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JUN 3 1997
CLERK, SUPREME COURT
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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

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

In addition to the argument and authorities presented in the Petitioner's initial brief on the merits, Petitioner offers the following argument:

Petitioner's counsel, in the brief on the merits, inadvertently requested the wrong relief in the Conclusion of said brief. Petitioners now ask that the ruling of the District Court be reversed by this Court, not affirmed.

The State's brief on the merits is largely an irrelevant discussion of issues already decided. That is, the Fifth District Court has twice found, as has this Court, that there was a discovery violation in this case, and that the trial court failed to adequately address that violation. Thus, the only question now before this Court is whether the District Court properly applied the harmless error analysis mandated by this Court, to the trial court's refusal to conduct a Richardson inquiry. On that issue, the State again offers argument as to factual issues; issues which have already been decided; issues that are irrelevant to the question before this Court. The State has not offered any legal authority to demonstrate that the harmless error analysis conducted by the District Court was a correct application of Schopp to the undisputed facts of this case.

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 the "Conclusion" of the merit brief, Petitioner's counsel inadvertently requested that the ruling of the District Court be "affirmed". That was an error. Petitioners seek this Court's reversal of the District Court's finding of harmless error in this case. On the merits, Petitioners offer the following argument and authorities:

The State's first claim is that there was a de facto, adequate Richardson inquiry in this case. (Respondent's Brief, Pg. 8) That claim is totally unfounded and devoid of merit. The District Court has twice ruled, and this Court has once previously ruled, that there was no Richardson inquiry in this case. If there had been one, (that is, had the trial court not refused to conduct one), this case would not be in the posture it is now.

The next claim made by the State is that there is no evidence the defense sought enforcement of the subpoena duces tecum issued to Dr. Tokarski, and "didn't bring the issue to the court's attention prior to trial." (Respondent's Brief, Pp. 9,10) This claim is also unsupported by the record, and is logically infirm. Dr. Tokarski did comply, in part, with the subpoena; i.e., she was deposed prior to trial. However, she failed to comply to the extent that she did not bring the colposcope photo, and did not inform the defense of its existence. The defense could hardly be expected to ask the doctor for a photograph that they did not know existed. The defense "brought the issue to the trial court's attention" when they first learned of the photograph's existence. The blame for the trial court's refusal to deal with the issue in the appropriate fashion, despite repeated requests by the defense, can hardly be laid at the defendant's doorstep. Which calls attention to perhaps the most outlandish claim in the State's entire brief.

It is asserted that the prosecutor "fully complied" with his discovery obligation, or, in the alternative, that any violation of the discovery rules was "inadvertent and trivial". (Respondent's Brief, Pp. 10-12) Here is what the State now calls either no violation, or a trivial violation at most: In a capital sexual battery case, the prosecutor learns, one week before trial, of a photograph taken by his own expert witness. The photograph is, in the witness' own words, an integral part of her examination of the victim and the formation of the expert opinion that she will offer against the accused. The prosecutor not only fails to inform the defense of said photograph, but apparently tells the witness that she need not bring it to court when she is called to testify, because he, (the prosecutor), has unilaterally determined the photo will not be helpful to the defense. To call such conduct inadvertent and trivial is an affront to all attorneys, officers of the court, who conduct themselves within the rules of ethics and procedure. That was not an inadvertent omission, it was deliberate; and it was far from trivial. The prosecutor made a very telling comment, when he said he did not tell the doctor not to bring the photograph to court. See, Appendix to Petitioner's jurisdictional and merit briefs, at Pg. 5 That means that while he did not tell the doctor to withhold the photograph, the prosecutor also did not tell the doctor, as was his obligation, to immediately turn it over to the prosecutor for inspection by the defense. That is, the prosecutor was not even certain if the doctor had the photograph with her when she appeared for trial. If the prosecutor had told the doctor to bring it to court, and had informed the defense of the photograph's existence, he would have been certain that the doctor had the photograph with her. The record does not reveal whether she in fact brought it to court. (A 4,6,7), but one thing is certain, the prosecutor said nothing to the defense or to the doctor that would have lead to disclosure of the photograph, The prosecutor opined that in any event, the photo would have been of no use to the defense. The prosecutor was immediately admonished by the trial court and informed that he had been obliqated by the rules of discovery to make the existence of that photograph known to the defendant's counsel, and that the State is not permitted to edit discovery

material in accordance with what it deems to be relevant.' (A 4,5) The State would now have this Court believe it is not only permissible, but within the bounds of ethics, for prosecutors to knowingly refrain from instructing expert witnesses to turn over materials produced and relied upon by experts and the prosecution in preparation for trial. The State's position is not only untenable, as this Court and the District Court have already concluded, but also demonstrates total disregard for the rules of ethics and fair play. In any event, the State's argument is irrelevant. That is, it is already established that there was a discovery violation, and it is already established that the trial court failed to adequately address and/or remedy that violation. Therefore, the only question is whether the District Court, in its most recent decision, has properly concluded that the record facts show beyond a reasonable doubt that the defendant's trial preparation was not adversely affected. The State has not even addressed that issue, let alone met its burden of proof.

The State claims, without any reference to the record, that "the defense "unquestionably knew about the 'undisclosed' evidence". (Respondent's brief, Pg. 15) This claim is refuted by the established fact that the doctor did not mention the photograph when deposed, and by the fact that the prosecutor clearly failed to instruct her to bring it to court one week later, for trial[2]. What the State now presumes, and which no one, including the State, has heretofore suggested, is that defense counsel was lying to the trial court when he stated he had never before been told about the photograph. What defense counsel meant when he said he had asked specifically for the photo, is that he had issued a subpoena duces tecum. That type of subpoena specifically requests that the witness bring to a deposition any

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[1] The trial court was correct. State v. Coney, 294 So.2d 82,87 (Fla. 1973); Hickey v. State, 484 So.2d 1271,1273 (Fla. 5 DCA 1986)

[2] The prosecutor "did not tell [the doctor] not to turn [the photo] over to" [the defense], but he also failed to immediately take possession of it and make arrangements to provide it to the defense for inspectoin, as he was obligated to do. (A 4,5)

documents and/or papers the witness might have, He was not saying he specifically requested the photograph; he could not have, because at the time he did not know it existed. (A 4,5) But he certainly issued the subpoena, and the doctor gave her deposition, **but** never mentioned the photo in question. Therefore, the State's claim, made without any evidence to support it, that defense counsel deliberately misled the trial court as to his knowledge of the existence of that photograph, is without merit. And, here again, the State's argument, albeit unfounded, ignores the fact that the discovery violation is already an established fact in this case.

Once again, because the State's discovery violation and the trial court's failure to adequately address it are beyond question, the only issue now is whether the District Court properly applied the Schopp[3] harmless error analysis in this case. The only argument offered by the State to address that specific question, is the assertion that the colposcope photo was not introduced at trial, and was, in any event, a "tangential part of the testimony of a witness who added little to the" issue at trial; i.e., the identity of the perpetrator. (Respondent's brief, Pg. 15) This is the same analysis applied by the District Court, and it demonstrates that neither the State nor the District Court have properly applied Schopp to the facts of this case. The District Court's analysis is entirely based upon the purported effect of the undisclosed evidence upon the fact-finder. Such an analysis in not only speculative, it is irrelevant, because it totally ignores the analysis mandated by Schopp; i.e., a focus upon the effect of the discovery violation upon the defendant's trial preparation. **As** shown in the Petitioner's merit brief, there was an unquestionable effect on the defendants' trial preparation, demonstrated by the record, because, as their counsel stated, they were precluded from consulting other experts in order to analyze the photograph. (A 8) If the photograph was an integral part of the trial preparation for the State and its expert, it would unquestionably

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State v. Schopp, 653 So.2d 1016,1019(Fla. 1995); Tarrant v. State, 668 So.2d 223 (Fla. 4 DCA 1996)

have been equally, if not more significant, to the defendant's trial preparation. That **is** proof beyond a reasonable doubt that the defendant's trial preparation was adversely affected, and any speculation as to what the photograph might have meant to the jury, is, according to Schopp, irrelevant.

Just **as** did the District Court, the State now suggests that the opportunity to question Doctor Tokarski about the photograph in the presence of the jury somehow eliminated the effect of the failure to disclose the photograph. That argument is patently infirm, because it is founded upon the incomprehensible notion that defense counsel can and should conduct the depositions of prosecution witnesses with the jury present. Such a procedure would not only be fraught with peril for the accused, but the prospect of doing **so** also dramatically illustrates the necessity and reason for the existence of the discovery rules. First of all, without having consulted his own expert about the photograph, defense counsel would not know what to ask Dr. Tokarski. Thus, the so-called "opportunity offered by the trial court was nothing of the kind. That is why discovery is conducted prior to trial; and that is why violations of the rules require sanctions and remedies. Second, even assuming for the sake of argument that the defense knew what questions to ask Dr. Tokarski about the photograph, the defense was entitled to have the questions asked and answered without the jury present, to then cross-examine the doctor after consultation with a defense expert, and to offer a defense witness in rebuttal. The defense was not given those "opportunities" in this case, and that is why the ruling of the Fifth District Court constitutes an incorrect harmless error analysis. The defense was literally robbed of its opportunity to effectively confront a State expert witness, because the prosecutor, based solely upon his opinion that the evidence was irrelevant, deliberately interfered with the defense team's access to evidence. That core underlying fact cannot be ignored, although it appears the District Court and the State have chosen to do just that. Petitioners ask this Court to inform trial courts, prosecutors and defense lawyers everywhere that such conduct will not be tolerated.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Petitioners respectfully request that the Florida Supreme Court reverse the District Court's finding of harmless error in this case.

Respectfully submitted,

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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 2ND day of June, 1997.

NOEL A. PELELLA
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