IN THE SUPREME COURT OF FLORIDA

ANTHONY B. BRYAN,

Appellant,

-v-

CASE NO. 68,803

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Appellant's supplemental brief is filed pursuant to this Court's Order of October 20, 1987, allowing therefor.

The Statement of the Case and of the Facts set out on page (1) of Appellant's Initial Brief are adopted by reference.

Where references are made to the Supplemental Transcript of Record, they will be designated by (S-) and references to the original Transcript of Record are referred to as (T-).

SUMMARY OF ARGUMENT

The trial was permeated by inadmissible evidence of prior illegal acts admitted under the guise of the Williams rule or supposed wide latitude of the prosecution in cross-examining the Appellant.

Because the Court erred in allowing such evidence together with an objectionable taped conversation without holding a Richardson hearing and because the overzealousness of the prosecutor both in cross-examination and in closing argument reached an untenable level of prosecutorial misconduct the Judgment and Sentence below must be reversed.

The Appellant was denied the opportunity for anticipatory rehabilitation and the murder weapon was illegally admitted after denial of a motion to suppress.

The victim's pictures were admitted although their gruesomeness made the prejudicial effect thereof outweigh any evidentiary value.

The Appellant's Motion to Continue should have been granted so that he would have been able to present necessary witnesses with the assistance of an investigator.

The Trial Court should have granted Appellant's Motion for New Trial upon the grounds referenced above and because the verdict was contrary to the law and the weight of the evidence necessitating that the Court grant Appellant's Motion for Judgment of Acquittal.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE PURSUANT TO A DENIAL OF APPELLANT'S MOTION TO SUPPRESS?

At a motion hearing prior to jury selection, Counsel and the Court agreed that the Court would adopt the ruling of Judge George Lowrey, who had presided over a former mistrial, on the Motion to Suppress with Appellant preserving the right to appeal that ruling (T-148). Pursuant thereto, a Browning Magnum twelve gauge shotgun, Serial #20310 and latent fingerprints were admitted into evidence at trial.

Appellant's Motion to Suppress Evidence (T-45) was heard by Judge Lowrey prior to the first trial (S-2). After an evidentiary hearing, he denied the motion and "ruled that the evidence would come in" at trial (Appendix "A" pages 68-69).

The evidence adduced at the suppression hearing was that Officer Charles Craddock of the Madison, Florida Police Department was dispatched to a Sears catalog store in that town which also contained a Western Union office. The officer was advised by the dispatcher that the occupants of a white Pinto had a flat tire and left the rim at a station near the interstate to go the Western Union office to obtain money to

pay for a new tire (S-10). The officer was told to be sure they went to the Western Union and stand by to see that they returned to the station.

While observing the Pinto at the Western Union, the Officer was further advised that the tag on the automobile indicated the car had been reported stolen.

During a period when both occupants were away from the vehicle, the officer approached it, looked inside and observed the barrel of a shotgun with a towel laying over the butt part of the gun (S-22). The officer acknowledged that as far as he was concerned at that point, it was an ordinary lawful firearm (S-33).

Officer Craddock acknowledged (S-16) that he did not know who had been driving the car and that the driver had not violated traffic laws. However, he placed both the Appellant and Sharon Cooper under arrest, detained them for several days at the jail and had another officer drive the vehicle to the jail.

Both Appellant and Sharon Cooper told the officers they had purchased the car (S-20) and apparently based thereon, no formal car theft charges were filed against either (S-45).

The car was searched by Officer Craddock on the instructions of Police Chief Edward Odom while the Appellant and Sharon Cooper were incarcerated (S-52) and the Chief had "no concern that the car was going anywhere".

It was searched, although not by a "complete inventory search" (S-52) on a Friday morning, without a search warrant although insofar as the Chief knew (S-53), the occupants were in jail, the resident County Judge or Magistrate was in his Chambers and he could have applied to him for a search warrant before searching the car.

If the search is conducted without a search warrant, as acknowledged, and the Appellant had standing, i.e, a legitimate expectation of privacy in the vehicle, the search is per se illegal and the State has the burden of establishing an exception to the warrant requirement, Thompson -v- Louisiana, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984).

The legitimate expectation of privacy standard was established by the United States Supreme Court in Rakas -v- Illinois, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) and expanded upon in United States -v- Salvucci, 448 U.S. 83, 100 S. Ct. 2547. The Florida case most on point appears to be De La Paz -v- State, 453 So.2d 445 (Fla. App. 4 Dist. 1984) where the Court concluded that the Defendant who

had been residing in a home for two to three months prior to the arrest, had standing to challenge the validity of the warrant authorizing the search of that home.

Unlike the Defendant in Rakas, the Appellant testified on the standing issue that (S-37) he and Sharon Cooper with whom he was hitch-hiking, purchased the Pinto for $300.00 from someone in Cameron, Louisiana and had no reason to believe the car was stolen. Sharon Cooper confirmed that purchase and specifically told Officer Craddock that they had purchased the car from somebody (S-20). Sharon Cooper further told Chief Odom that she and Appellant were married (S-44).

It is therefore clear that Appellant has standing to contest the search and that the circumstances known to the Madison police officers at the time of the search should have put them on notice of such standing and caused them to seek a search warrant before searching the vehicle.

The only asserted exception to the warrant requirement is the exigent circumstances or "automobile" exception established by the United States Supreme Court in Carroll -v- U.S., 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1923).

That doctrine has been most recently interpreted by Florida Courts in Manee -v- State, 457 So.2d 530 (Fla. App. 2 Dist. 1984); Mancini -v- State, 448 So.2d 573 (Fla. App. 1

Dist. 1984); State -v- Williams, 462 So.2d 69 (Fla. App. 1 Dist. 1985) and State -v- Bennett, 12 FLW 1455 (Fla. 5 Dist. 1987).

Those cases all held automobile searches invalid because the officers did not obtain a warrant and the Bennett Court, citing Coolidge -v- New Hampshire, 403 U.S. 443 (1971), held that the automobile exception to the warrant requirement did not apply to a situation where the searching officer intended in advance to arrest the suspect, seize his car and search it.

In this case Officer Craddock was determined to seize and search the car even though he had no basis to suspect contraband therein. The occupants were incarcerated and immediately arrested although not prosecuted.

No exigent circumstances have been exhibited and no other exceptions to the warrant requirements have been demonstrated. Therefore, the search and seizure was per se unreasonable and violated the Appellant's Fourth Amendment Rights.

ISSUE II

WAS THE ASSISTANT STATE ATTORNEY GUILTY OF PROSECUTORIAL MISCONDUCT?

The Assistant State Attorney, Mr. Patterson, was guilty of misconduct in cross-examining the Defendant about prior acts or crimes for which he was not convicted and in elaborating upon the details thereof both in cross-examination and in closing argument.

Nearly the entire cross-examination of the Defendant dealt with the prior bank robbery, his subsequent escape, stolen boats, cars, outdrives, trailers, and dealings in marijuana. Appellant objected to the admissibility either during cross-examination or at an earlier stage in the proceedings. A lengthy colloquy among the Court and counsel occurred as to the propriety of impeaching the Defendant by cross-examination about prior illegal acts which did not result in a conviction (T-645-656). The Court's ruling that, "I think he's made himself a witness for all purposes and subjects himself to cross-examination on his past," is contrary to the prevailing case law.

In a very similar case, this Court in Keen -v- State, 504 So.2d 396 (Fla. 1987), reversed a murder conviction because of the cross-examination of the Defendant about an

unrelated attempted murder in North Carolina. The Court found that error harmful with relation to the standards of State -v- DiGuilio, 491 So.2d 1129 (Fla. 1986).

An informative analysis of the issue is contained in Dixon -v- State, 426 So.2d 1258 (Fla. App. 2 Dist. 1983) where the Court first set out that:

> The admission of evidence of an accused's prior arrests is ordinarily deemed so prejudicial that it automatically requires reversal of his conviction. Fulton -v- State, 335 So.2d 280 (Fla. 1976). Here, the Court permitted this line of inquiry upon the theory that when the defendant made the statement quoted above he put his character in issue, and as a consequence, the state was permitted to ask about prior arrests. This was a misapplication of Robinson -v- State, 393 So.2d 33 (Fla. 1 Dist. 1981), which holds that the State may cross-examine a defendant's character witness by asking whether he knew of an existing felony charge pending against the defendant. Such a question is pertinent because the character witness's lack of knowledge of a prior arrest may affect his opinion concerning the defendant's reputation. Greenfield -v- State, 336 So.2d 1205 (Fla. 4 Dist. 1976). The same reasoning does not apply to the instant case because the defendant obviously knew about his prior arrests.

The Court in Michaels -v- State, 429 So.2d 338 (Fla. App. 2 Dist. 1983), summed up the Dixon holding in applying it to the facts of that case, to-wit:

> Even though the defendant had put in issue the question of his reputation for violence, the state should have proved his reputation for violence through testimony about the defendant's reputation, not by cross-examination of the defendant concerning prior criminal acts of violence.

Thus, we see that the prosecutor and judge herein fell into the same trap as the Dixon Court in believing that the Defendant could be cross-examined and the State could comment upon prior criminal activities when in fact only other character witnesses could be so confronted to test their knowledge of Defendant's reputation. The Appellant presumably knew of those illegal activities so it was not proper to confront him therewith.

The prosecutor was further guilty of commenting upon the failure of the Appellant to offer evidence and to call a witness contrary to the applicable law in the area.

Mr. Patterson commented in closing argument with regard to the rope which bound the decedent's hands, "why didn't they put it in evidence? They can put the rope in evidence." (T-797).

The comment was first improper because in an off the record discussion including Appellant's investigator, Jim Duck, Appellant offered to introduce the rope through the

investigator's testimony which would have included his testimony that the rope was tied in a slip knot, a knot that would never have been used by an experienced boat captain like the Appellant. The prosecutor refused to stipulate to its admissibility under those circumstances, expressing concern about the investigator's expertise in that realm. It is unfortunate that many bench conferences were unreported, but it is apparent from the discussion with the Court (T-691) concerning reading Dr. Ogburn's deposition into evidence that such a discussion had ensued. In response to Appellant's indication that the investigator would "play the doctor" in presenting the deposition testimony, the State objected on the basis that the investigator might testify later and at the Court's suggestion, Mr. Patterson's secretary read the responses of the doctor. The prosecutor therefore acted in bad faith in suggesting to the jury that the Appellant could have introduced the rope into evidence when his own actions prevented that.

Furthermore, Mr. Patterson commented in his closing argument upon Appellant's failure to produce a witness to corroborate his testimony that he, the victim and Sharon Cooper stopped and drank beer at the Blue Bayou Bar in Grand Bay, Alabama, en route to Crestview, Florida (T-801).

The prosecutor argued:

> He says they stopped by a little bar on their way to casually come to Crestview. Anybody else testify to that? The Blue Bayou Bar.

Appellant immediately objected that there was no evidence he had a witness available to testify to that. The Court overruled the objection, saying "it's arguable".

After the conclusion of closing arguments, Appellant moved for a mistrial upon that and other bases. The record reflects (T-807) that Appellant had subpoenaed Chris Gulfers (the spelling of his name in the transcript is incorrect), the owner of the Blue Bayou Bar in Grand Bay, Alabama, but he failed to appear during the guilt phase of the trial. However, he appeared for the penalty phase on the last day of the trial and gave testimony confirming Appellant's testimony. In that testimony, Mr. Gulfers confirmed counsel's diligence in staying in contact (T-939-940), stating that he was so visited on three different occasions. He also testified that Tony's lawyer "called me and told me to come here to testify" (T-925).

Chris Gulfers had been furnished in reciprocal discovery to the State as a defense witness, but, as he testified, the State Attorney did not contact him, take his deposition or in

any way try to find out what his testimony was going to be (T-938).

Mr. Patterson was aware, as pointed out to the Court (T-807) that Appellant was making every effort to produce the witness, but was unable to procure his presence during the guilt phase.

That knowledge is documented (T-732) by the Court's comment when Appellant objected to the State being allowed to re-open its case to present the testimony of Dr. Ogburn in rebuttal, to-wit:

> THE COURT: Well, I was prepared today to let you reopen your case to present a witness. Not in rebuttal but in your case in chief, as I understand that was a purpose for calling your witness from Alabama, leaving that open to have him here this morning. He wasn't going to be in rebuttal, he was going to be in your case in chief.
>
> MR STOKES: I thought it was going to be in surrebuttal, but he's not available still.

The Court was advised of the correct law in the area, but failed to follow it. The correctness of the representation of the state of the law made to the Trial Court is documented by the following cases:

Araujo -v- State, 452 So.2d 54 (Fla. App. 3 Dist. 1984):

> The applicable case law is clear. An inference adverse to the defendant for his failure to call witnesses is not permitted unless "it is shown that the witnesses are peculiarly within the defendant's power to produce and the testimony of the witnesses would elucidate the transaction, that is, that the witnesses are both available and competent." Kindell -v- State, 413 So.2d 1283, 1288 (Fla. 3d DCA 1982).

Bayshore -v- State, 437 So.2d 198 (Fla. App. 3 Dist. 1983):

> In the instant case, as in Kindell, the state not only "totally failed to establish the competency and availability of the .... alibi witness as a predicate to its argument, but -- even more egregiously -- itself created, in order to later destroy, the alibi defense."
>
> When the propriety of prosecutorial comments is raised on appeal, the key question is "whether or not [we] can see from the record that the conduct of the prosecuting attorney did not prejudice the accused, and unless this conclusion be reached, the judgment must be reversed. "Lipman -v- State, 428 So.2d 733 (Fla. 1st DCA 1983), quoting Coleman -v- State, 420 So.2d 354 (Fla. 5th DCA 1982).

Trinca -v- State, 446 So.2d 719 (Fla. App. 4 Dist. 1984):

> We reverse based on Michaels -v- State, 429 So.2d 338 (Fla. 2d DCA 1983). In that case, the state

> commented in closing argument on the failure of the defendant to call defendant's daughter as a witness. It had been demonstrated during the trial that the defendant's daughter was present when the alleged crime occurred and was available to testify. The Second District Court held that it was clearly improper for the State to comment on the defense's failure to call witnesses, citing Kirk -v- State, 227 So.2d 40 (Fla. 4th DCA 1969).

Salazar-Rodriguez -v- State, 436 So.2d 269 (Fla. App. 3 Dist. 1983):

> Our review of the record reveals that "the trial court was so fraught with errors that reversal could be bottomed on a multitude of them". Kirk -v- State, 227 So.2d 40 (Fla. 4th DCA 1969). We base our reversal primarily upon the state's comments on appellant's failure to call witnesses.

Surely this case falls within that same rationale. A case more fraught with error and prejudicial prosecutorial misconduct is hardly fathomable.

Other examples of prosecutorial abuse and overkill are the State's comment on the Appellant's right to remain silent concerning his failure to tell court-appointed psychiatrist Dr. Benjamin Ogburn all the details of the events surrounding the transaction (T-803). Appellant objected thereto and later moved for a mistrial (T-808-809) which was denied by the Court.

Adding salt to the wounds of an already beaten, battered and bruised record was the improper threat of arrest made during the penalty phase by the prosecutor to Appellant's aunt, Jean Hanley.

The Court was requested by the State to advise Ms. Hanley of her Miranda warnings prior to her cross-examination which were administered by the Court out of the presence of the jury. Quoting the prosecutor, the Court (T-864) advised her, "He says there's a real possibility that you may be arrested and charged with harboring a fugitive from Federal -- a Federal fugitive".

Consequently, the witness, in regard to a question as to why she did not want to disclose the name and address of the law firm she worked for in Phoenix, Arizona, testified before the jury, "Well, if I were to be arrested, I wouldn't want to be arrested at my work" (T-868).

She later invoked her Fifth Amendment privilege not to testify and the Court and the State commented thereon with the jury present (T-871).

As Justice Drew stated in Grant -v- State, 194 So.2d 612 (Fla. 1967):

> Many a winning touchdown has been called back and nullified because someone on the offensive team violated a rule by which

> the game was to be played. The test in such case is not whether the infraction actually contributed to the success of the play but rather whether it might have. Surely where life is at stake, the penalty cannot be less severe.

In this case, the State must be penalized for its overzealous prosecution; its offsides and out of bounds remarks about Appellant's past, his failure to produce evidence and witnesses and his exercise of his right to remain silent; for its clipping of the wings of Appellant's penalty phase defense by intimidating witness, Jean Hanley, then commenting upon her invocation of her Fifth Amendment rights; for holding Appellant's prior illegal acts against him in argument to the jury and indeed for interference with the entire system of justice and Appellant's right to a fair trial.

The penalty for those flagrant infractions of the rules is not merely the replay of the down after assessment of a five or fifteen yard penalty, but must be forfeiture of the entire game with a rematch rescheduled.

ISSUE III

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL AND IN THE RULINGS ASSERTED AS A BASIS THEREFOR?

The Appellant filed a Motion for New Trial asserting that the verdict was contrary to the law and the weight of the evidence, asserted three incidences of prosecutorial misconduct and eleven errors made by the Court (T-104).

After a hearing thereon, the Court entered an Order (T-106) denying the Motion for New Trial, concentrating primarily upon the Williams rule aspect thereof.

The primary issues raised therein have been addressed above or in the Initial Brief, but several remain which may be consolidated for purposes of argument.

The matters concerning the verdict being contrary to the law and the weight of the evidence and the Motion for Judgment of Acquittal will be addressed simultaneously since they are essentially the same. Likewise, the issue of the admissibility of the victim's fingerprint card will be discussed because it collaterally relates to the basis for the Motion for Judgment of Acquittal.

At the close of the State's case, the Appellant moved for a Judgment of Acquittal (T-567) as to all three counts of the indictment.

The basis of the motion on the First Degree Murder charge was that the State had failed to establish the identity of the alleged victim, George Wilson. The only means of identification of the decomposed body was fingerprint evidence taken by the F.B.I. lab in Washington from hands severed from the body and forwarded for analysis. Agent Massey of the F.B.I. compared the prints obtained from the hands to a fingerprint card of a George Wilson which was admitted into evidence over Appellant's objection. Agent Massey acknowledged (T-550) that he made no determination that the prints matched those of a particular George Wilson. Assuming there are many George Wilsons in the United States, that was far from a positive identification.

The State proffered the fingerprint card for evidence through the testimony of G. R. Thompson who retired from the Pascagoula Police Department twenty-one and a half years before the trial. The fingerprint was dated in 1962 and although Mr. Thompson's signature appeared thereon, it contained no picture, social security number or other identification of that George Wilson (T-374-377). Mr.

Thompson had no independent memory of having fingerprinted an individual named George Wilson.

Appellant objected that there had been no proper predicate laid for admission of the evidence, i.e, that it had not been properly authenticated. It was also irrelevant to the proceedings since it could not be specifically related to the body. The Court apparently admitted it under the business records exception to the hearsay rule, Florida Statute 90.803(6) (T-387), but as Appellant pointed out, it was not documented by the testimony of the custodian of the records as required.

The basis of Appellant's Motion for Judgment of Acquittal on the Kidnapping and Robbery charges were essentially that the kidnapping would have occurred in Mississippi with no asportation in Florida and that there was no requisite intent to commit robbery since the allegedly stolen car was soon run into a river and sunk.

Appellant objected to the admissibility of pictures of the body which was found in a creek in a decomposed state, pursuant to Florida Statute 90.403. That provision of the Evidence Code makes relevant evidence inadmissible when the probative value is substantially outweighed by danger of unfair prejudice.

The Court acknowledged that "they look a little gruesome" (T-355), but admitted them over Appellant's objection.

Prior to calling the Appellant as a witness, the testimony of Dr. Ellen Gentner of the Santa Rosa Mental Health Center was proffered for the purpose of explaining the Appellant's severe memory problems (T-587-597).

The Court denied Appellant the opportunity to present her testimony in the guilt phase, but indicated that she could testify in the penalty phase (T-597). As she indicated, she was unavailable for the penalty phase on Friday and the jury had only the benefit of her report without explanation to consider in that phase.

This Court in Lawhorne -v- State, 500 So.2d 519 (Fla. 1986) and recently the Second District in Williams -v- State, 12 FLW 1745 (Fla. 2 Dist. 1987) approved the concept of prospective or anticipatory rehabilitation of a witness concerning inquiry as to prior felony convictions. That is precisely what counsel sought to do in this case. Due to past experience with Appellant and given the psychological data available, it was obvious that the Appellant would be unable to remember some details and that the prosecutor would be able to effectively cross-examine him for his lack of memory.

Just as this Court in Bell -v- State, 491 So.2d 537 (Fla. 1986) approved anticipatory rehabilitation by the State "to take the wind out of the sails of a defense attack on a witness's credibility", Appellant sought to abrogate the State's billowing about his memory by anticipatory rehabilitation in the form of Dr. Gentner's testimony.

On the morning of jury selection, in addition to the Williams Rule argument, the Court heard argument upon Appellant's Motion to Impanel Separate Juries and a Motion to Continue (T-124-144). The Arkansas case relied upon for the former motion was reversed by the U.S. Supreme Court so that point merits no further argument. The Motion to Continue was based on the unavailability of several out-of-state witnesses and the psychologist, Dr. Gentner together with the unavailability of the Court-appointed investigator to assist in coordinating their appearance at trial.

In addition to the unavailability of Dr. Gentner for the penalty phase, the denial of the Motion to Continue most severely prejudiced the Appellant by denying him the opportunity to present the testimony of Jack Lowell. Mr. Lowell was an inmate in Oklahoma who would have testified that Mark Hart gave similar testimony at his murder trial in Oklahoma wherein he was acquitted. He would have testified

that Mark Hart lied at his trial concerning statements he supposedly made to him while incarcerated and that Mark Hart was a paid F.B.I. informant who fabricated such testimony for fees and favorable treatment.

Appellant's investigator had talked to Jack Lowell by telephone, but because of a fee dispute and a time problem, Appellant was unable to make the necessary arrangements with the Oklahoma authorities to have him present at the trial.

CONCLUSION

The statement contained in the CONCLUSION to Appellant's Initial Brief indicating that issues other than the Richardson and Williams rule were "without foundation" were in error.

Additional research reveals that the argument concerning prosecutorial misconduct is of equal strength with the Richardson and Williams rule positions and that reversal is also required because the Court denied Appellant the opportunity to present Dr. Gentner's testimony about his memory problems in anticipatory rehabilitation.

The Trial Court should have granted the Motion for New Trial upon many of the grounds set out therein and its failure to do so requires this Court to reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to Royall P. Terry, Jr., Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, by delivery, this 23 day of November, 1987.

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