Filing # 9687697 Electronically Filed 01/29/2014 03:43:24 PM

RECEIVED, 1/29/2014 15:48:36, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

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| ROBERT LUNDBERG, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. SC13-66 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

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On Discretionary Review from the District Court of Appeal,
Fourth District of Florida

_____

PETITIONER'S REPLY BRIEF ON THE MERITS

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## ARGUMENT

### I. THE FOURTH DISTRICT MISAPPLIED THE LAW IN DENYING CLAIM 14, WHICH CONCERNED THE SECRETLY RECORDED CONVERSATION WITH THE GIRLFRIEND.

A. The state bases much of its argument on the premise that the officer did not have a subjective intent to foster a sense of privacy. But an officer's subjective intent "is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted." *Brendlin v. California*, 551 U.S. 249, 260 (2007) (citing and discussing cases). At bar, the officer communicated to the defendant: "I'm going to give you all privacy." R3 386.

B. In this regard, the state says (AB 8) the defendant "did not present any testimony or affidavit from Detective Dennis or any other police officer suggesting that Dennis' actions were deliberately intended to foster a false expectation of privacy in the petitioner in order to elicit incriminating statements."

This is an odd claim. When was the defendant to present this testimony or affidavit? At the state's request the court denied an evidentiary hearing. Regardless, the individual officer's subjective intent is not the issue except so far as the officer conveyed an intent to the defendant. As just noted, she conveyed to him that she was giving him privacy.

C. The state also says (AB 8, 11, 12) that after the officer said she was "going to give you all privacy" the video recorder was running for purposes of officer safety, based on its reading of the detective's trial testimony at R3 507.

In fact, the detective said the videotaping was (1) "a backup system to" the audiotape, and (2) was an officer safety issue for when she was in the interview room with a suspect. R3 507.

This testimony did not explain the purpose of taping the defendant's conversation with the girlfriend as (1) the audiotape had been turned off and hence did not need a backup, and (2) the detective was not in the room.

D. The state says (AB 15) the trial court found that the defendant did not have an expectation of privacy and the police did not deliberately foster such an expectation. In this regard, however, it cites the court's order denying an evidentiary hearing on this claim.

As the trial court was not making a factual finding after an evidentiary hearing, it was merely drawing a legal conclusion plainly contradicted by the fact that the officer said "I'm going to give you all privacy." R3 386.

The court's legal conclusion is contrary to the well-settled case law, spelled out in the initial brief, that the po-

lice may not foster an expectation of privacy and then invade that privacy by secretly recording a conversation.

E. The state says (AB 18) the court must indulge in the strong presumption that counsel's performance was reasonable, but that is true only so far as counsel made a professional judgment based on a reasonably thorough investigation of his or her client's case. This is because it is "axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Hurst v. State*, 18 So. 3d 975, 1008 (Fla. 2009).

The Supreme Court has explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

*Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984).

Counsel's decisions are not reasonable if based on "ignorance of the law." *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Just as the distorting effects of hindsight are not to be used in condemning counsel's actions, hindsight also may not

be used to justify them. *Id*. at 386-87 (rejecting justifications for counsel's actions based on the "use of hindsight to evaluate the relative importance of various components of the State's case."

"It is well established, in a number of contexts, that 'a tactical or strategic decision is unreasonable if it is based on a failure to understand the law.'" *Butler v. State*, 84 So. 3d 419, 421 (Fla. 5th DCA 2012); *State v. Williams*, 38 Fla. L. Weekly D2563 (Fla. 1st DCA Dec. 5, 2013) (quoting *Butler*). *See also Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003) ("a tactical or strategic decision is unreasonable if it is based on a failure to understand the law").

Thus, the Supreme Court has explained, a decision cannot be "justified by a tactical decision" if "counsel did not fulfill their obligation to conduct a thorough investigation." *Sears v. Upton*, 130 S. Ct. 3259, 3265 (2010).

## II. THE FOURTH DISTRICT ERRED AFFIRMING AS TO THE CLAIMS ABOUT THE BOLSTERING OF V'S CREDIBILITY (CLAIMS 4, 5, 6, 7, 9 AND 12).

A. The state says (AB 21) defense counsel's strategy was to argue to the jury that the child was manipulated by her aunt, and "so lacked credibility that none of her family members believed anything had happened."

In fact, defense counsel did not argue to the jury that "none of her family members believed anything had happened."[1] He could not because he allowed extensive evidence that, though they may have doubted her at first, they assured themselves completely of the truthfulness of the accusations.

While counsel did argue that the victim was manipulated by the aunt, that cannot justify allowing the tidal wave of testimony from all the state's witnesses bolstering the child. The state has made no effort to show why the logic of *Rhue v. State*, 693 So. 2d 567 (Fla. 2d DCA 1996), *Norris v. State*, 525 So. 2d 998 (Fla. 5th DCA 1988), and *Henry v. State*, 652 So. 2d 1263 (Fla. 4th DCA 1995) should not lead to reversal at bar.

B. The state says (AB 22) the child's statements were admissible under the child hearsay rule. § 803(23), Fla. Stat. The record shows no compliance with the procedures of that rule, which involves written pretrial notice by the state and findings of fact by the trial court.

Regardless, that rule does not authorize evidence bolstering the child's credibility such as happened here.

C. As to the detective's testimony bolstering the child, the state stresses (AB 24-25) counsel's futile effort to have the child say she was coached by the detective.

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[1] Counsel's final argument is at pages 640 to 664 of volume four of the second supplemental record.

In response to counsel's questioning, the child denied being coached. R3 480-81. Hence, there was no need for her to be bolstered on this point by the detective.

Anyway, this questioning did not in any way open the door to the detective's testimony that: (1) Using her expertise as a detective, she carefully scrutinized the child's account and found that she responded "Perfectly." SSR2 374. (2) Children have blown things out of proportion in "five max" out of hundreds of cases but such cases, unlike the one at bar, are "very obvious from the get go." SSR2 491-92. (3) The child "was unconfused. I was the one that got confused. … . She kept me organized." SSR2 493.

D. The state argues (AB 25-26) the bolstering of the child in the taped interrogation, was harmless because, it says, the detective admitted in her testimony that she embellished or fabricated the child's statements as an interrogation technique. R3 511-12.

At the cited pages, the detective said that she would exaggerate the charges as a sort of lie-detecting mechanism in order to see if the suspect would truthfully deny such exaggerated claims.

She did not testify that she was lying when she bolstered the child's credibility during the interrogation at SSR2 435 ("she can tell me details about what you did and that makes it

more believable that she's telling the truth"), SSR2 436-37 (saying the child was "very detailed and "very compelling to talk to") and SSR2 449 (saying the child was "really - really detailed").

The jury could not have thought that the detective misrepresented her belief in the child's credibility in the interrogation since she told them under oath that the child was credible, as discussed above.

E. The state says (AB 26) the Fourth District applied the right standard as to deficient performance because it reviewed the trial transcript and it used the "highly deferential" standard of *Strickland*.

The first argument – that the court reviewed the record - is a makeweight and does not show it used the right legal standard.

The second argument is wrong because the "highly deferential" standard involves simply judging counsel's performance based on counsel's perspective at the time rather than using the distorting effects of hindsight. *Strickland*, 466 U.S. at 689-90. The Court explained further on the next page:

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable pro-

> fessional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

*Strickland v. Washington*, 466 U.S. 668, 690 (1984).

On the facts of our case, viewed as of the time of counsel's conduct, it was objectively unreasonable to let the jury hear witness after witness vouch for the child's credibility.

F. The state says (AB 27-28) the Fourth District used the right standard as to prejudice because it quoted *Strickland*. But the fact remains that, when it came to applying the law to the facts, it used an erroneous "would have been different" standard.

The court wrote: "we cannot say that had all of the evidence bolstering the victim's credibility been excluded, the result would have been any different or that the jury would have had a reasonable doubt respecting guilt, thus failing the second prong of *Strickland.*" *Lundberg v. State*, 127 So.3d 562, 569 (Fla. 4th DCA 2012) (e.s.).

## III. THE COURT ERRED IN AFFIRMING THE SUMMARY DENIAL OF THE CLAIMS ABOUT THE HURRICANE INCIDENT.

A. The state says (AB 28) there was "some evidence that the charged acts took place after the effective date of the statute. (R2 285-87; R4 685-91)." In fact, at the cited pages the evidence – and also throughout the trial - as to when the hurricane occurred was extremely vague.

In fact, the child's father said it might have been during Hurricane Floyd. SSR2 305, 326. Floyd occurred before the effective date of the statute under which the defendant was convicted of a first degree felony. The present record does not conclusively refute the defendant's claim.

B. The state also says (AB 28-29) the trial court properly took judicial notice of federal records about the hurricanes. The Evidence Code requires that if a court uses a documentary source not received in open court, it must afford each party reasonable opportunity to challenge such information, before judicial notice of the matter is taken. § 90.204(3), Fla. Stat. Even assuming that it could be proper for the court to take judicial notice of NOAA information in order to deny an evidentiary hearing, the fact remains that there is an ongoing dispute as to which of the two hurricanes the family feared would hit them. The NOAA information could not resolve that dispute.

Even more to the point, had counsel competently raised and litigated the issue, there is a reasonable probability that the jury could have had a reasonable doubt as to whether the crime occurred before the statute went into effect. Counsel's failure deprived the defendant of his right to effective assistance of counsel.

C. Finally, the state says (AB 29) that the change in the statute increased the state's burden of proof. The defendant was charged with the first degree felony for lewd and lascivious molestation of a child less than 12 years of age under section 800.04(5)(b), Florida Statutes (1999), which became effective between the dates of Hurricane Floyd and Hurricane Irene. It does not matter that, before that date, other subsections of the prior version of section 800.04 defined a second degree felony for sexual activity with a child under the age of 16. The state simply ignores that the change in the statute created a new, first degree felony, and the defendant was convicted of this new, higher offense.

## IV. THE LOWER COURT ERRED IN AFFIRMING THE SUMMARY DENIAL OF CLAIMS 8, 11, 15, 16, 19, AND 21.

A. As to Claim 8, the state quotes with great approval (AB 30) its own filing in the trial court, where it wrote that it was "masterful legal work" for counsel to have the detective say

that she had dealt with child victims who didn't tell the truth and blow things out of proportion.

In fact, it was hardly masterful since the jury had already heard detective say the same thing in the taped interrogation. SSR3 437 ("kids have a way of maybe blowing things out of proportion"). Instead, it was clumsy, foolish and hurtful to raise the matter on cross because it opened the door to a devastating rejoinder on redirect. Any minimally competent attorney would have explored the issue on deposition and would have known that such a rejoinder was possible and in fact inevitable.

As there has been no evidentiary hearing, it cannot be shown that counsel did the elementary groundwork of finding out in deposition how the state could use this issue on redirect. Hence, it cannot be said whether he undertook this reckless and unneeded line of cross-examination after a reasonably thorough investigation. The defendant is entitled to an evidentiary hearing.

B. The state's argument as to claim 11 (AB 30-31) takes for granted the admissibility of the recording of the conversation with the girlfriend in the interview room. This argument highlights the prejudice coming from the failure to make a proper motion to suppress that statement.

C. The state says as to Claim 15 (AB 31) that the defendant was not in custody. Although the defendant went to the station

voluntarily, there remains the question of whether his situation became custodial during the interrogation under *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999) and *State v. C.F.,* 798 So. 2d 751, 754 (Fla. 4th DCA 2001). Certainly the state could raise this issue at an evidentiary hearing, but it cannot be resolved without one.

The state also says (AB 31-32) that, at the time of trial, there was no case law supporting a challenge to the warnings given.

In fact, *Miranda v. Arizona*, 384 U.S. 436 (1966), has required for almost 50 years that it is "an absolute prerequisite" that persons held for interrogation must be clearly informed of the right the right to consult with a lawyer and to have one with them during interrogation:

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

*Id*. at 471-72.

Any competent attorney since 1966 would know this and would see that the warnings at bar were inadequate. The defendant was

told he had the right to an attorney before questioning, but not that he could exercise that right at any time during questioning, and though he was told he could stop the questioning, he was not told that he could have the attorney present during questioning.

D. The state inexplicably suggests (AB 32) that claim 16 did not raise a claim of ineffectiveness of counsel. In fact, it did raise such a claim. R1 107 ("Defense counsel was ineffective at trial for failing to move, pre-trial, to suppress videotape "ZB" … and all other taped evidence …) (underlining in original).

## V. THE FOURTH DISTRICT ERRED IN AFFIRMING THE SUMMARY DENIAL OF CLAIM 2, WHICH ALLEGED INEFFECTIVENESS FOR FAILING TO OBJECT TO THE INSTRUCTION ON ATTEMPTED CAPITAL SEXUAL BATTERY WHERE THERE WAS ONLY EVIDENCE OF A COMPLETED OFFENSE.

The state does not dispute that impeachment with prior inconsistent evidence is not substantive evidence. It has not shown that there was substantive evidence of an attempt as opposed to a completed offense.

## CONCLUSION

The lower court's decision should be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on 29 January 2014 a copy hereof has been efiled with this Court and furnished to Jeanine M. Germanowicz, Esq., Assistant Attorney General, Counsel for Respondent, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida, 33401-2299, by email to:
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/s/ Gary Lee Caldwell
Attorney for Petitioner

## CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

/s/ Gary Lee Caldwell
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