O/a 4-29-88

THE SUPREME COURT OF FLORIDA

RICHARD A. DOWNING,

Petitioner,

vs. CASE NO. 71,629

STATE OF FLORIDA,

Defendant.

SUPPLEMENTAL BRIEF OF PETITIONER DOWNING

JOHN F. TIERNEY, III
Attorney for Petitioner
324 Datura Street
Suite 312
West Palm Beach, FL 33401
Telephone: (407) 659-3901

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

References to the Record on Appeal will be made by the designation "R" followed by the appropriate page number, i.e. (R-page number).

It should be noted that the portions of the Record which contain the transcript of the trial are not in chronological order but are in the order that the transcripts were filed with the Clerk's office.

The trial in this case was a joint trial with two co-defendants. The trial court agreed that objections made on behalf of either co-defendant were construed by the trial court to be made on behalf of both defendants. (R-512-513).

References to the Supplemental Record on Appeal will be made by designation "SR" followed by the appropriate page number, i.e. (SR-page number).

STATEMENT OF THE CASE

After oral argument in this cause, the Court by Order dated May 5, 1988, has directed Petitioner to file a Supplemental Brief directed to the question of whether the trial Court's denial of discovery of FDLE Agent reports was a harmless error. This Brief is submitted in response to the Court's Order. For a detailed statement of the case and the facts and Petitioner's argument please see Initial Brief of Petitioner DOWNING.

THE TRIAL COURT'S DENIAL OF MOTIONS FOR DISCLOSURE AND DISCOVERY OF FDLE AGENT REPORTS WAS NOT HARMLESS ERROR

This Court, by Order dated May 5, 1988, has furnished copies of the written reports of the Florida Department of Law Enforcement Agents referred to in the opinion of the First District Court of Appeals in this case. The Court has requested a Supplemental Brief directed to the question of whether the trial Court's denial of discovery of these reports was harmless error. The First District Court of Appeals held that after review of the record in this case, it was manifestly clear that disclosure of the police reports would have had absolutely no effect on the outcome of the case; and therefore, the Court concluded that the error was harmless.

At the outset, counsel wishes to make it clear that Petitioner does not waive the argument contained in the Initial Brief, Reply Brief and made at oral argument that the discovery error, and failure to conduct an in camera inspection of the reports is the equivalent of the failure to conduct a proper "Richardson" inquiry, and that this Court should reverse without regard to a harmless error inquiry. Smith v. State, 500 So.2d 125 (Fla. 1986). Where a Defendant has been deprived of discovery which affected ability to prepare for trial, that is the type of error that is always harmful. After trial, it is exceedingly difficult to determine the effect of the error on the

trier of fact. The Court should presume prejudice. This Court has recently said that the test of whether a given type of error can be properly characterized as per se reversible is the harmless error test itself. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Therefore, it is respectfully suggested that the error in this case, under this Court's test could not be deemed "harmless error".

At oral argument, the Court inquired of counsel as to how the Defendant was prejudiced. It is respectfully submitted that the burden should be on the State not Petitioner DOWNING to demonstrate that the error was not harmless. In State v. DiGuilio, 491 So.2d 1129, 1138, this Court stated:

> "The harmless error test, as set forth in Chapman and progeny, places the burden on the State, as the beneficiary of the error, to prove beyond a resonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."

Therefore, counsel suggests that the State has not and cannot meet its burden to show that the Defendant was not prejudiced in pretrial preparation, nor can the State demonstrate beyond a reasonable doubt that the Defendant was not prejudiced by nondisclosure of information in the reports.

Petitioner moved to compel production of these reports and argued this before the trial Court prior to taking any depositions R-39, R-1212-1236. Counsel repeatedly argued that

the reports were necessary to properly prepare for depositions. The trial Court denied the request and the first deposition taken was that of the State's key witness, informant, Bruce Evans. At the beginning of the deposition, counsel stated as follows:

> "We are here for the deposition of Mr. Bruce Evans, who has been listed as a State witness in the case of State of Florida v. Martha Munroe and Richard Downing. By taking this deposition, I want to indicate on the record that I am not waiving my earlier position with the Court that I would like and want the police reports of all of the officers that were eye witnesses and participants to the alleged events that formed the subject matter of this case.
>
> I feel like I have been prejudiced by not having the benefit of those reports prior to taking this deposition. The Court's Order was, though, that my Motion was denied without prejudice. Nevertheless, I would like to make it clear for the record that I feel like I am being prejudiced in terms of preparation for taking this deposition by not having these reports, which I think are discoverable under Rule 3.220 and, perhaps, Brady v. Maryland."

Counsel then proceeded to depose Mr. Evans and then later conducted the discovery depositions of the officers without the benefit of any reports. If counsel had received the reports prior to scheduling depositions, the scheduling of the depositions probably would have been conducted by deposing Agent Layman first because of the information discovered in Agent Layman's report. Counsel would have attempted to elicit the

facts and background and information from Agent Layman as concerns the informant, Evans prior to taking his deposition. However, without the benefit of any documents, the decision was made to depose Mr. Evans first and then the officers.

The opinion of the First District Court of Appeals suggested that the Court reviewed the depositions of the witnesses and their trial testimony and compared them with the Florida Department of Law Enforcement investigative reports, and the Court stated that the agents testified to the same things that were set forth in their reports. However, with all due respect to that Court, the Agent's report contains a remarkable piece of evidence and disclosure which was never disclosed at any deposition or in any testimony at trial. The case agent in charge on this case was Agent, Charles Layman. The first report provided in the reports from the Court is a report from Mr. Layman indicating that it was dictated and typed on 4/17/85. The third paragraph of that report states:

> "On Wednesay, March 27, 1985, Martha Munroe contacted the CI and stated that "Geronimo" wanted to purchase 5 kilos of cocaine. She asked the CI if he had any contacts who could supply it. The source had told her that he had some contacts and would see what he could do. The figure of $25,000 per kilo was mentioned and the CI advised that Munroe had shown him $25,000 on the previous day. [Emphasis added].

At no time did anyone ever disclose that Munroe had shown Evans $25,000. Counsel thoroughly examined case agent,

Charles Layman in his deposition, and asked about everything that Evans had done and said, and at no time did the witnesses disclose that Evans had seen this money before DOWNING ever arrived in Florida. See deposition of Charles Layman R-61-168. Moreover, Evans never disclosed it, nor was it ever disclosed at trial. That would have been an incredibly important piece of evidence for counsel to present to the jury because it was the State's consistent argument and theory that the money was in the possession of DOWNING at the Red Roof Inn, and at the time of arrest the money was contained in a suitcase which belong to DOWNING. Munroe testified that the money belonged to the unidentified men that she had been dealing with and that she had left it with DOWNING to safeguard on the morning of April 3, because she did not want to be carrying that amount of money around when she was meeting with Evans R-1145, 1849-1852. The State suggested that this was ludicrous and they repeatedly argued at trial, and even in the Briefs on Appeal, that DOWNING must have been the purchaser and that it was his money. The State has made these arguments knowing full well that they had information which they have never disclosed that would prove that Munroe had at least $25,000 before DOWNING ever arrived in Florida.

The evidence is uncontradicted that DOWNING flew from San Francisco to Tallahassee on March 30, 1985 (See Exhibit 15, "airplane ticket".) DOWNING'S theory of defense is that he was

not involved with Munroe's attempts to obtain cocaine and the State deliberately withheld information that would clearly indicate that Munroe was involved in attempting to acquire the cocaine even before DOWNING arrived in town, and even showed Evans at least $25,000 before DOWNING ever arrived in town. The State had to know that this would directly contradict their theory of the case; therefore, it was never, at any time, diclosed to defense counsel, and the State had to know the significance of this evidence. The Information filed in this case charges that a conspiracy was between April 1, 1985 to April 3, 1985 (R-1). Evidence that Munroe possessed at least $25,000 before DOWNING arrived in Florida would have been highly probative, and in fact, would have proved the Defendant's theory. The State took great pains to attempt to connect DOWNING to the money, including introducing fingerprint testimony that showed he had handled the wrappers on the money. However, therewere no fingerprints on the money. Munroe's unrefuted testimony was that she took the money in a brown paper bag and put it in DOWNING'S suitcase before Evans was shown the money. In closing argument, the Prosecutor argued:

> "Well, of course, Martha's fingerprints aren't on here because he's the only one that ever touched the money because it's his money." R-1402
>
> * * *
>
> "She had been brokering dope for this man, DOWNING." R-1406

* * *

"She is a dope broker. He is a dope buyer." R-1406

* * *

"She calls him up, says, "We have dope here." He comes with the money. There's nothing more complicated on this deal than that, and that's what all of the surrounding circumstances point to, all of it." R-1406 ..."This guy has $155,000 in his suitcase, not in Martha Munroe's bag." R-1406

* * *

..."What you come down to is Charlie Layman selling 5 kilos of cocaine to Martha Munroe and this character having the money. That's all this case is, that's really all this case is..." R-1407

* * *

"What have we got? We have $155,000 in RICHARD DOWNING'S suitcase. Now, you ask yourself, is it reasonable to believe that this much money would be left by gangsters in the middle of the night in Martha Munroe's car in Havana, Florida? R-1423

If the jury had heard the evidence that Munroe had the $25,000 out of the presence of DOWNING before DOWNING arrived in Florida, the Prosecutor certainly would not have been able to make those arguments. Nondisclosure of that evidence was clearly a Brady violation, and the Court is reminded that the conviction in this case was based entirely on circumstantial evidence. Therefore, it is suggested it is impossible for the State to

prove beyond a reasonable doubt that the error did not contribute to the verdict, or that there is no reasonable possibility that the error contributed to the conviction.

In State v. DiGuilio, 491 So.2d 1129, 1139, this Court stated in reference to the harmless error test:

> "The test is not a sufficiency of the evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the Appellate Court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the State. If the Appellate Court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful."

In the context of a discovery violation where the State did not disclose evidence and reports that affected ones ability to prepare for trial, and which also was a Brady violation, which all arose in the context of a conviction based solely on circumstantial evidence, it should be exceedingly difficult if not impossible for the State to convince an appellate court that the nondisclosure was harmless. The question of "prejudice" in a discovery context is not dependent upon the impact of the undisclosed evidence on the fact finder, but rather on the impact

of the Defendant's ability to prepare for trial. State v. Wilcox, 367 So.2d 1022 (Fla. 1984); Smith v. State, 500 So.2d 125 (Fla. 1986).

If counsel had the information contained in the reports, the scheduling of depositions certainly would have been different. Counsel would have fully pinned down the information concerning Munroe's contacts with Evans before DOWNING's arrival in Tallahassee, and Munroe's display of $25,000.

Counsel would have ignored other areas covered in the depositions which served only to educate the State Attorney, and would instead waited for trial to cross-examine based on the information contained in the reports.

Agent Layman's report shows other inconsistencies with trial testimony. For example, the report dated 4/17/85 indicates that on Wednesday, March 27, 1985, Munroe contacted the CI and advised that "Geronimo" wanted to purchase 5 kilos of cocaine. This is directly contrary to Evans' trial testimony that he did not even know that "Geronimo" was in the state of Florida, until he saw him at the Red Roof Inn on the date of arrest of April 3, 1985, nor had he heard "Geronimo's" name mentioned at anytime by Munroe R-934-935.

The information in Agent Layman's report of 4/17/85 concerning a "similar fact episode" in Miami, where alledgedly Evans, Munroe, and "Geronimo" were attempting to purchase 10 kilos of cocaine in Miami from some Cubans, is directly contrary

to Evans' trial testimony concerning the "similar fact" incident that he testified at trial was in Marathon, Florida R-892-895, R-926-929, R-931-932.

The trial testimony was that there was an attempt to acquire cocaine in Marathon, Florida, but that the transaction was not completed, and then allegedly Munroe later went back and acquired 1 kilo of cocaine with the assistance of a Sonny Parnell. Agent Layman's report is that there was an attempt to purchase 10 kilos of cocaine in Miami from some Cubans and they only had enough money for 3 kilos which the Cubans sold to them but told them to leave and not come back. There is obviously an incredible difference between the agent's report and what Evans testified to at trial, and at no time did the Prosecution disclose this report and the information contained therein to counsel. (See Argument IV of Petitioner's Initial Brief on the Similar Fact Evidence)

The State made a conscious and deliberate decision not to disclose these reports. This was an exceedingly difficult case based on circumstantial evidence. Mere presence was at issue. There should be no question but that the reports would have aided counsel in the preparation of all issues and testimony for trial and for conducting discovery depositions. The information contained in the reports in terms of general background information would have been of great assistance to counsel in preparation for depositions and trial, and without a

doubt, the information about Munroe's showing Evans $25,000 prior to DOWNING'S arrival in Florida certainly could and should have changed the outcome of this trial. This was a Brady violation and the Prosecutor repeatedly argued evey inference that he could from the fact that the money was in DOWNING'S possession in order to obtain a conviction when the Prosecution knew there was evidence available that would suggest that the money was not DOWNINGS. Moreover, the similar fact evidence at trial as to the alleged Marathon episode is directly contradicted by the agent's report; therefore, there should be no question but that the State cannot demonstrate beyond a reasonable doubt that the discovery error and Brady violation would not have affected the outcome of this case.

CONCLUSION

Pursuant to the authorities, principals, and reasoning in Petitioner's Initial Brief and as contained herein, this Court should hold that the failure of the State to provide the reports was error and reverse and remand for a new trial.

Respectfully submitted,

JOHN F. TIERNEY, III
324 Datura Street
Suite 312
West Palm Beach, FL 33401
Telephone: (407) 659-3901

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Federal Express to Royall P. Terry, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, on this 31st day of May, 1988.

JOHN F. TIERNEY, III