IN THE SUPREME COURT OF FLORIDA

KEVIN SINCLAIR,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 82,499

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D. E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

KEVIN SINCLAIR, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 81,341

REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN CONTENTION THAT THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT A PROPER RICHARDSON HEARING AND THEN PERMITTED THE INTRODUCTION OF STATEMENTS MADE BY SINCLAIR OVER OBJECTION.

In appellant's initial brief, it was argued that the trial court erred in allowing witness Evette Busby to testify over objection to admissions against interest by the appellant. Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure requires that the prosecutor shall disclose the statement of any person whose name is furnished to the defense through discovery. The statement at issue occurred during the testimony of state witness Busby during direct examination:

> THE STATE: Just -- if you can limit it to what you heard the defendant say, okay, about what he was going to do about this monetary situation.
>
> BUSBY: He as trying to put it back. It was a situation where he was thinking about robbing a cab and--

THE DEFENSE: Objection, your honor if we could approach? (R896)

The appellant further contended that the trial court committed reversible error per se where it ruled that such a statement was admissible without prior disclosure and without conducting a full Richardson[1] Hearing. The trial court began a Richardson inquiry and merely concluded that the discovery violation was not willful, and ignored the issue of whether such discovery violation was willful or inadvertent, and whether the violation was prejudicial to the appellant.

In the state's answer it claims that "Clearly, the trial judge made a factual finding that the state had no knowledge that Busby would testify to having heard the appellant discuss robbing a cab.." (AB pg 15) The trial court may have inferentially ruled that the state had no knowledge. However, this determination was not done based on an evidentiary hearing. On the contrary, the trial would not permit state witness Busby to provide testimony or be subjected to thorough questioning by each counsel on the facts surrounding the prior disclosure of her testimony to the state. The whole point of a Richardson Hearing is for the trial court to make an adequate inquiry into all the surrounding circumstances related to a discovery violation. The entire thrust of appellant's argument on this issue is that the trial court chose not to conduct a full evidentiary hearing to determine the circumstances related to Busby's claim that she

---

[1] Richardson v. State, 246 So.2d 771 (Fla. 1971)

provided her statement to the state before trial.

If this court accepts the state's argument, trial courts can ignore virtually all state discovery violations by, as was done in the instant case, declaring that the state would not engage in such conduct. As a result, the underlying factual basis of the trial court's determination is unknown and can not be reviewed by appellate courts. In the instant case, the trial court did not conduct an adequate evidentiary hearing nor state clear factual findings, and as such is reversible error per se. See McCray v. State, 640 So.2d 1215 (Fla. 5th DCA 1994).

The appellant wishes to again stress the severe prejudice that Busby's testimony had on appellant's case. The state's theory of the case was that the appellant with premeditation and planning called a cab to commit robbery and murder. The evidence presented that there was a robbery was two-fold: the testimony of Evette Busby which is the subject of the discovery violation that Appellant told her that he planned to rob a cab driver; and two, circumstantial evidence that the victim performed a number of cab runs the day of the shooting and the likely fares collected was missing from the victim. Evette Busby's statement is likely the most substantial and significant piece of evidence of the whole trial concerning Sinclair's intent, and a discovery violation related thereto is was severely prejudicial to appellant and therefore a substantial violation.

POINT II

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

The state makes pains to point out that Attorney Reynolds rather than Attorney Chang were lead counsel in this case. Numerous pleadings in the record list Susan Kraus as the initial attorney assigned to this case. It is uncontroverted that she announced her resignation from the Public Defenders Office the month before trial. It is also uncontroverted that Ernest Chang was assigned to the case three weeks before trial and actually began preparation two weeks before trial. In addition, Ernest Chang had other scheduled matters and caseload that required near daily court appearances leading up to trial, and the state had filed additional supplemental discovery that requires evaluation and review. (R1589) Chang had only met with the appellant briefly one time. (R1304) The state performed DNA testing on evidence weeks before using a new technique that required time for appellant to review and evaluate. (R1306)

Public Defender Douglas Reynolds had great familiarity with the case in that he had been assisting Kraus to learn about capital defense. (R1318) Whether Reynolds was assisting Chang or he was lead counsel, it is uncontroverted that he had twenty-five sentencings scheduled over the next two days, a motion to suppress, a Williams' Rule hearing for another capital trial, and six cases set for trial immediately following the instant case.

(R1319)

It is no surprise to anyone that in many circuits in Florida the courts are overloaded with cases that strains the resources of both the prosecution and the public defender. In the instant case the trial court acknowledged this and concluded that this situation was a shame. (R1326-1336) Nonetheless, the court in its discretion ruled that the show must go on. This as an abuse of discretion despite the state's view that the court's ruling was "fair, right and reasonable."

Under ordinary circumstances where there is a dedicated defense team assigned to the case with adequate resources, there would have been sufficient time for counsel to prepare for trial. That is not what occurred in this case. This was, through the last minute shuffling of personnel and resources, a public defender bootstrap operation that is becoming all to common in Florida and which this trial court should not have permitted to happen. The trial courts admitted belief that more time is not going to solve the attendant problems of case overload and courtroom availability, therefore proceed to trial must shock the conscious of this Court. Due process demands that a new trial be ordered with experienced and prepared trial counsel.

POINT III

IN REPLY TO THE STATE AND IN CONTENTION THAT SINCLAIR'S DEATH SENTENCE IS DISPROPORTIONATE IN CONTRAVENTION OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court found only one aggravating circumstance, i.e., felony murder/pecuniary gain[2]. (1701) In mitigation there was evidence presented that Sinclair was a teenager at the time of the offense, had a lack of a significant past criminal history, low intelligence, and having no father. The trial court also found that, although not retarded, Sinclair has "dull normal intelligence." (R1711) According to the report of Dr. Howard R. Bernstein, appellant is functioning at 19th percentile which means that eighty percent of individuals his age have greater intellectual functioning then appellant.

The state in their answer claims that the death sentence is appropriate based upon the cases of Hayes v. State, 581 So.2d 121 (Fla. 1991); Smith v. State, 19 Fla. L. Weekly S312 (Fla. June 9, 1994); Eutzy v. State, 458 So.2d 755 (Fla. 1984); and Duncan v. State, 619 So.2d 279 (Fla. 1993). A review of these cases refutes that claim. In Hayes, the trial court found two aggravating factors: Cold, calculated, and premeditated without any legal or moral justification; and the merging of pecuniary gain and felony murder. In Smith, the trial court found two aggravating factors: Prior violent felony and felony

---

[2] See Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988)

murder. In Eutzy, the trial court found three aggravating factors: Cold, calculated, and premeditated; prior violent felony; and felony murder. On appeal this court struck the felony murder aggravating factor but noted that there was sufficient evidence to support the pecuniary gain aggravating factor if the trial court had made such a finding. In Duncan, the trial court found one aggravating factor: prior violent felony. Although only one aggravating factor was found, Duncan is distinguishable from the instant case in that Duncan was convicted of two prior violent felonies: second degree murder and aggravated assault.

The sentence of death in this case is disproportionate when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. Therefore, this Court should reverse the sentence of death and direct that the appellant be sentenced to life imprisonment without parole for twenty-five years.

CONCLUSION

Based on the foregoing cases, argument and authorities, as well as those in the Initial Brief, Appellant respectfully requests this Honorable Court:

as to Points I, II, VI and VII, reverse and remand for a new trial;

as to Points III, IV and V, vacate his judgment and sentence of death and impose a sentence of life.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

George D E Burden

GEORGE D. E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367
ATTORNEY FOR APPELLANT

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, Florida 32118, in his basket at the Fifth District Court of Appeal and mailed to Mr. Kevin Sinclair, #123120 (42-2093-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 1st day of February, 1995.

George D E Burden

GEORGE D. E. BURDEN
ASSISTANT PUBLIC DEFENDER