IN THE SUPREME COURT OF FLORIDA

TYRONE LLOYD BRAZELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,387

PETITIONER'S REPLY BRIEF ON THE MERITS

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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.

The following symbol will be used in this brief:

"R" Record on Appeal

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.

In its brief Respondent claims that Petitioner is not entitled to relief due to the very error he complains of -- i.e. the trial court's failure to ascertain the nature of the evidence prior to imposing the ultimate sanction of exclusion of the evidence. This claim is not logical.

Petitioner realizes the importance of proffering evidence to the trial court. This Court noted the importance of proffering evidence, in permitting the trial court an opportunity to make determinations, in Matthews v. State, 177 So. 321, 130 Fla. 53 (Fla. 1938) by stating:

> It also appears from the record that there was no proffer of proposed testimony, and therefore no opportunity presented to the trial court to determine whether or not the testimony elicited could be of any benefit to the accused. Therefore, no error is shown.

177 So. at 324 (emphasis added). However, in the situation at bar, unlike other situations where relief was denied due to the lack of a proffer by a party, the trial court absolutely cannot properly exercise its discretion in excluding evidence as a sanction without first learning of the nature of such evidence through a proffer. See Bradford v. State, 278 So.2d 624 (Fla. 1973).[1] In otherwords, in this unique situation, the lack of a

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[1] In Bradford, supra, it appears that there was no proffer of

proffer is part of the error now complained of -- the lack of an adequate hearing which was required prior to utilization of the extreme sanction of exclusion of the witness. As everyone knows, the trial court conducts and controls the Richardson inquiry. As everyone knows, it is the duty of the trial court to make a complete inquiry to determine if the violation was willful and prejudicial, and it if so finds, to make further inquiries to determine the appropriate sanction to impose. Thus, contrary to Respondent's claim, where the trial court conducts and controls the hearing so as to decide that the evidence will be excluded merely because a violation exists, but chooses not to conduct the required inquiry into the nature of the excluded evidence in order to determine the appropriate sanction to impose, in reality there is no opportunity for an airing of the evidence. The trial court's failure to hold the required hearing, which prevents the

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the excluded evidence. As noted by this Court in Bradford the trial court summarily denied a motion to delay, thus excluding witnesses, merely based on the fact of non-disclosure of the names. No proffer was referred to. In Nava v. State, 450 So.2d 606 (Fla. 4th DCA 1984) the district court reasoned that because Wilson v. State, 270 So.2d 426 (Fla. 3d DCA 1969) involved a proffer of the excluded testimony and was cited in Bradford, that there must have been a proffer in Bradford. However, it must be noted that the reversal in Wilson was not due to the failure of the trial court to inquire into the nature of the undisclosed evidence prior to imposing the sanction of exclusion as was present in Bradford and in this case. Rather, in Wilson a proper inquiry, including determining the nature of the evidence through a proffer, was conducted, but in view of the total circumstances the trial court erred in utilizing the sanction of excluding the witness. Consequently, the citation of Wilson by this Court in Bradford does not show there was a proffer in Bradford. If anything, the reference to a summarial denial, along with the complete lack of inquiry and no mention of the nature of the evidence, indicates the lack of a proffer.

dissemination of the required information, cannot be used to deny relief on the ground that the defendant failed to proffer evidence. See Holland v. State, 503 So.2d 1250, 1253 (Fla. 1987). This should be particularly true where the defendant is being deprived of a right which is one of the most fundamental an accused has -- i.e. the right to present witnesses in his own defense.

Respondent also claims that there was no error because the trial court conducted an adequate inquiry which casted "serious doubt as to the importance of the excluded testimony" (Respondent's brief at 7). From this Respondent concludes Petitioner was merely attempting to thwart justice by calling the witness. However, prior to the sanction of excluding the witness, there was no inquiry to determine the nature of the excluded evidence. The evidence may have been extremely important to the defense case, or it may have been of minimal importance. To conclude that the evidence was of minimal importance is to indulge in pure speculation. Again, the trial court was required to inquire into the nature of the evidence before it could determine if imposition of the severe sanction of excluding such evidence was appropriate. Petitioner relies on his brief on the merits for further argument on this point.

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,

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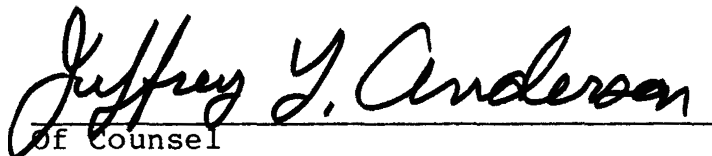
CERTIFICATE OF SERVICE

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 3rd day of February, 1989.



Of Counsel