IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

RENALDO RICARDO FERGUSON,	:	
Appellant,	:	
vs.	:	**Case No. 2D13-3043**
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

After allegedly being raped on August 8, 2008, the accuser in this case returned home and had sexual intercourse with her boyfriend before going to Mulberry Police Department to report it much later in the day. VI/R60. She told police that she has poor eyesight, so she was confused when she was picked up by a black male she thought was her friend. VI/R22. She told police she was driven to a large public park where she was forced to have oral and vaginal sex by the driver. VI/R22, 58. Thereafter, she was dropped off and returned home to have sexual intercourse with her boyfriend, Mr. Blandino. R60. Approximately ten hours following her alleged kidnapping and rape, she went police, and a rape kit was performed. VI/R59-60. Then, she took police to a public park and identified a white rag alleged to have been utilized by the perpetrator to wipe away semen after the attack. VI/R22, 55, 58. DNA testing of the rag conducted by the State is all that remains of the one piece of evidence linking Mr. Ferguson to the alleged rape of the victim in this case. VI/R22, 72.

About a year after this incident, the Mulberry Police Department merged with the Polk County Sheriff's Office. VI/R60. The rag, along with the alleged victim's bra and shirt, was lost and cannot be located. VI/R64.

This case was untouched by investigators for over two years. Then, on July 30, 2011, Mr. Ferguson was interviewed and maintained that he did not know the victim and had no knowledge of the allegations. VI/R23. His only link to the case was a CODIS DNA match on a lost white rag. Following a non-custodial, voluntary interview with investigators, Mr. Ferguson was arrested by Polk County Sheriff officers August 25, 2011. VI/R12-13. The State Attorney for the Tenth Judicial Circuit in Polk County, Florida filed an information on August 30, 2011 charging Renaldo Ricardo Ferguson with Kidnapping in violation of Fla. Stat. § 787.01 and two counts of Sexual Battery With Threat of Force in violation of Fla. Stat. § 794.011. VI/R12.

The State still had a pair of pants, the sexual assault kit, cassettes, sketches and photo line ups. VI/R65. The pants in the State's possession contain semen, as reflected in the DNA test, of the alleged victim's boyfriend. VI/R56.

On January 7, 2013, Mr. Ferguson filed a dispositive motion to dismiss his charges or suppress evidence of DNA results from the missing rag, bra and shirt. VI/R46-49. An hearing was conducted on April 1, 2013. VI/R50-81. On April 2, 2013, Honorable Judge John Radabaugh denied suppression and dismissal, finding that the State had not acted in bad faith nor violated discovery rules. VI/R82-83.

On June 7, 2013, Mr. Ferguson entered a plea of no contest to the stipulated lesser offense of sexual battery, a second

degree felony. VI/R85-88. He was sentenced to an agreed-upon four years in the Florida State Prison followed by three years probation with sentences on pending probation violations running concurrently therewith. VI/R88-89.

Mr. Ferguson reserved his right to appeal the dispositive issue and timely filed a notice of appeal on June 19, 2013. VI/R93-94,111.

SUMMARY OF THE ARGUMENT

The lower court erroneously denied Appellant's pretrial motion to suppress because the State's loss of material evidence caused extreme prejudice to Appellant regardless of whether the evidence is missing because of bad faith on the part of the State or inadvertent mistake. Regardless of the cause of lost material evidence, the appropriate sanction for its absence is suppression.

Here, the motion to suppress should have been granted because the evidence is material and risk of prejudice great. The lost rag was the only piece of evidence in this case which tied Appellant to the crimes in this case. Regardless of why it is missing, testimony and evidence thereof should be suppressed because the potential for extreme prejudice is imminent in Appellant's circumstances. In Appellant's case, identification is in contention, the accuser's veracity is questionable and multiple convictions resulted. Due to the loss of evidence, Appellant is unable to test the very piece of evidence that led police to his door. In such circumstances, prejudice is manifest and suppression is required.

Therefore, Appellant requests this Honorable Court to reverse the lower court's ruling on the motion to suppress and remand with instructions to dismiss because there is no other evidence linking the Appellant to this case and is dispositive.

ARGUMENT

ISSUE: WHEN THE STATE LOSES IRREPLACEABLE MATERIAL EVIDENCE AND CAUSES PREJUDICE TO THE ACCUSED, THAT EVIDENCE MUST BE SUPPRESSED IN ITS TOTALITY, AS TESTIMONY AND PARTIAL EVIDENCE THEREOF IS NOT CURATIVE OF THE BRADY VIOLATION.

Material evidence that is inadvertently lost by the State and causes prejudice to an accused should be suppressed regardless of the intent of the State. Therefore, the lower court erred in finding that missing evidence is admissible in this case. This Honorable Court should reverse the lower court's denial of Mr. Ferguson's motion to suppress.

The Fifth Circuit Court of Appeal has addressed a case similar to that of Mr. Ferguson's, finding that "[i]t is fundamentally unfair, as well as a violation of prosecutor's obligation to disclose information and material within State's possession and control, to allow State to negligently dispose of critical evidence and then permit State to offer an expert witness whose testimony cannot be refuted by the defendant because of want of access to such material." State v. Ritter, 448 So.2d 512 (Fla. 5th DCA 1984). In Ritter, the Fifth Circuit Court of Appeal suppressed drug testing results and testimony because the evidence was destroyed. Id. Law enforcement officers had reused the alleged contraband for other undercover

operations before the defendant had an opportunity to conduct individual testing. Id.

A trial's court ruling on a motion to suppress presents a mixed question of law and fact. Shingles v. State, 872 So. 2d 434, 437 (Fla. 4th DCA 2004). "Mixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the [legal] issues." Connor v. State, 803 So. 2d 598, 605 (Fla. 2001).

A discovery violation occurs when material evidence is lost and causes prejudice to the accused. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The State Attorney is charged with constructive possession of all evidence in criminal cases, even that evidence which is physically held by other state agencies. State v. Del Gaudio, 445 So.2d 605 (Fla. 3d DCA 1984). The United States Supreme Court enunciated the three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) and State v. Bullard, 858 So.2d 1189 (Fla. 2d DCA 2003).

In the absence of bad faith on the part of law enforcement, a Brady violation must regard material evidence that is more than potentially helpful. In this case, there is no evidence of bad faith. See Wright v. State, 857 So2d 861 (Fla. 2003). Compare Strahorn v. State, 436 So.2d 447 (Fla. 2d DCA 1983). However, material evidence of great importance was lost in this case, and should be suppressed. See State v. Thomas, 826 So.2d 1048 (Fla 2d DCA 2002); Pitts v. State, 362 So.2d 147 (Fla. 3d DCA 1978).

Material evidence must be differentiated from evidence that is merely "potentially useful" evidence (that which has only some likelihood of exonerating a defendant). See California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), and Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (holding that a "constitutional materiality" analysis differentiates between "materially exculpatory evidence", which requires no proof of bad faith or ill-will on the part of the state, and "potentially useful evidence" which does require a showing of the State's bad faith to establish a due process violation).

Suppression by the prosecution of evidence favorable to an accused upon request results in a violation of due process where the evidence is material either to guilt or punishment. State v. Thomas, 826 So.2d 1048 (Fla 2d DCA 2002); Pitts v. State, 362 So.2d 147 (Fla. 3d DCA 1978). Evidence is material if it creates a reasonable doubt that did not otherwise exist, is likely to

significantly contribute to the defense of the accused, or if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of a proceeding would have been different. State v. Sobel, 363 So.2d 324, 327 (Fla. 1978), U. S. v. Lanzon, 639 F.3d 1293 (11th. Cir. 2011). This Honorable Court has opined that "material evidence" is of such a nature that an accused would be unable to obtain comparable evidence by other reasonably available means. State v. Powers, 555 So.2d 888 (Fla. 2d DCA 1990).

The loss of material evidence, regardless of the good or bad faith of the State, is a Brady violation. Wright v. State, 857 So2d 861 (Fla. 2003).

The question for determining whether prejudice has ensued, regarding a Brady violation, is not whether the defendant would more likely than not received a different verdict if he would have had the evidence, but whether, in its absence, he received a fair trial. State v. Knight, 866 So.2d 1195 (Fla. 2003). The element of prejudice is measured by determining whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in a verdict (reached without the evidence). State v. Bullard, 858 So.2d 1189 (Fla. 2d DCA 2003) and Greehan v. State, 830 So.2d 878 (Fla. 2d DCA 2002).

"Procedural prejudice" occurs where there is a reasonable possibility that the defendant's trial preparation or strategy

would have been materially different had the violation not occurred." Portner v. State, 802 So.2d 444 (Fla. 4th DCA 2001).

The State carries the burden in the trial court of showing lack of prejudice. State v. Powers, 555 So.2d 888 (Fla. 2d DCA 1990).

The loss of material evidence, regardless of the good or bad faith of the State, is a Brady violation worthy of sanction. See Wright v. State, 857 So2d 861 (Fla. 2003) and State v. Muro, 909 So.2d 448, 452 (Fla. 4th DCA 2005). That sanction is typically suppression because dismissal of charges is rarely granted absent bad faith. See State v. Davis, 14 So.3d 1130 ((Fla. 4th DCA 2009). A balancing approach is utilized to determine the sanction employed when evidence is lost. State v. Sobel, 363 So.2d 324 (1978). The material nature of the evidence and the likelihood of prejudice are factors to consider. State v. Westerman, 688 So.2d 979 (Fla. 2d DCA 1997); State v. Counse, 392 So.2d 1029 (Fla. 4th DCA 1981) (holding that dismissal is proper where police destroyed container with liquid smelling and tasting of gasoline and charred pieces of brown paper recovered during an alleged attempted arson, which impaired the defendant's right to access relevant and material evidence necessary to the preparation of his defense.)

Mr. Ferguson is entitled to suppression of this evidence because "[i]t is a violation of state and federal due process for the state to unnecessarily destroy the most critical inculpatory

evidence in its case against the accused, and then be allowed to introduce essentially irrefutable testimony of the most damaging nature against that accused." See Stipp v. State, 371 So.2d 712 (Fla. 4th DCA 1979).

In 2011, Mr. Renaldo Ferguson was confronted by law enforcement officers about a two-year old violent sex crime that he knew nothing about. He went to talk to the officers on his own volition and has maintained his innocence throughout the case.

His accuser had sex with another man after her alleged attack, had his semen on her jeans and reported she had been raped ten hours after it allegedly occurred.

The State accused Mr. Ferguson of these dated crimes years after the fact and was forced to defend himself, or lose his freedom. Worse yet, the only piece of evidence that linked him to these horrible crimes is missing.

The facts are not in dispute in this case – the State negligently lost the single piece of evidence tying Mr. Ferguson to the case for his independent DNA examination and identification. This appeal seeks this Honorable Court's reversal of the trial court's order denying the Defense's Motion to Suppress in regard to missing evidence – a white rag, a bra and a shirt.

Of all of the evidence obtained by the State, only one rag is claimed to have led officers to search, then arrest Mr. Renaldo Ferguson. This rag was identified by an alleged rape victim with poor eyesight in a large public park. That same accuser had sex with another man and waited ten hours before reporting the allegations to police. The accuser's shirt and bra were also lost. Other evidence obtained by the State consists of a photo line-up of an additional man, Dinks Caldwell, pants containing the semen of the accuser's boyfriend and a rape kit excluding the accused.

The missing rag, bra and shirt are material evidence that were in the possession of a state agency, the Mulberry Police Department, and potentially, the Polk County Sheriff's Office. The State's loss of the shirt, bra and rag places the State in violation of the rules of discovery. The missing evidence in this case is clearly material as Mr. Ferguson is unable to obtain comparable evidence by other reasonably available means. Their absence undermines confidence in the outcome. Here, the stakes are very high, and the State, through inadvertent mistake, cannot provide Mr. Ferguson with the evidence that allegedly ties him to a crime that will cost him his life. He cannot independently test the evidence, but must find confidence in the judicial system in a tiny DNA test sample taken from a rag found in a public park and then misplaced before trial.

The rag is especially material in this case and cannot be excused as "merely potentially useful evidence." The rag, being the only piece of evidence linking Mr. Ferguson to this case, is without question "material to guilt or punishment".

Mr. Ferguson maintains his innocence, but the exculpatory rag cannot be tested independently to counter the State's evidence in his defense. Prejudice is evident here because Mr. Ferguson could reasonably expect a different result depending on the availability of the lost material evidence. Mr. Ferguson also suffered "procedural prejudice" because there is a reasonable probability that trial preparation and/or trial strategy would have been altered on the basis of the presence of the bra, shirt and rag, had they been available to the Defense.

Here, the State put forth no evidence that Mr. Ferguson would not be prejudiced without the material evidence. Thus, the State failed to carry its burden.

The missing evidence is material as it was the only link between Mr. Ferguson and the crime. Had the shirt, bra and rag been disclosed to Mr. Ferguson and his counsel, the result of the proceedings would have been different – Mr. Ferguson would not have entered a plea. That loss, regardless of the cause, should be sanctioned with complete suppression in accordance with Brady and its progeny of cases pertaining to fairness to an accused in the State's prosecution.

Mr. Ferguson is entitled to suppression of this evidence because the state cannot introduce essentially irrefutable testimony of the most damaging nature against him absent compliance with discovery rules.

Regardless of its intent, the State lost material evidence against Mr. Ferguson and caused prejudice to him. Thus, suppression of the missing evidence is required.

CONCLUSION

In light of the foregoing arguments and authorities, Mr. Ferguson respectfully requests this Honorable Court to vacate his conviction and remand the case to the trial court with directions to suppress the lost evidence.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Pam Bondi, Attorney General, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this 22nd day of October, 2013.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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