

IN THE SUPREME COURT OF FLORIDA

STEPHEN SCIPIO,

Appellant/Petitioner

Supreme Court Case #

Fifth DCA Case # 5D 02-2240

vs.

STATE OF FLORIDA,

Appellee/Respondent.

PETITIONER'S BRIEF ON JURISDICTION
(EXPRESS AND DIRECT CONFLICT)

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SEVENTH CIRCUIT

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STATEMENT OF THE CASE

The state filed a one-count Indictment charging Stephen Scipio with the first-degree premeditated murder of Ogard Smith. A 12-person jury in DeLand, Florida, (Seventh Judicial Circuit), found Scipio guilty as charged. The Honorable C. McFerrin Smith presided at trial, adjudicated Scipio guilty and sentenced him to life imprisonment without parole. The conviction and sentence were affirmed by the Fifth District Court of Appeal via written opinion, reported as ***Scipio v. State***, 29 FLW D276b (Fla. 5th DCA January 23, 2004) (Appendix A). Scipio's timely motion for rehearing was denied March 23, 2004. Scipio filed a timely Notice to Invoke this Court's discretionary jurisdiction on April 8, 2004. This brief on jurisdiction follows.

STATEMENT OF THE FACTS

The general facts of the offense are essentially that Ogard Smith was shot and killed while shooting pool early one morning at a bar in Daytona Beach, Florida. The state's theory was that Scipio murdered Smith to retaliate against Smith for testifying against a friend of Scipio's. There was no physical evidence connecting Scipio to the crime and, when questioned by police, no one claimed to have seen what happened. Four people later came forward and gave varying accounts of how Scipio shot Smith. *Scipio v. State*, 29 FLW D276 (Fla. 5th DCA January 23, 2004) (Appendix, p.2).

The issue for which review is sought involves the appellate court's treatment of a state discovery violation. On direct appeal, noting that this is "the type of 'dirty pool' that . . . the discovery rules were designed to prevent," the appellate court found a state discovery violation described as follows:

[T]he state actively procured the defense witness's recantation of his earlier deposition testimony, knowing that defense counsel intended to rely on that deposition. The recantation was obtained minutes before the trial and defense counsel was expressly excluded from the state's interview with the witness. Nor was the defense informed of Burch's recantation or permitted to question him, prior to the trial. Thus, defense was completely surprised by Burch's trial testimony.

(Appendix, p.5)

As in *Pender v. State*, 700 So.2d 663 (Fla. 1997), conflict jurisdiction exists due to misapplication of the harmless error analysis by the Fifth District Court of Appeal. Though identifying the correct analysis mandated by *State v. Shopp*, 653 So.2d 1016 (Fla. 1995), the court failed to apply it and, as it did in *Pender*, instead attempted to discern the substantive effect of the testimony as follows:

Had the defense known about the witness' change in his testimony, its trial strategy could only have been one of two things. One, it would not have called the witness. Clearly the outcome of this case would not have been affected given the multiple eyewitness testimonies concerning Scipio's shooting Smith inside the Inn. Or second, the defense would have called the witness and sought to impeach him, to present the jury with his prior testimony. That is, in effect, what happened in this case, which if anything, was more favorable to Scipio than not having called the witness.

(Appendix, p.6) The court reasoned that the discovery violation did not prejudice this defendant because of "overwhelming" evidence:

Although we conclude there was no reasonable doubt that the defense was not procedurally prejudiced by the discovery violating (sic) in this case, we warn prosecutors against failing to comply with the Florida Criminal Discovery Rules. They are intended to prevent surprise by either side. In a different case where the evidence is less overwhelming, or a recanting witness more material, we would be compelled to reverse for a new trial.

(Appendix, p.7)

SUMMARY OF ARGUMENT

The harmless error analysis of the Fifth District Court of Appeal contradicts *Schopp*. Just as it did in *Pender*, after identifying the proper legal analysis under *Schopp*, the court misapplied it by performing a substantive analysis of the evidence of the defendant's guilt rather than considering what procedural prejudice was caused by the discovery violation. In finding the error harmless due to "overwhelming" evidence, the holding contradicts *Schopp* by not reversing due to procedural prejudice caused by the discovery violation. The holding also contradicts *Williams v. State*, 28 FLW S853 (Fla. December 12, 2003) because the appellate court is substituting its view of the credibility of witnesses for that of a jury.

Respectfully, the continued confusion of this district court as to what constitutes harmless error requires correction to avoid further erroneous findings of "harmless" error concealed by Per Curiam: Affirmed decisions. Since intentional discovery violations are no longer per se reversible, the opinion stands for the premise that unethical prosecutors should wait until the morning of trial to influence defense witnesses so that the risk of reversible error is minimized if the discovery violation is revealed at trial.

ARGUMENT

ISSUE: DOES A HARMLESS ERROR ANALYSIS ASSESSING THE SUBSTANTIVE EFFECT THE EVIDENCE HAD ON A JURY, INSTEAD OF THE POSSIBLE AFFECT THE DISCOVERY VIOLATION HAD ON TRIAL STRATEGY, CONTRAVENE THE ANALYSIS REQUIRED BY SCHOPP V. STATE?

State v. Schopp, 653 So.2d 1016 (Fla. 1995) clearly sets forth the legal analysis appellate courts must use to analyze discovery violations. The appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. The defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial strategy would have been materially different had the violation not occurred. Trial strategy should be considered materially different if it reasonably could have benefited the defendant. In making this determination every conceivable course of action must be considered. *Schopp*, 653 So.2d at 1020-21 (underlining added).

Just as it did in *Pender*, this appellate court correctly identified the above analysis but then failed to apply it. The court again speculated about the substantive effect of the evidence rather instead of determining what affect the failure to disclose the changed testimony may have had on trial tactics and strategy. The court simplistically, myopically and erroneously reasoned:

Had the defense known about the witness' change in his testimony, its trial strategy could only have been one of two things. One, it would not have called the witness. Clearly *the outcome of this case* would not have

been affected given the multiple eyewitness testimonies concerning Scipio's shooting Smith inside the Inn. Or second, the defense would have called the witness and sought to impeach him, to present the jury with his prior testimony. That is, in effect, what happened in this case, which if anything, *was more favorable to Scipio* than not having called the witness.

(Appendix, p.6) (emphasis and underlining added).

The appellate court's conclusion that, given timely disclosure, the defense could have presented Burch is incorrect. Recanted testimony cannot be used substantively. *Bolin v. State*, 736 So.2d 1160, 1166 (Fla. 1999). Absent Burch's testimony, the defense would not have presented any witnesses and retained the opening and closing portions of closing argument in a case that hinged solely on the credibility of witnesses. *Schopp* mandates that all conceivable courses of action be analyzed to determine *procedural* prejudice, not substantive prejudice. Thus, the inquiry should include whether the discovery violation caused the defense to lose the first and last portions of closing argument. The significance of the opening and closing portions of closing argument in a case where credibility of witnesses is the main issue cannot be overstated. The loss of the benefit of opening and concluding segments of final argument is the type of procedural prejudice that makes intentional discovery violations, as occurred here, reversible error.

Using purely a substantive analysis, the court speculated that, had the prosecutor timely disclosed the recanted testimony, the “outcome of this case would not have been affected given the multiple eyewitness testimonies concerning Scipio’s shooting Smith” and, in closing, warned:

Although we conclude there was no reasonable doubt that the defense was not procedurally prejudiced by the discovery violating (sic) in this case, we warn prosecutors against failing to comply with the Florida Criminal Discovery Rules. They are intended to prevent surprise by either side. In a different case where the evidence is less overwhelming, or a recanting witness more material, we would be compelled to reverse for a new trial.

(Appendix, p.7) (emphasis and underlining added).

This reasoning contradicts *Schopp*, *supra*, and *Williams v. State*, 28 FLW S853 (Fla. December 12, 2003). The harmless error analysis “is not a sufficiency-of-the-evidence, a correct result, 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.” *Williams*, 28 FLW at S853. Appellate review of a transcript does not satisfy the entitlement to a fair jury trial. A trial does not have to be perfect, but it must be a fair forum so that jurors can reliably perform their critical role.

CONCLUSION

Discretionary review should be granted based on clear conflict caused by misapplication of this Court's holdings in *Pender v. State*, 700 So.2d 663 (Fla. 1997), *State v. Schopp*, 653 So.2d 1016 (Fla. 1995), and *Williams v. State*, 28 FLW S853, (Fla. December 12, 2003).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was sent by U.S. Mail to the Honorable Richard E. Doran, Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, this 15th day of April, 2004.

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CERTIFICATE OF FONT

I CERTIFY that the size and style of type used in this document is proportionally spaced 14 pt. Times New Roman.

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