IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,548

STATE OF FLORIDA,

Petitioner,

vs.

JOHN WILLIAM PARKER,

Respondent.

****

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

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REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

DOUGLAS J. GLAID
Assistant Attorney General
Florida Bar #249475
4000 Hollywood Blvd.
Suite 505S
Hollywood, Florida 33021
Telephone: (305) 985-4482

Counsel for Respondent

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PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Dade County. The Respondent was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" refers to the record transmitted to this Court by the Clerk of the Third District Court of Appeal on June 21, 1995. The symbol "T" refers to the transcript of trial proceedings.

Unless otherwise indicated, all emphasis has been supplied by Petitioner.

ARGUMENT

POINT I

HALE v. STATE, 630 So. 2d 521 (Fla. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994) SHOULD BE INTERPRETED TO ONLY PROHIBIT THE IMPOSITION OF CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR EACH OFFENSE COMMITTED DURING THE COURSE OF A SINGLE CRIMINAL EPISODE UNDER §775.084, FLORIDA STATUTES.

Again, since the issue involved here has previously been fully briefed in State v. Hill, Case No. 84,727, the Petitioner, the State of Florida, adopts and reiterates all of the arguments raised in its initial and reply briefs filed in that case as if they were fully set forth herein. The State asks this Court to take judicial notice of its file in that case and refer to the arguments contained in the briefs filed therein.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS SOUND DISCRETION BY DENYING RESPONDENT'S REQUEST FOR A CONTINUANCE AND PERMITTING A REBUTTAL WITNESS TO TESTIFY SINCE THE PROSECUTION COULD NOT HAVE REASONABLY ANTICIPATED THAT IT WOULD NEED TO CALL THE WITNESS. (Restated).

The trial court correctly ruled that the State committed no discovery violation by not disclosing Dina Dainov as a rebuttal witness until after Respondent testified, since the prosecution did not know that Dainov could provide rebuttal evidence until after Respondent testified. Although the State agrees that there is no rebuttal witness exception to the rules of discovery, it is established that the State is only required to disclose the name of a rebuttal witness if the necessity for calling the witness can be reasonably anticipated. Citing for support the decisions in Breedlove v. State, 295 So. 2d 654 (Fla. 3d DCA 1974) and Rowan v. State, 252 So. 2d 851 (Fla. 3d DCA 1971), this Court in Lucas v. State, 376 So. 2d 1149, 1151 (Fla. 1979), specified that, "Rebuttal witnesses, the necessity for whom the state can reasonably anticipate, are included within the operation of the rule." (Emphasis added). Thus, if the prosecutor cannot reasonably anticipate the need for calling a witness in rebuttal, he is not obligated to disclose that witness to the defense.

Here, the record reflects that the prosecutor, although aware of Respondent's defense of duress by drug

addiction, was unaware that Respondent would testify that he had never been in the store before the day of his arrest and that he did not own any credit cards. (T 324). Indeed, there is no evidence in the record to suggest that the prosecutor could have reasonably anticipated this particular testimony. To the contrary, the record shows that the prosecutor expected Respondent to testify that he was familiar with the store. (T 324). In addition, the mere fact that defense counsel told the prosecutor and jury during jury selection that Respondent would testify and that the defense would be duress could not have reasonably caused the prosecutor to anticipate that Respondent would testify that he never was in the store before and that he owned no credit cards. Indeed, only after Respondent testified did the prosecutor know that Ms. Dainov could provide testimony to rebut Respondent's testimony. As the trial court specifically found, the prosecutor did not know whether Dainov could testify to any relevant matter until Respondent testified. (T 345). Indeed, Dainov's testimony was not relevant until Respondent testified that he never was in the store and that he did not own any credit cards. Consequently, since the prosecutor could not reasonably have anticipated the need to call Dainov as a rebuttal witness, the trial court properly ruled that there was no discovery violation committed by the State. Grant v. State, 474 So. 2d 259, 261 (Fla. 1st DCA 1985). As such, it cannot be said that the trial court abused its sound discretion by permitting Dainov to testify as a rebuttal witness.[1] See Rowan, supra;

[1] The State notes that defense counsel below never sought to have

Holman v. State, 347 So. 2d 832 (Fla. 3d DCA 1977) (trial court did not abuse discretion in allowing rebuttal witness to testify even though State failed to notify defendant of rebuttal witness); Dupree v. State, 436 So. 2d 317 (Fla. 1st DCA 1983).

Since no discovery violation was committed with respect to the disclosure of the rebuttal witness, there existed no necessity for a Richardson[2] hearing, including its concomitant inquiry into prejudice. See Munoz v. State, 599 So. 2d 283 (Fla. 3d DCA 1992) (since no discovery violation, no duty to conduct Richardson inquiry) and cases cited therein; Grant v. State, supra, 474 So. 2d at 261. Nonetheless, as Respondent concedes and the record reflects, the trial court conducted an adequate inquiry into all of the facts and circumstances surrounding the alleged discovery violation pursuant to Richardson. (T 319-345). Assuming arguendo that a Richardson violation occurred, the State submits that this violation was clearly harmless relative to Respondent's ability to prepare for trial, as defense counsel deposed Ms. Dainov prior to her trial testimony. State v. Schopp, 653 So. 2d 1016 (Fla. 1995).

Moreover, considering the fact that no discovery violation occurred here and that the trial court permitted defense counsel to depose Ms. Dainov prior to her trial testimony, the State submits that the trial court did not abuse

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[1] Cont. Ms. Dainov excluded as a witness, but rather only moved for a continuance after deposing Dainov. (T 333-352).

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

its broad discretion in denying Respondent's ore tenus motion for continuance. Defense counsel asserted two grounds for a continuance: (1) counsel wished to consult with a handwriting expert to determine whether Respondent had in fact signed purchase slips relative to his prior store purchases, and (2) counsel desired to view the photograph of Respondent Ms. Dainov was shown by her manager the day after Respondent's arrest. The trial judge denied the motion for continuance, ruling that a handwriting expert could not determine whether Respondent signed the purchase slips, which slips were not introduced into evidence in any event. The trial court also ruled that viewing the photograph would not be necessary since the photograph would not be admitted into evidence. (T 341-343). In light of the foregoing, it cannot be said that the trial court's denial of Respondent's motion for continuance was a palpable abuse of discretion. Holman v. State, supra, 347 So. 2d at 835-36; Andrews v. State, 372 So. 2d 143, 151 (Fla. 3d DCA 1979).

Lastly, the State submits that Respondent's parting claim that the trial court improperly limited his ability to cross-examine Ms. Dainov is not cognizable on appeal since Respondent failed to interpose this argument in the trial court. Indeed, while defense counsel moved for a continuance and moved for a mistrial due to the denial of his continuance motion, counsel never argued that his cross-examination of Dainov would be improperly limited. (T 333-353). Thus, this point is not properly preserved for appellate review. Steinhorst v. State,

412 So. 2d 332, 338 (Fla. 1982); Strapp v. State, 588 So. 2d 27 (Fla. 3d DCA 1991). Moreover, since defense counsel chose not to cross-examine Dainov (T 349), it simply cannot be said that the trial judge improperly limited counsel's ability to cross-examine. Certainly, Respondent's claim to the contrary is necessarily mere speculation, which cannot serve as the basis for reversible error. Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974).

POINT III

THE TRIAL COURT DID NOT ERR BY DENYING RESPONDENT'S MOTION FOR RECUSAL SINCE THE MERE FACT THAT THE TRIAL JUDGE VERBALIZED HER OPINION OF ONE STATEMENT MADE BY A DEFENSE WITNESS DURING THE SENTENCING HEARING WAS NOT A SUFFICIENT BASIS FOR DISQUALIFICATION. (Restated).

Respondent claims that the trial judge should have recused herself from sentencing Respondent due to the trial judge's statement to defense witness, Elise Hubbard, during the sentencing hearing that she was offended by Hubbard's statement that the system had failed Respondent. For the following reasons, the State strongly disagrees.

The State submits that the situation presented at bar is extremely analogous to the facts which the court faced in Nateman v. Greenbaum, 582 So. 2d 643 (Fla. 3d DCA 1991), rev. dismissed, 591 So. 2d 183 (Fla. 1991), and requires this Court to affirm the trial judge's denial of the motion for recusal. In Nateman, the petitioner/wife sought to preclude a judge from further hearing a family law trial based on the wife's allegation that the trial judge had an improper "tone and demeanor" and had relied on personal experiences to challenge the wife's testimony. In holding that judicial disqualification was not required, the Third District Court of Appeal, speaking through Judge Ferguson, first noted that "a 'judicial officer is the sum of his past' who is expected to be influenced by real life experiences." Id. [quoting In re Inquiry Concerning a Judge, 357 So. 2d 172, 178

(Fla. 1978)]. This Court stated that when a trial judge is sitting as the sole finder of fact, his role is not that of a passive observer. In this regard, the Third District cited to the case of In re J.P. Linahan, Inc., 138 F.2d 650, 653-54 (2d Cir. 1943), wherein the court opined as follows:

> [B]ecause his fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is [the judge's] duty, while listening to and watching them, to form attitudes towards them. He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. ... He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not make childlike innocence. If the judge did not form judgments of the actors in those courthouse dramas called trials, he could never render decisions.

Furthermore, the Third District in Nateman, supra, significantly reiterated that a trial judge's disbelief in a witness's testimony, while perhaps at some point reflecting negatively on a judge's temperament, is ordinarily no basis for disqualification. In support of this proposition, the court cited two analogous cases - Mobil v. Trask, 463 So. 2d 389 (Fla. 1st DCA 1985) (a judge is not required to abstain from forming mental impressions and opinions during the cause of a proceeding), and Deauville Realty Co. v. Tobin, 120 So. 2d 198 (Fla. 3d DCA 1960) (the formation of a prejudice by a judge

during and as a result of a party's testimony in a trial does not operate to disqualify the judge in that case). See also Brown v. Pate, 577 So. 2d 645, 647 (Fla. 1st DCA 1991) (trial court's expression of "grave concern" concerning father's visitation of children was not basis for disqualification, but rather was permissible comment on her mental impressions and opinion formed during course of presentation of evidence). In Nateman, Judge Ferguson aptly and perceptively concluded as follows:

> Disqualifying a judge because his examination of a witness on relevant matters gives a clue as to how he may be inclined to rule at the end of the evidence would wreak administrative havoc in the circuit court by inviting mid-hearing motions for recusal. The unacceptable alternative is a blanket rule against a judge's examination of parties or witnesses.

Id., 582 So. 2d at 644-45.

Like the trial judges in Nateman and In re J.P. Linahan, Inc., supra, the trial judge here was sitting as the sole finder of fact in her capacity as sentencer. In carrying out that function, it was the trial judge's obligation to evaluate the credibility of the witnesses presented by either party. Certainly, it was the trial court's responsibility to listen to and form an opinion of the witnesses' testimony presented during the sentencing hearing. Simply because the judge verbalized her opinion as to one statement made by a defense witness did not provide a legal basis for the judge's disqualification. Similarly, the fact that the judge asked Ms.

Hubbard one question concerning her knowledge of Respondent's prior drug treatment was not reasonably sufficience to create a well-founded fear supporting disqualfication. Certainly, the qustion propounded by the judge undoubtedly helped the court understand the extent of Hubbard's knowledge of Respondent.

In his motion for recusal as well as his initial brief, Respondent paints the trial court's comment to Ms. Hubbard with a very broad brush. Contrary to Respondent's argument that the trial judge's comment placed him on notice that any attempt to present mitigating evidence would be futile, the record reveals that the trial judge liberally allowed the defense an opportunity to present evidence and testimony in mitigation, including but not limited to evidence concerning Respondent's medical condition. (T 427-483). Indeed, after making the statement to Ms. Hubbard, the trial judge assured defense counsel that she was not yet passing judgment regarding the issue of sentencing. (T 441). Additionally, the record does not reflect that the judge was offended by Hubbard's entire testimony, as Respondent argues, but rather merely reflects that the trial court was offended only by Hubbard's singular statement that the system had failed Appellant. Moreover, Respondent's allegation that the trial judge had an "open hostility to the testimony" of Hubbard is simply not factually supported by a careful review of the trial judge's brief remarks at the sentencing hearing concerning Hubbard's statement. (T 440-441). To be sure, this allegation is merely Respondent's subjective opinion, not a fact,

which is not reasonably sufficient to create a well-founded fear supporting the disqualification of the trial judge. See City of Palatka v. Frederick, 128 Fla. 366, 174 So. 826 (1937) (in affidavit to disqualify trial judge, allegations that judge continuously interrupted counsel in a "hostile manner" and permitted opposing counsel to break in and "heckle" counsel, quoted terms were not statements of fact but opinions of affiants, which were insufficient to warrant disqualification); Kowalski v. Boyles, 557 So. 2d 885, 886 (Fla. 5th DCA 1990) (subjective fears of plaintiffs that they would not receive a fair trial and that judge had predetermined merits were not reasonably sufficient to create a well-founded fear requiring disqualification of judge).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Petitioner respectfully requests that this Honorable Court ACCEPT discretionary jurisdiction in this cause, answer the certified question in the negative, and reinstate the trial court's sentence. In all other respects, this Court should approve of the decision of the Third District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

DOUGLAS J. GLAID
Assistant Attorney General
Florida Bar #249475
4000 Hollywood Blvd.
Suite 505S
Hollywood, Florida 33021
(305) 985-4482

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief on the Merits has been furnished by U.S. Mail to: Rosa C. Figarola, Assistant Public Defender, Counsel for Appellant, 401 N.W. Second Avenue, Miami, Florida 33128, this 4th day of August, 1995.

DOUGLAS J. GLAID
Assistant Attorney General