IN THE SUPREME COURT OF FLORIDA

MARK D. SCHWAB,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 80,289

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

MARK D. SCHWAB, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 80,289

ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO RECUSE THE STATE ATTORNEY'S OFFICE OF THE EIGHTEENTH JUDICIAL CIRCUIT FROM PROSECUTING HIM.

Appellee's argument on this point contains several misconstructions of the facts. Appellee first states that since Appellant was well aware of the fact that Chris White was a prosecutor he should have known that any response from White would not be in his best interest. In so arguing, Appellee characterizes Appellant as "a suspect who is thoroughly familiar with the criminal justice system." (Brief of Appellee Page 6) While the record does reflect that Appellant had one prior criminal conviction (R4635), this fact alone does not equate to someone who is thoroughly familiar with the criminal justice

system. This is especially true since the prior conviction resulted from a plea and not a trial. Additionally, there is no showing that Appellant was ever interrogated by the police with regard to the prior case.

Appellee next states that if White did in fact render legal advice to Appellant the appropriate remedy would have been to seek suppression of the fruits of the advice. Appellee also argues that the proper attack should have been a violation of due process. (Brief of Appellee Page 6) Appellant would point out simply that the thrust of this entire issue on appeal is that Appellant's due process rights were violated by the Assistant State Attorney Chris White. Indeed a simple perusal at the issue as framed clearly shows that Appellant is arguing a violation of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. Appellant is further arguing that it was error to deny the motion to suppress the fruits of this misadvice given him by White. (See Point V) Appellee suggests that Appellant should have sought suppression on the grounds of ineffective assistance of counsel. Appellant is somewhat confused by this statement since it is not being alleged that Assistant State Attorney Chris White was currently his counsel. Rather, because White undertook to offer advice to Appellant, this created an attorney/client relationship and thus was grounds for recusal of the State Attorney's Office.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COURT DENIED DEFENSE COUNSEL'S MOTION TO WITHDRAW ON THE BASIS OF A CONFLICT OF INTEREST WHERE MEMBERS OF THE DEFENSE COUNSEL'S LAW FIRM WERE CALLED AS WITNESSES AGAINST HIS CLIENT.

Once again, Appellee's argument with regard to this issue contains gross speculation and misconstruction of the argument being made. Initially, Appellee makes much of the fact that these members of the Public Defender staff testified to uncontested matters which were not adverse to the position taken by the defense. Thus, according to Appellee, nothing could have been developed and therefore, no prejudice resulted. This is nothing more than mere conjecture on the part of Appellee since in fact no cross-examination was conducted. Appellee states that the credibility of these witnesses could not have been attacked. This argument misses the important principle of law that a purpose of cross-examination is to develop any bias on the part of the witness. D.C. v. State, 400 So. 2d 825 (Fla. 1981).

In a very recent case, Williams v. State, 18 Fla. L. Weekly D1564 (4th DCA July 7, 1993), the court reversed a conviction on the grounds that the trial court should have granted the Public Defender's motion to withdraw due to conflict. The facts of Williams are strikingly similar to the instant case.

In Williams, trial counsel, an Assistant Public Defender, filed a motion to withdraw after the trial court ruled that the Public Defender's investigator could be called by the state as a witness. The investigator had prepared a photo lineup and was present when the alleged victim identified Mr. Williams. The basis for the motion to withdraw was that the Assistant Public Defender had a conflict of interest which precluded him from cross-examining the investigator. This conflict arose because the Assistant Public Defender felt he owed his investigator a duty of loyalty which would preclude him from effectively cross-examining him. The state argued that it was not error to refuse to allow the Assistant Public Defender to withdraw since he did not have an actual conflict of interest. On appeal, the court ruled:

> We agree with appellant's contentions that the public defender correctly concluded that withdrawal was required where he believed he could not adequately represent appellant due to his loyalty to his investigator, a third party, and that the denial of the motion to withdraw resulted in the public defender's lack of cross-examination of Nazon, which was prejudicial to appellant.
>
> We reject the state's argument that the trial court correctly denied the motion because Nazon and appellant's interests were neither conflicting nor adverse, therefore there was no actual conflict. The public defender's argument was that his own interests, not those of Nazon, were adverse to appellant's interests in that he believed it was in his best interest not to destroy the working relationship he had with his investigator by subjecting

> him to harsh cross-examination. Obviously, this interest was in conflict with appellant's interest in having the weaknesses of the photo lineup exposed to the jury.
>
> Based on appellant's counsel's perceived conflict between his own interests and appellant's interests, we conclude that the trial court reversibly erred in denying appellant's trial counsel's motion to withdraw. [Emphasis in original].

In the instant case, defense counsel argued that his interests and loyalties were in conflict in just the same way that the interests were in conflict in the Williams case. When the issue arose at trial, defense counsel renewed his motion to withdraw and stated that he could not cross-examine the members of his office even though he knew of certain biases of these witnesses. (R1360-65) It is respectfully submitted that Appellant's interests in the instant case were compromised by the public defender's action below. Once Appellant's trial counsel perceived that there was a conflict, the trial court was duty bound to grant the motion to withdraw. Babb v. Edwards, 412 So. 2d 859 (Fla. 1982). It is improper for this Court to speculate what might have occurred if other counsel was representing Appellant. The trial court clearly erred in denying the Assistant Public Defender's motion to withdraw as counsel. Consequently, Appellant is entitled to a new trial.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD SUFFICIENTLY PROVEN THE CORPUS DELICTI OF THE CRIMES CHARGED SO AS TO RENDER THE APPELLANT'S STATEMENTS ADMISSIBLE AS EVIDENCE AGAINST HIM AND FURTHER IN FINDING APPELLANT GUILTY AS CHARGED WHERE THE STATE FAILED TO PROVE THE CORPUS DELICTI INDEPENDENT OF APPELLANT'S STATEMENTS.

With regard to the proof presented as to the corpus delicti of sexual battery charge, Appellee argues that the state did in fact present evidence tending to show the proof of each and every element of sexual battery. This is simply not true. There was no evidence of penetration. The anal area showed no tears whatsoever. The medical examiner testified that he could find no evidence of a sexual assault. He further testified that the darkened area of the anus could represent bruising but again, this doesn't indicate that a sexual battery occurred. (R270-71) Without the statements of Appellant, there was insufficient evidence as a matter of law to support a conviction for sexual battery. It was improper for the trial court to permit these statements absent independent proof of the corpus delicti of the crime of sexual battery. Consequently, this Court must reverse Appellant's conviction for sexual battery.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT EVIDENCE OF COLLATERAL OFFENSES WHERE SUCH EVIDENCE WAS IRRELEVANT AND WHICH BECAME A FEATURE OF THE TRIAL.

Appellee argues that each of the Williams Rule witnesses were properly allowed to testify on the grounds that testimony was admissible to show identity, motive, intent, method of operation, and to rebut an anticipated defense. Appellant naturally disagrees. None of the alleged prior incidents had sufficient similarities to make them admissible for purposes of showing identity. Drake v. State, 400 So. 2d 1217 (Fla. 1981). With regard to Appellee's allegation that the evidence was admissible to rebut an anticipated defense, it is important to note that the so-called anticipated defense was never presented by the defense. Instead, the state was permitted to present evidence during their case-in-chief regarding a potential defense and then proceed to present further evidence to disprove this defense. While it may be true that had Appellant taken the stand and testified as to a particular defense, some of the Williams Rule testimony may have been relevant to rebut that defense, this simply did not occur. The Williams Rule evidence was further inadmissible to show any absence of mistake or method of operation since there is no showing that the same method of

operation was employed in all the cases. There was never any indication that prior to the day of the alleged offense involving Dale Marsh, that Appellant had ever seen him before. Thus the idea that this was admissible to show method of operation by luring unsuspecting victims is simply untrue. The fact that Appellant may have been involved with a complete stranger has nothing to do with the fact that in the instant case Appellant apparently had established somewhat of a relationship with Junny Martinez. Thus there was no "luring" involved in the instant case. It is entirely probable that Junny Martinez went willingly with someone he considered a family friend.

Simply put, the Williams Rule testimony was inadmissible since at best it showed only the propensity of Appellant to commit deviant sexual acts. The prejudice of such testimony cannot be understated. The state cannot show that such evidence was harmless beyond a reasonable doubt. A new trial is required.

CONCLUSION

WHEREFORE, based on the reasons and authorities presented herein as well as in the Initial Brief, Appellant respectfully requests this Honorable Court to grant the relief requested in the Initial Brief.

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 Mr. Mark D. Schwab, #A-111129, (42-2101-A1), P.O. Box 221, Raiford, FL 32083, this 26th day of August, 1993.

Michael S. Becker

MICHAEL S. BECKER
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