IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,124

LARRY SMALL,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, Larry Small, was the appellant in the District Court of Appeal and the defendant in the circuit court. Respondent, the State of Florida, was the appellee in the District Court of Appeal, and the prosecution in the circuit court. All parties will be referred to as they stood in the circuit court. In this brief, the symbol "R" will be used to designate the record on appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's version of the statement of the case and facts as a correct and accurate statement of the proceedings below.

POINT ON APPEAL

WHETHER THE EXCLUSION OF A DEFENSE ALIBI WITNESS BASED ON A DEFENSE VIOLATION OF 3.200 FLA.R.CRIM.P., WITHOUT FIRST INQUIRING INTO THE CIRCUMSTANCES SURROUNDING THAT VIOLATION CAN BE REMEDIED BY A POST-TRIAL HEARING TO DETERMINE WHETHER GOOD CAUSE EXISTED FOR WAIVING THE REQUIREMENTS OF SAID RULE. (RESTATED).

SUMMARY OF THE ARGUMENT

Where a defendant fails to list its alibi witness pursuant to 3.200 Fla.R.Crim.P. and the trial court excludes said witness without a Richardson inquiry, this should not result in a per se reversal. The prejudice to the State where the defendant fails to list its alibi witness and surprise the State at trial, is inherent. Any testimony the alibi witness would provide as evidence would be in direct opposition to the State's case. The surprise factor coupled with the inherent damaging testimony could not be remedied by a simple recess. The alibi witness would have to be deposed. Is the alibi witness competent to stand trial. The crime scene might have to be reexamined, new witnesses could appear, as well as new problems. This inherent prejudice coupled with the language in Rule 3.200 "for good cause shown the court may waive the requirements of this rule," would allow the trial court to hold a post-trial hearing to determine whether cause could be shown for the excluded alibi witness.

ARGUMENT

THE EXCLUSION OF A DEFENSE ALIBI WITNESS BASED ON A DEFENSE VIOLATION OF 3.200 FLA.R.CRIM.P., WITHOUT FIRST INQUIRING INTO THE CIRCUMSTANCES SURROUNDING THAT VIOLATION CAN BE REMEDIED BY A POST-TRIAL HEARING TO DETERMINE WHETHER GOOD CAUSE EXISTED FOR WAIVING THE REQUIREMENTS OF SAID RULE. (RESTATED).

The defendant contends that after a defense violation of 3.200 Fla.R.Crim.P. by failing to give the State notice within ten (10) days prior to trial of its alibi witness, the trial court cannot exclude the witness without an inquiry into the circumstances surrounding the violation. Further, this exclusion cannot be rendered by a post-trial hearing. The State submits that the Third District Court of Appeal opinion in this case fashioned a proper remedy and its holding should be affirmed.

The defendant is arguing that because a violation of 3.220 Fla.R.Crim.P. necessitates a Richardson inquiry, Richardson v. State, 246 So. 2d 771 (Fla. 1971), there also should be a Richardson inquiry for a violation of 3.200 Fla.R.Crim.P. Thus, an absence of any type of an inquiry would result in per se reversible error. Smith v. State, 520 So. 2d 125 (Fla. 1986).

The State submits that although the two rules are similar, a defense violation of 3.200 Fla.R.Crim.P. should be viewed differently than a discovery violation pursuant to 3.220

Fla.R.Crim.P. First, 3.200 Fla.R.Crim.P. places the burden on the defendant. Upon written demand of the prosecuting attorney, specifically as particularly as is known to the prosecuting attorney the place, date, and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in defense shall, not less than 10 days before trial or such time as the court may direct, file and serve on the prosecuting attorney a notice in writing of an intention to claim an alibi. There is no such burden on the defendant pursuant to 3.220 Fla.R.Crim.P. In fact, under 3.220 the defendant does not have to participate in the discovery process whatsoever.

Second, 3.200 Fla.R.Crim.P. is a separate rule from 3.220. Inherent in a defense violation of 3.200 the State is always prejudiced. The alibi witness testimony will always fly in the face of the State's case. There is a built-in presumption of prejudice. The State spends a great deal of time preparing its case for trial against the defendant. There is evidence to gather from the crime scene, witnesses to interview and prepare, case law to research, strategy to consider and hours of actual preparation for the trial itself. Further, the State has the burden of proof that the defendant committed the crime charged beyond a reasonable doubt. According to Rule 3.200, at least ten (10) days prior to trial, the defendant must give the State notice of its alibi witness(es). The purpose of this rule is to

ensure the state is not surprised, hence prejudiced at trial with an alibi witness whose testimony undoubtedly will rebut the States case. Moreover, the State would not be able to depose the alibi witness, find out if the witness is credible, or determine if there is a rebuttal witness to the alibi witness. Lastly, the State would have to alter its trial strategy, perhaps having to reopen its investigation of the case and go back to the crime scene or another area the alibi witness might compel the State to search. Therefore, the State will automatically be prejudiced upon a defense violation of Rule 3.200.

However, a defense violation of 3.220 will not always result in prejudice of such magnitude as in defense violation of 3.200. For example, if the defendant fails to disclose certain tangible papers prior to trial, pursuant to 3.220(d)(1)(B)(iii) Fla.R.Crim.P., this may or may not prejudice the State. The State could ask for a recess (after a Richardson inquiry) to review the documents and proceed with its case.

Sub judice, the defense violation of 3.200 Fla.R.Crim.P. could not have been remedied by a brief recess. The State needed to know if the alibi witness was credible. Was she competent to stand trial. The State might need to contact other witnesses the alibi might disclose. The State possibly would have to reinvestigate the crime scene or even reevaluate its trial strategy. Thus, it is obvious that the State was prejudiced when the defendant violated 3.200.

Finally, although both rules state that the trial court has the discretion to exclude witnesses not included on the witness lists, Rule 3.200 specifically provides: "For good cause shown the court may waive the requirements of this rule." This portion of 3.200 allows the trial court to waive certain requirements of the rule that cannot be done in Rule 3.220. By following the defendant's argument, a trial court could never hold a good cause hearing, absent a Richardson inquiry. Thus, effectively turning the last line of Rule 3.200 into a vestige that has no apparent use.

The State's argument is premised on the fact that unlike a post-trial Richardson hearing, which this Court has found inadequate in Smith v. State, 372 So. 2d 86 (Fla. 1979), a post-trial hearing to determine if good cause existed can work without the worries enumerated by this Court in Smith. In Smith v. State, 372 So. 2d 86 (Fla. 1979), this Court held that a post-trial Richardson inquiry would be inadequate as a remedy for failing to conduct such an inquiry at trial. This Court went on to hold that that it would be difficult for a trial judge to determine the thorny question of prejudice in an isolated Richardson hearing without the possibility of being subconsciously affected by a jury's prior judgment of guilt, as well as, a narrowing of

sanction options available, thus eviscerating the flexibility contemplated under subsection (J).[1] 372 at 89.

Sub judice, unlike this Court's reasoning in Smith, the question of prejudice is essentially moot. The State will always be prejudiced where the defendant violates Rule 3.200. The State has its game plan of trial strategy prior to trial. It has to locate witnesses and prepare them. Investigators as well as the police are involved. Much time and effort is invested in order to present the States case, especially as the State is the party carrying the burden of proof. There is no greater act of prejudice at trial against the State as a surprise alibi witness. Especially as in this case, where the defendant knew of the alibi witness during the first trial and failed to notify the State. After a hung jury, six (6) weeks elapsed and the defendant's new trial was to begin. Again, the defendant failed to provide the name and address of the alibi witness he planned to call at trial, in gross violation of Rule 3.200.

Moreover, the factual question of whether the defendant showed good cause to waive the requirements of Rule 3.200 can be determined post-trial. The trial judge would not be prejudiced subconsciously by a guilty adjudication, nor would there be a

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[1] Rule 3.220(j) was relettered to (n) in the 1989 amendment.

narrowing of sanctions available. Unlike Rule 3.220(n), which has numerous sanctions, i.e.,

> the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such order as it deems just under the circumstances.

Rule 3.220 has only one sanction

> If a defendant fails to file and serve a copy of the notice as herein required, the court may exclude evidence offered by the defendant for the purpose of providing an alibi, except the defendant's own testimony.

Because of the inherent differences between 3.220 and 3.200, the improper exclusion of the alibi witness can be remedied by a post trial good cause hearing.

Other courts have used post-trial hearings instead of vacating a judgment and sentence. In Fowler v. State, 255 So. 2d 513 (Fla. 1971), this Court held that it was error not to provide for a competency hearing during trial where there were reasonable grounds to believe the defendant insane and defense counsel requested such a hearing. Further, these factors did not require vacation of judgment and sentence entered against the defendant. The cause was temporarily remanded to the trial court to hold a post-trial hearing to determine the defendant's sanity. 255 So.

2d at 515. See also Knight v. State, 164 So. 2d 229 (Fla. 3d DCA 1964); United States v. Walker, 301 F.2d 211 (6th Cir. 1962).

The State submits there have been cases that used the for good cause language set forth in Rule 3.200 to determine a violation of said rule, without determining if a Richardson violation occurred. In the cases of Lail v. State, 314 So. 2d 234 (Fla. 4th DCA 1975), Barnes v. State, 294 So. 2d 679 (Fla. 2d DCA 1974) and Chester v. State, 276 So. 2d 76 (Fla. 2d DCA 1973) the courts held that it is not an abuse of discretion for the trial court to exclude the testimony of an alibi witness upon the failure to comply with 3.200 Fla.R.Crim.P. In Chester, the defendant conceded in his brief to the Second District Court of Appeal that he did not comply with Rule 3.200. In Lail, the court held that the defendant was in gross violation of 3.200 Fla.R.Crim.P. and there was no support displayed that good cause could waive the requirements of said rule. However, in Barnes the court found that the defendant was in violation of 3.200 Fla.R.Crim.P. but failure to make inquiry into the circumstances of the violation did not require vacation of the judgment and sentence. The court remanded the case to the trial court to hold a hearing to determine whether or not good cause existed to waive the requirements of 3.200 Fla.R.Crim.P. 294 So. 2d at 680.

The key question in any discovery violation is prejudice. Where a defendant is prejudiced by the State's failure to comply

with the rule or failure to produce evidence, it does not matter whether that failure was purposeful or not. Pizzo v. State, 289 So. 2d 26 (Fla. 2d DCA 1974). On the other hand, a violation of a rule of procedure prescribed by the Supreme Court does not call for reversal of a conviction unless the record discloses that noncompliance with the rule resulted in prejudice or harm to the defendant. Holman v. State 347 So. 2d at 824.

Sub judice, the prejudice to the State because of the defendant's gross violation is inherent. Any alibi testimony will be directly in opposition to the State's case, therefore, fulfilling the need for a Richardson inquiry. Because the trial court incorrectly excluded the alibi witness, this can be remedied by following Rule 3.200 to determine if good cause can be shown for waiver of the rule. By using the standards enumerated in Richardson as the only way to remedy the situation sub judice, the for good cause language in 3.200 Fla.R.Crim.P. might as well not exist.

The defendant cites to numerous cases to further his cause. In Bell v. State, 287 So. 2d 717 (Fla. 2d DCA 1974), the defendant violated 3.200 Fla.R.Crim.P. by failing to list its alibi witness, Dr. Guest. However, Dr. Guest was listed on the State's witness list, thus the State could hardly claim any type of surprise or prejudice when the defendant failed to list Dr. Guest as its alibi witness.

In Fedd v. State, 461 So. 2d 1384 (Fla. 1st DCA 1984), the court adopted the reasoning of Briesno v. State, 449 So. 2d 312 (Fla. 5th DCA 1984). Both cases involved a defense violation of 3.200 Fla.R.Crim.P. where the court excluded the alibi witness from testifying. However, like Bell, both alibi witnesses in Fedd and Briesno were listed as defense witnesses. Because the State had access to the alibi witness prior to trial, no prejudice could be claimed by the State.

The defendant also cites to Holman v. State, 347 So. 2d 832 (Fla. 3d DCA 1977). In that case the defendant argued that the trial court erred in allowing a non-listed State rebuttal witness to testify over objection. Because the rebuttal witness was discovered after the alibi witness testified and the defendant knew of the rebuttal witness, it was not error to allow the State's rebuttal witness to testify. 347 So. 2d at 836. The facts of Bell, Fedd, Briesno and Holman are all sufficiently different to the case sub judice. There was no prejudice to the party that was supposedly harmed by the opposing parties failure to abide by the rule. The court in Holman went on to hold that the discovery rule was designed to furnish a defendant with information which would bona fide assist him in the defense of the charge against him. It was never intended to furnish a defendant with a procedural device to escape justice. 347 So. 2d at 827 citing to Richardson v. State, 246 So. 2d 771 (Fla. 1986).

However, this seems to be the case. The defendant wants this Court to hold that it was per se reversible error for the trial court to exclude its alibi witness where he was the party in violation of 3.200. At the second trial, prior to voir dire, the trial court excluded the alibi witness. The defendant did not object or make mention of the exclusion for the remainder of the trial. The defendant is attempting to take advantage of a procedural device, namely ride the per se wave of Richardson and ask this Court to simply look the other direction, away from the for good cause language of Rule 3.200. Because of the inherent prejudice suffered by the State as discussed infra, the trail court's need to conduct a Richardson inquiry is unnecessary. Rule 3.200 and Rule 3.220 are inherently different and separate rules. The Third District Court of Appeal opinion allowing for a post trial hearing to determine if good cause can shown by the defendant for his violation of Rule 3.200 was a proper and just remedy. Accordingly, the decision of the District Court of Appeal must be affirmed.

CONCLUSION

Based on the foregoing facts, authorities and arguments, the Respondent respectfully requests this Court to affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **HOWARD K. BLUMBERG,** Assistant Public Defender, Office of the Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 16 day of July, 1993.

MARC E. BRANDES
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