IN SUPREME COURT OF FLORIDA

LAWRENCE WILLIAM PATTERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-228

RESPONDENT'S ANSWER BRIEF

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0045489

KATHRYN LANE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0026341

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Lawrence William Patterson, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of ten volumes, which will be referenced by the appropriate roman numeral, followed by any appropriate page number. The record also contains three supplemental volumes, which will be referenced as "Supp," and the appropriate roman numeral followed by any appropriate page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Defendant's statement of the case and facts as generally supported by the record, subject to the following supplementation and corrections:

Prior to trial, Petitioner filed a Motion to Dismiss or in the Alternative to Exclude Testimony of State's Expert Witnesses (hereinafter "Motion"). (I 21). In the Motion, Petitioner asserted that the State's theory in this case was that he intentionally set fire to his truck, which was parked inside the garage of his residence. (I 21). The Motion further stated that shortly

after the fires in this case (in February of 2010), the State Fire Marshal's Office secured the truck so that it could be investigated. (I 22). Additionally, the Motion stated that after law enforcement officials completed their examination of the truck, Geico Insurance Company took possession of the truck (in March of 2010). (I 22). The Motion requested that the court "enter an Order dismissing all charges against him or in the alternative prohibit the State from calling any expert witness who examined or conducted tests on the GMC pickup truck." (I 24). A hearing on the Motion was held on October 5, 2011. (I 26).

SUMMARY OF ARGUMENT

The trial court properly denied Petitioner's motion to suppress the testimony of State experts who examined Petitioner's truck, which was the subject of one of his arson charges. Petitioner failed to meet the standard enunciated in Arizona v. Youngblood, 488 U.S. 51 (1988), for determining whether a defendant's due process right is violated when the State fails to preserve evidence. Petitioner not only failed to show that the truck was anything other than merely potentially useful to him, he failed to show any evidence of bad faith on the part of law enforcement.

Petitioner's reliance on Lancaster v. State, 457 So.2d 506 (Fla. 4th DCA 1984), is misplaced, as the case is no longer good law in light of Youngblood. If this Court maintains jurisdiction over the instant case, Lancaster should be disapproved, and the decision of the First District Court in the instant case affirmed.

ARGUMENT

ISSUE: WHETHER THE TRIAL COURT ERRED IN HOLDING THAT NO DUE PROCESS VIOLATION OCCURRED AND NOT SUPPRESSING THE TESTIMONY OF THE STATE'S EXPERTS, WHERE PETITIONER CANNOT MEET THE ARIZONA V. YOUNGBLOOD, 488 U.S. 51, 57-58 (1988), TEST FOR ALLEGED DUE PROCESS VIOLATIONS? (RESTATED)

Jurisdiction

The State maintains its position that this Court lacks jurisdiction to consider the instant case. The decision in the instant case was driven by controlling facts different from those in Lancaster v. State, 457 So.2d 506 (Fla. 4th DCA 1984), rendering the decision incapable of being in express and direct conflict with that case.

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). A district court must address the legal principles it relies upon to reach its decision. See Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981).

Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, 485 So. 2d at 830; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002).

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result so directly and expressly opposite Lancaster v. State, 457 So.2d 506 (Fla. 4th DCA 1984), that it can be said they are irreconcilable. See Crossley v. State, 596 So.2d 447, 449 (Fla. 1992)(holding that express and direct conflict arose from decisions reaching opposite results on the substantially the same controlling facts).

In the instant case, Petitioner was convicted, based on setting two fires that destroyed his house and truck, of two counts of first-degree arson, second-degree arson, arson resulting in bodily injury to a firefighter, two counts of insurance fraud, burning a dwelling with intent to defraud, and

burning a vehicle with intent to defraud. Patterson v. State, 153 So.3d 307, 308 (Fla. 1st DCA 2014). Both the State Fire Marshal and the insurance company investigated the fire without an eye towards a possible arrest, and once their investigations were complete and Petitioner was paid the proceeds under his policy, the insurance company took the truck and destroyed it. Patterson, 153 So.3d 307 at 309. The investigators preserved approximately 300 photographs of the truck and garage area. Id. at 310. Five months later, Respondent was arrested and charged. Id. at 309. During trial, both the State's and Respondent's experts centered their testimony on the photographs preserved from the scene of the truck arson. Id. at 311. Petitioner's expert was able to use the photographs, as well as their inspection of the garage in which the truck was burned, to refute the testimony of the State's experts by concluding that the fire was merely electrical, and not arson. Id.

In Lancaster, 457 So.2d 506, the determinative facts are wholly different. That case involved a defendant who was convicted of arson based on burning a truck of which they had custody, but did not own. Id. at 506. Law enforcement discovered the burning truck and shortly thereafter began to doubt the defendant's innocent explanation for the fire. Id. Law enforcement summoned fire investigators, who examined the truck and concluded the fire was not accidental. Id. Meanwhile, the truck's owner requested that he be allowed to salvage the truck. Id. After law enforcement completed their investigation, the truck was released for that purpose to the owner. Id. A warrant was issued for the defendant's arrest the next day. Id. Because there was no evidence for a defense expert to examine, the defendant was

unable to refute the testimony of the State's experts that the fire was no accidental. Id. at 507. The court concluded that, based on these facts, a due process violation occurred and the remedy was a retrial with a prohibition on the State's experts testifying. Id.

The First District explicitly distinguished Lancaster based on Respondent's expert actually being able to refute the testimony of the State's experts based on evidence of the truck which the State did preserve, whereas the defendant in Lancaster was completely deprived of this opportunity. Patterson, 153 So.3d 307 at 311. As the First District noted, it was this distinction upon which the decision in Lancaster turned. Id. Additionally, the initial investigation in the instant case was not conducted with criminal prosecution in mind, unlike in Lancaster, and so the duty to preserve evidence for a potential prosecution could not have been apparent at the time the truck was disposed of. Id.

Given the lack of parity in the relevant facts, Lancaster and the instant case are not irreconcilable, and so cannot be in express and direct conflict. Indeed, the First District merely applied the same law elucidated in Lancaster to different facts. Without an express and direct conflict, this Court does not have jurisdiction to hear the instant case.

It is worth noting that Lancaster was decided prior to Arizona v. Youngblood, 488 U.S. 51 (1988), in which the United States Supreme Court considered the appropriate test to apply when due process violations involving the loss of evidence are alleged, a test different than that elucidated in Lancaster. Lancaster is thus no longer a dispositive case under current law.

As for the second proffered basis for jurisdiction, that of express construction of the state or federal constitution, the lower court must have "explain[ed], define[d] or overtly expresse[d] a view which eliminates some existing doubt as to a constitutional provision . . . ." Rojas v. State, 288 So. 2d 234, 235 (Fla. 1974). Merely applying a constitutional provision or precedent is insufficient. "Applying is not synonymous with Construing; the former is NOT a basis of our jurisdiction, while the Express construction for a constitutional provision is." Rojas, 288 So. 2d at 235 (caps in original). Here, the First District did not expressly construe a state or federal constitutional provision. Instead, the First District merely applied what the due process clause has already been said to mean to a particular set of facts. Nowhere in the instant decision does an overt statement that eliminates some existing doubt as to due process appear. Moreover, Petitioner makes no attempt to explain exactly how the First District's decision amounts to an express construction, but instead merely asserts that such construction occurred.

This case is not of the same character as other cases where this Court has taken jurisdiction based on an express construction of the state or federal constitution. See, e.g., Powell v. Markham, 847 So. 2d 1105 (Fla. 4th DCA 2003), reversed sub. nom. Zingale v. Powell, 885 So. 2d 277 (Fla. 2004); Fla. Dept. of Ag. v. Haire, 836 So. 2d 1040 (Fla. 4th DCA 2003), approved, 870 So. 2d 774 (Fla. 2004); Doe v. Milacki, 771 So. 2d 545 (Fla. 3d DCA 2000), approved, 814 So. 2d 347 (Fla. 2002). This Court does not have jurisdiction.

Standard of Review

Although Petitioner filed a motion to dismiss below, he has maintained in this petition only his alternative claim that the testimony of the State's expert be suppressed. Thus, the only claim before this Court is one involving the potential suppression of evidence. A trial court's legal ruling on a motion to suppress is reviewed de novo. Twilegar v. State, 42 So.3d 177, 192 (Fla. 2010), quoting State v. Glatzmayer, 789 So.2d 297 at 301 n.7 (Fla. 2001). However, factual findings by the trial court must be sustained if they are supported by competent, substantial evidence. Id. Additionally, a trial court's ruling on a motion to suppress is cloaked with a presumption of correctness, and the evidence and all reasonable inferences derived from the evidence must be interpreted towards sustaining the trial court's ruling. Pagan v. State, 830 So.2d 792, 806 (Fla. 2002).

Burden of Persuasion

Appellant bears the burden of demonstrating prejudicial error. Section 924.051(7), Fla. Stat. (2008), provides:

> In a direct appeal ..., the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). Moreover, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not

expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999); see Robertson v. State, 829 So. 2d 901, 906-907 (Fla. 2002).

Preservation

The issue appears sufficiently preserved for appellate review.

Merits

Petitioner argues in his Initial Brief that the trial court erred by denying his motion to suppress the State's expert witnesses who examined the vehicle upon which Petitioner had committed arson. According to Petitioner, the State's release of the burned vehicle to Petitioner's insurance company long before it attempted to arrest him, and after photographically preserving its evidentiary value, was "fundamentally unfair". (IB 16). Petitioner's argument has no merit, as it fails the requirements of Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988), and California v. Trombetta, 467 U.S. 479 (1984), for determining whether due process is violated by the destruction of evidence.[1]

The suppression by the state of evidence favorable to the accused violates due process where the evidence is material either to guilt or to punishment, regardless of the good faith or bad faith of the state. Brady v. Maryland,

[1] While Petitioner does not articulate what right of his was violated, beyond the issue being one of fundamental unfairness, a due process violation appears to be the closest match.

373 U.S. 83, 87 (1963). But the loss or destruction of evidence that is only potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution. Youngblood, 488 U.S. 51 at 58; see also King v. State, 808 So.2d 1237, 1242 (Fla. 2002); Guzman v. State, 868 So.2d 498, 509 (Fla. 2003). Bad faith cannot be shown where the state's failure to preserve evidence is in accord with the agency's normal practice. See U.S. v. Beckstead, 500 F.3d 1154, 1161 (10th Cir. 2007).

Further, "whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479 (1984); State v. Gomez, 915 So.2d 698, 700 (Fla. 3rd DCA 2005).

While the First District only applied Youngblood to Petitioner's motion that the charge be dismissed, Youngblood also applies when a defendant requests the exclusion of evidence as a remedy. See State v. Coleman, 911 So.2d 259 (Fla. 5th DCA 2005); see also U.S. v. Deaner, 1 F.3d 192, 201 (3rd Cir. 1993)(holding under Youngblood that evidence of the weight of marijuana should not be excluded when no due process violation shown); U.S. v. Gonzalez, 2009 WL 3156688 (D. Del. Dec. 8, 1995). Regardless of the remedy sought, the analysis is the same pursuant to Trombetta, Youngblood and their progeny.

In the instant case, Steven Callahan, a detective with the State Fire

Marshal's Office, testified at the motion hearing that he investigated the fires that occurred at Petitioner's house on February 15/16, 2010. (I 33-37). Detective Callahan testified, as to the first fire, that he was able to determine "from both burn patterns, fire damage and other burn damage on one of the walls, that the fire had actually come from inside the truck" and that the fire was not accidental. (I 42-43). The evidence presented at the hearing showed that there were over 300 photographs taken of the vehicle by Detective Miller prior to its destruction. (I 30-31, 58). In fact, Detective Miller did such a thorough job of photo-documenting the condition of the vehicle after the fire, that Petitioner's expert Cam Cope was able to give his expert opinion to the jury on what was the cause of the fire to the vehicle based on his examination of the photos of the truck. (IX 827-829).

As such, there was evidence presented by the State at the hearing that the evidence at issue was not material exculpatory evidence, and that at most it could only be potentially useful to Petitioner. The officers, having concluded that the fire was not accidental, had no reason to believe the vehicle possessed any apparent exculpatory value. Further, preserving the vehicle by way of extensive photographic documentation still provided for Petitioner to support his theory of defense. Perhaps most importantly, Petitioner does not appear to contest the point that the vehicle was not materially exculpatory in his brief.

Petitioner has further failed to assert that law enforcement acted in bad faith by failing to physically preserve the vehicle. Even if he had, there is no evidence to support such a finding. As already noted, law enforcement were

unaware of any exculpatory value in the vehicle. They also went to great effort in producing 300 photographs of the truck to ensure that it was preserved photographically. It cannot be more clear that law enforcement had no intent to gain an advantage over Petitioner by preventing his physical access to the vehicle. Perhaps most importantly, however, is that the vehicle was not physically preserved pursuant to law enforcement's normal practice, a fact noted by Petitioner in his brief. (IB 19; I 46). Consequently, Petitioner cannot make a showing of bad faith.

It is worth noting that law enforcement testified that at the conclusion of their investigation, the vehicle was released to both Petitioner and his insurance company. (I 46). The subsequent destruction of the vehicle for salvage was not the result of law enforcement action, but was the consequence of Petitioner having ceded his property rights to the vehicle by submitting an insurance claim and accepting payment for the same. (I 114, 118-119, 121-127). The instant case is therefore even more favorable to the State than those in which law enforcement personally destroy evidence or fail to preserve it from destruction by an unrelated third party, as opposed to the designee of Petitioner here.[2] Law enforcement can hardly be said to have acted in bad faith when they gave the vehicle to Petitioner and his insurance company,

[2] Of course, pursuant to Youngblood, all of the above scenarios do not result in a due process violation when the evidence at issue is only potentially useful to the defense and law enforcement did not act in bad faith.

thereby affording him the opportunity to do with it as he saw fit.

Having failed to meet the test enunciated in Trombetta and Youngblood, Petitioner cannot be entitled to the exclusion of the State's expert witnesses who examined the vehicle. Nevertheless, Petitioner argues that Lancaster v. State, 457 So.2d 506 (Fla. 4th 1984), applies and leads to the conclusion that his due process rights were violated. In Lancaster, arson investigators examined a burned truck and released it to the defendant before an arrest warrant was issued. Id. The owner of the truck, who was not the defendant, then materially changed the condition of truck. Id. At trial, the investigator testified as to condition of truck after the fire. Id. The Fourth District held that the defendant's due process rights were violated by the State's failure to preserve the truck as there existed a possibility that examination of the truck would have assisted the defendant. Id. The court, in Lancaster, also held that reversal was the proper remedy and that "at retrial, the state will be precluded from calling as witnesses the experts who physically examined the truck prior to its release." Id. at 507.

Put simply, Lancaster is no longer good law, and has been superseded by Youngblood. As previously cited, this Court has approved the application of the Youngblood test. See King, 808 So.2d 1237, 1242 ("We find no error with the trial court's application of *Youngblood* that King has failed to demonstrate bad faith on behalf of the State"). Lancaster directly contradicts the standard that the defendant must show that the exculpatory value of the evidence was apparent before its destruction by applying its holding to all discoverable evidence. Id. at 507. Moreover, the court's

holding that the mere possibility that evidence would prove helpful to the defendant results in a due process violation also conflicts with the appropriate standard. Based on the facts present in Lancaster, the current and correct analysis would categorize the truck as "potentially useful evidence", and thus the defendant would have been required to show bad faith. Id. at 506. However, in Lancaster whether there was bad faith on the part of the officers played no part in the court's analysis or decision, conflicting further with the current standard for determining this issue. Lancaster, 457 So. 2d at 506.

Petitioner's case is comparable to the case of State v. Gilson, 72 So. 3d 263 (Fla. 2d DCA 2011), which involved evidence of automobile in which defendant was a motorist on night of shooting, which the State destroyed between first trial and start of second trial. In Gilson, as in Petitioner's case, the State photographed the automobile prior to its destruction. Id. The court held that the photographs of the automobile were still available to the defendant and supported his claim that he was shot in the back as he drove away, and therefore the actual automobile was not necessary to make his point. Id. The same is true in the instant case as Petitioner's expert was able to form an opinion as to the cause of the fire based on the photographs. Petitioner's argument that the photographs were inadequate to show the exact location of the fire is inapposite; not knowing the location of the fire did not prevent the defense expert from determining that the fire was accidental, and so did not prevent Petitioner from presenting his defense.

Even if this Court were to find that Lancaster is still good

law, the instant case is distinguishable in that here, unlike in Lancaster, the Petitioner was able to present his own testimony of an expert who was able to give an opinion as to the cause of the fire in Petitioner's truck. Petitioner's expert Cam Cope, despite the destruction of the vehicle, was still able to give his expert opinion to the jury on what was the cause of the fire to the vehicle. (X 827-829). Mr. Cope stated that based on his review of the over 300 photographs, he opined that the cause of the first fire was "electrical in nature" (i.e., the fire was not intentionally caused by Petitioner Patterson). (X 827-829). Indeed, it was only due to the officers' comprehensive photo documentation of the vehicle that Petitioner's expert was able to form an opinion as to how the fire was started. (X 827-829). This shows that the truck was in fact preserved to the point that it enabled Petitioner's expert to form an opinion as to the cause of the fire. As such, Petitioner's due process rights were not violated in the instant case by the State being allowed to have its experts testify on the condition of the truck as there was no prejudice to Petitioner.

Even if this Court were to find that the State should not have been allowed to present experts at trial who examined the truck, this only would have affected Petitioner's convictions for Count 1: Arson First Degree, Count 2: Arson Second Degree, Count 5: Insurance Fraud Less than $20,000, and Count 8: Burning to Defraud Insurer as these were the only counts that Petitioner was charged with which related to, at least in part, the burned truck. As such, Petitioner's conviction's for Counts 3, 4, 6, and 7 were unaffected by any potential error, and thus should be affirmed.

While Petitioner claims that it is "fundamentally unfair" to have allowed the State's experts to testify at trial regarding the vehicle, the standard applied by both the United States Supreme Court and this Court reveals otherwise. Petitioner has wholly failed to assert relief under the appropriate standard, relying instead on outdated authority, and so his argument must be rejected. The trial court properly found that no due process violation had occurred and allowed the State's experts to testify at trial.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal reported at 153 So.3d 307 should be approved, and the judgment entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on September 8, 2015: Michael Ufferman, Esq., at ufferman@uffermanlaw.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

Trisha Meggs Pate
TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

Kathryn Lane
By: KATHRYN LANE
Florida Bar No. 0026341
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)
L15-1-01674

Attorney for the State of Florida