O/a 4-29-88

THE SUPREME COURT OF FLORIDA

RICHARD A. DOWNING,

Petitioner,

vs.

CASE NO. 71,629

STATE OF FLORIDA,

Respondent.

PETITIONER DOWNING'S SUPPLEMENTAL REPLY BRIEF

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THE STATE HAS FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE TRIAL COURT'S DENIAL OF MOTIONS FOR DISCLOSURE AND DISCOVERY OF FDLE AGENT REPORTS WAS NOT HARMLESS ERROR

The State argues that the real issue before this Court is whether the Petitioner's inability to examine the FDLE Reports so hindered trial preparation that the ultimate case outcome would likely have been different. It is submitted that the State is not framing the issue properly because it is the State's burden to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or that there is no reasonable possibility that the error contributed to the conviction. State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). Petitioner also urges that in the context of this case where the discovery violation was for non-disclosure, the harmless error standard must be applied in a manner which attempts to determine if the error affected the Defendant's ability for trial. In the past, this Court has consistently held that where one has been deprived of discovery which affects ability to prepare for trial, that type of error is always harmful. Smith v. State, 500 So.2d 125 (Fla. 1986).

The State urges this Court to place some significance on the fact that the Defendant DOWNING rested without testifying or presenting any evidence SB-4, SB-8. This is an improper attempt to influence this Court. The Defendant has an absolute right to remain silent and not to testify, and no negative inferences can

be drawn from that even on appeal. Notwithstanding this, the State continues to urge this Court to place some signficance on the fact that counsel elected not to call DOWNING as a witness. It is respectfully submitted, this is an attempt to improperly influence this Court.

> "We consider this reference both as an attempt to improperly influence the Court, and in its unstated assumption that it might have that effect, as an insult either to our intelligence or our integrity. We have a right to and do expect more from counsel who appears before us, particularly one who represents the the State of Florida." Malcomb v. State, 415 So.2d 891, 892 (N. 2) (Fla. 3d DCA 1982).

The decision to not put on any further evidence or call DOWNING as a witness was simply a pragmatic one and it was counsel's opinion that the State had not proven their case. There was no need to make the case any more protracted than it already was as counsel believed then and now that there is insufficient evidence to support a conviction (See: Initial Brief of Petitioner Downing "Sufficiency of Evidence").

Petitioner takes exception to the State's stream of consciousness attempts to denigrate the facts and issues, and counsel takes extreme exception to the State's characterization of the defense as nothing more than desperate trial strategy and "concocted stories". The State goes to such lengths as to argue that clearly Munroe had concocted the entire story and theory of

her defense about other characters and more importantly that DOWNING was not involved. The State argues that Munroe did this because she must have known she would only be charged with conspiring to trafficking cocaine with RICHARD DOWNING and not others if she got arrested. What the State fails to point out continuously is that the date, time, and place of Munroe's arrest she immediately told the officers that DOWNING was not involved. Munroe's statement to the officers, at the time of arrest, was identical to her trial testimony. If she created all of this knowing the legal implications and knowing the charge that she ultimately faced, then certainly Martha Munroe would have been an expert in criminal law and had the ability to read the proverbial crystal ball. The fact that DOWNING was not involved was evident from her statement the date of her arrest which was the same as her trial testimony.

This Court has recently considered the issue of the State's failure to disclose statements and information which constitutes discovery violations. In Roman v. State, 13 F.L.W. 329 (Fla. May 27, 1988), the Court reversed a death penalty conviction and remanded the case for a new trial where the State failed to disclose statements of prosecution witnesses that would have been helpful at trial and were inconsistent with the witness' trial testimony. This Court stated that

> "Given this trial's circumstantial nature, we cannot say beyond a reasonable doubt that the State's failure to disclose Reese's prior

statement did not contribute to the conviction. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)".

Petitioner DOWNING has argued consistently that given the circumstantial nature of the evidence that supported the conviction below, this Court should hold as a matter of law that there cannot be harmless error in the context of convictions based entirely on circumstantial evidence. That is to say that the State cannot meet their burden to demonstrate and prove beyond a reasonable doubt that the error did not contribute to the conviction when the State's case is based primarily or entirely on circumstantial evidence.

The information in Agent Layman's report of 4/17/85 concerning the "similar fact episode" wherein the informant, Evans advised Layman that he, Munroe and "Geronimo" were attempting to purchase 10 kilos of cocaine in Miami from some Cubans and that they ultimately purchased 3 kilos is incredibly contradictory to Evans' trial testimony concerning the "similar fact incident", where Evans testifed that there was an attempt to acquire a kilo of cocain in Marathon, Florida that was unsuccessful R-892-895, R-926-929, R-931-932.

Moreover, even the State concedes that the information contained in Agent Layman's report of 4/17/85 about Munroe having $25,000 on March 26, 1985, merits this Court's consideration SB-10. Without question, this is an extremely important piece of information and evidence that was withheld from defense counsel

pretrial and during the course of the trial. The State now comes up with an imaginative theory that this was "flash money". Naturally, there is no record citation as this was never inquired to by defense counsel because it was never disclosed nor did the State ever elicit any testimony concerning this.

The State has several suggestions as to the importance of the fact that Munroe had $25,000 to show Evans earlier. First they say, "Who is to say that Munroe did not have $25,000 of her own "flash money"." "Who is to say when DOWNING was not in town on a prior occasion and transferred monies to her for an earlier unsuccessful attempt to procure cocaine for him." "Who is to say that she did not receive the money from DOWNING via UPS or transferred by "mule" such as Bruce Evans." SB-11. Frankly, counsel wishes the Court to note who is to say where the money came from or anything else about it because it was never disclosed at anytime in discovery, and the State deliberately did not elicit any testimony about it at trial. The State is required to speculate as everyone must at this point in time only because it was never disclosed. If it had been disclosed most assuredly DOWNING would have utilized that testimony to prove that Munroe was dealing with somebody else or attempting to acquire cocaine on her own behalf, and that Munroe not DOWNING was the source of the money makes no difference if it came from somebody else. The fact that Munroe had it when it was uncontradicted DOWNING had no involvement with it, would have

been a most significant fact. All one need do is review the prosecutor's closing argument (See: highlighted portions in Initial Supplemental Brief of DOWNING) to conclude that the State's theory at trial was that it was DOWNING'S money, and yet the State possessed evidence to show that Munroe had the money with no involvement via RICHARD DOWNING. In determining whether error is harmless, the Court's of this State have often referred to the prosecutor's closing argument to see if the State capitalized on the errors in closing in order to determine if a particular error was "harmless error". Where the State highlights or takes advantage of the error in closing argument, the Courts have fairly consistently concluded that the State cannot prove harmless error beyond a reasonable doubt. McClain v. State, 516 So.2d 53 (Fla. 2nd DCA 1987); Robinson v. State, 13 F.L.W. 122 (Fla. 2d DCA 1988); Jones v. State, 13 F.L.W. 750 (Fla. 1st DCA 1988); Porterfield v. State, 13 F.L.W. 723 (Fla. 1st DCA 1988); Russ v. State, 13 F.L.W. 342 (Fla. 4th DCA 1988); Hosper v. State, 513 So.2d 234 (Fla. 3d DCA 1987); Abreu v. State, 511 So. 2d 1111 (Fla. 2d DCA 1987); Williams v. State, 510 So.2d 656 (Fla. 2d DCA 1987); Murphy v. State, 511 So.2d 397 (Fla. 4th DCA 1987); Garcia-Perez v. State, 510 So.2d 1051 (Fla. 3d DCA 1987); Golden v. State, 509 So.2d 1149 (Fla. 1st DCA 1987); Lowry v. State, 510 So.2d 1196 (Fla. 4th DCA 1987).

The State argues that this case involved common strategy and that there were no antagonistic differences, and no Motions for

severance SB-8. The State hasapparently ignored or overlooked the record in this case. It was clear to the participants at trial that DOWNING took a contrary adverse position to Munroe. It was DOWNING'S theory of the case, in jury selection and throughout, that Munroe may have attempted to traffic in cocaine, but that DOWNING had not R-757-758. It is true, there was no pretrial Motion for Severance, but that was based upon an agreement between the State and defense counsel that the State would move into evidence Martha Munroe's arrest statement that DOWNING was not involved R-525-526. Counsel was lead to believe the State would introduce the post-arrest statement. However, on the morning of presenting evidence, during the course of the trial, the prosecutor moved the Court orally for an Order prohibiting the introduction of the statement at trial. Counsel clearly indicated to the Court the agreement and the State never contested there was such an agreement, but merely indicated they had the right to change their mind about trial strategy R-1615. (See: Bench conference 1609-1617). At trial, the Court initially would not permit the testimony about the post-arrest statement, and there was even a proffer as to what the testimony would be R-1619-1634. When the trial Court ruled that the evidence would not be received, DOWNING moved for a mistrial and then also moved for severance. DOWNING also made it very clear during the course of that entire dialog that the defenses indeed were antagonistic and the positions of the Defendants were adverse.

The State, in their Brief (SB-9), for some reason sets out information contained in Agent Layman's report concerning the meeting in the Red Roof Inn between Layman and Martha Munroe on April 2, and the State has quoted a portion of Agent Layman's report that Munroe stated that she would go upstairs to test the cocaine and that Munroe agreed to get her man from upstairs and return for the deal SB-9. Although this information appears on page 3 of Layman's report that was dictated on 4/18/85, those facts simply did not occur. Counsel and the Court would know that because the tape recording of that conversation was introduced into evidence at trial, and moreover, the transcript of that conversation was filed in the record and those facts simply did not happen as set forth in the State's Brief. (See: Transcript of tape recording R-416-423). Munroe, at the time of arrest and at trial, indicated that her "testor" was at Shoney's. The implement to be used to test the cocaine apparently was a bottle of Clorox that was in her car that was at no time in the hotel room. Therefore, the report does not "reinforce" anything, let alone a "critical point" as suggested by the State.

The State now argues that counsel should have redeposed informant Evans SB-10. Counsel made it very clear at the beginning of Evans' deposition that he was prejudiced in taking the deposition by not having reports. Without the benefit of the reports, one would question why redepose Mr. Evans. Moreover, counsel disputes the State's assertion that there is no obstacle

to redeposing a witness in a criminal case. There is every obstacle. The State strenuously objects to deposing an individual more than once and in this case, counsel had no way of knowing Mr. Evans' address as the State insisted that any contact with Mr. Evans would be through the Florida Department of Law Enforcement Agents, and no address was provided as to Mr. Evans.

The police reports would have dictated different strategy in pretrial preparation, and most importantly, would have enabled counsel to prove that DOWNING did not fly to Tallahassee, Florida on March 30, with $155,000 for purposes of consumating a cocaine transaction. That was the State's entire theory at trial and one only need review the prosecutor's closing argument to conclude that. If counsel had been able to show the jury that Munroe had at least $25,000, 4 days before DOWNING ever arrived in Florida, the result clearly could have been different. The information contained in the reports about the incredible contradiction as to the alleged "similar fact" episode in South Florida, The jury certainly would have further questioned Evans' credibility on a similar fact evidence. Evans' various stories on the similar fact episode in South Florida are so different as to make it impossible to believe any one of them. The trial testimony is that the episode occurred in Marathon, and there was a failed attempted to acquire cocaine. On deposition Evans testified different from his trial testimony and now the Agent's

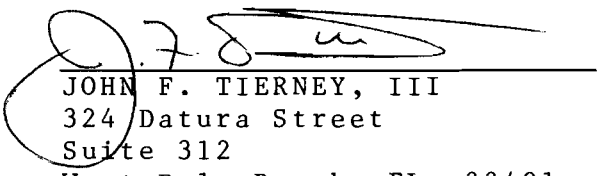
report reveals, instead of a transaction in Marathon, the transaction was in Miami and they acquired 3 kilograms of cocaine.

The information withheld was discoverable as a matter of right and the failure to disclose it constituted a Brady violation. This was not an inadvertent discovery violation, but rather was a direct conscious decision to not provide counsel with information that would have been exceedingly helpful in trial preparation and exceedingly helpful at the trial, and the result of the trial should have been different, particularly with the disclosure that Munroe had money that Evans had seen prior to DOWNING even arriving in Florida. One need only review the closing argument to see the significance of that evidence.

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,



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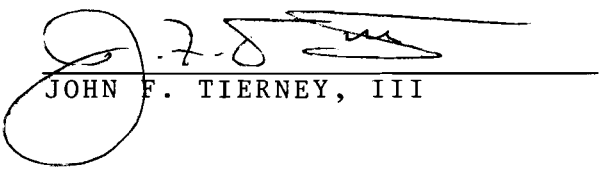
CERTIFICATE OF SERVICE

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 5th day of July, 1988.



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