IN THE SUPREME COURT OF FLORIDA

WILLIE A. BROWN,
and LARRY TROY,

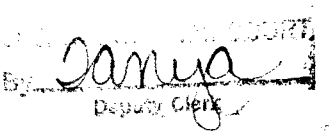
Appellants,

v.

STATE OF FLORIDA,

Appellee.

_____/



APPEAL NUMBERS 64,802
64,803
69,427

REPLY BRIEF OF APPELLANT BROWN

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ARGUMENT

POINT ONE

THE TRIAL JUDGE ERRED IN ALLOWING UNDISCLOSED TESTIMONY OF A STATE'S WITNESS WITHOUT FIRST CONDUCTING AN INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE STATE'S FAILURE TO COMPLY WITH THE DISCOVERY RULES.

The essence of the argument advanced by the State its Answer Brief is that; (1) that the prosecutor did not commit a violation of the discovery rules, and (2) even assuming a violation of the discovery rules the trial judge cured any possible harm by conducting a Richardson hearing.[1] Both of these arguments are without merit. The first argument is unsupported by any legal authority, and the second is unsupported by the record.

As to the threshold issue of whether there was a discovery violation, the State contends that it had no responsibility for Claude Smith's refusal to testify at his deposition. While it is true that this case would not have been dismissed as a result of Smith's failure to honor a defense subpoena, State v. Valdes, 443 So.2d 302 (Fla. 3d DCA 1983), that does not necessarily mean that the prosecution could freely use Smith's testimony at trial. The only remedy the defendant Brown sought in the trial court was an order excluding Smith's testimony. At no point did Brown move to dismiss the entire case on this ground, Compare State v. Valdes, supra, relied upon by the state. (Answer Brief p.34).

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971).

Furthermore, it is plain from the record that the prosecutor in this case actively participated in Smith's refusal to answer questions at the deposition, and expressly led the defense lawyers to believe that he would contact them at a later date to resolve the issue if he intended to use Smith's testimony. The pertinent portions of Smith's deposition are as follows:

> PROSECUTOR: At this point, as to any substantive question, Mr. Smith is going to refuse to answer.
>
> We discussed a couple of things regarding his personal safety, but I am incapable at this time, of making him any guarantees or as to any statement of what we could do or not do, or what could be done for him.
>
> Because of that, he doesn't feel that, because of his own safety, he can answer questions.
>
> Am I correctly stating what we talked about?
>
> CLAUDE SMITH: Yes, Sir
>
> * * *
>
> DEFENSE COUNSEL: (Mazar) Do you intend to go into this a little bit farther?
>
> PROSECUTOR: Yes, I will. I will at a future date. I am incapable of doing it now because it is 4:30 in the afternoon.

While the state is now disclaiming any responsibility for Claude Smith's refusal to testify, the record shows that the prosecutor not only participated in the Smith's refusal to honor the defense subpoena, but also that he accepted the

responsibility of addressing the matter "at a future date" if that became necessary. Apparently it was necessary to address the matter, but the prosecutor made no effort to contact the defense.

Perhaps the Defendants could have enforced the deposition subpoena by filing a motion to compel, but that is beside the point. The failure to enforce Smith's deposition subpoena does not justify his failure to honor it in the first place. In this case it is reasonable to conclude that counsel for the defense considered it unnecessary to engage in further efforts to depose Claude Smith. The earlier statements attributed to Smith by Investigator Sands were not incriminating to the defendants.[2]

For at least a week before trial, the prosecutor knew that Claude Smith would give a different version of the events in question, a version that would be devastatingly incriminating to Troy and Brown. It is undisputed that the prosecutor failed to disclose that knowledge until after the commencement of the trial. To make matters worse, the prosecutor actually obtained a tape recorded statement from Smith, and failed to disclose the existence of the tape to the attorneys for Troy and Brown.

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[2] In fact, the statement given by Claude Smith to Investigator Sands and repeated to defense counsel could actually be regarded as exculpatory in that it cast some doubt upon the testimony of Frank Wise, the other principal trial witness for the state. Smith told Sands that it appeared to him as if Wise was acting as a lookout at the time the victim was killed. (Sands Depo. p.38-39).

Counsel for the State argues that the tape recording was disclosed to the defense on June 13, 1983, implying that the disclosure was made in a timely fashion. (Answer Brief p.35) Although a time reference is not given in this part of the State's brief, June 13th was after the trial had commenced.[3] To restate the matter in its proper perspective, the fact that the disclosure was not made by the prosecutor until as late as June 13, supports the Defendants' argument that the prosecutor committed a violation of the discovery rules.

Counsel for the State quotes Troy's lawyer as saying that the disclosure was made by the prosecution "forthrightly", but that should not be taken as an indication that it was timely. The disclosure was "forthright" in the sense that it was a candid admission the State had been in possession of the tape, but certainly not in the sense that the disclosure was prompt.

Next, the State argues that the prosecutor is not obligated to inform the defense of "new information he orally receives in preparing his witnesses if he does not contemporaneously record it, State v. Rabin, 495 So.2d 257 (Fla. 3d DCA 1986) and Mathews v. State, 44 So.2d 664 (Fla. 1950); and that a "prosecutor's failure to inform the defense of [even a] change of testimony is

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[3] As detailed in the Initial Brief of the Defendant Troy, there is ample authority for the proposition that a disclosure may not be prompt enough to cure an earlier discovery violation even if made before the commencement of trial. (Troy's Initial Brief p. 43).

not a discovery violation." Bush v. State, 461 So.2d 936 (Fla. 1984). The problem with this argument is that the new information from Claude Smith was contemporaneously recorded.

For that reason, it appears that the cases cited by the State actually support the argument of the defense. There may have been a lapse in the logic of the State's argument as to this particular point, but it should be clear that these statements were tape recorded, and the failure to disclose the tape is the principal basis of the defendant's objection to Claude Smith's testimony. Inasmuch as the tape recording is itself a form of evidence that the prosecution was obligated to disclose to the defense, the State violated the rule.

This argument has yet to be acknowledged by the trial judge, the prosecutor, or the assistant attorney general on appeal. Lest there be any misunderstanding, the Defendant Brown is arguing that the tape recording is evidence the State had a duty to disclose and that the failure to disclose it constitutes a violation of the discovery rule. Thus, the State is incorrect in its assertion that there was no discovery violation sufficient to require a Richardson hearing.

As an alternative argument, the state contends that the trial judge did not commit reversible error because he complied with the "letter and spirit" of the rule in Richardson. That is plainly not the case. When the prosecution attempts to introduce evidence that was not disclosed under Fla.R.App.P. 3.220, the trial judge has an obligation to conduct a hearing to determine

whether there is some justification for the nondisclosure, and then to make a finding as to whether the nondisclosure prejudiced the defense in the presentation of its case.

The fact that the trial judge rescheduled the testimony of Claude Smith until the next day so that the defense lawyers could listen to the tape recording during the evening recess does not constitute a "hearing" on any issue relevant to the discovery violation. Nor can it be seriously be argued that the trial judge made a "finding" that the State's failure to disclose the tape recording did not prejudice the defense. The record is simply devoid of any such finding.

Contrary to the position advanced by the State, a trial judge does not comply with the "letter and spirit" of the rule in Richardson merely by granting a brief delay in the presentation of previously undisclosed evidence. Richardson contemplates a hearing on the alleged discovery violation and an express finding as to the issue of prejudice. Cumbie v. State, 345 So.2d 1061 (Fla. 1977), Poe v. State, 431 So.2d 266 (Fla. 5th DCA 1983), Miller v. State, 403 So.2d 619 (Fla. 5th DCA 1981), and Ross v. State, 474 So.2d 1170 (Fla. 1985)

It is not the function of this Court to make an initial finding as to whether the defense was prejudiced by the nondisclosure since that is a matter of fact to be determined by the trial judge. The point of the defendant Brown's argument, apparently missed by the state, is that the failure to make the

appropriate finding is in itself reversible error. See e.g. Poe v. State, 431 So.2d 266 (Fla. 5th DCA 1983). It is not the function of an appellate court to determine whether it is acceptable in some cases to decline a Richardson hearing because the record does not show prejudice. The burden is on the prosecution to make an affirmative showing in the trial court that there was no prejudice. Poe v. State, supra at 268.

Even if this Court could make an after-the-fact finding that no prejudice existed, the record in this case would not support such a finding. Claude Smith took the witness stand at trial and testified that he saw Troy and Brown leaving the victim's cell shortly after he was killed. (T-537) It is hard to imagine a statement more harmful to the defense, and it certainly appears that the prosecutor's undisclosed knowledge of this statement was prejudicial, particularly in view of Smith's earlier statement to Investigator Sands. Stating the proposition in the reverse, the trial court erred because the prosecution did not affirmatively demonstrate the absence of prejudice.

For these reasons, and the reasons more fully set forth in the Initial Brief, the Defendant Brown submits that the trial judge committed reversible error in failing to conduct a Richardson hearing.

POINT TWO

THE TRIAL JUDGE ABUSED HIS DISCRETION IN DENYING THE MOTION FOR WRIT OF ERROR CORAM NOBIS BECAUSE THE EVIDENCE CLEARLY DEMONSTRATED THAT CERTAIN MEMBERS OF THE JURY COMMITTED ACTS OF MISCONDUCT DURING THE COURSE OF THE TRIAL.

The State's argument that the pleadings are not sufficiently detailed to warrant a hearing on the Petition for Writ of Error Coram Nobis (Answer Brief p. 60-63) appears to be moot in view of the fact that the trial judge actually conducted a hearing. Since the trial court held an evidentiary hearing and actually reached a decision on the merits of the petition, the question of whether the pleadings are sufficient to require a hearing no longer presents a controversy warranting consideration by this Court. The only issue before the Court is whether the trial judge abused his discretion in denying the writ.

The State's procedural default argument is bottomed on the assumption that a petition for writ of error coram nobis is governed by the same time constraints as a motion for new trial. That is clearly not the case. Coram Nobis is an extraordinary remedy which is similar in some respects to habeas corpus. It is not, and never has been, governed by a time limit other than that which would apply under the equitable principle of laches. There is no evidence (or allegation) in this case that the defense delayed this matter.

Turning to the merits, the State contends that the jurors were approached improperly and, for that reason, the State absolutely insists that there is some sort of exclusionary rule

that applies as a matter of "public policy." The State's own Brief demonstrates that this position is unsupported by any legal authority, and the application of a little common sense will demonstrate that it is not otherwise a valid argument. If a person improperly obtains evidence of juror misconduct sufficient to vitiate a sentence of death, the remedy is to punish the person who is guilty of the impropriety, not to allow the defendant to die at the hand of a biased juror simply because the juror was contacted improperly.

Ironically, the State compares this issue to the Fourth Amendment Exclusionary Rule, the underpinnings of which the State would happily attack under other circumstances. The analogy is flawed in any event because the exclusion of illegally seized evidence is mandated by the Constitution. By contrast, there is no consitutional provision (or even a statutory provision) that prohibits contacting jurors. The worst that could be said is that this type of conduct is proscribed by ethical considerations, but so far in the history of our jurisprudence there does not appear to be a decision that would prohibit the introduction of relevant evidence obtained as a result of a violation of the cannons of ethics.

Another fatal flaw in the State's argument is that it is based upon the assumption that the jurors were improperly approached. The only thing that could lend credence to this argument is that it has been repeated often enough by the trial judge, and counsel for the State that someone may now actually

believe it has some support. Judge Crews vilified Ms. Snyner and concluded in his order that she had approached these jurors improperly, but part of the problem with this case is that there is just no evidence of that.

Oddly enough the gross juror misconduct that Ms. Snyner and Ms. Lichtenfeld uncovered in their investigation seems to have taken a back seat to the issue of whether they themselves acted improperly. It is difficult to understand why the trial judge thought it was acceptable for a juror to talk to her minister about the case during the trial, but not acceptable for the investigators to talk to the juror after the case had been concluded.

The only public policy consideration that should be applied here is the one that is supposed to assure a defendant charged with a capital offense that he will not have jurors who have made up there minds before hearing the evidence, that he will not have jurors who will rely on evidence obtained from outside the courtroom, and that he will not have jurors who have consulted with others about the case during the trial. The defendants in this case have presented proof of gross juror misconduct and the force of that proof cannot be trivialized by attacking the manner in which it was obtained.

It is not necessary for the Defendant Brown to restate the evidence on this point or the details of the argument made in the Initial Brief. The argument made here is limited to a rebuttal of the State's argument, which appears to be more in the nature of an affirmative defense to the petition for writ of error coram nobis.

POINT THREE

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO PROHIBIT THE SYSTEMATIC EXCLUSION OF BLACKS FROM THE JURY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Answer Brief does not address the argument raised by the Defendant Brown in the Initial Brief. To recapitulate the original argument, the Defendant has contended that since this Court has an independent duty to review the record in capital cases, the trial courts must have an independent duty to insure that all facets of the trial proceedings are reported. Otherwise, this Court will be unable to discharge its duty to review capital cases to ascertain whether there are any errors (other than those raised in the briefs) sufficient to preclude the imposition of the death penalty.

It is noteworthy that the State did not dispute the Defendant's contention that the local custom in Union County is that the exercise of peremptory challenges are not recorded by the court reporter. The state does not deny that assertion, and it seems that the absence of an adequate record on this point would in itself amount to reversible error, at least with respect to the propriety of imposing the death penalty.

Nor is it any answer to say that the Defendants failed to object. First, the objections may very well be contained in the missing record. Secondly, the Defendants did file a motion to preclude the systematic exclusion of blacks and the motion was denied. (R-700) That alone would preserve the issue for review.

By denying the motion the trial judge essentially held that the state is permitted to systematically exclude blacks. Thus, the issue would have been preserved for appellate review even if there was no subsequent objection to the procedure when it was actually employed.

POINT FOUR

THE SENTENCING OF BLACK MALES TO DEATH FOR HOMICIDES OF WHITE VICTIMS IS DISPROPORTIONATE FROM OTHER SENTENCES OF DEATH IN FLORIDA AND THEREFORE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

In reply the State's argument on this point the Defendant Brown relies upon the position taken in his Initial Brief.

POINT FIVE

THE COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A CHANGE OF VENUE FROM UNION COUNTY TO ANOTHER COUNTY IN THE SAME JUDICIAL CIRCUIT IN VIOLATION OF THE DEFENDANT'S RIGHTS TO A FAIR AND IMPARTIAL JURY AS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A fair reading of the motion hearing makes several things clear. First, the State's position that Dr. Thomas didn't present any statistical evidence to support his conclusions (Answer Brief p.32) implies that he didn't have any such evidence. This implication is, of course, false. He assembled the data a year earlier and submitted it to the court in another case. This evidence was available for the prosecution to use at its leisure. Secondly, the "confession" the State attributes to the witness, that he believed that the data would probably show that the Division of Corrections occupied a special position in Union County society, is a confession every literate person would make. In fact, that is exactly the point.

Dr. Thomas testified as an expert to having isolated attitudes in the Union County population, which every reasonable person knew were there to begin with. This is not earth shaking or novel testimony. On the contrary, when something like eighty-five percent of the population has ties to the Division of Corrections, and many derive their income from the Division of Corrections, it is only logical to believe that employees of the Division of Corrections would be held in higher esteem than inmates. It is because it is logical and reasonable to believe

this, and because it ultimately turned out to be true during voir dire, that a change of venue should have been granted. The number cited by Dr. Thomas appears to have been fully born out by the jury selection.

Furthermore, the problems Dr. Thomas warned the court about on June 8, 1983, at the motion hearing, came back to haunt the court in the form of affidavits signed by jurors who testified at the coram nobis hearing. While the State can now take refuge in belittling Dr. Thomas' testimony, and in finding fault with how the jurors swore to misconduct, counsel for the State cannot suggest that the court was not adequately warned.

While the State claims that Dr. Thomas could not give an "absolute unqualified answer," the witness in fact testified, "I believe his right to such a trial (a fair and impartial trial) has already been undermined." (Record Vol. V p.33) It doesn't get much clearer than that. The State had every opportunity to put on any witness to dispute this testimony, and failed to do so. The State had an opportunity to question Dr. Thomas' expertise, and failed to do so.

The denial of this motion for change of venue clearly prejudiced defense as the coram nobis affidavits and the testimony during voir dire show.

POINT SIX

THE COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY ENGAGING IN A CONTINUOUS PATTERN OF SARCASM AND INVECTIVE DIRECTED AT DEFENSE COUNSEL, THEREBY VIOLATING THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State characterizes the pattern of sarcastic and demeaning remarks by the trial judge merely as an effort to "urge that defense counsel streamline their presentation." (Answer Brief p.47) The Defendant Brown concedes that when a lawyer is told to sit down, and by implication, to shut up, this can "streamline" his presentation. The point is that each defense lawyer was "streamlined," but the prosecutor was not.

The streamlining took place in front of, and in the hearing of a jury drawn from a population Dr. Thomas had described in the change of venue hearing. The cumulative effect of these errors, the refusal to change venue and the pattern of sarcastic and demeaning remarks, constitutes fundamental error. This issue is not addressed in the State's Brief.

Appellate counsel for Brown contended in the Initial Brief that an objection was not required because the actions of the trial judge amount to fundamental error. Nevertheless, the State takes great pains to address the admitted fact that there was no objection. The State's position that this type of error requires a contemporaneous objection is illogical. No trial judge could be expected to objectively rule on an accusation that he or she treated an attorney so unfairly as to deprive the client of a fundamental right to an impartial trial.

POINT SEVEN

THE COURT ERRED IN FAILING TO DISCHARGE THE DEFENDANT AS A RESULT OF A SEVENTEEN-MONTH PREINDICTMENT DELAY THUS ABRIDGING HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

The State suggests that Mr. Brown was actually placed in administrative confinement because of "security concerns." (Answer Brief p.22) That does not appear to coincide with the testimony of Investigator Sands:

> "I understand what you're saying...and my answer is: that I had him, (Appellant Brown) ...or my request was to Lt. Lee, that he be placed in administrative confinement. It was my intention that he remain in administrative confinement pending the outcome of the investigation and any subsequent action." (Vol. V. Motion Hearing p.19)

Sands makes no mention of security concerns. This inmate was taken from the population and isolated for seventeen months while the State built its case, and while he was impotent to prepare a defense. Now the State argues that the record of prejudice is too vague to support action by this Court. It is, the State says, "unsubstantiated by hard facts like traceable names or potentially exculpatory witnesses." (Answer Brief p.22)

The State ignores the fact that this is the very prejudice the Defendant Brown complains of. "Porky" is indeed a nickname, but if the Defendant Brown had not been confined, this person was certainly traceable. Porky's name is found in the motion hearing

volume V, p.95. The second inmate "Connors," who lived on "F-floor," is another person who had potentially exculpatory evidence.

Finally, the State asserts matter-of-factly, that the Defendant Brown did not request counsel during his confinement. (Answer Brief p.22) Evidently, counsel for the State overlooked the Defendant's unequivocal testimony to the contrary. (Vol. V, p.88 Motion Transcript) The testimony is:

Q. Did you request a lawyer?

A. Yes, I requested an attorney.

Q. On the 8th of July, 1981?

A. On the 8th of July, 1981.

Q. Did they provide you with one.

A. No, they didn't

Thus, it was not only Willie Brown who couldn't make a move to defend himself, he couldn't defend himself or trace witnesses through a lawyer. Meanwhile, the prosecution could take its time, make its deals, and build its case. The unfairness and prejudice inherent in this situation is palpable.

POINT EIGHT

THE COURT ERRED IN FAILING TO DISCHARGE THE DEFENDANT PURSUANT TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.191.

In reply to the State's argument on this point the Defendant Brown relies upon the arguments made in his Initial Brief.

CONCLUSION

This case should have been dismissed on the ground that the delay in prosecution constitutes a violation of the Defendant's right to a speedy trial. Alternatively, the Defendant Brown submits that the Court should remand the case for a new trial for the reasons given in any or all of the remaining points on appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to John W. Tiedemann, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, and Steven L. Bolotin, Esquire, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, by U.S. Mail this 25th day of March, 1987.

PHILIP J. PADOVANO