IN THE SUPREME COURT OF FLORIDA

TYRONE LLOYD BRAZELL,

Petitioner,

V.

STATE OF FLORIDA!

Respondent.

CASE NO. 73,387

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue, 9th Floor
West Palm Beach, FL 33401
(407) 355-2150

JEFFREY L. ANDERSON
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the court below and the Defendant in the trial court. Respondent was the Appellee in the court below and the Prosecution in the trial court. A copy of the district court's opinion is attached to this brief as part of the Appendix.

The following symbols will be used in this brief:

"R"	Record on Appeal
"A"	Appendix

STATEMENT OF THE CASE

On June 3, 1987, Petitioner, TYRONE LLOYD BRAZELL, was charged with possession of cocaine with intent to sell[1] and with sale of cocaine[2] (R228). At the beginning of trial, Appellant made the trial court aware that he wanted to call Terry Taylor as a witness and that Taylor had not been disclosed to the state as a witness (R3). The trial court ruled that the witness could not testify because Petitioner had violated the rules of discovery by not disclosing the witness to the state (R4). On November 19, 1987, a jury trial on the charges commenced (R2).

Petitioner was found guilty of possession of cocaine with intent to sell and sale of cocaine as charged (R234,230-231). Petitioner's recommended guideline sentence was 12 to 30 months incarceration or community control (R239).

On December 21, 1987, Petitioner was sentenced to 24 months in prison to be followed by 5 years of probation for each conviction (R236-237). On December 22, 1987, Petitioner timely filed his notice of appeal (R240). The district court affirmed Petitioner's conviction for sale of cocaine and certified the following question:

> IS A DEFENDANT WHO FAILS TO PROFFER OR OTHERWISE ESTABLISH ON THE RECORD THE NATURE OF THE TESTIMONY OF A WITNESS, WHOSE IDENTITY HAS NOT PROPERLY BEEN DISCLOSED TO THE STATE, FORECLOSED FROM ASSERTING THE EXCLUSION OF SUCH WITNESS' TESTIMONY AS ERROR ON APPEAL?

---

1 § 893.13(1)(a)1, Fla. Stat. (1987).

2 § 893.13(1)(a)1, Fla. Stat. (1987).

On December 1, 1988, Petitioner timely filed his notice to invoke this Court's discretionary review. On December 7, 1988, this Court set forth a briefing schedule for this review.

STATEMENT OF THE FACTS

Deputy Bobby Kelley of the Okeechobee County Sheriff's Department testified that on April 23, 1987, he met with confidential informant, Benny Crowell, behind the state attorney's office (R24). Crowell later drove to the parking lot of the ET lounge (R29). Deputy Kelley and Deputy Wayne Thomas followed Crowell (R29). When Kelley was driving around the block of the ET lounge, he saw Petitioner leaning on the windshield of Crowell's car with his riqht hand inside the open driver's window (R30). The officers later followed Crowell back to the state attorney's office (R31). Crowell gave Kelley some substances he claimed to have purchased from Petitioner (R32). The substances tested positive for cocaine (R33). Kelley testified that he never saw Petitioner hand Crowell any cocaine (R40).

Benny Crowell testified that he originally made contact with Deputy Kelley when he was in jail (R63). Crowell was on a $40,000 bond (R84). Crowell was released from jail on his own recognizance in order to assist Kelley in making controlled narcotics purchases (R64,44). Crowell testified that no deals were ever made with regard to his pending charges (R64).

Crowell testified that after he pulled into the ET parking lot he talked to Kissy Lane and then called to Petitioner who was sitting on a porch (R70). According to Crowell, Petitioner then came over to Crowell's car (R70). Crowell told Petitioner that he wanted fifty (50) dollars worth of cocaine (R70). Petitioner reached into his sock and produced a bag (R71). Crowell testified that Petitioner gave him the bag which contained three (3)

or four (4) rocks (R71). Crowell testified that after the purchase he returned to the state attorney's office and turned the rocks over to Deputy Kelley (R73).

Deputy Wayne Thomas of the Okeechobee County Sheriff's Office testified that he and Deputy Kelley followed Crowell to the ET lounge and observed Petitioner leaning in the window of Crowell's car (R115-116). Thomas testified that they couldn't watch Crowell all of the time and that it was possible that Crowell got the cocaine from someone other than Petitioner (R116, 123). Thomas testified that the purchase occurred at around 10:00 p.m. (R121).

Shiela Kidd was the first witness to testify in Petitioner's defense.[3] Shelia Kidd testified that on April 23, 1987, Petitioner took her to the emergency room of the hospital for the pains she was having due to her pregnancy (R141-142). Kidd was given a prescription and discharged from the hospital at 8:15 p.m. (R142-143). Petitioner and Kidd then went to an Eckerd Drug store to get the prescription filled (R144). They arrived at the store around closing time (R144). Petitioner and Kidd then stopped for food and then went to Kidd's house (R145). Petitioner left Kidd's house at 10:25 p.m. (R147-148).

Shelia Kidd's mother, Inez Collins, testified that on April 23, 1987, Kidd had to go to the hospital due to problems with her pregnancy (R161). Collins testified that Kidd and Petitioner

---

[3] Petitioner's defense was that he was not the person who gave Crowell the cocaine; he was with Shelia Kidd at the time Crowell obtained the cocaine.

returned home at 10:15 p.m. (R162). Collins specifically remembered looking at the clock because she was worried about her daughter (R162). Collins testified that Petitioner remained at the house ten (10) minutes before leaving (R164).

Nicolet Coker testified that she works in the medical record department of Lakewood Memorial Hospital in Ft. Pierce (R127). Coker testified that the medical records show that Shelia Kidd was discharged from the emergency room at 2015 hours on April 23, 1987 (R127-129).

Thomas Walton, a registered pharmacist at Eckerd Drugs, testified that a prescription for Shelia Kidd was filled at approximately 8:40 p.m. on April 23, 1987 (R133-136).

SUMMARY OF THE ARGUMENT

The trial court was made aware that Petitioner desired to call a witness who he had not disclosed to the state pursuant to discovery. The trial court totally excluded the witness without inquiring into the prejudice to the state due to the non-disclosure. More importantly, the trial court also failed to consider whether sanctions less thantotal exclusion of the witness would be appropriate. The failure to hold an adequate inquiry into the prejudice to the state and into the possibility of lesser sanctions was reversible error.

Petitioner was denied relief in the district court of appeal because the nature of the excluded evidence did not appear on the record. The failure of the record to indicate the contents of the excluded testimony is the very error Petitioner complains of -- i.e. the failure to hold the required Richardson inquiry prior to depriving Petitioner of his Sixth Amendment right to present a witness in his defense. The trial court cannot intelligently decide what, if any, sanction is appropriate without first knowing the nature of the evidence being excluded. If the required Richardson hearing has been held before imposing a sanction, the nature of the excluded evidence would be reflected in the record. Petitioner should not be denied relief due to the very error which he complains if -- i.e. the trial court's failure to inquire into the complete circumstances, including the nature of the evidence excluded, prior to depriving Petitioner of his Sixth Amendment right to present a witness in his defense.

ARGUMENT

POINT INVOLVED

THE TRIAL COURT ERRED IN EXCLUDING A DEFENSE WITNESS ON THE BASIS OF A DISCOVERY VIOLATION WITHOUT FIRST MAKING AN ADEQUATE INQUIRY INTO THE PREJUDICE TO THE STATE AND WITHOUT INQUIRING INTO WHETHER EXCLUSION WAS THE APPROPRIATE SANCTION TO INVOKE FOR THE VIOLATION.

At the beginning of trial, the trial court was made aware that Petitioner desired to call a witness who had not been disclosed to the state pursuant to discovery (R2-3). The trial court made the following inquiry and excluded the witness:

> THE COURT: Mr. Brazell. It's my understanding that there's some question about an additional witness?
>
> THE DEFENDANT: Yes, sir. Mr. Terry Taylor, he was in town during the time that all this was going on so I didn't know where he was or how to locate him and I just have recently seen him in town and I have not talked to him about --
>
> MR. YOUNG: What's the name of the witness?
>
> THE DEFENDANT: Terry Taylor. He was in jail, as a matter of fact, I think he had just got out of jail too.
>
> MR. YOUNG: He's been in the Okeechobee County jail, Judge, for months.
>
> THE DEFENDANT: He was one of the persons that was -- was talking to Mr. Crowell (phonetic) during the time.
>
> THE COURT: Okay, and you saw him when?
>
> THE DEFENDANT: I seen him recently in town.
>
> THE COURT: How recently, a month ago?
>
> THE DEFENDANT: No sir, it was about -- within a week, this week.

> THE COURT: But you understand that your attorney has tried to seek out the names of all persons who would be witnesses and this witness was known to you and has been known to you for some time.
>
> THE DEFENDANT: Right, yes sir, but he was out of town, he had left.
>
> THE COURT: Well, it's up to your counsel to be able to try to locate one if its possible. The time -- the time for listing witnesses has passed, particularly where a witness was known to you earlier. Under the rules you have to make disclosure of witnesses just like the state has to disclose to you the witnesses they have and it's a little late to -- to bring up an additional witness at this time.

(R3-4). The trial court failed to conduct an adequate Richardson[4] inquiry.

In Smith v. State, 372 So.2d 86 (Fla. 1979) this Court explained that an adequate Richardson hearing requires an inquiry into the prejudice to the state and a determination of the appropriate sanction to invoke for the violation:

> A Richardson inquiry is designed to ferret out procedural prejudice occasioned by a party's discovery violation. Wilcox v. State, supra. In ascertaining whether this type of prejudice exists in a given case, a trial court must be cognizant of two separate but interrelated aspects. First, the judge must decide whether the discovery violation prevented the aggrieved party from properly preparing for trial. Second, the judge must determine the appropriate sanction to invoke for the violation. Id.

372 So.2d at 88 (emphasis added).

---

4 Richardson v. State, 246 So.2d 771 (Fla. 1971).

In the present case, after the trial court was made aware of the violation, the only inquiry made was into the inadvertence or willfulness of Petitioner's failure to disclose the witness to the state (R3-4). There was no inquiry into the prejudice to the state. Nor was there any determination that exclusion of the witness, as opposed to a less drastic remedy, was the appropriate sanction to impose.

The trial court erred in totally excluding the witness without making an adequate inquiry into the prejudice to the state and into the appropriate sanction to invoke for the violation. Smith v. State, supra; O'Brien v. State, 454 So.2d 675 (Fla. 5th DCA 1984) (trial court failed to conduct an adequate inquiry into prejudice to state and the trial court should never exclude defense witness except when the violation is purposeful, prejudicial and with intent to thwart justice).

In this case the district court cited to Nava v. State, 450 So.2d 606, 609 (Fla. 4th DCA 1984) for the general proposition that the lack of a proffer of the contents of the excluded evidence to determine what effect, if any, the evidence would have had on the proceedings precludes relief. However, in this particularly unique situation, the failure of the record to indicate the contents of the excluded testimony cannot be used to deny Petitioner's relief. Instead, the failure of the record to indicate the contents of the excluded testimony is the very error Petitioner complains of -- i.e. the failure to hold an adequate Richardson inquiry prior to depriving Petitioner of his Sixth Amendment right to present a witness in his defense.

An inquiry into the contents of the evidence which is not disclosed is an indispensible component of an adequate Richardson inquiry. The trial court needs to know the complete circumstances surrounding the discovery violation, including the nature of the evidence being excluded, in order to determine whether the offended party's ability to prepare for trial has been impaired. For example, if the undisclosed witness was to provide alibi evidence, the state would be severely prejudiced in preparing for trial. The state would not be able to adequately investigate whether the alibi witness was legitimate if it was only given notice of the witness on the day of trial. On the other hand, if the undisclosed witness was merely going to rebut a state witness on a very minor matter which the state was already aware of, the procedural prejudice probably would be so minimal that a sanction would not be appropriate. The point is, a trial court cannot conduct an adequate Richardson inquiry into whether the state's ability to prepare for trial court would be be prejudiced by the failure to disclose certain evidence without inquiring into the nature of that evidence.

Moreover, the trial court must also inquire into the nature of the evidence being excluded in order to intelligently determine whether the drastic sanction of totally excluding the witness is appropriate. For example, if the excluded evidence was merely cumulative, or of little substantive value, the trial court might decide to exercise its discretion by excluding the evidence. However, if the evidence was the key to the defense, a lesser sanction may be appropriate. In otherwords, the trial

court cannot determine the appropriate sanction to impose without first delving into the nature of the undisclosed evidence. Compare, Smith v. State, 500 So.2d 125, 126 (Fla. 1986) (failure to hold adequate Richardson inquiry is per se reversible error because inquiry itself was designed to determine whether violation was in fact harmless). Here, the inquiry into the complete circumstances, in order to determine the appropriate sanction to impose, was designed to ferret out such things as the harm incurred by the defendant in excluding his witness.

But for the lack of an adequate inquiry required to determine if a sanction should be imposed, and the appropriate sanction to be imposed, the record would reflect the nature of the excluded testimony. The very reason for a Richardson inquiry is to determine what harm is caused to both parties by imposing, or not imposing, certain sanctions. Thus, where the trial court fails to make the required inquiry, the harm to the parties in imposing, or not imposing, sanctions is never reflected in the record. As this Court noted in Holland v. State, 503 So.2d 1250 (Fla. 1987), the failure to hold a required hearing, which itself prevents the dissemination of evidence showing harm, cannot be used to deny relief on the ground that no harm is demonstrated:

> Indeed, the very reason that the rule requires that the court either grant the hearing or attach those portions of the record which would conclusively show that the defendant is not entitled to relief, is precisely because no other means exists by which a defendant can present a record to the appellate court.

503 So.2d 1253.[5] Likewise, here Petitioner should not be denied relief for the failure to hold a Richardson inquiry which, if properly conducted as required before imposing sanctions, would have yielded the nature of the excluded evidence.

On point to the instant case is Plummer v. State, 454 So.2d 61 (Fla. 1st DCA 1984) where the failure to proffer the testimony did not waive the issue where there was an inadequate inquiry into the extent the state would be prejudiced and no inquiry into the appropriateness of the sanction:

> In the present case the limited inquiry which the trial court conducted is clearly deficient under Richardson. The court made no attempt to ascertain the extent to which the state would be prejudiced, and the court further "made no search of a manner in which to rectify any possible prejudice short of the exclusion." Compare Adams v. State, 366 So.2d 1236 (Fla. 2d DCA 1979). While appellant made no proffer of the contested testimony, in the circumstances here Presented we do not deem such proffer to be essential. We therefore find that the trial court abused its discretion by excluding the witness' testimony without conducting an adequate inquiry into the circumstances of, and considering less severe sanctions for, appellant's discovery violation.

---

5 Holland is facially distinguishable because it dealt with a denial of a motion for post-conviction relief which was held to be harmless in the district court. However, the important principle, that a defendant cannot be punished for a trial court's failure to hold a required hearing which would have produced the required evidence, is applicable in the instant case.

454 So.2d at 62-63 (emphasis added). Again, without an inquiry into the complete circumstances surrounding the violation, including the nature of the undisclosed evidence, it cannot be determined if any, or what, sanction should be imposed. Petitioner cannot be denied relief due to the very error which he complains of -- i.e. the trial court's failure to inquire into the complete circumstances, including the nature of the evidence excluded, prior to imposing sanctions. Rather, the trial court should have made the required inquiry before depriving Petitioner of his Sixth Amendment right to present a witness in his own defense.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner would request that this Honorable Court reverse the district court's affirmance of his conviction for sale of cocaine and direct that this cause be remanded for a new trial.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

Jeffrey L. Anderson
JEFFREY L. ANDERSON
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA A. TERENZIO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 27th day of December, 1988.

Jeffrey L. Anderson
Of Counsel