

IN THE SUPREME COURT OF FLORIDA

TYRONE LLOYD BRAZELL,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent .)

CASE NO. 73,387

FILED
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JAN 19 1989
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RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
West Palm Beach, FL 32399-1050

CELIA A. TERENCE
Assistant Attorney General
111 Georgia Avenue - 240
West Palm Beach, FL 33401
Telephone (407) 837-5062

Counsel for Respondent

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PRELIMINARY STATEMENT

Respondent was the Appellee in the court below and the prosecution in the trial court. Petitioner was the Appellant in the court below and the defendant in the trial court.

The following symbol will be used in this brief:

"R" Record on Appeal.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts with the added clarifications and additions:

1. Appellant stated on the morning of trial that he had another witness he wished to call (R 2). Appellant's counsel made it very clear that he had advised his client concerning the need to list all possible witnesses (R 2-3).

2. Appellant's counsel put into evidence two letters, one dated July 6, 1987 and the other dated September 2, 1987 that were written by trial counsel explaining the need to list all witnesses (R 17).

3. Appellant admitted knowing the existence of this witness at least three months prior to trial (R 3-3).

4. Appellant states that this witness slipped his mind because he was not around (R 4).

5. Appellant claims to have seen him in town but he has not talked to the potential witness (R 3, 4).

6. Petitioner presented an alibi defense and called four witnesses on his behalf (R 126-168).

POINT ON APPEAL

WHETHER THE TRIAL COURT PROPERLY EXCLUDED A DEFENSE WITNESS AFTER AN ADEQUATE HEARING, SINCE THE PETITIONER FAILED TO PRESERVE THE ISSUE FOR PROPER REVIEW BY FAILING TO PROFFER WHAT THE EXCLUDED TESTIMONY WOULD BE?

SUMMARY OF THE ARGUMENT

Petitioner should be precluded from claiming any error to the exclusion of a witness since he failed to proffer the testimony for the record. The trial court conducted an adequate inquiry, affording the Petitioner the opportunity to demonstrate the relevance and need for the testimony.

ARGUMENT

THE TRIAL COURT PROPERLY EXCLUDED A DEFENSE WITNESS AFTER AN ADEQUATE HEARING, IN ANY EVENT, THE PETITIONER FAILED TO PRESERVE THE ISSUE FOR PROPER REVIEW BY FAILING TO PROFFER WHAT THE EXCLUDED TESTIMONY WOULD BE.

Petitioner alleges that the trial court erred in excluding the testimony of a defense witness. Specifically, Petitioner claims that the trial court failed to follow the requirements of a proper Richardson¹ hearing.

Respondent submits that the district court correctly rejected this claim under the authority of Nava v. State, 450 So.2d 606 (Fla. 4th DCA 1984), cause dismissed, 508 So.2d 14 (Fla. 1987). As the district court stated, the nature of the evidence being offered must be ascertained prior to any further Richardson inquiry. Nava, 450 So.2d at 609. If the testimony is not relevant or competent, any further inquiry concerning a discovery violation and respective prejudices to the parties resulting from exclusion or admissibility is meaningless. Although a Richardson hearing concerns procedural prejudice, Smith v. State, 500 So.2d 123 (Fla. 1987), the inquiry into the appropriate remedy does take into account the importance of the evidence in question.

¹Richardson v. State, 246 So.2d 771 (Fla. 1971).

Respondent submits that the gravamen of the issue in the instant case is who bears the responsibility of providing that proffer. Respondent submits that the trial court must provide the forum, i.e., hearing, however, the party requesting that the testimony be admitted must establish its relevancy. Hitchcock v. State, 413 So.2d 741, cert. denied, 103 S.Ct 274, 459 U.S. 960, 74 L.Ed.2d 213 (1982).

When the trial court questioned Petitioner about the potential witness (R 2-5), Petitioner should have proffered what the testimony would have been. Failure to do so renders appellate review impossible. Jacob v. Wainwright, 450 So.2d 200 (Fla. 1984); **§90.104(1)(b)**, Fla. Stat. (1983).

Respondent submits that the facts of this case cast serious doubt as to the importance of the excluded testimony. Petitioner admitted to the trial court that he knew the existence of this witness several months prior to trial (R 3-5). Petitioner's attorney advised him of the necessity of listing all possible witnesses on several occasions (R 2-3, 17). Petitioner told the trial court that he forgot about the witness until about a week ago (R 4). Respondent points out that even after "realizing" the existence of this witness a week prior to trial, nothing was said until the morning of the trial (R 2-5). Common sense and logic dictate that when a party is faced with the possibility of exclusion of a witness due to their own discovery

violation, a proffer of the testimony would be immediately forthcoming regardless of whether or not anyone first inquired as to the nature of that testimony.

Respondent submits that the trial court conducted an adequate inquiry and was well within its discretion in excluding the witness. It is apparent that Petitioner's dilatory tactic was nothing more than an attempt to delay the inevitable and thwart justice. O'Brien v. State, 454 So.2d 675 (Fla. 5th DCA 1984).

Respondent submits that the facts of the case sub judice as outlined above distinguish this case from Plummer v. State, 454 So.2d 61 (Fla. 1st DCA 1984). In that case, the witness was available the morning of trial to be interviewed. There were assurances from the defendant's counsel that the testimony was exculpatory. Plummer, 454 So.2d at 62. None of those factors indicating good faith on the part of the defendant are present in the instant case.

Respondent submits that this Court should answer the district court's certified question in the affirmative. Respondent submits that it is the responsibility of any Petitioner to establish on the record the nature of excluded testimony to ensure a proper review of their claim. Jacobs, supra. To articulate this requirement in the context of a discovery violation does not conflict with established law of


this Court. To the extent that Plummer, supra, is in conflict,
it should be overruled.

CONCLUSION

Respondent respectfully requests that this Court AFFIRM the district's court's opinion and answer the certified question in the affirmative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, FL 32399-1050

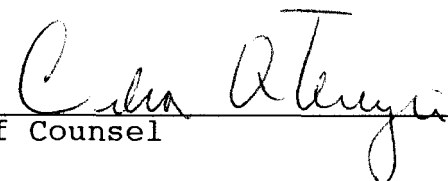


CELIA A. TERENCE
Assistant Attorney General
111 Georgia Avenue - 204
West Palm Beach, FL 33401
Telephone (407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded to JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 18th day of January, 1989.



Of Counsel