IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 73,981
74,101

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On March 7, 1989 Governor Martinez signed a death warrant for Provenzano and execution, which was subsequently stayed, was set for May 9, 1989. Pursuant to Florida Rule of Criminal Procedure 3.851, Provenzano filed a petition for writ of habeas corpus in the Supreme Court of Florida and a motion for post-conviction relief, in the circuit court, pursuant to Florida Rule of Criminal Procedure 3.850, raising twenty-three primary claims for relief.

In claim XIV of the Rule 3.850 motion Provenzano contended that the state intentionally withheld material and exculpatory evidence in violation of his constitutional rights under the Fifth, Sixth, Eight and Fourteenth Amendments. Counsel averred that it was impossible to fully plead the claim or to even know whether a claim existed because of the state's refusal to provide access to Provenzano's files (R 168). The lower court denied relief on this claim on the basis that it could have or should have been raised on direct appeal (R 447).

Provenzano again raised this claim in Point IX on appeal to this court from the denial of post conviction relief. Appellant's Initial Brief, p. 73. The state responded that while such claims are cognizable on post conviction motion, the instant claim is insufficient on its face, being entirely speculative in nature and that the basis for such claim was factually unlikely since Provenzano did not dispute his guilt, instead relying on the defense of insanity. Appellee's Answer Brief, p. 65.

On June 19, 1989 this court issued an order to supplement the record on appeal with a petition for writ of mandamus/prohibition filed by Provenzano and the circuit court order denying the petition. The supplemental record filed herein reflects that on January 6, 1989 **CCR** wrote a letter to State Attorney Ed Austin asking for immediate access to inspect and copy **any** and **all** files and records concerning Provenzano including: case reports; investigation reports, i.e., crime scene witnesses, etc. (including any and all memoranda prepared by law enforcement prosecutors during the course of the investigation and prosecution of this matter); any and all jail records, including medical files; booking records and arrest reports; classification files; interrogation records and reports; transmittal sheets of evidence to crime labs; the reports and results of crime lab work; information with regard to other potential suspects; log sheets and/or other records which reflect the physical location and movement of Provenzano; all notes of investigators, detectives and other officers and personnel; visitation records; medical records; any and all statements made by Provenzano or others, including any and all statements obtained from suspects and potential witnesses in each of the subject's cases; any and all records and reports of polygraph examinations, hypnosis, administration of sodium pentothal, sodium amethol or any other drug; any and all physical and/or documentary evidence, including any which was not placed in evidence at his trial and; files and notes of any assistant state attorneys who participated in the prosecution of these cases (R 464-465).

On March 6, 1989, Chief Assistant State Attorney John A. Delaney responded by letter to CCR's request indicating that the public records law did not apply to cases on appeal or to notes or work product of assistant state attorneys. Mr. Delaney claimed the following exemptions under the Public Records Act, section 119 et. seq., Florida Statutes:

> (1) This request is not being made under reasonable conditions, F.S. §119.07(1)(a)
>
> (2) This file contains handwritten notes, drafts, and other documents that are not public records. See, Shevin v. Byron, Harless, Schaeffer, Reid and Associates, 379 So.2d 633 (Fla. 1980); Orange County v. Florida Land Co., 450 So.2d 341 (Fla. 5th DCA 1984).
>
> (3) This file contains active criminal investigation information that will be used if Thomas Harrison Provenzano wins a new trial through his planned litigation prior to execution. F.S. §119.07(3)(d).
>
> (4) This file contains the direct or directed product of an agency attorney reflecting a mental impression, conclusion, litigation strategy or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation which has not concluded. F.S. §119.07(3)(o). This case has been involved in other post-conviction litigation.

Mr. Delaney concluded that the result of complying with such request would be to expand the provisions of Florida Rule of Criminal Procedure 3.220, contrary to section 119.07(6) Florida Statutes (1988)(R 466-467).

On April 5, 1989 CCR filed a petition for writ of mandamus/prohibition on behalf of Provenzano in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida seeking to compel the Office of the State Attorney for the Fourth Judicial Circuit to provide access for inspection and copying of any and all public records relating to Provenzano (R 456).

On April 27, 1989, Circuit Judge Clifford B. Shepard entered an order denying the petition for writ of mandamus/prohibition on the ground that CCR failed to specify which records it sought access to but instead made a blanket request, which does not constitute "reasonable" record inspection pursuant to section 119.07(1)(a), Florida Statutes (1988), as Provenzano was not entitled to all records held by the State Attorney. The judge concluded that "should Provenzano choose to specify which records he seeks, and those to which he believes he is legally entitled, this Court would consider such a petition." The judge distinguished the case of Tribune Company v. In re: Public Records, 493 So.2d 480 (Fla. 2d DCA 1986), as not dealing with the records of an attorney who was prosecuting the case against the defendant (R 468). The record does not reflect any further requests on the part of CCR.

On July 28, 1989 this court issued an order requesting that Provenzano and the state provide supplemental briefing on the issue of whether the Capital Collateral Representative on behalf of Provenzano was entitled to inspect and copy the requested files of the State Attorney.

SUMMARY OF ARGUMENT

Provenzano's claim that the state intentionally withheld material and exculpatory evidence along with the concomitant claim that he was denied access to his files under the Public Records Act is waived for failure to prosecute. The Public Records Act is not a device for forestalling the execution of sentence. Provenzano was not entitled to the files in their entirety, in any event, and further waived this claim by refusing to designate what public and nonexempt records he desired to inspect.

ARGUMENT

I. THE CLAIM THAT THE STATE INTENTIONALLY WITHHELD MATERIAL AND EXCULPATORY EVIDENCE IS WAIVED FOR FAILURE TO PROSECUTE, AS WELL AS ANY CLAIM THAT INFORMATION WAS WRONGFULLY WITHHELD UNDER THE FLORIDA PUBLIC RECORDS ACT, CHAPTER 119, FLORIDA STATUTES (1988).

Provenzano was formally sentenced to death on July 18, 1984. On October 16, 1986, this court rendered its opinion, affirming Provenzano's convictions and sentence in all respects. Provenzano v. State, 497 So.2d 1177 (Fla. 1986). On or about February 17, 1987, Provenzano sought review by the Supreme Court of the United States. On April 20, 1987, the Court denied review. Provenzano v. Florida, 481 U.S. 1024 (1987). Pursuant to section 27.702, Florida Statutes (1985), representation by the Capital Collateral Representative commences upon the termination of direct appellate proceedings in state or federal courts, which in this case occurred at the latest on April 20, 1987. At that point in time the Capital Collateral Representative should have assigned the case to personnel in his office for investigation, client contact, and such further action as the circumstances may have warranted. §27.702, Fla. Stat. (1985). It was not until January 6, **1989,** however, that CCR wrote a letter to State Attorney Ed Austin seeking access to all files and records concerning Provenzano (R 464-465). Chief Assistant State Attorney John A. Delaney promptly responded on March 6, 1989 and at that point in time CCR was on notice that the Office of the State Attorney would not be turning over its files in their

entirety **(R 466-467).** The following day Governor Martinez signed a death warrant for Provenzano, setting the execution for May 9, 1989. Pursuant to Florida Rule of Criminal Procedure 3.851 CCR was aware that collateral litigation must commence within thirty days of the date of the signing of the warrant. Nevertheless, CCR waited until April 5, 1989, the time when actual collateral litigation should have commenced, to file a petition for writ of mandamus/prohibition to compel the Office of the State Attorney to turn over its files.

Provenzano shot and killed Bailiff Wilkerson in the Orange County courthouse in full view of court personnel and spectators. He did not dispute his guilt and relied on the defense of insanity. Provenzano had since 1987 to secure the records from the State Attorney but did not seek legal redress until the eleventh hour, upon the signing of a warrant and then did not press the claim until the day before filing his post conviction motion, only to justify the "incompleteness" of claim XIV. To this day Provenzano has never specified, as the lower court said he must, what records he seeks to inspect, particularly in regard to this claim, but demands access to the entire files of the State Attorney, regardless of the presence of recognized statutory exemptions. It is clear in this case that the Florida Public Records Act, Chapter 119, Florida Statutes (1988), is being invoked, not for the information hoped to be obtained (for what exculpatory information could the state possess when Provenzano did his deed in front of others and claimed to be insane?) but for the purpose of delay. The summary denial of the

claim presented in Point IX of Provenzano's appeal should be affirmed for the alleged information in support of it could certainly have been ascertained through the exercise of due diligence prior to the time of post conviction litigation. This claim should be deemed waived for failure to exercise due diligence in prosecuting it, see, Demps v. State, 515 So.2d 196 (Fla. 1987), along with the concomitant claim that Provenzano was denied access to his files under the Public Records Act.

II. HAD APPELLANT TIMELY SOUGHT LEGAL REDRESS HE WOULD HAVE BEEN ENTITLED TO REVIEW THE MAJORITY OF DOCUMENTS IN THE STATE'S FILE EXCEPT FOR VARIOUS RECOGNIZED EXCEPTIONS.

It is clear that had Provenzano made a specific, reasonable request under the Florida Public Records Act, Chapter 119, Florida Statutes (1988), and timely sought legal redress, the majority of documents normally contained in the state's file that were either discoverable or had already been provided to Provenzano in the past or were public records would be the type of public information that would have been made available for inspection and copying, such as arrest and booking reports, evidence technician's reports, FDLE reports, medical examiner's reports, written statements of a witness or co-defendant, and depositions. Provenzano's demand for the **entire** file, however, is a broad fishing expedition that encompasses public records, non-public records and exempt public records alike.

In its broadest sense the term "public records" includes all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, or other material regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. §119.011(1), Fla.Stat. (1988). In essence, any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type is a public record.

To be contrasted with public records are non-public records not subject to the Public Records Act, such as materials prepared as drafts or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation. Shevin v. Byron, Harless, Schaffer, Etc., 379 So.2d 633, 640 (Fla. 1980). Assistant State Attorneys have taken the position that this would include their notes and drafts, evidence lists, tentative order of proofs, possible cross examination questions, opening and closing argument notes, deposition notes, and often interoffice or intra-office memorandums, etc., which were never intended to formalize or finalize knowledge but were merely to assist the attorneys. After the fact review of such preparatory materials is often regarded by prosecutors as an unwarranted intrusion into their mind processes. Outlines of evidence or questions to be asked of a witness, proposed trial outlines, handwritten notes from meetings with attorneys and notes regarding the deposition of an anticipated witness have been held not to constitute public records, Orange County v. Florida Land Company, 450 So.2d 341 (Fla. 5th DCA 1984), as such documents simply do not contain the final evidence of knowledge obtained and are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things. Such documents would seem to be simply preliminary guides intended to aid the attorneys when they later formalize the knowledge. 450 So.2d at 344.

Attorney memoranda, such as inter-office and intra-office memorandums, which are intended to perpetuate, communicate, or formalize knowledge, are public records, Coleman v. Austin, 521 So.2d 247 (Fla. 1st DCA 1988), which must be disclosed pursuant to a public records demand if no statutory exemption applies. There is, however, a recently created limited attorney work product exemption under the Public Records Act which is relied on by prosecutors that exists until the "conclusion of the litigation or adversarial administrative proceedings." Section 119.07(3)(o), Florida Statutes (1988).

Tribune Co. v. Public Records, 493 So.2d 480 (Fla. 2d DCA 1986), which holds that litigation essentially ends with direct appeal is not controlling. First, in Tribune Co. the file of the Pasco County Sheriff was sought, not the State Attorney file. Second, the information sought in Tribune Co. was specific in nature, such as police reports, lab reports, arrest reports, etc.,[1] and was not a request for Assistant State Attorney notes, drafts, or work product. In fact, most of the information sought in Tribune Co. was discoverable. Thirdly, in Tribune Co., the information was sought by defendants who claimed it might exonerate them, a brother and sister of a missing Tennessee woman

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[1] Unlike the present case, the demand in Tribune Co. was specific in nature. As stated by the Second District: "The information sought included: (1) investigative reports pertaining to the disappearance of the Tennessee woman; (2) police reports of the crime scene investigation; (3) transmittal sheets of evidence to a crime lab; (4) crime lab reports; (5) arrest reports; (6) information regarding other suspects; (7) statements of co-defendants and witnesses; (8) arrest records of particular witnesses; (9) a report of an autopsy of the victim with fingerprints and dental charts; (10) and a composite sketch of the victim." 493 So.2d at 482.

who may have been the murder victim, the Tribune Company and a reporter for the St. Petersburg Times. Each party had a recognized and special need for the requested information.

Non-discoverable criminal investigative information constitutes "public records" within the meaning of Shevin and section 119.011(1), however, such information would seem to be exempt from disclosure during the pendency of post conviction litigation, subsequent appeals or retrial under section 119.07(3)(d), Florida Statutes (1988). Section 119.07(3)(d) provides that "active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1). Thus, under this provision, if the criminal intelligence or investigative information is "active" it is exempt from the disclosure provisions of the Public Records Act.

Section 119.011(3)(d)2, Florida Statutes (1988) provides that "criminal intelligence and criminal investigative information will be considered 'active' while such information is directly related to pending prosecutions or appeals."

In Tribune Co. the Second District Court of Appeal held that actions for post conviction relief were not "appeals" within the meaning of section 119.011(3)(d)2 and, thus, during the pendency of post conviction litigation criminal intelligence and investigative information is not exempt from disclosure under the Public Records Act. Such an approach may rest upon strained statutory construction, however.

First, the Second District has inserted the words "first appeal of right" or "direct appeal" into the statute. The statute does not limit appeals to a "first appeal of right" or a "direct appeal". In death penalty litigation, there are numerous appeals, only the first of which is a direct appeal or a first appeal of right.

Second, the court changed the plural "appeals" in the statute to the singular "first appeal" or "direct appeal." While the statutory language of the Public Records Act clearly anticipated more than one appeal, the Second District limits the Public Records exemption to one appeal.

Third, by limiting "appeals" to a first appeal of right the Second District excluded federal appeals from the statute. The statute itself contains no such limitation. The statute simply states that the criminal intelligence and investigative information is active during the pendency of "prosecutions or appeals", without regard to whether the appeal is in state or federal court.

The result of limiting "appeals" to a "first appeal of right" would seem to be inconsistent with legislative intent that the Public Records Act not be used to expand discovery. Section 119.07(6), Florida Statutes (1987) provides that:

> The provisions of this section are not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution.

If post conviction proceedings are not a critical step in criminal prosecution, as CCR suggests, then there is no reason to not only reactivate but enlarge discovery. Under the rule announced in Tribune Co., once the first appeal of right is concluded in death penalty cases, all non-discoverable documents must be turned over to the defendant under the Public Records Act. The defendant may then use the non-discoverable documents in his next appeal, the 3.850 motion attacking the conviction and sentence, and his re-trial or re-sentencing if one results. Such a result prosecutors argue is inconsistent with legislative intent, the statutory language of the Public Records Act, and common sense.

Second, the result of limiting "appeals" to a direct appeal or "first appeal of right" would seem to be inconsistent with the legislative purpose in having an exemption in the first place. It must be presumed that the Legislature intended that criminal intelligence and investigative information not be disclosed "pending prosecutions or appeals" for a reason. Prosecutors argue that the reason is that the Legislature did not want disclosure of this information until there was finality in the prosecution so that law enforcement and prosecution efforts would not be undermined or compromised. To suggest that a prosecution is over, and, thus, not compromised, after a "first appeal of right" in a death penalty case prosecutors argue, with some logic, ignores the reality of death penalty litigation in Florida. The prosecution and appellate process is far from over after the "first appeal of right," in death penalty cases.

In interpreting the meaning of the exemption codified in Section 119.07(3)(d), Florida Statutes and the meaning of "pending prosecutions or appeals" as used in section 119.011(3)(d)(2), the court must look to legislative intent. State v. Webb, 398 So.2d 820 (Fla. 1981). If the Legislature had intended to limit nondisclosure of nondiscoverable criminal intelligence and investigative information until the completion of the "first appeal of right" it would seem that the Legislature would have simply said *so.* Such a limited exemption, however, would have served no purpose. Nothing would seem to be accomplished by requiring nondisclosure during the first appeal of right and requiring disclosure immediately afterwards. The Legislature did not resort to such limited language and instead used the language "pending prosecutions or appeals," evidently with the intent that the prosecution, whether at the trial stage or post-trial stage, be completed prior to the disclosure of nondiscoverable criminal intelligence and investigative information.[2]

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[2] Labels should not be controlling and the court should look to the substance of the proceeding. In Nelson v. State, 414 So.2d 505 (Fla. 1982), this Court held that the State's petition for certiorari, to review a district court's reversal of a conviction, was an "appeal" by the State's petition, therefore, constituted an exceptional circumstance for extending speedy trial. The court stated it would interpret the term "for appeals by the State", under criminal rule 3.191(d)(f) to include "all appellate applications made by the State." 414 So.2d at 508. The court looked to the substance of the proceeding and not its form in concluding "appeals" meant appellate review of any nature.

It is absolutely correct, as CCR alleges, that there is no legitimate state interest or public concern in allowing an unfair conviction to stand. Prosecutors argue, however, that the Public Records Act was not designed as yet another vehicle for Death Row inmates to further support their attacks on their conviction and sentence or to obtain access to information they could not obtain otherwise but was designed to promote an open policy with respect to State, County, and Municipal records. Section 119.01, Florida Statutes (1988).

The issue is not, as CCR suggests, one of "State Attorney secrecy." The State Attorney has real and legitimate concerns that the Public Records Act and Brady v. Maryland, 373 U.S. 83 (1963), are being used to obtain carte blanche rights of perusal to probe their mental processes looking for the transient, haphazard mental impression that will be employed to cast doubt upon the conviction and sentence, in spite of the evidence, and to enlarge discovery rights. A prosecutor is not required to make his files available to a defendant for an open-ended fishing expedition for possible Brady material, United States v. Davis, 752 F.2d 963 (5th Cir. 1985); United States v. Andrus, 775 F.2d 825 (7th Cir. 1985), and this should hold true even more in the post conviction context where there is a presumption of finality, especially where there is a continuing duty of disclosure on the prosecutor, Mooney v. Holohan, 294 U.S. 103, 108 (1935), and the state accords the defendant broad discovery rights in the first place. Some middle ground must be reached and appellee asks this court to justice to both the defendant and the state.

CONCLUSION

Based on the above and foregoing arguments, the state requests this Court to find that the Public Records Act is not a device for extending post conviction litigation and to further find that Provenzano has waived the claim that the State withheld material and exculpatory evidence and the concomitant claim that he was denied access to the State Attorney's files under the Public Records Act and to affirm the summary denial of such claim by the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Supplemental Brief of Appellee has been furnished by U.S. Mail, to Larry Helm Spalding, K. Leslie Delk, Billy H. Nolas, Julie D. Naylor, Bret R. Strand, of the Office of the Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, Florida **32301**, this 9th day of October, **1989**.

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