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IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY,

Appellant,

v.

Case Number 65,134

STATE OF FLORIDA,

Appellee.

_____/

On Direct Appeal From The Circuit Court Of The
Tenth Judicial Circuit Of Florida
In And For Highlands County

REPLY BRIEF OF APPELLANT

BARRY HAIGHT, ESQ.
480 Adams Street
Milton, Mass. 02186
(617) 698-5700

DONALD L. FERGUSON, ESQ.
1650 South Bayshore Drive
Coconut Grove, Florida 33133
(305) 854-4444

Attorneys for Appellant

ISSUE I

WHETHER THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT OR BAR PROSECUTION BECAUSE OF THE STATE'S FAILURE TO PRESERVE EVIDENCE.

The State in its brief concedes that immediately after the murder of Charles Von Maxcey on October 3, 1966, the appellant in this action "was considered a suspect . . . ." (Appellee's Brief p. 13) However, the State then illogically argues that even though the appellant was still a suspect and the murder remained unsolved, because the case had been "inactive" for nine and a half years, "the case was for all intents and purposes closed." (Appellee's Brief pp. 13-14) It is irresponsible to suggest that an investigation of a highly publicized murder was "closed" when at the same time the state concedes that the appellant was a "suspect" in that murder. Fla. Stat. 775.15 provides no time restriction on the State Attorney.

The State is equally irresponsible in reasoning that simply "because the clerk of the court needed more storage space", the State Attorney was thus justified in moving the court to destroy material evidence in an unsolved and notorious pending murder case. (Appellee's Brief p. 13) Interestingly, the State's Attorney did not mention this pressing need for storage space in his motion to the judge who allowed the requested destruction. Instead, he alleged only "that this cause has been disposed of", a statement that in 1976 was clearly incorrect. See "Petition for Disposal of Evidence". The "cause" was still pending. The appellant, a "suspect" from the

inception of the investigation, was arrested for the murder of Charles Von Maxcey in June of 1983. (Appellee's Brief p. 6) By implying that the court's housekeeping needs could supercede a potential defendant's constitutional rights, the state blithely ignores the mandate of both federal and Florida law, including case law such as Budman v. State, 362 So. 2d 1022, 1026 Fla. Dist. Ct. App. 1978) and Fla Stat. 918.3, which require the State to preserve physical evidence in pending cases. See also Fla. R. Crim. P. 3.220 (a)(2); James v. State, 453 So. 2d 786, 789 (Fla. 1984).

But most incomprehensible is the State's quantum leap in logic in positing that because the Von Maxcey case was supposedly "closed", the evidence which the State destroyed "could not possibly have possessed an apparent exculpatory value." (Appellee's Brief p. 14) Evidence is either exculpatory or not, regardless of the status of the case in which it has been or might be offered at trial. The test for whether destroyed evidence was material and exculpatory, thus raising constitutional error, is to decide if "the omitted evidence creates a reasonable doubt that did not otherwise exist . . . " Smith v. State, 400 So. 2d 956, 964 (Fla. 1981); State v. Sobel, 363 So. 2d 324, 327 (Fla. 1978). This test "is to be applied generously to a defendant when there is substantial room for doubt as to what effect disclosure might have had". Budman v. State, 362 So. 2d 1022, 1025 (Fla. Dist. Ct. App. 1981). In the present case, there was substantial room for doubt as to the potential effect of disclosure. (See Appellant's Supplemental Brief pp. 11-18) Therefore, because the destroyed

evidence does create a reasonable doubt under the facts of this case, that evidence was exculpatory under the current Florida test. See Smith v. State, supra. Under the Florida test, the status of the case to which the evidence pertains is totally irrelevant.

The State also misstates two other legal standards in its argument. First, the State somehow overlooks the second part of its two-part burden to prove that the destroyed evidence was neither prejudicial nor material. See Krantz v. State, 405 So. 2d 211, 213 (Fla. Dist. Ct. App. 1981); State v. Sobel, 363 So. 2d 324 (Fla. 1978). (But see Appellee's Brief p. 16) ("The burden is on the state to demonstrate that no prejudice occurred.") The State never mentions its burden to disprove materiality, a burden which it can neither deny nor sustain.

The State begins its argument with the test for constitutional materiality set forth in California v. Trombetta, U.S. , 104 S.Ct. 2528, 2534, 81 L. Ed. 2d 413, 422 (1984), (Appellee's Brief p. 12), although it later adversely argues that this Court has not yet adopted the Trombetta standard. (Appellee's Brief p. 16)

In the Trombetta case, which is very much distinguishable from the case at bar, the defendants were present when the sobriety tests were administered. They knew, or should have known, the results of the tests and the procedures used, and they were afforded the opportunity for comparable testing. The Trombetta court said:

> We have, however, never squarely addressed the Government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants. The absence of doctrinal development in this area reflects, in part, the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight. (emphasis added)

Trombetta, supra, 104 S.Ct. at 2533.

In the instant case, the issue of "evidence destroyed through prosecutorial neglect or oversight" is not addressed. What is addressed is the deliberate and intentional destruction of evidence by the prosecutor who, on April 23, 1976, alleged that the "cause has been disposed of" when said prosecutor knew then that the cause had not been disposed of, that the murder investigation was on-going and that the appellant remained a suspect.

Under Trombetta's test for materiality and the Florida balancing test set forth in State v. Sobel, supra, which was also misstated by the State in its brief, the destroyed evidence was both material and prejudicial. It was material under Trombetta because Kelley could not obtain any other evidence comparable to that taken by the State from the scene of the crime some seventeen years before his arrest; and because the exculpatory value of such evidence was unarguably apparent before it was destroyed. If the State used the destroyed evidence at John J. Sweet's former trials, alleging then that it was inculpatory as to Sweet, such evidence would have been exculpatory for Kelley, having in mind that Sweet, the defendant at two prior trials was the primary State witness against Kelley. The destroyed evidence could have been used by Kelley to impeach Sweet's already doubtful credibility, to show bias, bad character and Sweet's association with the crime. On November 16, 1968, John J. Sweet testified in his own defense under oath at his second trial in connection with State of Florida vs. John J. Sweet, case number 1603-1-358 as follows:

Q Mr. Sweet, I want to hand you two photographs which are in evidence as State's Exhibit E and F. I'm advised by the State attorney that E purports to be William Kelly and F purports to be Andrew Von Etter. Do you know those men?

A No sir, I do not.

Q Did you see those pictures at the previous trial when you were here before? Did you see those same pictures?

A I really don't recall, Mr. McEwen.

Q Have either of those men ever been in an automobile with you anywhere?

A No sir.

Q Were they in a car with you on the afternoon of October 3, 1966?

A No sir.

Q Have you seen them at any time since October 3, 1966?

A No sir.

Q Have you seen either one of them in the vincinity of the hospital, Walker Memorial Hospital, in Highlands County?

A No sir.

Q Have you seen either one of them in Daytona Beach or its vicinity?

A No sir, I have not.

Q Did you tell Mrs. Maxcy (sic) that you had?

A I did not, sir.

Clearly the evidence which the State used against Sweet at his two prior trials would, at the very least, be material to the appellant's defense.

> (The) appellant's right to examine tangible evidence is a part of his right to the confrontation of witnesses against him and the right to a full and complete cross-examination of the witnesses who are to be presented against him. (citations omitted). (T)he State may not by the simple statement that they have "lost the physical evidence" prevent the exercise of the right and then use the "lost evidence" against the defendant.

State v. Hills, 10 F.L.W. 385, 386 (Feb. 22, 1985), citing Johnson v. State, 249 So. 2d 740 (Fla. Dist. Ct. App. 1971).

In this regard, the State, incorrectly, says "With authorization from a Circuit Judge, the State exhibits introduced at Sweet's second trial were finally destroyed because the clerk of the Court needed more storage space." (emphasis added)(Appellee's Brief p. 13) An examination of the court's order dated April 30, 1976 relating to the State's petition for the disposal of evidence, directs the clerk of the Circuit Court "dispose of all evidence held by said clerk in the above entitled cause". (emphasis added) There is absolutely no reference whatsoever, as the State would have this Court believe, that the destruction of evidence was limited to "the State's exhibits introduced at Sweet's second trial."

The State also fails to disprove that under the Florida balancing test for weighing the prejudicial effect of destroyed evidence, the appellant is entitled to reversal. (Appellee's Brief pp. 16-17) Not only does it fail, but it blatantly misstates the test. The State argues that it did not destroy the evidence in "bad faith". (Appellee's Brief p. 17) But bad faith is only one factor to be

weighed in assessing the State's conduct when evidence is destroyed while in the State's possession. The Court must assess whether there was a violation of the State's duty to preserve evidence "and whether it was flagrant or in total disregard of the rights of the accused." Adams v. State, 367 So. 2d 635, 640 (1979). Here, the State's Attorney deliberately and intentionally moved the court to destroy the "evidence" in a pending murder case, and falsely alleged that "the cause had been disposed of." The destruction of evidence in this case was not occasioned by neglect or oversight, but resulted from the State's own "flagrant and deliberate act." Id. Where, as here, the State's actions were deliberate and flagrant, the evidence destroyed was material and the appellant was prejudiced by not having the evidence available for his defense, including cross-examination, under the Florida balancing test the judgment below must be reversed.

ISSUE V(A)2

WHETHER THE TRIAL COURT ERRED IN GIVING A JURY DEADLOCK INSTRUCTION WHERE THE INSTRUCTION WAS NOT COERCIVE, HAD NO VISIBLE IMPACT ON THE JURY AND WAS NOT OBJECTED TO BY THE DEFENSE.

The State has offered no foundation for its contentions as set forth in its statement of this issue.

The deadlock charge given by the trial judge at the appellant's second trial was undeniably coercive because it went beyond the admittedly "approved" language of Instruction 3.06 to include an unconstitutional Allen-type charge that was coercive both in fact and in effect. (See Appellee's Brief pp. 30, 32.)

The State bases its argument on a fundamental error in understanding as to what Instruction 3.06 is intended to do. This court did not approve the practice of giving a "verdict urging instruction", by approving Instruction 3.06, nor has such an unconstitutional practice been approved by other courts. "Verdict urging instructions" such as the outlawed "Allen charge" upon which the trial judge's erroneous instructions were based, have been declared unconstitutional by both state and federal courts across the country. (See Appellant's Supplemental Brief p. 36) Instruction 3.06 was intended as a balanced charge urging neither acquittal nor conviction, fully recognizing each juror's right to "disagree". See Fla. Std. Jury Instr. (Crim.) 3.06. Compare State v. Bryan, 290 So. 2d 482 (Fla. 1974). A defendant has a right to hung jury. Bell v. State, 311 So. 2d 179 (Fla. Dist. Ct. App. 1975). As the State has

attempted to point out, "Generally, a verdict urging instruction should make plain to the jury that each juror has a duty to conscientiously adhere to his own opinion and that it is not improper for a juror to cause a mistrial". (Appellee's Brief pp. 31-32) Except for the misnomer of "verdict urging", the State's proposition is correct. (See Appellant's Supplemental Brief pp. 32-33) The State also correctly argues that an instruction should not be coercive or imply a false duty to decide (Appellee's Brief at 32). By making these arguments, the State has highlighted two aspects of the trial judge's additional comments which were clearly constitutionally deficient. The judge's additional comments at appellant's second trial made absolutely no mention of the jurors' duty to maintain their convictions and disagree, if necessary, and strongly implied that the jurors had a duty to reach a verdict. (Appellant's Supplemental Brief pp. 20-33) When such an improper deadlock instruction is presented to a jury, the defendant is thereby deprived of his constitutionally guaranteed right to receive a fair trial.

It is also significant that throughout its argument the State relies mainly on federal, and not Florida, caselaw, and that almost all of the cases it cites were decided prior to 1981, the year that Instruction 3.06 was approved by this Court. Federal cases decided prior to 1981 have little or no relevance to current Florida law regarding deadlock instructions. Even more significant is the State's failure to provide any counterargument to the fact that the trial

judge's added comments were in essence an outlawed Allen charge, a charge which is clearly "verdict urging" and thus unconstitutional. (See Appellant's Supplemental Brief pp. 24-25)

Furthermore, the State utterly fails to distinguish the coercive instructions given in Nelson v. State, 438 So. 2d 1060 (Fla. Dist. Ct. App. 1983) from the instructions given in the case at bar. (See Appellant's Supplemental Brief pp. 26-27; Appellee's Brief p. 34) By giving an instruction very similar to that which was held to be error in Nelson, the trial judge in the case at bar not only demanded a verdict from the jury, but in so doing caused the jury to return a verdict of guilty. The judge's coercive intention becomes particularly clear when the instructions given at the appellant's second trial are compared with those given by the same judge at the first trial of the same case, where the judge was forced to declare a mistrial. (See Appellant's Supplemental Brief pp. 36-37).

Finally, the State itself cites Rodriguez v. State, 10 F.L.W. 199 (Jan. 25, 1985), the recent Florida case that supports appellant's appeal of this issue. (Appellee's Brief p. 35). In Rodriguez, the Third District Court found fundamental error in a coercive deadlock charge that (1) tainted the juror's decision-making process by exhorting them, as good citizens, to consider such extraneous and improper factors as the government's fiscal health in arriving at a decision and (2) instructed the jurors that they must reach a verdict. Rodriguez, supra, 10 F.L.W. at 200. The Rodriguez court cites Nelson v. State, as does appellant, as supporting its decision.

Id. Moreover, the Rodriguez court distinguishes as inapplicable the very same cases cited by the State in support of its argument. As was stated in Rodriguez, supra, 10 F.L.W. at 199:

> We deem it significant that the deadlock instructions given in Armstrong and Tejeda - Bermudez were of the "balanced" type approved by the Florida Supreme Court. (Fla. Std. Jury Instr. (Crim) 3.06) In the instant case, the trial court deviated substantially from the approved deadlock charge, and no subsequent curative instruction could have removed from the jurors' minds the belief that they were required to reach a verdict.

Where the trial court committed these same errors in the case at bar, fundamental error has occurred and appellant's conviction must be overruled.

ISSUE III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ANSWER THE JURY'S QUESTION AS TO WHETHER JOHN SWEET, A CRUCIAL STATE WITNESS, HAD RECEIVED A GRANT OF IMMUNITY PRIOR TO TESTIFYING AGAINST APPELLANT.

In it's brief, the State responds to this issue in several ways, some of which do not appear to be supported by the record.

Initially, the State argues that defense counsel on behalf of Appellant did not ask precisely "when" John Sweet was granted immunity.(Brief of Appellee, p. 22). This response, by the State, that defense counsel did not ask exactly when Sweet was granted immunity somewhat misses the point. The jury's question spoke in terms of whether John J. Sweet ". . . received immunity in Florida for the first degree murder and perjury before he gave information on the Maxcey trial, and if he had anything to gain by his testimony. (R 925). The State argues that a small portion of direct testimony by Mr. Sweet supports its position that Sweet did not receive immunity until after Sweet had given Prosecutor Pickard his "story". (R 608; Appellee's brief, p.21), and until Sweet had brought his "letter" down. (R 608; Brief of Appellee, p. 21)[1]

There can be no question but that the "letter" merely memorialized the conferring of immunity at a much earlier date. Indeed, because the testimony of Sweet was somewhat equivocal, and the jury's question not concretely clear, [whether Sweet had received immunity before he "gave information on the Maxcey trial, ...

1/ The actual question and answer was:
Q. Later were you given an immunity agreement?
A. Well, yes. I believe my lawyer made a letter that I brought down. (R. 608)

(emphasis added)] the Court should have exercised its discretion in favor of having Sweet's testimony re-read to the jury. Further, a reasonable reading of the jury's question was whether Sweet simply had received immunity before testifying for the simple reason that the question also asked whether he "had anything to gain by his testimony". (R 925).

An examination of Sweet's cross-examination revealed that he had substantial benefits to gain by his testimony, to wit: immunity from perjury previously committed:

> Q. (By Mr. Edmund): Mr. Sweet, you received immunity for first degree murder in Florida, didn't you, sir? This is the killing of Von Maxcey; right? Is that a fair statement?
>
> A. Yes, sir.
>
> Q. You received immunity for the perjury that you committed in your two trials in Florida, didn't you, sir?
>
> A. Yes, sir. (R 614-615).

Important to note in the context of Appellant's abuse of discretion argument is the fact that this was the second trial of William Harold Kelley for the identical charge, the first having ended in a hung jury and mistrial on January 30, 1984. The first trial was conducted before the very same trial judge and prosecuted by the very same prosecutor as in the second case. Ironically, at the first trial in January of 1984, Judge Bentley was faced with the same dilemma that faced him in the second trial. On January 30, 1984, the jury had a

similar problem during its deliberation. The following is taken from the transcript of the first trial.[2]

> The Court: Gentlemen, the jury has requested the copy of Sweet's testimony, or to hear the testimony of Sweet again. So we have a decision whether we read back Sweet's testimony, which has made our Court reporter's day. Does counsel have any comments? How long was he on the stand?
>
> Mr. Edmund: It is all typed, Judge.
>
> Mr. Pickard: We are talking about what?
>
> Mr. Edmund: His testimony is totally typed, Judge.
>
> Mr. Pickard: Judge I object to giving a transcript to the jury.(emphasis added).
>
> The Court: Do you have any objection to the Court reporter reading it? It would make it easier on her.
>
> Mr. Pickard: I don't have any objection. Although the Court may consider asking them if they want the entire testimony or if there are certains portions that would be of benefit to them. I would say reading the entire thing, we are looking at two and half hours. Your cross-examination was an hour and half.
>
> The Court: We will be in recess for about five minutes.
>
> * * *
>
> (Thereupon, a short recess was taken, after which, with all parties present, the following proceedings were had:)
>
> * * *
>
> The Court: Please be seated. Ladies and Gentlemen, the Court reporter will read Mr. Sweet's testimony for you. (Thereupon, the Court reporter read the testimony of Mr. Sweet.) (supplemental record, p. 235-236)

Following the re-reading of Sweet's testimony, the jury advised the Judge that they were unable to reach a verdict, even after having been administered an "Allen" type charge (supplemental record, p. 257). The importance of what had happened on January 30, 1984, when compared to the actions of the trial Court and the prosecutor at the second trial is

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2/ Pertinent portions of the transcript of the first trial have been filed as part of a motion to supplement the record.

obvious. Both juries had problems with the credibility of the main State witness, John Sweet. In the first trial, the Judge read the entire testimony of John Sweet to the jury and the result was a mistrial. In the retrial, the Judge refused to answer the jury's direct question, resulting in the conviction of the defendant. The trial court, in two different instances, exercised its discretion in diametrically opposed ways. Not surprisingly, the second jury had the precise problem that the first did.

This is raised for the reason that the State has argued that "jury questions involving questions of fact do not have to be answered by the trial judge." citing State v. Ratcliff, 329 So.2d 285 (Fla. 1976). Indeed, the present Florida Rule of Criminal Procedure 3.410 gives discretion to the trial Court to answer or to not answer a jury's request to hear testimony. Further, there are relatively few cases on point since the inception of the new rule on February 1, 1973 and none of which address the precise issue before this Honorable Court. Here, the trial court and the prosecutor were well aware of what concerned the jury panel. Moreover, in the first trial, the Judge exercised his discretion in having Sweet's testimony read to the jury with the result that the jury was unable to reach a verdict. In the second trial, the trial Judge did not read Sweet's testimony, thereby sustaining the prosecutor's objection and depriving the jury of the answer to probably the most important issue in the case.

The State also argues that, on several occasions, the judge expressed his inclination to read back the testimony of John Sweet and that, "Defense counsel, as well as the prosecutor, discouraged this way

of handling the question". (R 931) (Brief of Appellee, p. 23). The record of the trial proceedings below not only does not support this allegation by the State, but rather supports Appellant's argument that defense counsel persevered in their attempts to convince the trial judge to read to the jury John Sweet's testimony. The following reflects the argument of counsel:

> Mr. Edmund: I think the answer to this is that Sweet gave no information on any matter until his mind was satisfied that he would not be prosecuted. Now, that's what happened, sir. Sweet gave no information on anything until his mind was satisfied he would not be prosecuted. That is the answer to their question. (R 928-929)
> * * *
> The Court: Maybe I will tell them we can't answer the question. Part of the testimony can be read back to them if they designate. (Emphasis added)
>
> Mr. Edmund: Judge, that is unfair because throughout his testimony I made him say time after time, "I am not going to be prosecuted for anything I told them about". (Emphasis added)
>
> The Court: Okay. Then we will read all of his testimony, but I am not going to answer the question.
>
> Mr. Pickard: Don't tell them they can have all of his testimony read back either. (R 931).
>
> Mr. Kunstler: Judge, there is testimony in there though when Jack asked him," were you given immunity for everything you told him ?" and he saids, "yes, something like that". I think that answered the question don't you?
>
> Mr. Pickard: I don't think that answers it, no. (R 932).
>
> Mr. Kunstler: I think he gained by his testimony means--and an honest answer is he got immunity before he testified. They used the word gain by his testimony (R 933).

The above can hardly be described as discouragement by the defense counsel to the Court answering the question. It is clear from the record of the proceedings below that defense counsel did everything in their power to persuade the judge to read the testimony of John Sweet and/or answer the jury's question. In view of the Court and the prosecutor having participated in the first trial, it is respectfully urged that the trial court abused its discretion in refusing to answer the jury's question.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed to: Karla J. Staker, Assistant Attorney General, 1313 Tampa Street, Suite # 804, Park Traminell Building, Tampa, Florida 33602 on this 13th day of April, 1985.

DONALD L. FERGUSON, ESQ.
1650 South Bayshore Drive
Miami, Florida 33133
(305) 854-4444

Donald L. Ferguson
DONALD L. FERGUSON, ESQ.