w/app

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
APR 23 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

KEVIN W. PENDER and,
CLARENCE PENDER,
Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 89,619

5th D.C.A. Case Nos. 93-1832
93-1942

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONERS BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904)252-3367

COUNSEL FOR PETITIONERS

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
THE TRIAL COURT DENIED A DEFENSE REQUEST FOR A RICHARDSON HEARING, AND THE RECORD ON APPEAL PROVIDES NO BASIS OF PROOF, BEYOND A REASONABLE DOUBT, THAT SAID ERROR WAS HARMLESS.	
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Schopp v. State 653 So. 2d 1016 (Fla. 1995)	4
Tarrant v. State 668 So.2d 223 (Fla. 4 DCA 1996)	4

IN THE SUPREME COURT OF THE STATE OF FLORIDA

KEVIN W. PENDER and,
CLARENCE PENDER,
Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 89,619

5th D.C.A. Case Nos. 93-1832
93-1942

STATEMENT OF THE CASE AND FACTS

In the trial court, the Petitioners were convicted of capital sexual battery, They took an appeal in the Fifth District Court, and on December **2,** 1994, the District Court issued an Opinion reversing said convictions, on the grounds that the State's discovery violation, (failure to disclose a colposcope photograph of the victim's sexual organ taken by a treating physician), could not be considered harmless error. See, Appendix to this Brief, (hereinafter "A), at Pp. 10-13) The decision of the Fifth District Court was founded upon a ruling of the Fourth District Court in Schopp v. State, 641 So.2d 141 (Fla. 4 DCA 1994). (A 11, 12) The Schopp case **was** then pending review in this Court, and this Court took discretionary review in the instant case at the State's petition. See, State v. Pender, Fla. S. Ct. Case # 85,042 This Court, on October 12, 1995, issued its Opinion in the instant case, and remanded this case to the Fifth District Court for a determination, in accordance with the Supreme Court's ruling in State v. Schopp, 653 So.2d 1016 (Fla. 1995), **as** to whether the State's discovery violation in the trial court in this case could **be** called harmless error. (A 14-17)

After briefs and oral argument in the Fifth District Court on remand from this Court, the District Court ordered supplementation of the record on appeal with the deposition of the State witness who took

the colposcope photograph at issue in this case. **(A 18)** In her deposition for defense counsel prior to trial, **(A 19-45),** Doctor Tokarski did not reveal the existence of the colposcope photograph.

On October 25, 1996, the Fifth District Court issued its second Opinion in this case, and found that the error complained of, (the State's discovery violation; i.e., the failure to disclose the colposcope photo), was harmless error. **(A 46,47)** The District Court found that "the fact that defense counsel did not avail himself of the opportunity, offered by the judge, to question Dr. Tokarski about the photograph confirms the unimportance of what it depicted under the facts of this case." **(A 47)** The District Court also found that the failure to produce the Photograph would "only have been harmful error if it could have negated the identity of the defendants [...] or if it could have helped impeach the child victim's credibility." **(A** 47)

Petitioners offer the following facts and/or proceedings in the trial court as being relevant to this appeal:

At trial below, when defense counsel alleged a discovery violation and requested a Richardson inquiry, the trial court and the prosecution acknowledged that the prosector had been aware of the existence of the photograph at issue, and that the State's witness who possessed the photo had been served with, but had refused to comply with a defense subpoena to produce the photo. See, Excerpt of trial transcript: **(A 4-7)** The trial court refused a specific request for inquiry, outside the presence of the jury, to determine the prejudicial effect of the witness' refusal to produce the photograph. **(A** 4,6,8) **As** a part of the side-bar discussion, the trial court found that it did not have enough factslevidence upon which to make a decision as to whether the defendant's trial preparation had been prejudiced by the State's failure to make timely disclosure, but still refused to conduct **a** Richardson inquiry. **(A 6,8)**

SUMMARY OF ARGUMENT

The facts of the instant case are in no way similar to those in Schopp, where the this Court found that record facts proved beyond a reasonable doubt that the State's discovery violation had not prejudiced the defense. In the instant case, the District Court made a finding regarding harmless error, despite the trial court's specific acknowledgment, on record, that without conducting the Richardson inquiry which the defense had requested, and which the trial court refused to conduct, the trial court could not determine whether the defense had been prejudiced. The Opinion of the District Court on remand from this Court thus ignores record evidence that the trial court had no basis to make a finding as to whether the defense had been prejudiced, and ignores record evidence that the defense was in fact prejudiced in its trial preparation. Given such a record, there is no way the State could meet its burden to prove, beyond a reasonable doubt, that the error in this case was harmless, and there was therefore no basis for the District Court's finding that the error complained of was harmless.

ARGUMENT

THE TRIAL COURT DENIED A DEFENSE REQUEST FOR A RICHARDSON HEARING, AND THE RECORD ON APPEAL PROVIDES NO BASIS OF PROOF, BEYOND A REASONABLE DOUBT, THAT SAID ERROR WAS HARMLESS.

In Schopp v. State, 653 So. 2d 1016 (Fla. 1995), this Court ruled that the record upon which its finding was based proved harmless error beyond a reasonable doubt, as did the specific finding by the District Court that beyond question, Schopp had not been prejudiced by the State's discovery violation. This Court also noted that circumstances such as those in Schopp, (where the record clearly showed harmless error), would be the exception, not the rule. The instant case demonstrates the rule, not an exception.

Most important now, is the principle set forth in this Court's Schopp Opinion, which dictates that the analysis in determining harmless error with regard to discovery violations, the only question is the effect upon trial preparation, ***not the potential impact of the undisclosed material on the jury***. See, Schopp, at 1019; and Tarrant v. State, 668 So.2d 223 (Fla. 4 DCA 1996) Moreover, in consideration of the harmless error question, the reviewing court ***must*** account for ***every conceivable course of action*** that trial counsel might have taken in preparing for trial, had the State made timely disclosure. Schopp, at 1020

When these factors are weighed, a finding of harmless error can be entered only if the record shows, ***beyond a reasonable doubt*** that trial preparation was not prejudiced. The latest Opinion from the District Court shows not only that the District Court conducted an improper analysis under Schopp, but also shows that the District Court based its finding on assumptions rather than facts, while it overlooked ***record evidence*** that the trial court's refusal to conduct a "Richardson hearing" could not have been harmless error in this case.

The District Court's conclusion that the error here was harmless because "defense counsel did not avail himself of the opportunity, offered by the judge, to question Dr. Tokarski about the photograph" in question, is erroneous. Defense counsel asked for the opportunity to question the doctor ***outside the presence of the jury***, and the request was denied. (A 4,6,8) Thus, the ***record facts*** in this case show that defense counsel was denied the very procedure prescribed by law; i.e., a hearing outside the jury's presence to determine the effect of the State's discovery violation. It is malpractice, in a capital case, for a defense attorney to conduct discovery of the testimony of a State witness in the presence of the jury. That is why courts are permitted to sanction discovery violations; i.e., so that discovery will be conducted properly, and so that the State can be penalized for its violations. Petitioners submit that contrary to the District Court's assumption, the decision of defense counsel to decline to ask questions in front of the jury for which he did not know the answers does not show that defense counsel found the photo "unimportant". Rather, it demonstrates the huge significance of the colposcope photo, and the corresponding effect on defense trial preparation that resulted from the State's failure to meet its discovery obligation.

In addition, other ***record facts*** show that defense trial preparation was adversely affected. That is, defense counsel stated that had he been given a copy of the photograph, he could have consulted his own expert. (A 8) That is certainly a reasonable and "conceivable course of action" that defense counsel would have had available had the State made timely disclosure. Unlike the defense in Tarrant, supra, the defense in the instant case was denied the opportunity for additional time and investigation of the previously undisclosed material. *Id.*, at 226 Thus, under a proper Schopp analysis, a finding of harmless error is precluded, because it cannot be said that the record in this case shows beyond a reasonable doubt that defense trial preparation was not hampered.

The District Court's Opinion in this case, in focusing on the presumed potential effect of the subject photo on the jury, rather than on defense trial preparation, where the focus should have been, overlooked

the conduct of the State Attorney, as well as the ***record findings*** of the trial judge. It is beyond question, because the State's Attorney said so on record, that Dr. Tokarski asked the prosecutor, one week before trial, if she needed to bring the photograph to court. (A 4) It is therefore beyond question that at least one week before trial, the State knew the photograph existed, and did not notify the defense. We also know now that the doctor never disclosed the existence of the photo in her deposition by the defense, because a copy of the deposition is now on file with the District Court. (A 21-45) The trial court recognized that the State had completely ignored its discovery obligation by knowingly failing to disclose the existence of the photograph. (A 5,7,8) Moreover, the trial court stated, ***as a matter of record,*** that in the absence of the photograph, (i.e., without a Richardson hearing), it ***could not make a determination*** as to how the State's failure to disclose the photograph had prejudiced the defense. (A 6) If the trial court could make no determination without a Richardson hearing, then certainly the State, on appeal, did not meet its burden to show ***beyond a reasonable doubt*** that the defense had not been prejudiced. That is, without knowing what the doctor found, and what she discussed with the State about the colposcopy photo, it is impossible, without total conjecture, to determine how the defense would have prepared its case once proper disclosure had been made.

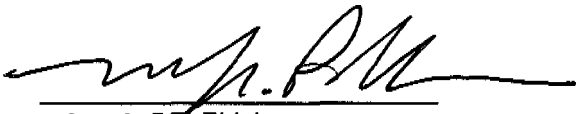
The District Court's Opinion states that it was established through the testimony of the doctor that the child's hymen was intact, and that therefore, the colposcope photo would not have been useful in impeaching the victim's testimony. This overlooks the fact that a defense expert, having reviewed the photograph, might have concluded that the "scarring" purported by the State's witness to be evident in the photo, (A 1-3), was not scarring at all. Regardless of what the defense expert may have concluded had the State not deprived the defense of such trial preparation, it is clear that the State's discovery violation materially altered the defendant's trial preparation. Again, under Schopp, this means the error was not harmless.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Petitioner respectfully requests that the Florida Supreme Court affirm the ruling of the District Court in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

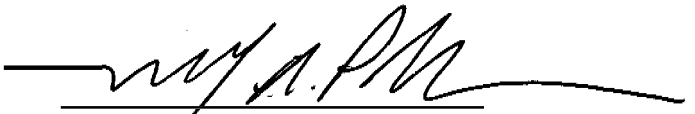


NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 9041252-3367

COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Kevin W. Pender, Inmate #140449, Hardee Correctional Institute, Route 2, Box 200, Bowling Green, FL 33834 and Clarence P. Pender, Inmate #334268, Hardee Correctional Institute, Route 2, Box 200, Bowling Green, FL 33834 on this 21st day of April, 1997.



NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF THE STATE OF FLORIDA

KEVIN W. PENDER and,
CLARENCE PENDER,
Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 89,619

5th D.C.A. Case Nos. 93-1832
93-1942

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

APPENDIX TO
PETITIONERS BRIEF ON THE MERITS