

DA 2-9-89

ESR:et

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 73,435

JAMES JOSEPH RICHARDSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

FILED
SID J. WITTS
FEB 8 1989
CLERK, SUPREME COURT
By *[Signature]*
Deputy Clerk

REPLY TO STATE'S RESPONSE

State v. Richardson is one of those rare cases where a prosecutor's files are available to compare with the transcript of trial. Incidentally, the authenticity of those files has not been denied nor even questioned in these proceedings.

Has any case before presented seventeen (17) documented instances of knowing use of perjured testimony, which is also undenied by the State's Response? Or twenty (20) suppressed items that the defense was entitled to and was ordered to receive an still was withheld by the prosecution, including pre-trial statements of the accused himself? Or prosecution-induced perjury brought about by fear and force on a witness, who now recants? This case presents them all in a totality that cries out for a redress by this Court and a look by the trial court. Over twenty years in prison, almost five of which were served on death row, is the cost of that look.

Instead of joining us in seeking another look, the State contends we are here foolishly and travelling the wrong road. They do no deny use of perjured testimony -- they don't refute suppression of evidence; the State demands more years of this man's life to be sacrificed on the alter of "Let's not make waves. The State can do no wrong. Uphold the conviction at all costs."

We now have sworn testimony that cellmate James Weaver was beaten by a Florida Deputy Sheriff, "Bad Boy" Boone, who was brought into the investigation by the prosecution. Boone told Weaver he must testify that James Richardson confessed to killing

his seven children while Weaver and the accused were in an Arcadia jail in 1967. Just last month Weaver admitted under oath that he lied at the trial and helped convict this Petitioner because of fear and the beating.

In 1942, the U.S. Supreme Court, in Hysler vs. State of Florida, 62 S.Ct. 688, pronounced that:

The guides for decision are clear. If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law. Mooney vs. Holohan, 294 U.S. 103, 55 S.Ct. 340.

* * * * *

In this collateral attack upon the judgment of conviction, the petitioner bases his claim on the recantation of one of the witnesses against him. He cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause against a conviction. However, if Florida through her responsible officials knowingly used false testimony which was exhorted from a witness "by violence and torture", one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony.

Then, Napue vs. Illinois, 79 S.Ct. 1173 (1959) at 1177 gave us the cornerstone law on the knowing use of perjured testimony:

"First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.

* * * * *

The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.

* * * * *

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People vs. Savvides, 1 N.Y.2d

554, 557, 154 N.Y.S. 2d 885, 887, 136 N.E. 2d 853, 854-855:

"It is of no consequence that the falsehood bore upon the witness credibility rather than directly upon defendant's guilt. Alie is a lie, no matter

what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue is followed, of course, in Florida. Bogan vs. State, Fla. App., 211 So. 2d 74, was decided on the very day, May 31, 1968, that the jury convicted James Richardson resulting in a sentence of death:

The decisions in this State are uniform that the willful use of false testimony upon material matters from State witnesses by public prosecutors, known by the latter to be perjured testimony, is a recognized ground for relief under former Rule 1.

Next in line is Giglio vs. United States, 92 S.Ct. 763 (1972):

As long ago as Mooney vs. Holohan, this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." * * * * "the same result obtains when the State, although not soliciting false evidence, allows it to uncorrected when it appears." * * * * Thereafter Brady vs. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution."

* * * * *

A finding of materiality of the evidence is required under Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if "the false testimony could... in any reasonable likelihood have affected the judgment of the jury..." Napue, supra, at 271, 79 S.Ct., at 1178.

Florida follows in Salerno vs. State, Fla. App., 347 So.2d 659 (1977):

"We recognize the obligation of a prosecutor to assure a defendant a fair trial and not sit silently by while false or misleading evidence is adduced."

Knowing use of perjured testimony requires that a conviction

be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," according to U.S. vs. Agura, 96 S.Ct. 2393 (1976). And where the use of known perjury involves prosecutorial misconduct, it constitutes "corruption of the truth-seeking function of the trial process," says the same case.

At bar it has been shown that the lead investigator and chief State witness at trial was Sheriff Cline. And as has been shown, he committed perjury several times at that trial. Even if we were to assume or if the State Attorney were to claim, "I didn't know," it matters not because Sheriff Cline was a member of the prosecuting team, and, according to U.S. Ex Rel Kowal vs. Attorney General, 550 F.Supp. 447 (1982):

A due process claim will lie where there has been knowing use of perjured testimony on the part of the "prosecuting authorities." * * *
* As law enforcement officers, Mollen and Skultety are members of the prosecuting team. It is sufficient to allege that these officers were representatives of the state, as petitioner has done. "A constitutional due process claim is not defeated merely because the prosecution attorney was not personally aware of the alleged prosecutorial activity." Schneider vs. Estelle, 552 F.2d 593, 595 (5th Cir. 1977).

When Deputy Sheriff Boone made James Weaver testify falsely at trial by fear and force, it was attributable to the prosecutor because that officer acted as an arm of the prosecution. Petitioner would show that this was sufficient to cause his trial "to pass the line of tolerable imperfection and fall into the field of fundamental unfairness."

The law is firmly established the both the Florida and United States Constitutions cannot tolerate a state criminal conviction obtained by knowing use of false evidence or improper manipulation of material evidence. See U.S. v. Bagley, 105 S.Ct. 3375 (1985) and Giglio and Napue, supra.

The term "false evidence" includes the nondisclosure of specific evidence valuable to the accused's defense. Donnelly vs. De Christoforo, 94 St.Ct. 1868 (1974). Of course, the false evidence must be material to the defendant's guilt or innocence.

Giglio. Such a determination requires an independent examination of the record. That is what Petitioner seeks by these proceedings.

From the Supplement to the Application at bar, we see where before trial, defense counsel moves for production of any statements made pre-trial by the accused. The Motion was never ruled on, but the Motion was made. This is tantamount to a request for favorable evidence to be produced via Brady vs. State of Maryland, 83 S.Ct. 1194 (1963). There, the High Court said:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. * * * * "The United States wins its point whenever justice is done its citizens in the Courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.

In the famous Florida case of Pitts and Lee, State vs. Pitts, 241 So.2d 399 (1970) -- reversed after the State confessed error on appeal to this Court -- we learned that:

Here Pitts and Lee were tried before the Criminal Rules of Procedure authorized pretrial discovery and there is no constitutional right thereto. Even in the absence of such a right the State Attorney, being an arm of the Court and charged with the duty of seeing justice done, is required to present to the jury at the trial all material facts known to him, favorable to the accused, and relative to the issues of innocence and punishment. The State Attorney may not deliberately hinder the defense in its investigation, knowingly present false evidence, or unfairly suppress exculpatory evidence. Both state and federal cases indicate that the State Attorney may, under certain circumstances not yet clearly defined, be required, in the interest of

justice, to reveal to the defense, at the proper time, exculpatory evidence which is otherwise unobtainable by the accused, and upon request disclose "favorable" evidence.

So much for the knowing use of perjured testimony and suppression of evidence as grounds for a Writ of Error Coram Nobis. What of newly discovered evidence? In State vs. Gomez, Fla. App. 363 So.2d 624 (1978), the Third D.C.A. opined:

It is the weight of authority in this state that any ground which would have been valid to collaterally attack a criminal conviction on a petition for a writ of error coram nobis may be raised on a motion to vacate judgment and sentence under Fla. R. Crim. P. 3.850.

* * * * *

It is also the weight of authority in this state that newly discovered evidence tending to establish the innocence of a convicted defendant is a valid ground for collateral attack of a criminal conviction under a writ of error coram nobis providing: (1) such evidence was unknown at the time the judgment of conviction was rendered and (a) could not have been discovered through the use of a reasonable diligence for presentation at the original trial or on a motion for new trial, or (b) was not discovered because of actual dominating fraud, duress, or other unlawful means, and (2) such evidence is of such probative force that had it been so produced, it would have prevented rendition of the judgment of conviction under attack. This ground has been reserved for those infrequent, but greatly unsettling cases where a miscarriage of justice has in all likelihood occurred in which a person stands convicted of a crime which he did not commit.

Finally, it is Ashley vs. State, Fla. App. 433 So.2d 1263 (1983) wherein the First D.C.A. magnificently describes that the conclusiveness test of Hallman - Smith on Petitioner for Writ of Error Coram Nobis can be met if the known use of perjured testimony and/or newly discovered evidence is shown to reach the depravation of substantial constitutional rights level. After setting down the basic requirements at page 1268, the Court then discusses the affect of alleged misconduct of police and prosecutors at 1269:

This alleged misconduct would clearly violate petitioner's constitutional rights under the Sixth and Fourteenth Amendments if the requisite materiality of Loggie's testimony were shown and would require the trial judge to set aside the conviction and order a new trial. Presumably, therefore, the last

remaining requisite of coram nobis -- that the alleged facts would conclusively prevent entry of the judgment of conviction -- is also satisfied by petitioner's application.

* * * * *

It has been said that relief by coram nobis may be appropriate where false testimony on a material issue at trial was induced by the prosecuting officer or was known by him to be false when given.

Knowing use of perjured testimony, suppression of the Defendant's own statements and other crucial evidence before and during the trial, and the forced perjury of a cellmate witness has resulted in one of the grossest examples of prosecutorial misconduct known to the law. The very name JAMES RICHARDSON is destined to become associated with this despicable phenomenon. It shall join the ranks of Berger vs. U.S., 55 S.Ct. 629 (1935), where a state attorney's duty is defined as transcending that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty... whose interests... in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The prosecution and trial of Mr. Richardson has produced injustice. He is entitled to this Court's consideration and redress.

Respectfully submitted.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Peggy A. Quince, Esq., Assistant Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602; this 3rd day of February, 1989.

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