

POSTSCRIPT—*DEATH AND HIS LAWYERS*[†]

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On January 21, 1996, following a week-long evidentiary hearing, Seminole County Circuit Judge O.H. Eaton ordered a new trial in Joseph Spaziano's case, to occur on March 25, 1996:

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY,
FLORIDA

CASE NO. 75-430-CFA

STATE OF FLORIDA,

Plaintiff,

vs.

JOSEPH R. SPAZIANO,

Defendant.

ORDER VACATING JUDGEMENT AND SENTENCE AND SETTING TRIAL DATE

On September 12, 1995, the Supreme Court of Florida entered an order treating two out-of-time motions for rehearing as a successive Rules of Criminal Procedure 3.850-3.851 motion based upon newly discovered evidence of the recantation of the testimony of a significant witness and remanded the case to this court for consideration of that issue. Spaziano v. State, 660 So. 2d 1363 (Fla. 1995). By separate order dated October 12, 1995, the Supreme Court directed this court to commence an evidentiary hearing no later than January 15, 1996. The hearing

† Michael Mello, *Death and His Lawyers: Why Joseph Spaziano Owes His Life to the Miami Herald—and Not to any Defense Lawyer or Judge*, 20 VT. L. REV. 19 (1995).

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commenced on January 8, 1996, and was completed on January 15, 1996. At that time the matter was taken under advisement.

The Issue

The issue to be decided is whether, due to the newly discovered evidence of the recanted testimony of Anthony Delisio, the defendant is entitled to a new trial.

The Law of Newly Discovered Evidence and Recanted Testimony

In order to prevail on newly discovered evidence the defendant must prove:

1. the evidence has been discovered since the former trial;
2. the evidence could not have been discovered earlier through the exercise of due diligence;
3. the evidence is material to the issue;
4. the evidence goes to the merits of the case and not merely impeachment of the character of a witness;
5. the evidence must not be merely cumulative; and
6. the evidence must be such that it would probably produce a different result on retrial.

Jones v. State, 591 So. 2d 911 (Fla. 1992); Henderson v. State, 106 So. 625 (Fla. 1938); Smith v. State, 158 So. 91 (Fla. 1934); Beasley v. State, 115 So. 2d 540 (Fla. 2d DCA 1975); Weeks v. State, 253 So. 2d 459 (Fla. 3d DCA 1971).

In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the issue. Armstrong v. State, 642 So. 2d 730 (Fla. 1994); Bell v. State, 90 So. 2d 704 (Fla. 1956). Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury. Id. at 705; Henderson v. State, supra.

Findings of Fact

Trial judges are taught to determine the credibility of a witness and the weight to be given to testimony by considering the demeanor of the witness; the frankness or lack of frankness of the witness; the intelligence of the witness; the interest, if any, that the witness has in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testifies; the ability of the witness to remember the events; and the reasonableness of the testimony considered in light of all of the evidence in the case. Additionally, trial judges attempt to reconcile any conflicts in the evidence without imputing untruthfulness to any witness. However, if conflicts cannot be reconciled, evidence unworthy of belief must be rejected in favor of evidence which is worthy of belief. These principals have been applied here, although it has not always been easy.

The crucial testimony at the trial of this case in 1976 came from the mouth of Anthony Delisio. It was he who provided the only evidence of the cause of death of the decedent and it was he who supplied the jury with the evidence connecting this tragic event to the defendant. Without his testimony, there simply is no corroborating evidence in the trial record that is sufficient to sustain the verdict—not even any evidence from the medical examiner who performed the autopsy.

Delisio now testifies that he did not tell the truth during the trial and provides a complicated explanation of the events which led up to his trial testimony. This testimony is credible and is corroborated by other evidence to a significant extent.

Delisio testified that he and his five siblings lived in a dysfunctional family ruled by his father, Ralph Delisio, who physically abused them.¹ Delisio tried to please his father but he never succeeded. His father owned a boat dealership known as Maitland Marine and Delisio frequented the business as a young teenager.

Ralph Delisio started an affair with a younger woman employee named Keppy who seduced Delisio when he was fifteen and with whom he had frequent sexual intercourse for about two and one half years. His father and Keppy ultimately married. Delisio had sex with her for the last

1. Two of Delisio's sisters testified at the hearing. Neither of them were directly asked to corroborate the testimony of systemic physical abuse. However, Donna Yonkin indirectly corroborated the testimony when she related the physical altercation which occurred when Delisio was arrested for drug possession at his father's residence. The testimony concerning abuse is accepted as true.

time on their wedding day. It was during this time that Delisio started using drugs including marijuana, hash and alcohol.²

The defendant worked at the marina and Delisio knew who he was. There is a conflict as to just how close their relationship was but none of the witnesses who testified were able to establish a fast friendship.

Not surprisingly, Keppy began to have a sexual relationship with the defendant. Ralph Delisio found out and became angry. At some point Keppy accused the defendant of raping her. It was about that time that Ralph Delisio asked his son if the defendant had told him that he mutilated women. Delisio testified that the defendant never said anything like that to him. But the idea was planted in his mind.

Delisio's mid-teenage years included several brushes with the law. He ran away from a drug treatment center in a stolen car with two other juveniles and ended up in Volusia House. It was there that Detectives Abby and Martindale, who were investigating the homicide in this case, approached Delisio for information. After being encouraged by his father to cooperate with the police, he agreed to be hypnotized in order to refresh his memory.

The detectives induced Delisio to cooperate by inferring that his cooperation would get him out of Volusia House and would result in several serious criminal charges being dropped. They also supplied him with bits of information prior to the hypnosis session. He was scared. He went along with the police in an effort to please them and his father.

After the first hypnosis session was over, Delisio did not think the police believed he cooperated. In fact, he "recalled" very little during the first session. It was then that the police took him to the scene of the homicide. A second hypnosis session was scheduled the next day.

Tapes of the sessions are in evidence as are the transcripts. The hypnotist does not give the listener confidence in his abilities. The defense experts who testified about the sessions and procedures agreed. One of them gave the hypnotist a "double f" and the other rated his skill level at "zero." It is plain from the testimony of these two distinguished experts that the reliability of the procedure used should be seriously doubted and that the information which was produced as a result was unreliable. Both experts agreed that hypnosis cannot improve recall beyond that which can be recalled through conscious efforts and that is exactly what the hypnotist thought he could do. It is most likely that the crime scene depicted by Delisio is a scene that he created for the purpose of pleasing the police and

2. He stated that he tried an animal tranquilizer called T.H.C. but he must have meant P.C.P. T.H.C. is the active chemical agent in marijuana.

his father. One of the experts even pointed out that the actual crime scene did not match Delisio's depiction in several material respects.

The State called several witnesses in order to attack Delisio's testimony and destroy his credibility. Many of these witnesses had major credibility problems themselves. One of the witnesses, a murderer in the Federal witness protection program, testified that he and the defendant were in prison together after the defendant was sentenced to life for rape but before the trial in this case. The witness heard the defendant express concern over a young boy whom he had taken to see some dead bodies. The reliability of that statement is questionable. If the statement was made, it is likely that the defendant was discussing the testimony he had learned Delisio was going to give at trial. That is the only way to reconcile the testimony with Delisio's version of the events without rejecting it as being untruthful.

Another witness, Bill O'Connell, was a counselor at the Volusia House and knew Delisio while he was there. He stated that Delisio was having trouble sleeping and told him that he had taken the police to a grave site. However, that statement, if made, does not agree with other credible evidence in the case unless it was made after Delisio had developed his testimony for the trial. The same is true of the statement Annette Jones says Delisio made to her and the statement Delisio says he made to Sandy Vehman.

Conclusions of Law

In the United States of America every person, no matter how unsavory, is entitled to due process of law and a fair trial. The defendant received neither. The validity of the verdict in this case rests upon the testimony of an admitted perjurer who had every reason to fabricate a story which he hoped would be believed. The courts of this country should not tolerate the deprivation of life or liberty under such circumstances. A fair trial requires a determination of the truth by an informed jury. The verdict of an uninformed jury results in an unfair trial. An unfair trial is an unlawful trial because it produces an illegal result.

The evidence of recantation in this case is newly discovered evidence which could not have been discovered earlier through the exercise of due diligence. It is material evidence which goes to the merits of the case. It is not cumulative evidence and it would probably produce a different result on retrial. As Justice Kogan stated in his concurring opinion remanding this case to this court:

Today we are presented with a grossly disturbing scenario: a man facing imminent execution (a) even though his jury's vote for life imprisonment would be legally binding today, (b) with his conviction resting almost entirely on testimony tainted by a hypnotic procedure this Court has condemned, (c) with the source of that tainted testimony now swearing on penalty of perjury that his testimony was false, and (d) without careful consideration of this newly discovered evidence under the only legal method available, Rule of Criminal Procedure 3.850 or 3.851.

Spaziano v. State, *supra* at 1367. That careful consideration has now been given and the validity of the Judgment and sentence has been found to be so questionable that it cannot stand.

IT IS ADJUDGED:

1. The Judgment rendered on January 23, 1976, and the sentence entered on June 4, 1981, are vacated.

2. This case is set for trial during the trial period commencing March 25, 1996, with docket sounding on March 12, 1996.

ORDERED at Sanford, Seminole County, Florida, this 22nd day of January, 1996.

/s/
O.H. EATON, JR.
Circuit Judge

The new trial order is now being held in abeyance while the state appeals Judge Eaton's new trial judgment. So much for the state's loud and frequent demands for "finality" in death cases. As of this writing, Mr. Spaziano's lawyers are planning to file a motion to vacate judgment in the rape case.

It will be said of Mr. Spaziano's new trial order: The system worked. "In fact, it was lawyers and reporters who worked. The legal system did its powerful best to kill."¹ In the same week that Joe Spaziano won a new trial, Delaware hanged a man and Utah executed another man by firing squad.²

1. Colman McCarthy, *States Streamline Machinery of Death*, WASH. POST, Feb. 6, 1996, at D16.

2. *Id.*