IN THE SUPREME COURT OF FLORIDA

STEPHEN SCIPIO,

Appellant/Petitioner

Supreme Court Case # SCO4-647
Fifth DCA Case # 5D 02-2240

versus

STATE OF FLORIDA,

Appellee/Respondent
______________________________/

PETITIONER'S REPLY BRIEF

JAMES B. GIBSON
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SEVENTH CIRCUIT

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REPLY TO STATE'S CONTENTIONS THAT "THE INSTANT CLAIMS WERE NOT PRESERVED FOR REVIEW; NO DISCOVERY VIOLATION OCCURRED, AND EVEN IF IT DID ANY ERROR IS HARMLESS."

The State first contends that the discovery violation was not preserved for review. Petitioner respectfully disagrees. Burch's testimony revealed that, after defense counsel verified the content of Burch's anticipated testimony, Assistant State Attorney Davis approached Burch, asked him about the firearm, and then brought him into the State Attorney's Office. (T. Vol. IX, pp. 1234-1235). Once there, "He showed – I discussed with Mr. Davis that I would have to review the scene photos to determine whether or not there was a weapon. He produced the scene photos, we reviewed the scene photos and I saw that one of the Florida Department of Law Enforcement photos indicated that it was a pager, not a firearm." (T. Vol. IX, p.1236). It is undisputed that Assistant State Attorney Davis asked Burch "to review all the crime scene photographs" while in the State Attorney's Office. (T. Vol. IX, p.1242).

Defense counsel objected, stating, "Your Honor, I believe that the State Attorney knew that this witness had changed his testimony between the time I took his deposition, indeed, between the time that I talked to Mr. Burch outside the courtroom, and before he testified. Mr. Davis did not notify me of that change. That is a clear discovery violation." (T. Vol. IX, p.1250). The Court was

asked to impose sanctions against the State Attorney's Office based on the violation of the continuing duty to disclose under Florida's rules of discovery. (T.Vol. IX, p.1250). The Court was specifically asked to grant a mistrial because "Mr. Davis talked to Investigator Burch and his testimony changed dramatically. They went into an area that was not done during the deposition and I was not told." (T.Vol. IX, p.1255). "I move for a mistrial based on the State's violation of the Discovery Rules. That's my motion." (T.Vol. IX, p.1256).

When asked to respond, Assistant State Attorney Davis asserted that he had no duty to disclose conversations occurring in the hallway:

> (A.S.A. Davis) Judge, we obviously oppose it. There is no basis for that. It's a conversation before he testified in the hallway and that was the extent of it. Defense counsel deposed him. The statements I provided prior for Investigator Burch didn't deal with this at all. It's not as if I'm providing him a statement and then all of a sudden that statement changes in a dramatic fashion. We never provided it anyway, so I just agree, we have no duty based on conversations prior to testimony to apprise the Defense of what they tell us. So I strongly oppose a mistrial.

(T.Vol. IX, p.1256). The Court ruled, "I'll deny the motion because I don't think that's the law. Not under these facts. I do understand the continuing duty to disclose, but I've never heard of a duty to disclose conversations in the hallway, even if they disclose changes in testimony, unless it, again, falls under one of the

other categories." (T.Vol. IX, p.1257). Petitioner respectfully submits that this issue is preserved.

THE APPROPRIATE STANDARD OF REVIEW

Relying on ***Consalvo v. State***, 697 So.2d 805 (Fla. 1996), the State asserts, "Where a trial court rules there was no discovery violation, the reviewing court must determine whether the trial court abused its discretion." (Answer Brief at p.31) (emphasis added). Undersigned counsel respectfully disagrees that an "abuse of discretion" standard solely applies and submits that instead a mixed question of law and fact exists. Factual determinations are properly a matter within the sound discretion of the trial judge. The facts here are not in dispute. The determination that the facts do not constitute a discovery violation is a question of law entitled to de novo review.

This Court's holding in ***Consalvo v. State***, supra, is instructive, however, for it involved a situation where an ethical prosecutor "informed the defense that the fingerprint expert had identified several previously unidentified prints as belonging to the victim's deceased boyfriend." ***Consalvo***, 697 So.2d at 812. Addressing the continuing duty to disclose, the trial judge conducted a thorough ***Richardson***[1] inquiry that revealed the following material facts:

> Months before trial the State disclosed the

[1] ***Richardson v. State***, 246 So.2d 771 (Fla. 1971)

> fingerprint expert's name (Tom Messick) and his thirteen-page latent fingerprint report to the appellant. There were some forty unidentified latent fingerprints in the victim's apartment. The prosecutor asked Messick the day before trial to determine if any of those prints could match the victim. However, in addition to acting on the State's request, Messick ran the unidentified prints through a computer database to check for other possible matches. The computer identified the victim's deceased boyfriend, Scott Merriman, as a potential match. Messick retrieved Merriman's prints from the archives and compared them to the previously unidentified prints. After confirming that Merriman's fingerprints matched eighteen fingerprints found in the victim's apartment, Messick notified the prosecutor, who, in turn, *immediately notified* defense counsel. Defense counsel deposed Messick two days later and the State sought to present Messick's testimony a week later.
>
> The record reflects that the fingerprint expert was not acting on the State's request or at the direction of the State when he independently tried to match the unidentified fingerprints to someone other than the victim. *Further, the State immediately disclosed its results to defense counsel once the State was informed of Messick's analysis*. Thus, we find that the trial court did not abuse its discretion in finding no discovery on the part of the State.

Consalvo, 697 So.2d at 812-813 (Fla. 1996) (emphasis added).

A trial judge certainly has the discretion to determine that the timing of disclosure was in substantial compliance with the continuing duty to disclose. Those are not our facts. This prosecutor affirmatively caused, therefore

necessarily knew, but then *never* disclosed a highly material change in the testimony of a category "A" eye-witness. It is respectfully submitted that, even if an abuse of discretion standard is used, the absolute failure of this assistant state attorney to *ever* disclose the necessarily-known material change in eye-witness testimony and the status of that witness cannot be condoned.

The State claims, "the discovery provided by the State was consistent throughout these proceedings, up to and including its trial presentation, so there was no discovery violation in failing to tell the defense that Burch made a mistake in his deposition and would be testifying consistently with his report." (Answer Brief at p.32). The State forgets that Burch was listed and presented as an eye-witness by the State, but then converted. This assistant state attorney knew that Burch testified in his deposition that he personally *saw* a firearm under Ogard Smith. Yet, the prosecutor did not question Burch about that "mistake" at the time of the deposition on the record in front of defense counsel, nor did he talk to investigator Burch about his "mistake" at any time prior to trial. It was only moments before Burch was to be presented by the defense as an eye-witness to seeing a firearm under the victim that this prosecutor approached Burch, questioned him about the gun, and then brought him into the State Attorney's Office to show him photographs taken by the Florida Department of Law

Enforcement. Even at that, had this prosecutor then immediately disclosed to the defense that Burch was no longer an eye-witness, the trial court may have had the "discretion" to rule that there was no discovery violation. It is respectfully submitted that, where a disclosure was *never* made, as here, it is an abuse of discretion to rule there was no discovery violation.

The State argues that defense counsel should have *again* verified the testimony because "it is apparent that defense counsel was well aware of the fact that the prosecutor was talking to this witness[.]" (AB at 29). There is nothing sinister about an attorney, especially an assistant state attorney, talking to a witness before he or she testifies. At least, there should not be. It is only when a lawyer takes that last-minute opportunity to manipulate testimony or a witness's recollection that the judicial system breaks down. Our system is adversarial, but ethically adversarial. It is clear from this record that Burch had just confirmed to defense counsel that his testimony would be consistent with his sworn deposition testimony – a deposition that this same prosecutor had attended – when the prosecutor approached Burch and altered his testimony.

Judges demand ethical advocacy from lawyers appearing before them because the integrity of a verdict and/or the courts' rulings depends on it. A lawyer should also be entitled to rely on the professionalism and integrity of another

lawyer, especially an assistant state attorney. If fairness dictates disclosure of information, even if it hurts the chance of "winning," it must be disclosed. The rules of discovery in Florida, in both the civil and criminal arenas, are intended to avoid such "gotcha" tactics and ambush strategies.

The State's observation that the defense knew that no firearm was *recovered* totally misses the point. Other key evidence (a sworn taped statement of a major state witness) was also "misplaced" in this case by a detective who claimed he put the tape of a sworn interview in a box behind his desk at the police station, only to discover it just before trial. (T. Vol. 8, pp.1133-11949) See Initial Brief of Appellant, p.5. When deposed in the presence of this prosecutor, Burch swore that he personally saw a firearm under Smith. The prosecutor did not then challenge that recollection as a "mistake." That testimony was competent evidence from an eye-witness that a gun was there. When Burch's recollection that he *saw* a firearm was verified by the defense before presenting him as a witness, Burch maintained that position – he was an eye-witness who saw a firearm being underneath the victim. That is competent and relevant evidence that a firearm was present. It did not matter whether or not a firearm was recovered because it was seen and described by a person under oath. The State would have defense counsel necessarily assume the witness was lying or mistaken solely because the testimony

did not comport with the physical evidence that was recovered. That position is untenable.

What the defense did NOT know when Burch was presented to the jury was that the prosecutor had actively convinced this eye-witness with photographs that there was no firearm recovered by law enforcement. Burch was converted from the only eye-witness to seeing a firearm under the victim into an irrelevant witness who would NOT have been called had that been revealed. The prejudice of what transpired is manifest.

The State asks this Court to stray from determining whether the harmless error analysis was correctly applied, to condone the shenanigans of this prosecutor and hold that no discovery violation occurred based on ***Bush v. State***, 461 So.2d 936 (Fla. 1984) and ***State v. Evans***, 770 So.2d 1174 (Fla. 2000). In response, Petitioner respectfully points out that, when this Court decided ***Bush***, the only relief available for *any* violation of a discovery rule was reversal. That Draconian result often worked an injustice in the case of trivial, inadvertent violations of the rules of discovery that in fairness should not be charged to the State because the prosecutor did not actually know of a discrepancy in the discovery and the testimony/evidence.

Those results are now foreclosed. *Per se* reversible error no longer applies.

Appellate courts are empowered to conduct a thorough analysis and hold that even an intentional discovery violation was harmless if the State shows beyond a reasonable doubt that it did not procedurally prejudice the defense. ***State v. Schopp***, 653 So.2d 1016 (Fla. 1995). The courts are also empowered to grant a new trial if the prosecutor intentionally circumvents the fairness of the trial by deliberately failing to timely disclose that the status of an eye-witness had changed.

The instant factual scenario is the converse of ***State v. Evans***, 770 So.2d 1174 (Fla. 2000). In ***Evans***, this Court clarified that a discovery violation occurs where the State provides a witness's statement and then fails to disclose that the witness is transformed from a "witness who didn't see anything" into an eyewitness who observed material aspects of the crime charged. Here, the State identified Burch as a Category "A" eyewitness and stood silent when he swore that he saw a semi-automatic firearm underneath the victim. After he was deposed the State failed to address this "mistaken" testimony until after trial had commenced, the rule of sequestration had been invoked and defense counsel had verified the content of the testimony he was about to present. Only then did this prosecutor convert Burch into a witness "who didn't see anything." The State's total failure to notify defense counsel that the status of this key defense eyewitness had materially changed from a Category A witness violated the State's continuing duty

to disclose. This prosecutor knew that the status of this eye-witness changed because he affirmatively caused it.

In closing, Petitioner must reply to two assertions made by the State. First, the State chides that, "Everyone conveniently overlooks the fact that at the heart of this issue is the fact <u>that the defense wanted to present inaccurate testimony</u>." (Answer Brief, pp.37-38) (emphasis added, footnote omitted). That simply is not true. The Defense wanted to present the testimony of an eye-witness who swore that he saw a firearm under Ogard Smith. If counsel had known that Burch did not see a firearm, as testified to in deposition without contradiction by the State and as confirmed just prior to being presented as a witness, Burch would not have been presented. There was never any desire by the defense to present inaccurate or mistaken testimony because that certainly would distract the jury from performing its function of determining the credibility of the witnesses.

Lastly, the State asserts, "Let us not forget that both discovery and trial are truth seeking processes, and the result sought by Scipio flies in the face of this. In short, he is claiming that he is entitled to a new trial because he was <u>unable</u> to present inaccurate testimony." (Answer Brief, p.38) (emphasis added).

In reply, undersigned counsel absolutely agrees that both discovery and trial ARE truth seeking processes. Counsel disagrees that the reason Scipio is entitled

to a new trial is because he was "unable" to present inaccurate testimony. In fact, it is *because* he was deliberately tricked by the State into presenting inaccurate testimony that reversible error has occurred. Simply said, reversible error exists because Scipio was procedurally prejudiced and the State has not shown that the defense strategy was not adversely impacted by its failure to disclose the change in Burch's status.

Scipio does not ask just for a "new" trial, as quipped by the State. Nor does he request a new "perfect" trial, though hopefully one will occur by the grace of this Court. He asks only for what every person is at the very least fundamentally entitled to before his liberty is taken away for the rest of his life - a "fair" trial as guaranteed by our Constitution.

CONCLUSION

Because the discovery violation that occurred here procedurally prejudiced the defendant and denied him a fair trial, this Court is asked to REVERSE the conviction and remand for a new trial.

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 Assistant Attorney General Kellie A. Nielan, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 and mailed to Mr. Stephen Scipio, DOC# 166740, Charlotte Correctional Institution, 33123 Oil Well Road, Punta Gorda, Florida 33955, this 5th, day of November, 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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