IN THE SUPREME COURT OF FLORIDA

JAMES E. HUNTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 82,312

APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN CONTENTION THAT THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE FAILURE OF THE STATE TO DISCLOSE TO THE DEFENDANT EVIDENCE WHICH TENDED TO EXCULPATE HIM.

Appellee dismisses the Brady[1] claim stating that it is based upon an incorrect factual premise. The Appellee ignored the fact that there were **two** sets of pictures taken of defendant depicting his clothing and appearance the night of the homicide. (TR929,935) The appellee only addressed the first set of photographs taken by Detective Graves minutes after the shooting. (TR929) The appellee elected not to address the second set of photographs taken by Investigator McLean after appellant was placed in police custody. (TR929)

Appellant's motion for mistrial was based upon both sets of photographs:

[1] Brady v. Maryland, 373 U.S. 83 (1963)

> MR. BURDEN: Yes. I'd make a Motion for Mistrial, Your Honor, on the fact that I was not provided those photographs, either set. Your Honor, it's true that the photographs that had been marked in the photo lineup were viewed in the deposition of Donald Clark involving a robbery in Deland that happened earlier that evening, upon which my client was not charged.

The state argued that there was disclosure of the second set of photographs to appellant at the deposition of Donald Clark. Donald Clark was the victim of an armed robbery in Deland, Florida the same night as the shootings in Daytona Beach. Appellant was not charged in the armed robbery of Donald Clark. However, counsel for appellant was present at the deposition of Clark because of the multiple scheduling of depositions that day among co-defendants to the murder that occurred in Daytona Beach later that evening. For purposes of disclosure of Brady material, the Clark armed robbery was totally unrelated to the murder charge in Daytona Beach. Eric Boyd was appellant's co-defendant in the instant case, and it was his counsel that scheduled and performed the deposition of Donald Clark. Subsequently, the State made a photostatic copy of the lineup page and provided it to counsel for Boyd and made an additional copy and gave it to counsel for appellant.

If this Court reviews the photostatic copy of the lineup sheet that was provided by the state, it does not depict the complete photograph but merely the face. The complete photograph which was not provided shows that appellant wore beige shorts and a white Florida Gators T-Shirt when he was arrested immediately after the shooting. State witnesses described the

shooter as wearing a red hat, red shirt and blue jean shorts. (R739,828) The fact that the state had color pictures depicting appellant's clothing taken minutes after the shooting in Daytona Beach was never disclosed to defense counsel. Such evidence was material exculpatory evidence. The failure of the state to disclose such evidence requires that the case must be reversed for a new trial.

The trial court's determination that there was disclosure of the second set of pictures belies the facts. The state at no time disclosed to appellant that any pictures of appellant were taken the night of shootings. At trial it is disclosed that one set of pictures were taken by Detective Graves at the scene and that an additional set of pictures were taken by Investigator Mclean at the police station. The fact that the state provided a courtesy copy of a photostated lineup sheet which was state evidence to be used in an armed robbery prosecution of Eric Boyd does not satisfy the disclosure requirements.

If one follows the trial court's finding, the state has no duty to disclose exculpatory evidence but merely provide copies of their case file. Appellant argues that the state has an affirmative duty to disclose exculpatory evidence. The complete color picture of appellant and not the facial display that was used for the lineup picture box was exculpatory evidence in the possession of the state. The complete color picture of appellant was not provided to counsel, nor was the fact that a

color picture that showed appellant's clothing was taken by police that night was in the state's possession.

Because the State failed to provide material information in its possession to the defense which could have reasonably resulted, if fully developed, in a different outcome at trial, a new trial is required.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF TRIAL.

The state's answer to the appellant's point on appeal was merely that ten months passed from the time of the offense to the time of trial, therefore there was sufficient time to prepare. This argument is not on its face persuasive. As argued in the initial brief, due process requires that the defendant must be given ample opportunity to prepare for trial. Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983); Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981); Lightsey v. State, 364 So.2d 72 (Fla. 2d DCA 1978); Sumbry v. State, 310 So.2d 445 (Fla. 2d DCA 1975); Hawkins v. State, 184 So.2d 46 (Fla. 1st DCA 1966).

The chronology of a case is relevant but not dispositive on the issue of whether the trial court abused its discretion in not granting a continuance. In the instant case, the State supplied defense counsel with nineteen new witnesses, flipped a codefendant and procured an agreement for him to testify; provided two hundred five (205) pages of written materials, two weeks before trial. Moreover, the mitigation investigator had only been working on the case for six weeks at the time of the motion to continue and was still developing mitigation evidence, and had informed defense counsel that more time would be required to develop mitigation evidence. In addition, a new eyewitness to the shooting was located and made

an affidavit and subsequently could not be located for trial. Finally, defense counsel requested an evidentiary hearing to make a record of other difficulties that precluded counsel from being prepared, but was denied the opportunity to have an evidentiary hearing. Had the request for hearing been granted, the defense counsel would have shown that he had concluded an armed robbery trial with appellant the Friday evening before the Monday trial start; that defense counsel had an additional capital trial scheduled immediately following the capital trial in the instant case; and would have called expert witnesses to detail to the trial court what mitigation evidence had not been gathered and what was required to obtain such evidence.

Wherefore, Appellant submits that the denial of the motion for continuance was a palpable abuse of discretion which violated Appellant's due process right to the benefit of counsel and the denial of his constitutional right to a fair trial where force in the trial was so expeditious to deprive and effectively aid in the assistance of counsel.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT A TRIAL COURT CANNOT SUMMARILY DENY MOTIONS TO DETERMINE COMPETENCY TO STAND TRIAL AND COMPETENCY AT THE TIME OF THE OFFENSE WITHOUT FIRST APPOINTING EXPERTS AND HOLDING A COMPETENCY HEARING WHEN THE DEFENSE MOTIONS ARE SUFFICIENTLY SUPPORTED BY FACTUAL ALLEGATIONS.

During the penalty phase proceeding, appellant filed a Motion for Determination of Defendant's Competence to Proceed. (R710) The state alleges in its answer that the above motion was lacking in ample and reasonable grounds. The appellant submitted as part of the grounds for the motion the thirteen page report of psychiatrist Dr. Jack Rotstein. Dr. Rotstein concluded in his report based upon an examination which occurred during appellant's trial that "this man's competence to stand trial is so questionable that it probably does not exist." (R726)

Counsel for appellant had six months before filed a motion to determine competency based upon appellant's bizarre behavior. Nonetheless, the Court ruled appellant competent. This initial determination is not controlling. As this Court explained in Nowitzke v. State, 572 So.2d 1349 (Fla. 1990):

> Thus, a prior determination of competency does not control when new evidence suggests the defendant is at the current time incompetent. See also Lane v. State, 388 So.2d at 1022 (Fla. 1980).
>
> Nowitzke at 1349.

The appellant submits that the standard for the trial court for ruling on a petition to determine competency is whether there is

a reasonable ground to believe that the appellant may be incompetent. Through appellant's pleadings and the opinion of Dr. Rotstein, appellant met its burden in showing that appellant may be incompetent to proceed.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The appellee argues that the appellant's reasoning in this point is contrary to the reasoning of the numerous decisions of this Court. However, appellant contends that this Court's decision in Omelus v. State, 584 So.2d 563 (Fla. 1991). In Omelus, as in the instant case, the state stressed that three aggravating circumstances were clearly established by the evidence (pecuniary gain, CCP and HAC). In Omelus as in the instant case, the state focused especially upon the factor that was not supported by the evidence. The trial judge in Omelus as in the instant case subsequently imposed the death penalty, finding two aggravating circumstances. Appellant submits that its argument is supported by Omelus.

The appellee claims that appellant "invoked Espinosa v. Florida" and that such decision does not support appellant's position. Appellant did not argue Espinosa in this point and therefore appellee's claim is without merit.

CONCLUSION

Based upon the foregoing cases, authorities, policies and argument, as well as those set forth in the initial brief, James Hunter respectfully requests that this Honorable Court vacate his convictions and sentences and remand for a new trial where life imprisonment is the maximum possible sentence.

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, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 in his basket at the Fifth District Court of Appeal, and mailed to Mr. James E. Hunter, #115624 (44-2193-A1), P.O. Box 221, Raiford, FL 32083, this 28th day of September, 1994.

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER