IN THE SUPREME COURT OF FLORIDA

CLIFFORD BELL,
Petitioner,

v. Case No. 67,434

STATE OF FLORIDA,
Respondent,

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This brief refers to Clifford Bell as "Petitioner"; to the State of Florida as "Respondent"; and to the Record on Appeal as "R", followed by the appropriate page number. The Record consists of one volume and an Appendix.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts as a substantially accurate account of the proceedings below with such exceptions or additions as set forth in the Argument portion of this Brief.

ARGUMENT SUMMARY

"Anticipatory rehabilitation", in the context of a prior inconsistent statement, intended to buttress, not discredit, a witness's credibility is not impeachment and does no violence to Section 90.608(1)(a), Florida Statutes(1983).

ISSUE

WHETHER A PARTY CALLING A WITNESS CAN QUESTION THE WITNESS CONCERNING A PRIOR INCONSISTENT STATEMENT IN AN EFFORT TO REHABILITATE THE WITNESS PRIOR TO AN ATTEMPT AT IMPEACHMENT?

Petitioner reaches the crux of his complaint when he argues that "By impeaching McBride, the Respondent pre-empted the defense perogative." (Appellant's Initial Brief, P. 11).

It reflects Petitioner's persistence in attempting to characterize the exchange in question as impeachment. It ignores the Second District's opinion:

> We do not, [however], perceive the prosecutor's questions and McBride's explanation of the reason for his earlier inconsistent statements to be impeachment.
>
> Bell, supra [10 FLW at 1397]

Petitioner's argument assumes that when a party elicits a prior inconsistent statement from his own witness that he necessarily impeaches his own witness; and necessarily runs afoul of § 90.608. This is faulty logic.

The Second District noted:

> [W]e do not find the purpose underlying the rule to be the protection of an opposing party's trial tactics or to shield against

> the speculative implications [1] deemed significant in Price. Rather, the rule codified in Section 90.608 has evolved from the ancient but often criticized principle that when a party calls a witness that party vouches for the witness's credibility, i.e., the "Voucher Rule". See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 297 [sic] (1973).
>
> Bell, supra [10 FLW at 1765]

Witness McBride's anticipatory rehabilitation did not alter the testimony the jury heard nor did it impair the jury's task of determining the truth. Bell, supra [10 FLW at 1397]

Assuming only for argument that the option to impeach always rests with the opposing party:

Petitioner advances as argument the summary conclusion that ..."before McBride's credibility was bolstered, it was necessary for Respondent to impeach him by bringing to the jury's attention McBride's prior inconsistent statements." (Petitioner's Initial Brief, P. 10).

However, Petitioner advances no reason for this conclusion.

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[1] In addition, in such circumstances, the State is always vulnerable to the assertion by the defense counsel that he was going to forego impeachment. Furthermore when a party calls a witness, obtains favorable testimony and then undertakes to anticipate impeachment by introducing the witness' prior inconsistent statement the party is vulnerable to the assertion that it is attacking the credibility of its own witness which is impermissible. Price v. State, 469 So.2d 210 (Fla. 5th DCA, 1985)

He then argues that "This procedure is exactly that not allowed by Section 90.608, Florida Statutes." [1] (Petitioner's Initial Brief, P. 10).

The Second District's decision rejects "the time-worn notion that the option to impeach always rests with the opposing party"; and congruently rejects its "rigid, mechanistic application." Bell v. State, ____ So.2d ____ (Fla. 2nd DCA. Case No. 84-1616, June 7, 1985) [10 FLW 1396], mot. for reh. den., ____ So.2d ____ (July 19, 1985) [10 FLW 1765]. See also: Lipinski v. People of the State of New York, 557 F.2d 289 (2d Cir. 1977); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973).

> The drafters of the Code considered repealing the common law [Voucher] rule and allowing a party to impeach his own witness; however, they determined that generally, counsel should not call a witness whom he knew was not testifying truthfully and proceed to impeach that person.
>
> Ehrhardt, Florida Evidence § 608.2 (2d Ed. 1984) [emphasis added]

Here, the record is devoid of any indication the prosecutor thought McBride was lying.

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[1] Any party, except the party calling the witness may attack the credibility of a witness by:
(a) Introducing the statements of the witness which are inconsistent with his present testimony.

Indeed, the Fifth District's rigid and mechanistic reading of § 90.608 is at odds with its own decision in Sneed v. State, 397 So.2d 931 (Fla. 5th DCA 1981). Price, supra, condemns the State's "anticipatory rehabilitation." Sneed, supra, condones a defendant's election to first bring out his prior conviction in an effort to soften its effect.

CONCLUSION

Respondent asks this Honorable Court to affirm Petitioner's judgment and sentence; and to affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

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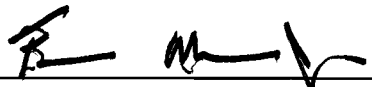

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Regular Mail to L. S. Alperstein, Assistant Public Defender, Courthouse Annex, Tampa, Florida 33602 this 4th day of September, 1985.

OF COUNSEL FOR RESPONDENT