IN THE SUPREME COURT OF FLORIDA

WILLIAM F. HAPP,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 74,634
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CITRUS COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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Reply ~~INITIAL~~ BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT BASED ON DOUBLE JEOPARDY GROUNDS.

Appellee contends that the state gained no advantage as a result of the mistrial pointing out that Richard Miller's testimony was presented again at the second trial. This overlooks the fact that Miller's testimony was simply read to the jury at the second trial. The jury at the first trial saw and heard Richard Miller give his "purchased" testimony. They saw Miller squirm when defense counsel conducted an effective cross-examination. That effectiveness is apparent even on the face of a cold record. Effective cross-examination of a "jailhouse snitch" can be devastating. As this Court is well aware, the

jury is in the best position to judge the credibility of testifying witnesses. That credibility is best judged after watching a witness testify in person instead of simply hearing a transcript of that testimony read back. The state obtained a huge advantage as a result of the mistrial.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS.

Contrary to Appellee's assertion Appellant contends that a reading of Trody v. State, 15 FLW D618 (Fla. 3d DCA March 6, 1990) clearly indicates that Trody invoked his Sixth Amendment right to counsel. The opinion discusses Trody's invocation of his right to counsel when he is appointed counsel at various pre-trial hearings.

Additionally, Appellee's reliance on Parham v. State, 522 So.2d 991 (Fla. 3d DCA 1988) and Rivera v. State, 547 So.2d 140 (Fla. 4th DCA 1989) is outdated. Both of these cases rely heavily on Lofton v. State, 471 So.2d 665 (Fla. 5th DCA 1985) which was specifically disapproved in Arizona v. Roberson, 486 U.S. __, 100 L.Ed.2d 704 (1988). Appellant submits that his statement was improperly admitted in violation of his constitutional rights. See also Butler v. McKellar, 494 U.S. __, 108 L.Ed.2d 347 (1990).

Appellee's contention that the error is harmless is without merit. Appellee states that Happ's statement that he had never seen the car was ont an important part of the state's case where there was no logical way he could have been in contact with the car unless he committed the murder. (Answer Brief at 25) This statement overlooks the fact that Happ's prints were found only on the outside of the car. The car was parked in a public

place for several days before it was processed. Happ could have easily frequented the restaurant where the car was parked. This could account for his prints. He is entitled to a reversal based on this issue.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN REFUSING TO ANSWER A SIMPLE QUESTION ASKED BY THE JURY DURING DELIBERATIONS.

Appellant takes issue with the Appellee's characterization of Miller's testimony regarding the fact that he read about Happ's case in the newspaper. On cross-examination, Miller clearly admitted that he had read about Happ's case in the newspaper. (R1891) This testimony was not disputed on re-direct, contrary to Appellee's assertion. The portion of re-direct cited by Appellee reeals to the prosecutor reading in portions of Miller's deposition in an attempt to clarify when Happ was housed in the same cell as Miller. (R1925-7) The date that Miller read about Happ's extradition in the newspaper was therefore important to that issue. The fact that Miller followed Happ's case in the newspaper is still undisputed. The trial judge could have easily answered the question or could have read back the short but critical portion of the testimony.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN RESTRICTING PRESENTATION OF CRITICAL EVIDENCE AT THE GUILT PHASE.

Appellant agrees that little significance should be attached to Miller's statements to Hugh Lee that Miller requested an attorney before speaking to authorities about Happ's case. The significance of the evidence lies in the fact that Miller admitted that he lied under oath. The subject matter of the lie is of no import. However, an admission of perjury is critical when the state's case is grounded on the bedrock of that witness' credibility.

More importantly, the jury would have heard that the prosecutor had suborned perjury, a fact that the prosecutor never denied. A conviction obtained through use of false evidence, known to be such by representatives of the State, falls under the Fourteenth Amendment. Napue v. Illinois, 360 U.S. 264 (1959).

> 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.

Napue v. Illinois, 360 U.S. at 269. (emphasis added)

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie 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.

People v. Savvides, 136 N.E. 2d 853, 854. (N. Y. Ct. App.).

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE STATE FAILED TO PROVIDE VALID, NON-RACIAL REASONS FOR STRIKING VENIREMAN JONES.

The state has apparently missed Appellant's point regarding venireman Jones' Catholic faith. Appellant does not dispute the fact that the Catholic church (specifically the Roman Catholic Bishops of Florida) has officially condemned the practice of capital punishment. This fact is important since, in spite of his church's stance on the issue, venireman Jones clearly had no problem with capital punishment. (R1474-7) In fact, Jones was clearly unaware that his church had taken such a position. (R1546-49) Most of the other prospective jurors' churches also favored abolition and, like Jones, they were also unaware of their churches' positions. Despite that fact, the prosecutor did not pick on any other jurors whose churches took a similar stance. This reason cited by the state is therefore clearly bogus.

Contrary to the state's assertion, several of the five factors set forth in Slappy v. State, 522 So.2d 18 (Fla. 1988) are present in this case. As set forth above, the first reason (alleged group bias not shown to be shared by the juror in question) is present in the excusal of venireman Jones. The prosecutor attributed the Catholic bias against capital punishment to Jones when he clearly stated that he did not share in his church's opposition and, in fact, was ignorant of that

stance. Also as stated above, the fifth Slappy reason (challenge based on reasons equally applicable to jurors not challenged) is operative in this case. Other jurors were members of churches favoring abolition, but were not excused by the state. The fourth Slappy reason (prosecutor's reason is unrelated to facts of case) is also present. The state cited Jones' "liberalism" which the prosecutor assumed from Jones' vocation as a psychology teacher at a community college. Aside from the fact that the prosecutor's assumption regarding Jones' politics is completely unfounded, Appellant sees no rational relation to the facts of this case.

Contrary to the state's assertion, three out of the five Slappy reasons are operative in Happ's case. At trial, the state failed to meet its burden of showing non-racial reasons for excusing venireman Jones. The state's case is no stronger on appeal. Happ is entitled to a new trial.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL JUDGE COMMENTED ON THE EVIDENCE AND LIMITED DEFENSE COUNSEL'S CLOSING ARGUMENT.

Focusing on defense counsel's statement at issue:

> . . . He's [Miller] over there in Citrus County. He wasn't locked up then.

(R2414) Defense counsel did not say that Richard Miller was in Citrus County in May of 1986. He pointed out that Miller was locked up in Citrus County at the time of Happ's trial. The fact is that Richard Miller was in Citrus County at the time of Happ's trial. He was transported from the Citrus County Jail to testify. Therefore, defense counsel's statement was clearly correct. The other statement, "He wasn't locked up then," was (although not directly proved by the evidence) clearly a reasonable inference from the evidence. There was clearly no evidence presented by the state that Richard Miller was not in Citrus County at the time of Crowley's murder, which was precisely defense counsel's point.

Appellant is dumbfounded at the trial court's gratuitous instruction to the jury that, in essence, destroyed Happ's defense. In the undersigned's eleven years of appellate experience, the usual response to an objection of this sort is an instruction reiterating that the lawyers' arguments are not evidence and that the jury's recollection of the evidence shall prevail if it differs from counsels'. Appellant contends that

the trial court's bold assertion that no evidence existed to support defense counsel's argument denied Happ a fair trial.

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO REFER TO THE KEY STATE WITNESS AS A "SNITCH" OR "SQUEALER."

Appellant strongly disputes Appellee's contention that this issue is not preserved for appellate review. Prior to the commencement of trial, the prosecutor referred to a previous discussion in chambers and then formally made an oral motion in limine to prohibit defense counsel from referring to state witnesses by names such as "snitches" or "squealers." (R1423) The prosecutor contended and the trial court agreed that defense counsel would be limited to calling these witnesses "informants" or "jailhouse informants." (R1423-4) Defense counsel refused to stipulate to the state's request but did abide by the trial court's ruling. (R1423-4) In light of the fact that the trial court had granted the state's motion in limine and that defense counsel refused to stipulate to the state's request, Appellant believes that this issue has clearly been preserved. An objection to the trial court's ruling would have clearly been a useless act. The trial judge was aware of defense counsel's opposition on the issue and ruled adversely to the defendant. "Magic words" are not required to preserve an issue. Spurlock v. State, 420 So.2d 875 (Fla. 1982).

POINT XII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO FAIR TRIAL BASED UPON THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS THAT OCCURRED BELOW.

Appellee correctly points out that, generally, the credibility of witnesses is for the jury to determine. Appellant submits that a unique scenario occurred below in that the state relied on perjury suborned by the prosecutor. See Point IV, supra; Napue v. Illinois, 360 U.S. 264 (1959).

CONCLUSION

Based upon the cases, authorities, and policies cited herein and those in the initial brief of appellant, Appellant requests that this Honorable Court grant the following relief:

As to Point I, vacate Happ's convictions and sentences and remand for discharge;

As to Points II-VI, VIII-IX, and XII, reverse and remand for a new trial;

As to Point VII, remand for the imposition of a life sentence or, in the alternative, a new penalty phase;

As to Points X-XI, remand for the imposition of a life sentence; and,

As to Point XIII, remand for the imposition of a life sentence, or in the alternative, declare Florida's Death Penalty Statute to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to William F. Happ, #117027, P.O. Box 747, Starke, Fla. 32091 on this 20th day of August, 1990.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER