IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,691

MILFORD WADE BYRD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT COURT, IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The State's brief misrepresents the facts. The prosecuting attorney, Mark Ober, in fact testified he was indebted to Mr. LaRussa and sent him referrals including Linda Latham, Mr. Byrd's sister-in-law. Mr. Ober did this out of "loyalty" and "concern for the family" (T. 136). In response, Mr. LaRussa gave Mr. Ober a sixteen hundred dollar check, "he wanted to pay me in a way for it" (T. 150). At the conclusion of Mark Ober's testimony at the Rule 3.850 evidentiary hearing, the circuit court judge asked Mr. Ober:

> Q. Mr. Ober, when you got this check from Mr. LaRussa, did you ever ask him what this was all about? Do you have a recollection of that?
>
> A. No. Mr. LaRussa had been very good to my family throughout. He helped me get into law school. He helped me get my job with the State Attorney's Office. He was just, although we weren't related by blood, he was like a brother to me. I would only assume that throughout the years, that, you know, I had sent him a lot of things, he wanted to pay me in a way for it. But there was never any, that is my assumption. I never, he wasn't there. We met down in Sarasota or Long Boat Key that weekend. I never had any discussion with him regarding it.

(T. 150)(emphasis added).

Mr. Ober's testimony was that he had assumed Mr. LaRussa was paying him for referrals that he -- Mr. Ober -- had sent to Mr. LaRussa over the years. He testified he sent referrals to Mr. LaRussa "on numerous occasions" (T. 147). However, DR 2-103 of the Code of Professional Responsibility which was in effect throughout 1981-83 provided:

> (B) Except as permitted under DR 2-103(C), a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.

Thus, according to the testimony of Mr. Ober, Mr. LaRussa's "sixteen hundred dollar" check was given to him in violation of DR 2-103(B). Not so surprisingly, Mr. LaRussa denied giving Mr. Ober any benefit (T. 76). Mr. LaRussa did not acknowledge that Mr. Ober had received a sixteen hundred dollar

check, even though the State does not deny such a check was given. Had Mr. LaRussa admitted giving the money to Mr. Ober, as payment of any kind, Mr. LaRussa would be chargeable with a blatant violation of DR 2-103(B). Nevertheless, according to Mr. Ober, Linda Latham was sent to Mr. LaRussa because Mr. Ober was indebted to Mr. LaRussa. As a result, Mr. Ober had a personal and familial interest in the outcome of the civil litigation.

The State contends that there was no impropriety because a district court of appeal opinion two (2) years after Mr. LaRussa collected sixteen thousand dollars by using the judgment and sentence Mr. Ober obtained against Mr. Byrd, said it was wrong to use the judgment and sentence in that fashion. Whatever Anderson v. Anderson, 468 So. 2d 528 (Fla. 3d DCA 1985), held does not matter. What matters is the fact that Mr. LaRussa testified he got sixteen thousand dollars by using the conviction Mr. Ober obtained against Mr. Byrd:

> Q. Okay. To that extent was the conviction of Mr. Byrd on the charges or charge of first-degree murder useful in that civil action?
>
> A. At that time it was, because the law had changed in Florida. In other words, prior to that, prior to his conviction, the law in Florida as I recall was that you would have to prove in a civil action that he caused the death, regardless of what happened in the criminal proceedings. But a statutory provision was passed about that time, right before I went to court with a motion for summary judgment, that indicated that if a person is convicted, that in itself is sufficient to indicate he is not entitled to proceeds from the insurance policy. But prior to that statutory provision, and as I was proceeding with that case in civil court, we would have had to try the case civilly and prove it, regardless of what happened in the criminal court or in his case.
>
> Q. In this case you were able to use the conviction?
>
> A. Yes.
>
> Q. Okay. And Mr. Ober, is he related to you?
>
> A. Well, he was.
>
> Q. At that time?
>
> A. Yes.

(T. 79-80).

The State in its brief observes that the Florida statute was changed on April 2, 1982, to allow the admission of a criminal conviction in a civil action to preclude the defendant from getting insurance benefits (Appellee's Brief at 36). This statute interestingly became effective nineteen (19) days before Mr. Ober worked out giving an admitted killer probation in return for saying he was hired by Mr. Byrd. The State claims that there is no merit to Mr. Byrd's contention that Mr. Ober knew whoever was hired to represent Linda Latham stood to make a large fee. (Appellee's brief at 36). Of course, there is no record cite for the State's assertion. Moreover, Mr. Ober was and is clearly not a stupid person. He knew as every attorney who has made it through law school knows, Linda Latham, armed with a criminal conviction against Mr. Byrd or even just Mr. Sullivan's sworn testimony[1], stood to make a bundle of money, and that her attorney would get a contingent fee.

The State contends that there is no evidence that Mr. Ober had any interest in obtaining Mr. Byrd's conviction (Appellee's Brief at 37). The State is wrong. The evidence was undisputed that Mr. Ober was indebted to Mr. LaRussa. "Mr. LaRussa had been very good to my family throughout. He helped me get into law school. He helped me get my job with the State Attorney's Office" (T. 150). Mr. Ober testified he sent Linda Latham to Mr. LaRussa. "I did it out of my loyalty to him. I did it out of my concern for the family" (T. 136).

The undisputed evidence is that Mr. Ober was indebted to Mr. LaRussa and he sent Linda Latham out of familial concern. He did it out of "loyalty." The State's assertion that Mr. Ober had no interest in whether his brother-in-law recovered a sixteen thousand dollar contingent fee is belied by Mr. Ober's testimony.

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[1]The State conveniently ignores the fact that Mr. Sullivan's testimony at Mr. Byrd's trial could have been presented in the civil action if he was unavailable to give the same testimony in person. See sec. 90.804 of the Florida Evidence Code.

The State in its brief claims that Mr. Sullivan's December 17, 1981, statement to the police was not inconsistent with the prosecutor's closing. However, the prosecutor testified at the evidentiary hearing that in light of the December 17, 1981, statement, Mr. Sullivan's trial testimony was not "correct":

> Q. Okay. Is there a question in there where Mr. Johnson is basically asking Mr. Sullivan if any statements were made to law enforcement between October 28, the date he made a long statement, a lengthy statement?
>
> A. Yes.
>
> Q. And the time of his guilty plea, which was in April?
>
> A. Yes, I believe there is.
>
> Q. What does Mr. Sullivan indicate?
>
> A. If I am understanding you correctly, I believe his answer is, "I did on April 19," indicating he talked to one person or talked on one occasion.
>
> Q. Now, is there any indication there in Mr. Sullivan's statement that he had talked to police officers in December, which is reflected in the December 17 report?
>
> A. No, it does not indicate in here that Mr. Sullivan mentions talking to the police on December 17.
>
> Q. Okay.
>
> A. That is not mentioned.
>
> Q. All right. Okay. Is Mr., would it be fair to say that Mr. Sullivan's testimony, then, is not correct in that it does not contain that?
>
> A. In that regard, that's correct.
>
> Q. Do you recall that testimony when it was occurring?
>
> A. On the stand?
>
> Q. Yes.
>
> A. No.
>
> Q. Do you recall ever pointing out to either the Court or to defense counsel, you know, "There is something wrong with what Mr. Sullivan just said"?

A. No. I am sure I probably didn't point that out to defense counsel. But I certainly hoped to God I gave Mr. Sullivan a copy of this, gave Mr. Johnson a copy of that police report, if I had it.

Q. You are relying on the fact that Mr. Johnson should have known that what Mr. Sullivan was saying wasn't true?

A. If Mr. Johnson had this police report, he certainly should have known.

Q. Okay. Now, do you recall if at the trial Mr. Sullivan's credibility was a big issue?

A. That is an understatement.

(T. 90-91)(emphasis added). Thus, contrary to the State's brief, the prosecutor testified at the Rule 3.850 hearing that Sullivan's trial testimony was a lie.

The prosecutor also testified at the Rule 3.850 hearing that the December 17, 1981, police report concerning Mr. Sullivan's statement of that date was "inconsistent" with the prosecutor's closing argument:

Q. My question is, what is reflected in that report, is that at all inconsistent with what you indicated in the closing argument?

A. It is a little bit inconsistent in that, in that context, yes.

(T. 94). In fact, the prosecutor said in his closing:

. . . [Ronald Sullivan] was given probation -- please understand this -- he was given probation before he told the State Attorney's Office anything.

(R. 1206).

The police report, which the prosecutor admitted was inconsistent with his closing and which established that Mr. Sullivan lied to the jury, was admitted into evidence at the Rule 3.850 hearing as Defense Exhibit 4. It provided:

Supplement

Details -- On 17 Dec. 81 at approx 1550 hours, the w/s spoke with H.C.S.O. Detectives Ed. Carter Unit #328 and Connie Smith #338. Det. Carter advised this writer he had just come from the Hillsborough County Jail where he had been talking with w/m murder suspect Ron Sullivan in regards to burglarys [sic]. Det. Carter advised that while talking with Sullivan he (Sullivan) told Carter he wanted to contact this writer because "he could show us where Indress told him he threw the gun." Sullivan also stated that "he could give us Wade and Indress really good."

The u/s will re-interview Sullivan in the near futher [sic]. (T. 709).[2] Mr. Sullivan's trial testimony was that he did not talk to the police between October 28, 1981, and April 19, 1982, and thus did not indicate that he would testify against Mr. Byrd in return for probation (R. 438).

ARGUMENT I

MR. BYRD WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL WHEN HE WAS PROSECUTED BY AN ASSISTANT STATE ATTORNEY WITH A PERSONAL, FAMILIAL, OR FINANCIAL INTEREST IN OBTAINING A CONVICTION.

The circuit court concluded that as a matter of law there is no due process violation unless a prosecutor has a "pecuniary interest or financial motive" (T. 346). The circuit court was wrong as a matter of law. The State in fact led the circuit court to this erroneous legal principle by relying on United States ex rel. Vuitton Et Fils, S.A. v. Klayminic, 780 F.2d 179 (2d Cir. 1985) (T. 629). The State argued Klayminic to the circuit court as holding it was proper for a party to litigation to prosecute his party opponent on contempt charges arising from the litigation. However, Klayminic was in fact reversed by the United States Supreme Court in Young v. United States ex rel. Vuitton Et Fils S.A., S.A., 481 U.S. 785 (1987).[3] There the Supreme Court held:

> The requirement of a disinterested prosecutor is consistent with our recognition that the prosecutors may not necessarily be held to as stringent a standard of disinterest as judges. "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law," Marshall v. Jerrico, Inc., 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). We have thus declined to find a conflict of interest in situations where the potential for conflict on the part of a judge might have been intolerable. See id., at 250-252, 100 S.Ct., at 1617-1618 (fact that sums collected as civil penalties returned to agency to defray administrative costs presented too remote a potential for conflict in agency enforcement efforts). Ordinarily we can only speculate whether other interests are likely to influence an enforcement officer, and it is this speculation that is informed by appreciation of the prosecutor's role. In a case where a prosecutor represents an interested party, however, the ethics of the

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[2]Mr. Byrd's middle name is Wade; it is in fact the name he goes by.

[3]Interestingly, the State chose not to address or even cite this decision in its brief to this Court.

> legal profession require that an interest other than the Government's be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence.
>
> As we said in Bloom, "In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases." 391 U.S., at 207, 88 S.Ct. at 1485. The requirement of a disinterested prosecutor is consistent with that trend since "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision."

481 U.S. at 807-08 (footnotes omitted).

The law of Klayminic was reversed; the very decision the State relied upon before the circuit court was overturned. Thus, according to the United States Supreme Court "a personal interest, financial or otherwise" implicates due process. Here, Mr. Ober admitted a personal and familial interest. His familial interest was to get a contingent fee to his brother-in-law to whom he was indebted. The situation herein is really no different than that in Hughes v. Bowers, 711 F. Supp. 1574 (N.D. Ga. 1989). There, the court found the "appearance of impropriety" coupled with "evidence of specific misbehavior on the part of the prosecutor." 711 F.Supp. at 1583, 1584.[4] The result should the same; a new trial must be ordered.[5] The prosecutor presented false testimony that was left uncorrected; this was "specific misbehavior on the part of the prosecutor." 711 F.Supp. at 1583.

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[4]The Assistant State Attorney, John Skye, who conducted the 3.850 hearing for the State, conceded to the press covering the proceedings that Mr. Ober's actions in referring Ms. Latham to Mr. LaRussa "is not a practice condoned" by the State Attorney's Office (T. 670). Obviously, there was even according to the State Attorney's Office the appearance of impropriety.

[5]The State relies on Dick v. Scroggy, 882 F.2d 192 (6th Cir. 1989). However, there the Sixth Circuit noted "Mr. Dick [] does [not] make any claim of prosecutorial misconduct in the courtroom." 882 F.2d at 195. In Dick, the Sixth Circuit found no due process violation because there was not "an irregularity 'sufficiently fundamental'" to warrant reversal. 882 F.2d at 197. However, here unlike Dick, the prosecutor has testified that the jury heard uncorrected perjured testimony from the State's star witness.

Here, the prosecution gave a co-defendant with an extensive criminal history probation in return for his admitting that Mr. Byrd hired him to kill Mr. Byrd's wife and that he did in fact participate in the killing. During the trial, the prosecution repeatedly told the jury that when probation was given to Mr. Sullivan, no one knew if he would implicate Mr. Byrd. Yet the prosecutor has admitted this was not correct. Mr. Sullivan had already expressed his intent to "give [the police] Wade [Byrd] and Indress [sic] really good" (T. 709). Mr. Byrd has shown "an irregularity 'sufficiently fundamental'" to warrant a new trial. Dick v. Scroggy, 882 F.2d at 197.

ARGUMENTS II, III AND IV

MR. BYRD DID NOT RECEIVE AN ADVERSARIAL TESTING BECAUSE THE JURY WAS ERRONEOUSLY LED TO BELIEVE THAT MR. SULLIVAN NEVER TOLD THE POLICE OR THE STATE THAT HE HAD EVIDENCE TO GIVE AGAINST MR. BYRD UNTIL AFTER HE WAS GIVEN PROBATION. MR. SULLIVAN'S TESTIMONY WAS FALSE AND NEITHER THE PROSECUTOR NOR THE DEFENSE ATTORNEY CORRECTED THE OBVIOUSLY FALSE TESTIMONY.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> [a] fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such still and knowledge as will render the trial a reliable adversarial testing process." Strickland, supra.

Here, Mr. Byrd was denied a reliable adversarial testing. The jury never knew that Mr. Sullivan lied in his testimony. The prosecutor at the Rule 3.850

evidentiary hearing admitted that Mr. Sullivan's testimony was false:

Q. Okay. Is there a question in there where Mr. Johnson is basically asking Mr. Sullivan if any statements were made to law enforcement between October 28, the date he made a long statement, a lengthy statement?

A. Yes.

Q. And the time of his guilty plea, which was in April?

A. Yes, I believe there is.

Q. What does Mr. Sullivan indicate?

A. If I am understanding you correctly, I believe his answer is, "I did on April 19," indicating he talked to one person or talked on one occasion.

Q. Now, is there any indication there in Mr. Sullivan's statement that he had talked to police officers in December, which is reflected in the December 17 report?

A. No, it does not indicate in here that Mr. Sullivan mentions talking to the police on December 17.

Q. Okay.

A. That is not mentioned.

Q. All right. Okay. Is Mr., would it be fair to say that Mr. Sullivan's testimony, then, is not correct in that it does not contain that?

A. In that regard, that's correct.

Q. Do you recall that testimony when it was occurring?

A. On the stand?

Q. Yes.

A. No.

Q. Do you recall ever pointing out to either the Court or to defense counsel, you know, "There is something wrong with what Mr. Sullivan just said"?

A. No. I am sure I probably didn't point that out to defense counsel. But I certainly hoped to God I gave Mr. Sullivan a copy of this, gave Mr. Johnson a copy of that police report, if I had it.

Q. You are relying on the fact that Mr. Johnson should have known that what Mr. Sullivan was saying wasn't true?

A. If Mr. Johnson had this police report, he certainly should

have known.

Q. Okay. Now, do you recall if at the trial Mr. Sullivan's credibility was a big issue?

A. That is an understatement.

(T. 90-91)(emphasis added).

The situation here is virtually identical to Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). There "[t]he jury was permitted to believe that Johnson's testimony against Smith was consistent with what he had told the police." 799 F.2d at 1444.

> The conviction rested upon the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See United States v. Bagley, 641 F.2d 1235 (9th Cir. 1981), cert. denied 454 U.S. 942, 102 S.Ct. 480, 70 L.Ed.2d 251.

799 F.2d at 1444-45 (footnote omitted).

Here, the prosecutor testified that Sullivan's credibility was critical (T. 91). Yet, evidence "that what Mr. Sullivan was saying was not true" was not presented to the jury (T. 91). The prosecutor testified that if defense counsel had the December 17, 1981, police report, "he certainly should have known" that Sullivan's testimony "wasn't true" (T. 91).

Here, not only did the prosecutor have a stake in the outcome, he let perjured testimony be presented to the jury. The United States Supreme Court has held:

> 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, Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; Curran v. State of Delaware, 3 Cir., 259 F.2d 707. See State of New York ex rel. Whitman v. Wilson, 318 U.S. 688, 63 S.Ct. 840, 87 L.Ed. 1083, and White v. Ragen, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348. Compare Jones v. Commonwealth of Kentucky, 6 Cir., 97 F.2d 335, 338, with In re Sawyer's Petition, 7 Cir., 229 F.2d 805, 809. Cf. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1. The same result obtains when the State,

> although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; United States ex rel. Thompson v. Dye, 3 Cir., 221 F.2d 763; United States ex rel. Almeida v. Baldi, 3 Cir., 195 F.2d 815, 33 A.L.R.2d 1407; United States ex rel. Montgomery v. Ragen, D.C., 86 F. Supp. 382. See generally annotation, 2 L.Ed.2d 1575.
>
> 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 v. 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 guilty. 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. * * * 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 v. Illinois, 360 U.S. 264, 269-70 (1959).

The United States Supreme Court has explained "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" Giglio v. United States, 405 U.S. 150, 154 (1972). In other words, reversal is required unless the error is harmless beyond a reasonable doubt. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985).

It does not matter who failed in their duties to insure an adversarial testing; the prosecutor or the defense attorney.[6] The bottom line is that the jury was lied to, and in all likelihood the jury convicted Mr. Byrd on the basis of false testimony. Accordingly, due process requires that a new trial be

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[6]In this case, because the defense attorney lost his file, no one will ever know for sure whether the defense was provided the December 17, 1981 report. However, what is known is that Sullivan lied to the jury and no one corrected the false testimony.

afforded Mr. Byrd.

CONCLUSION

For each of the foregoing reasons and for the reasons stated in Mr. Byrd's Initial Brief, the denial of each of Mr. Byrd's Rule 3.850 claims was erroneous, and this Court should reverse.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by United States Mail, first class, postage prepaid, to Fariba Komeily, Assistant Attorney General, Department of Legal Affairs, Dade County Regional Service Center, 401 NW Second Avenue, Suite 921N, Miami, Florida 33128, this 27th day of March, 1991.

_____
Attorney