IN THE SUPREME COURT OF FLORIDA

CLIFFORD BELL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO: 67,434

PETITIONER'S BRIEF ON THE MERITS

J. MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX AND STATEMENT OF ISSUES

CITATION OF AUTHORITIES

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PRELIMINARY STATEMENT

Clifford Bell was the Appellant below and will be referred to as Petitioner in this brief. The State of Florida was the Appellee below and will be referred to as Respondent.

STATEMENT OF THE CASE

On December 1, 1982 Petitioner Clifford Bell was charged, along with one Gasper F. McBride, with trafficking in cocaine (R 304). Jury trial was conducted on February 20-21, 1984 before the Honorable F. Dennis Alvarez and Petitioner was found guilty as charged (R 334). A motion for new trial was denied on April 2, 1984 (R 342).

Adjudication of guilt was made and the Petitioner was sentenced to three years imprisonment on June 18, 1984; a three-year mandatory minimum sentence was applied (R 345-348). A motion for mitigation of sentence was filed on July 6, 1984 (R 350).

Notice of Appeal was timely filed (R 352); the Public Defenders for the Tenth and Thirteenth Judicial Circuits were appointed as appellate counsel (R 357).

On June 7, 1985, the Second District Court of Appeal filed an opinion affirming Petitioner's conviction and approving "anticipatory rehabilitation" of the State's own witness. Bell v. State, 10 FLW 1397 (Fla. 2d DCA June 7, 1985). On motion for rehearing, the Second District Court of Appeal denied rehearing but certified a direct conflict with the Fifth District Court of Appeal decision, Price v. State, 10 FLW 1292 (Fla. 5th DCA May 23, 1985), on the same question of law.

STATEMENT OF THE FACTS

Detective Boudreaux of the Tampa Police Department undercover narcotics division testified that on November 3, 1982, he and Earl Mills, a confidential informant, met Gasper McBride to buy a testing sample of cocaine (R 8-11). When they met in a gas station parking lot, the witness gave McBride a $100 bill to purchase one gram of cocaine. McBride drove to a house at 909 East 128th Avenue, where Petitioner resided at the time, and returned in fifteen minutes with a gram packet of cocaine. McBride told Boudreaux he could get an ounce of the cocaine he had a sample of for $2,200 (R 12-13).

On November 9, 1982, Boudreaux and Mills met McBride in a pub parking lot; when Boudreaux showed McBride some money in a bank bag McBride went to make a call at a pay phone. According to Boudreaux, McBride told him he was getting the cocaine from the manager of the Sly Fox Lounge (R 14-18).

After McBride made a phone call, two short trips and returned, a white van drove into the parking lot. McBride allegedly identified the Petitioner, who was driving, by saying "There is my man. That is Cliff, and he has got it now." (R 18-19).

McBride spoke with Petitioner, reached inside the van window, returned to the van Boudreaux was driving and handed him a velvet whiskey pouch. Inside the pouch was a plastic baggie containing white powder. Boudreaux signalled the back-up units as he began counting out money to McBride, and thereafter everyone was arrested (R 22).

Boudreaux made an in-court identification of Petitioner as the driver of the white van (R 25). He identified the state's exhibit as being identical to the plastic baggie of cocaine he took into custody on November 9, 1982 (R 26-30).

Detective W.R. Dial weighed the contents of the baggie on June 23, 1983, in the presence of counsel; it contained 30.0 grams of white powder (R 63-70). Anthony Ziberna, a chemical expert, testified that the baggie contained cocaine and lidocaine (R 81-94).

Earl D. Mills became a confidential informer for the Tampa Police Department in August of 1982 (R 95-96). He set up arrangements with Gasper McBride, who he had known for five or six years, to purchase a quantity of cocaine (R 97-100). Mills was with Detective Boudreaux when McBride took one hundred dollars, went to the house on 128th Avenue, and delivered a gram of cocaine (R 100-103).

A few days later Mills met McBride at the Sly Fox, where he was introduced to Petitioner. At that time, McBride allegedly told Mills that Mr. Bell was the supplier (R 104). It was arranged that on November 9, 1982, an ounce of cocaine would be purchased for $2,200 (R 106).

Mills corroborated the version of the events which occurred that evening testified to previously by Detective Boudreaux (R 106-113). Because of his work as a confidential informant, Mills received probation on robbery charges against him (R 114-116). Mills also identified the Petitioner as the driver of the white van

(R 116), and stated that according to Gasper, the house McBride went inside before delivering the gram of cocaine was Petitioner's house (R 118-119).

Gasper McBride testified that he had known the Petitioner, was a family friend, since they were children. Petitioner, along wih his wife and child, shared McBride's apartment for several weeks in October, 1982. McBride was arrested for trafficking and delivery of cocaine on November 9, 1982 (R 144-146).

Earl Mills, an old school friend, had spoken with McBride about the purchase of cocaine on several occasions. While Petitioner was staying with him, McBride asked him to help him get some cocaine (R 146-148).

On November 3, 1982, Petitioner was living at 909 East 128th Avenue (R 150). McBride met Detective Boudreaux and Earl Mills at the gas station that day; Boudreaux gave him one hundred dollars to purchase a gram of cocaine. McBride then drove his car to Petitioner's house, which was one block away from the gas station. He gave Petitioner the money in exchange for the gram, which he then delivered to Boudreaux at the gas station (R 152-154).

McBride made arrangements to deliver an ounce of cocaine from Petitioner to Earl Mills. He was to make $200 from the deal by selling it to Mills for $2,200 and paying Petitioner $2000 (R 157-158). McBride's version of the events of November 9, 1982, in the Peanut Gallery parking lot was the same as that testified to by the previous State witnesses (R 162-166).

McBride said that he was asked to tell the truth in order to render substantial assistance for the State. The charges pending against him were for trafficking and delivery of cocaine; he had pled guilty and would be sentenced by the same Court that coming Friday. He expected to receive a worse sentence if he lied, but no one had promised him a light sentence or probation (R 167-169).

According to McBride, his original trial counsel advised him concerning a sworn statement given on August 3, 1983. At that time, this witness had lied under oath, stating that Petitioner had nothing to do with the November 9, 1982, cocaine transaction. A defense objection to the State's impeachment of its own witness was denied (R 170-171).

McBride's previous statement was that the Petitioner was in the parking lot to buy his wife a birthday pesent after collecting money McBride owed him. He had made this statement because he wanted to help his friend Clifford after causing him to be arrested. However, he was now saying that Petitioner went to the parking lot only to deliver an ounce of cocaine to McBride (R 169-174).

McBride was now testifying to give substantial assistance in order to help himself (R 182-184). At the Sly Fox when McBride had introduced Earl Mills to Petitioner, there was no discussion of cocaine in the Petitioner's presence (R 190-192).

Detective John Cuesta, III was a member of the surveillance and back-up unit on November 9, 1982 (R 216-218). He had observed Gasper McBride driving to the Sly Fox twice to meet with an individual

who was later arrested. This individual had a beard, mustache, and shoulder-length hair; although Detective Cuesta was told later that this person was Petitioner, he did not see the person in the courtroom at trial (R 219-221).

SUMMARY OF THE ARGUMENT

The practice of "anticipatory rehabilitation" was approved by the Second District Court of Appeal in Bell v. State, 10 FLW 1397 (Fla. 2d DCA June 7, 1985), rehearing denied Case No. 84-1616 (Fla. 2d DCA July 19, 1985. The Fifth District Court of Appeal in Price v. State, 10 FLW 1292 (Fla. 5th DCA May 23, 1985), disapproved the practice of "anticipatory rehabilitation." This Court should adopt the decision in Price, supra and quash the decision in Bell, supra.

ARGUMENT

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?

On direct examination, the Respondent elicted testimony from Gasper McBride concerning a prior statement that was inconsistent with his statement at trial. In that prior statement, McBride had sworn that Petitioner was innocent of the trafficking charges, that he was in the parking lot to collect money McBride owed him (R 169-174). Petitioner's objection to this questioning was overruled and McBride testified that he had perjured himself when he denied Petitioner's complicity in the cocaine transaction (R 169-174).

In Bell v. State, 10 FLW 1397 (Fla. 2d DCA June 7, 1985), rehearing denied Case No. 84-1616 (Fla. 2d DCA July 19, 1985), the Second District Court of Appeal affirmed Petitioner's conviction and approved the practice they termed "anticipatory rehabilitation." The Fifth District Court of Appeal in Price v. State, 10 FLW 1292 (Fla. 5th DCA May 23, 1985), however, disapproved the practice of "anticipatory rehabialitation." Appellant urges this Court to follow the decision of the Fifth District in Price, supra.

In Price, supra, as in the instant case, the witness testified favorably for the State at trial. However, over defendant's objection, the State was allowed to question the witness concerning a prior inconsistent statement. The State argued this was proper as they

were anticipating the defense would impeach the witness and therefore, was just giving her an opportunity to explain the former inconsistent statement.

In reversing the cause in Price, supra, the court stated:

> The State "anticipates" impeachment of its own witness by the defense at the State's peril because the option is always with the defense to impeach or not. The defense often quite reasonably does not impeach a particular witness because the defense knows that the evidence that the State is entitled to present on rehabilitation of its witness will be much more harmful to the defense than any benefit derived from an impeachment of that witness. 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 no 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.

Judge Frank, in his opinion in Bell, supra, states that this procedure does not violate Section 90.608(1)(a), Florida Statutes, because the Respondent was not impeaching McBride but was, instead, bolstering his credibility by disclosing a prior inconsistent statement. Judge Frank overlooks, however, 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 statement. This procedure is exactly that not allowed by Section 90.608, Florida Statutes.[1]

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

In Ryan v. State, 457, So.2d 1084 (Fla. 4th DCA 1984), the Fourth Distict addressed this same question. As Petitioner argues, the Fourth District recognized that while the State may not have the specific intention of attacking the witness' credibility, the prosecutor's questioning had the effect of impeaching in one breath by showing the inconsistent statement and rehabilitating in the next breath by allowing the witness to explain why he lied. As the court stated in Ryan, supra at 1092:

> . . .
>
> Not only does this scramble the orderly procedure laid out by the Florida Rules of Evidence, but it robs the defense counsel of an important strategic tool used in cross-examination, that of impeachment of a witness through the use of prior inconsistent statements. (Cites omitted)

By impeaching McBride, the Respondent pre-empted the defense perogative. Impeachment evidence is not properly introduced during the State's case-in-chief. Giddens v. State, 404 So.2d 163 (Fla. 2d DCA 1981). In addition, it is the defendant, rather than the State, that must be afforded wide latitude in demonstrating the bias or possible motives of a witness especially during cross-examination of a State witness regarding pending charges or matters arising out of the same incident for which the accused is on trial. Blair v. State, 371 So.2d 224 (Fla. 1979).

Petitioner submits the appropriate reasoning for impeachment is set forth in Erp v. Carroll, 438 So.2d 31, 37 (Fla. 5th DCA 1983):

> The purpose of impeachment is to attack the credibility of a witness so that the trier of fact will accord his testimony less weight

> than otherwise. Accordingly, there is a good reasons for a party to impeach a witness giving testimony harmful or adverse to that party but there is no proper purpose of impeachment in order to attack a witness that has not given testimony prejudicial to the person seeking to impeach the witness, and this is true without regard to who called the witness or the adverse witness' status.
>
> . . .

For the foregoing reasons and authorities cited, Petitioner submits the Second District Court of Appeal's decision in Bell, supra, is incorrectly decided and urges this Court to adopt the Fifth District's reasonng in Price, supra.

CONCLUSION

For the foregoing reasons and authorities cited, Petitioner respectfully requests this Honorable Court to quash the decision of the Second District Court of Appeal affirming Petitioner's judgment and sentence and remand with directions to grant Petitioner a new trial.

Respectfully submitted,

J. MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Petitioner, Clifford Bell, 3802 W. Buffalo Avenue, Tampa, Florida 33614 this 15th day of August, 1985.

L. S. Alperstein
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