ORIGINAL

IN THE SUPREME COURT OF FLORIDA

RICHARD NAGEL

Petitioner,

v.

CASE NO. SC96900
Lower Tribunal No.:4D98-4144

STATE OF FLORIDA,

Respondent.

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

CHARLES W. MUSGROVE, ESQUIRE
Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, FL. 33406
561 / 968-8799 / Fla.Bar #095137

CERTIFICATE OF TYPE SIZE

Petitioner certifies that this brief uses 14PT Times New Roman .

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Circuit Court in and for Palm Beach County, Florida, and the Appellant in the District Court of Appeal , Fourth District. Respondent was the Prosecution in the Circuit Court and the Appellee in the District Court. The parties will be referred to as they appear before this Court.

The symbol "R" followed by a number will refer to the record on appeal.

The symbol "T" followed by a number will refer to the transcript of the trial.

STATEMENT OF THE CASE

Petitioner was charged with possession of Darvocet and with driving under the influence (R3), The jury acquitted him of drug possession but convicted him of DUI (R33, T417). He was sentenced to probation with jail time as a condition (R48). The jail portion was later modified (R49).

On appeal, the District Court of Appeal affirmed, citing Goodwin v. State, 721 So.2d 728 (Fla.4DCA 1998), rev.gr. 729 So,2d 391 (Fla.1998), and Doherty v. State, 726 S0.2d 837 at 838 (Fla,4DCA 1999) , Nagel v, State, 739 So.2d 1242 (Fla.4DCA 1999).

Petitioner timely sought rehearing and was denied. Petitioner filed his notice to invoke discretionary jurisdiction on October 22. This Court accepted jurisdiction on January 28, 2000, and dispensed with oral argument.

STATEMENT OF THE FACTS

At about 2:30 A.M. on April 12, 1998, Officer Crowell of the Lake Park police department saw Petitioner at the Dunkin Donuts (T68-69), Crowell thought he saw Petitioner's head in his food (T70). He did not think it necessary to help Petitioner at the time (T112), but he claimed he asked the cashier to stop Petitioner from driving away (T70).

Petitioner had been up since 4:30 A.M. the day before. He was called back to work that night for a 6 to 7 hour repair job (T220, 222, 224-225, 227). Though he was bone tired afterward (T233), he denied that his face was ever in his food, or that anyone at the restaurant asked him not to drive (T237-239).

As Crowell went by Dunkin Donuts again, Petitioner was driving away in his silver pickup truck. Crowell said he made a wide turn out of the parking lot (T71-72), but Petitioner said it was no wider than usual (T243). Crowell claimed he drove on the wrong side of the road and was swerving (T74-75). Petitioner denied that he was swerving, but he admitted he did not keep to the right because he was avoiding dips (T244). Crowell refused to admit there were any rough spots in the road, saying it depended on the definition of rough spots (T117).

Petitioner stopped in satisfactory fashion at a stop sign (T115). His speed was satisfactory too (T116). After another wide turn, Crowell pulled him over (T77). He got out of the truck and walked toward Crowell's vehicle (T248), though Crowell seemed reluctant to admit it (T123).

Crowell testified that Petitioner stumbled and staggered as he went toward the police car (T8l). Officer Tawil, who backed Crowell up (T15) thought Petitioner's feet seemed heavy (T31). Petitioner testified there was no trouble with his walking at any time (T240, 247). Crowell said Petitioner did so badly on the walk and turn and heel to toe tests that he was not asked to do any others (T83, 90-92). Petitioner said he was never asked to perform any roadside sobriety tests (T251-252).

Crowell, Tawil and Forteza, an x-ray technician who videotaped Petitioner over two hours later (T161,171), declared Petitioner's eyes bloodshot and his speech slurred (T17, 82, 93, 162-163, 167). Crowell acknowledged that he did not know how Petitioner ordinarily sounded (T93).

Crowell and Tawil testified that Petitioner's breath smelled of an unknown alcohol (T16-17, 82). Petitioner testified that he'd only had one drink, a rum and coke in a little plastic cup at 7:30 P.M. (T229, 232). As he left Dunkin Donuts, he used mouthwash because his food left a bad taste (T240). Police found mouthwash in his truck (T86).

Petitioner refused the request for a breath test. He felt like he was being railroaded, and he had read and heard bad things about the machine (T276-278, 312-313, 325).

All three officers considered Petitioner impaired (T46, 107, 163), but Crowell told him he was arrested for suspicion of DUI and wrote it that way in the probable cause affidavit (T138, 139, 266). Petitioner was sure he was not impaired (T280).

The videotape of Petitioner was made part of the record on appeal. This Court is urged to view it. If does so, it will find:

1. No sign of swaying or of any alcoholic influence. When technician Forteza claimed he saw swaying on the tape (T163), he put his own credibility in question.

2. Less contradictions than the prosecutor argued during trial. Petitioner stated on the tape that a crewman brought him the rum and coke from the Crab Pot. He made it clear that he did not drink it at the restaurant. That did not stop the prosecutor from arguing that he contradicted himself (T384).

3. He told police he ate something at Dunkin Donuts. The contradiction the State argued at trial (T384) about his last food was unfounded.

4. He may have been unsure of the date (T384), but he was sure it was Saturday and said so. It was Saturday when he went back in to work through the night.

SUMMARY OF ARGUMENT

This case turned on credibility of the witnesses. The arresting officer and his colleagues thought Petitioner was impaired. Petitioner denied it. The State was allowed to tilt the scales in its favor improperly. It purported to impeach Petitioner for attempting to influence the arresting officer to give him a break. It had no evidence that he did so, only prejudicial suggestion and innuendo.

It was tantamount to accusing Petitioner of an uncharged crime. Such an accusation is presumed harmful. When the District Court affirmed his conviction, it was based on an erroneous view of the burden of demonstrating the presence or absence of prejudice. This Court should quash the decision of the District Court and either remand for reconsideration in light of the correct standard or do what the District Court should have done and order a new trial.

POINT INVOLVED

WHETHER OF COURT'S ERROR IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT FRIENDS SOUGHT HELP WITH PETITIONER'S CASE TO IMPEACH HIM WITHOUT PROVING HE ASKED THEM TO DO SO WAS SHOWN TO BE HARMLESS.

ARGUMENT

THE COURT'S ERROR IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT FRIENDS SOUGHT HELP WITH PETITIONER'S CASE TO IMPEACH HIM WITHOUT PROVING HE ASKED THEM TO DO SO WAS NOT SHOWN TO BE HARMLESS.

The crux of this case at trial was who the jury was going to believe. The State presented enough evidence to convict if believed, but there were flaws. Crowell's reluctance to admit Petitioner walked toward his vehicle and to admit there were dips in the road suggested an interest in the outcome and a willingness to color his testimony. His use of the phrase "suspicion of DUI" casts doubt on his alleged certainty that Petitioner was impaired. Both officers testified Petitioner stopped his truck straddling several marked parking spaces, but neither one moved it (T24, 25, 41, 80, 119).[1] Petitioner said he parked within a single space (T247), which would explain failure of the officers to move the truck.

Petitioner also presented sufficient evidence, if believed, to be acquitted. His eyes might well be bloodshot and his gait labored after being up from 4:30 A.M. until 3:30 A.M. whether he consumed alcohol or not. Mouthwash is well-known to create an alcoholic smell on the breath.

The prosecutor acknowledged that the issue was who the jury believed (T369, 377). She tried her best to prejudice the jury in her cross-examination. She asked Petitioner if Crowell was lying, but defense objection was correctly sustained (T292), see Boatwright v. State, 452 So.2d 666 (Fla.4DCA 1984). She tried to get Petitioner to say he "made that one up, too" (T296). She did succeed in planting the suggestion that Petitioner tried to tamper with the case against him.

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[1]Crowell later read in his report that he parked and locked the truck (T149).

Over defense objection, she was allowed to ask Petitioner if he had friends at the Riviera Beach police department call Lake Park police to get the charges dropped. Petitioner denied making any such effort. He knew Riviera Beach officers who dropped in where he worked, and had discussed his case with them, but was unaware of any calls (T315-316).

Under the guise of impeachment, she then recalled Officer Crowell to say he'd been called by a Riviera Beach officer and asked to cut Petitioner a break. Petitioner's objection was overruled, even though the Judge seemed to perceive that there was no evidence Petitioner asked the officer to call, or even knew he did so.

The suggestion that Petitioner attempted to influence the prosecution or at least its chief witness was insidious. As the trial Judge noted, it suggests a guilty mind (T315). Tampering with a witness is a crime, Section 914.22 Fla. Stat. It amounts to obstruction of justice. Some consider it grounds for impeachment. If there were competent evidence that Petitioner put police friends up to making the call, it would have been powerful evidence for the State. However, there was no competent evidence, only suggestion and innuendo.

The State made no effort on appeal to defend the actions of its prosecutor, and rightly so. There is no basis in the law for allowing evidence of efforts to influence the case or the witness to be used against the accused absent proof that the efforts are attributable to him. See Freeman v. State, 538 So.2d 936 at 937 (Fla.2DCA 1989), Coleman v. State, 335 So.2d 364 (Fla.4DCA 1976), Manuel v. State, 524 So.2d 734 (Fla. 1DCA 1988) , and Duke v. State, 142 So. 886 (Fla. 1932). It was error to allow the State to plant the suggestion and then to shore it up with evidence of a phone call which could not be attributed to Petitioner.

On appeal, this case turned on the burden of demonstrating the presence or absence of prejudice. The State argued that Petitioner had the burden to prove prejudice under decisions such as Goodwin v. State, supra, and Copertino v. State, 726 So.2d 330 (Fla. 4DCA 1999). Petitioner argued that State v. DiGiulio, 491So.2d 1129 (Fla. 1986) controlled, requiring the State to prove the error did not affect the outcome. The District Court ruled with the State, citing Goodwin, supra, in its affirmance.

This Court has now resolved the conflict in decisions. In Goodwin v. State, Case No. 93,491, Opinion of this Court filed December 16, 1999, 24 Fla.L.Weekly S583, this Court held that the DiGiulio test continues to apply to errors whether constitutional or not. Thus the Fourth District applied the wrong standard, and its affirmance should be quashed.

Evidence suggesting the accused may have committed another crime is presumed prejudicial. It may come in the form of collateral crime evidence, as in the companion case in Goodwin. Herbert Jones' affirmance was quashed with directions to reconsider. It may come in the form of a reference to the accused being on probation, as in Clark v. State, 742 So.2d 824 (Fla. 2DCA 1999), where a new trial was ordered. The Fourth District applied the rule in Madison v. State, 726 So.2d 835 (Fla. 4DCA 1999), saying:

> "We also reject the State's argument that the admission of the offer of a bribe was harmless. The erroneous admission in evidence of other uncharged criminal offenses can amount to a denial of a defendant's 'constitutional right to a fair trial.' Thompson v. State, 492 S0.2d 203, 204 (Fla. L986). This type of evidence is presumed harmful. Gore v. State, 719 So..2d 1197, 23 Fla.L.Weekly §518 (Fla. L998); Holland v. State, 636 So.2d 1289 (Fla. 1994)." (emphasis added) (726 So.2d at 836).

Petitioner submits that the presumption of prejudice should prevail here and requires a new trial. The last words the jurors heard from the witness stand were those improperly suggesting other criminal activity. The State has not and cannot demonstrate beyond a reasonable doubt that this error did not contribute to the convictions. The case is too close and credibility of the witnesses too critical.

This Court is urged to order a new trial as the District Court should have. At a minimum it should remand the case for reconsideration as it did with Jones in Goodwin.

CONCLUSION

Because the District Court applied the wrong burden of demonstrating prejudice to evidence presumed prejudicial, this Court should quash the decision of the District Court and order a new trial or remand for reconsideration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Joseph A. Tringali, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, FL 33401, by U.S. Mail this 2nd day of March, 2000.

Charles W. Musgrove

CHARLES W. MUSGROVE, ESQUIRE
2328 So. Congress Avenue
Congress Park - Suite 1D
West Palm Beach, Florida 33406
561 / 968-8799 / Florida Bar No. 095137

Counsel for Petitioner