure to have two experts examine him after having decided the need for a competency determination. Valdez also challenged the trial court's refusal to postpone the trial and the prosecutor's improper closing remarks.

The Third District affirmed Valdez' conviction:

Because the number of examiners is merely a non-fundamental procedural matter ... we hold that the failure to bring the deviation from the rule to the trial court's attention effected a waiver of the contention. [D'Oleo-Valdez v. State, 516 So.2d 1125 (Fla. 3d DCA 1987)].

Valdez obtained review upon conflict with Graydon v. State, 502 So.2d 25 (Fla. 4th DCA 1987) in which the Fourth

District found reversible error in the appointment of only one expert without regard to whether the defendant objected below.

ISSUE ON APPEAL

WHETHER THE TRIAL COURT COMMITS REVERSIBLE ERROR, EVEN IN THE ABSENCE OF DEFENSE OBJECTION, BY USING ONLY ONE EXPERT TO EVALUATE A CRIMINAL DEFENDANT'S COMPETENCY AFTER FINDING REASONABLE GROUNDS TO BELIEVE THE DEFENDANT IS INCOMPETENT TO STAND TRIAL.

SUMMARY OF ARGUMENT

A judge's decision whether a defendant is competent to stand trial is an informed decision when made upon consideration of the opinion of two mental health experts. There is a difference of thought on whether defense counsel's failure to object to noncompliance with competency rules eliminates what would otherwise be reversible error. The better view and the view more consistent with Florida jurisprudence is that there is no waiver where the defense does nothing more than fail to object.

ARGUMENT

THE TRIAL COURT COMMITS REVERSIBLE ERROR, EVEN IN THE ABSENCE OF DEFENSE OBJECTION, BY USING ONLY ONE EXPERT TO EVALUATE A CRIMINAL DEFENDANT'S COMPETENCY AFTER FINDING REASONABLE GROUNDS TO BELIEVE THE DEFENDANT IS INCOMPETENT TO STAND TRIAL.

While evaluation of a party's competency is ultimately a judicial decision, Florida requires its judges to make an informed decision upon the advice of mental health experts. Poynter v. State, 443 So.2d 219 (Fla. 4th DCA 1983) (reversible

error for judge to ignore experts' uncontested testimony that defendant incompetent to stand trial); Harrell v. State, 296 So.2d 585, 586 (Fla. 1st DCA 1974) (mental competency to stand trial is legal question judicially decided after doctors render medical opinions). The view from the mental health community is that one professional opinion does not insure an accurate competency evaluation. Bonnie, Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 505, 526 fn. 261 (1980).

Since 1980, the Florida legislature has statutorily acknowledged the necessity of appointing no fewer than two experts to decide competency to stand trial and other questions of a criminal defendant's mental health. Section 916.11, Fla. Stat. (1987) (created by Ch. 80-75, Laws of Fla. (1980)). This court augmented the statute by adopting Florida Rule of Criminal Procedure 3.210, which requires two experts on competency once the trial court has "reasonable ground to believe that the defendant is not mentally competent to stand trial." In Re Rules of Criminal Procedure, 389 So.2d 610 (Fla. 1980). Competency in the context of involuntary civil commitment, although different from competency to stand trial, is also decided upon more than one professional opinion. Since 1973, Florida has mandated the appointment of two mental health professionals on such commitments. §394.467, Fla. Stat. (1987) (created by Ch. 73-133 §8, Laws of Fla. (1973)).

The courts of the State of New York, under a rule of criminal procedure similar to Rule 3.210, have consistently held that the failure to appoint two experts is reversible error. N.Y. [Crim. Proc.] Law section 730.20 mandates the designation of either two psychiatrists or one psychiatrist and one certified psychologist to examine a questionable defendant on the issue of competency. In People v. Armlin, 37 N.Y.2d 167, 371 N.Y.S.2d 691 (1975), the court held the defendant does not waive his right on appeal to insist upon compliance with the two expert procedure regardless of whether the defendant pleads guilty, does not object or does not bring the noncompliance to court's attention. See also, People v. Graham, 127 A.D.2d 443, 515 N.Y.S.2d 126 (1987) (violation of defendant's due process rights occurred where CPL Article 730 was not followed in that only one examination rather than two was done and no reports filed); People v. Mulholland, 129 A.D.2d 857, 514 N.Y.S.2d 135 (1987) (appointment of only one psychiatrist error; failure to provide defendant with examination by two psychiatrists as required by CPL 730.20 deprived him of his right to a full and impartial determination of his mental capacity to stand trial - remand for competency hearing); People v. Vallelunga, 101 A.D.2d 603, 474 N.Y.S.2d 857 (1984) (notwithstanding one psychiatrist report finding defendant competent, where court initiated inquiry under section 730, compliance with requirement of reports from two examining psychiatrists was mandatory); People v. Ross, 50 A.D.2d 1064, 375 N.Y.S.2d 714 (1975) (failure to appoint two psychiatrists to

examine defendant is not waived by failure to object or by entering a plea of guilty).

The State of Washington has a two expert rule similar to New York and Florida, (Wash. Rev. Code §10.77.060(1)) but it has suggested compliance with the rule is waivable. In State v. Israel, 19 Wash.App. 773, 577 P.2d 631 (1978), immediately before trial the prosecutor stated, "I would like to raise an issue of competency here of the defendant, pursuant to RCW 10.77.060(1) and have that resolved at this time." No experts were appointed to conduct an examination. Instead, the prosecutor and the trial court questioned the defendant after which the defense counsel stated that his client was competent. The trial court agreed and the case proceeded to trial. In a broadly worded opinion, the appellate court determined the rule was simply procedural and a defense counsel can waive the statutory requirement for the appointment of experts.

Given Florida's ingrained recognition of the necessity of more than one professional opinion on mental health matters and the unequivocal mandate of Florida Rule of Criminal Procedure 3.210, this court should adopt the New York courts' view that fewer than two experts is not a full and impartial determination of mental competence and is a denial of due process.

Florida Rule of Criminal Procedure 3.210 and case law, contemplate circumstances where defense counsel will entirely overlook the issue of competency, yet the trial judge will find reasonable grounds to doubt competency. State v. Tait, 387 So.2d

338, 341 (Fla. 1980) (rejected State's contention that defense counsel's failure to request competency hearing is a waiver notwithstanding existence of reasonable grounds for a hearing). The portion of the rule on appointment of experts does not distinguish between reasonable grounds arising from a defense motion and reasonable grounds arising from a court acting on its own. Once reasonable grounds exist, the trial court must appoint two experts. This court has only excused compliance where the defendant continuously refused to cooperate with the appointed experts. Muhammad v. State, 494 So.2d 969, 972 (Fla. 1986), cert. denied, 107 S.Ct. 1332 (1987); Gilliam v. State, 514 So.2d 1098 (Fla. 1987).

Here, Valdez did not refuse examination by a second expert. None was offered, notwithstanding the trial court's finding of reasonable grounds to believe Valdez was incompetent to stand trial. Valdez' due process rights were pushed aside further by the trial court's noncompliance with the hearing requirements under Rule 3.210. Cf. Copeland v. Wainwright, 505 So.2d 425, 429 (Fla. 1987) ("[A]lthough the trial court did not hold a formal adversarial hearing on competency, it did appoint a psychiatrist and two psychologists to examine appellant and make reports to the court. Based on these reports and the other information available, the court found appellant competent to stand trial.").

In recognition of the difficulty of determining in 1988 whether Valdez was competent to stand trial in 1985, this court

should vacate his conviction and sentence and order a proper competency evaluation under Rule 3.210. Scott v. State, 420 So.2d 595, 598 (Fla. 1982).

CONCLUSION

This court should quash the decision of the Third District Court of Appeal, vacate the conviction and sentence and remand for a proper determination of competency.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on: ROBERT A. BUTTERWORTH, Attorney General, RICHARD L. POLIN, Assistant Attorney General, Department of Legal Affairs, Ruth Bryan Owen Rhode Building, 401 Northwest Second Avenue, Suite 820, Miami, Florida 33128, this 3rd day of May, 1988.

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