ORIGINAL

IN THE SUPREME COURT OF FLORIDA,,

RICHARD NAGEL

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE No. SC96900

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PETITIONER'S REPLY BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE

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

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STATEMENT OF THE FACTS

Petitioner reasserts his statement of the facts, which he submits accurately describes the State's evidence and the contradictory evidence, primarily from his own testimony.

The State denies that its officer was reluctant to admit Petitioner was walking back to the police car after exiting his vehicle, but the officer twice refused to say so - once at T121, lines 16-20, and again at T123, lines 13-14 - before he finally admitted that was the direction of the police car.

POINT INVOLVED

WHETHER 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 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.

Despite the State's recitation of the evidence in its favor at trial, the decisive issue in this case was credibility of Petitioner and the police officers. If Petitioner was believed, the jury could and should have found him not guilty.

The State has yet to defend the action of its prosecutor in offering a call from one officer to another as alleged impeachment without proving Petitioner caused the call. It argued harmless error below, and asserted that Petitioner had the burden to prove the error harmful.

Now the State modestly argues that its effort in District Court did not lead the District Court astray. It expresses confidence that the District Court applied the correct standard.

The evidence is to the contrary. When the District Court cited its own decision in Goodwin v. State, 721 So.2d 728,729 (Fla.4DCA 1998), rev. granted, 729 So. 2d 391 (Fla. 1999) and Doherty v. State, 726 So.2d 837,839 (Fla.4DCA 1999), it made it clear that the erroneous standard of those cases was applied.

If the Fourth District was convinced beyond a reasonable doubt that the error was harmless, it need not and surely would not have cited to its rulings on the burden of proving error harmful.

The State also seems ready to try to show the error was harmless. It cites to its three experienced police witnesses who thought Petitioner impaired. If this is an "overwhelming evidence" argument, it violates State v. DiGiulio, 491 So.2d 1129 at 1139 (Fla. 1986):

> "The test is not a sufficiency-of-the evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing , or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict." (emphasis added)

The fact is that none of this "evidence " was uncontradicted and/or unexplained.

The State also argues that because the evidence does not truly impeach Petitioner, it was not grounds for reversal. The State's trial attorney had a better idea of the effect of this evidence. She went to great lengths to get it in under the guise of impeachment. She laid the foundation on cross-examination by asking if Petitioner had his friends call. The last thing the jurors heard from the stand was the claim that the call was made.

When attempts at impeachment for tampering with a witness or the evidence fail to lead back to the accused, the innuendo remains. It has lead to reversals in cases such as Madison v. State, 726 So.2d 835 (Fla.4DCA 1999), Freeman v. State, 538 So.2d 936 (Fla.2DCA 1989), Coleman v. State, 335 So.2d 364 (Fla.4DCA 1976), Manuel v. State, 524 So.2d 734 (Fla.lDCA 1988) and Duke v. State, 142 So.886 (Fla. 1932). That the impeachment misses its target is grounds for a new trial, not for calling the error harmless.

CONCLUSION

Because credibility ofthe witnesses was the critical issue below, this Court cannot say the improper impeachment did not affect the outcome. This Court should order a new trial, or should remand to the District Court to reconsider in light of the proper standard of review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to CELIA A. TERENZIO, ESQUIRE, Assistant Attorney General, and JOSEPH A. TRINGALI, ESQUIRE, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, West Palm Beach, Florida, by U.S. Mail, this 19th day of April, 2000.

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