

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

Case No. SC01-2671

Lower Tribunal No. 86-8931

RUDOLPH HOLTON,

Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
Telephone: (813) 801-0600
Facsimile: (813) 356-1292

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

<u>NO.</u> :	<u>PAGE</u>
TABLE OF CITATIONS	ii
ARGUMENT	1
ISSUE I	1
THE TRIAL JUDGE ERRED IN FINDING THAT THE STATE VIOLATED <u>BRADY V. MARYLAND</u> , 373 U.S. 83 (1963) BY FAILING TO DISCLOSE A NUMBER OF ITEMS TO DEFENSE COUNSEL PRIOR TO APPELLEE'S TRIAL.	
ISSUE II	12
THE TRIAL JUDGE ERRED IN GRANTING APPELLEE RELIEF ON HIS CLAIM OF NEWLY DISCOVERED EVIDENCE.	
ISSUE III	13
THE TRIAL JUDGE ERRED IN CONCLUDING THAT THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS DEPRIVED APPELLEE OF A FAIR TRIAL.	
CONCLUSION	14
CERTIFICATE OF SERVICE	15
CERTIFICATE OF FONT COMPLIANCE	15

TABLE OF AUTHORITIES

<u>Brady v. Maryland,</u> 373 U.S. 83 (1963)	1,2,6
<u>Crump v. State,</u> 622 So. 2d 963 (Fla. 1993)	3
<u>Johnson v. State,</u> 769 So. 2d 990 (Fla. 2000)	9
<u>Rivera v. State,</u> 561 So. 2d 536 (Fla. 1990)	3
<u>Rogers v. State,</u> 782 So. 2d 373 (Fla. 2001)	1
<u>State v. Savino,</u> 567 So. 2d 892 (Fla. 1990)	3
<u>Way v. State,</u> 760 So. 2d 903 (Fla. 2000)	1

ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED IN FINDING THAT THE STATE VIOLATED BRADY V. MARYLAND, 373 U.S. 83 (1963) BY FAILING TO DISCLOSE A NUMBER OF ITEMS TO DEFENSE COUNSEL PRIOR TO APPELLEE'S TRIAL.

Contrary to Appellee's assertions, the State correctly noted the applicable standard of review in its Initial Brief. See Initial Brief of Appellant at 37-38. In determining whether the trial court erred in finding that the State failed to disclose Brady material, this Court upholds the decision as long as it is supported by competent, substantial evidence. Way v. State, 760 So. 2d 903, 911 (Fla. 2000). As noted in the State's brief, the ultimate question of whether the Brady material is of such a nature that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different, is a mixed question of law and fact. Rogers v. State, 782 So. 2d 373, 377 (Fla. 2001). In the instant case, the State contends that substantial, competent evidence does not support the trial court's finding that the State failed to disclose some of the disputed items and also submits that confidence in the outcome of Appellee's trial

has not been undermined to the extent that there is a reasonable probability that had the information been disclosed, the outcome would have been different.

With regard to the June 13, 1986 police report regarding an alleged rape of "Katrina Grant" by David Pearson, aka, Pine, the State asserts that the trial court erred in finding that this report was Brady material. In order to constitute a Brady violation, the evidence must be favorable to the accused because it is exculpatory or impeaching, that it was suppressed by the State, and that prejudice ensued. Contrary to Appellee's argument, the instant report does not meet this criteria.

Although David Pearson cooperated with the State by giving a statement to prosecutors after the postconviction evidentiary hearing in 2001 wherein he admitted to engaging in consensual sex with Katrina Graddy approximately a week before her murder, Appellee never established that at the time of his trial he could have shown that "Katrina Grant" was in fact the murder victim, Katrina Graddy. Even if Appellee's trial counsel had obtained the police report and been able to establish that the victim of the alleged sexual assault was in fact Katrina Graddy, it would not have led to any admissible exculpatory or impeachment evidence.

Appellee argues that the evidence of the alleged rape would

have been admissible to show David Pearson's motive to murder the victim or to show the adequacy of the police investigation. Contrary to Appellee's claim, the evidence would not have been admissible under either of these two theories. See Crump v. State, 622 So. 2d 963, 969 (Fla. 1993) (stating that the trial court did not err in prohibiting the defendant from cross-examining a detective on whether the "police interviewed or focused on other suspects during the investigation;" the testimony was not admissible as reverse-Williams rule evidence because it would not have been admissible had the other suspect been on trial for the present offense). The issue of using so-called "reverse-Williams rule evidence" by a defendant to show that the crime had been committed by another person was not an established practice at the time of Appellee's trial in 1986. See Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990) (stating that use of reverse-Williams rule evidence was a case of first impression for this Court). As this Court noted later that year in State v. Savino, 567 So. 2d 892 (Fla. 1990), the use of such evidence by a defendant to shift suspicion to another person must still meet the criteria set forth in Florida Statutes, section 90.404. In the instant case, the evidence of the alleged rape by David Pearson does not meet this standard for admissibility. Accordingly, Appellee could not have been

prejudiced from the suppression of the police report regarding the alleged incident.

Even if Appellee was allowed to introduce such evidence, there is no reasonable probability that evidence of the unrelated alleged sexual battery would have produced a different outcome at Appellee's murder trial. The victim of the alleged rape waived prosecution at the scene after David Pearson informed the investigating officers that it was a crack cocaine for consensual sex deal and that he was willing to submit to any kind of test to prove that he did not force sex on the victim. (SPC:169). There is no question that law enforcement officers would have arrested David Pearson at the scene, notwithstanding the victim's desire to waive prosecution, had they believed the victim's story that Mr. Pearson violently raped her.

Appellee argues that it makes no difference in a Brady analysis whether the victim was telling the truth because her allegations caused David Pearson to be a suspect in four different crimes and could have produced a homicidal rage. Although Pearson was arrested for giving a false name, the law enforcement officers did not arrest him for sexual battery or any drug offenses despite his admission that he had just smoked crack cocaine with the victim. Pearson had no reason to retaliate against the victim based on her allegations because he

had already successfully established his innocence to the investigating officers. Had the jury heard the evidence surrounding the alleged rape, it would not have changed the outcome of Appellee's trial in any way. The jury would have known that there was no rape and the victim's allegations would not have provided Pearson with a motive to retaliate against her by committing murder.

Appellee further alleges that the report of the alleged rape was significant because it would have allowed defense counsel to locate Donald Lamar Smith, the name David Pearson had used to officers resulting in his arrest for obstruction by disguise. According to Donald Smith's testimony at the evidentiary hearing, he saw the fire and smoke at the house on Scott Street and ran over there and saw David Pearson walking fast from the scene of the murder. (PCT:244). Smith testified that Pearson told him that Katrina had been strangled. Donald Smith then walked up to the house and spoke with Officer Lawless and asked him "Who choked Anita? What happened, who got choked?" Donald Smith also claimed that Pearson confessed to killing Ms. Graddy.

The State submits that Donald Smith's testimony was not

credible.¹ Mr. Smith testified at the evidentiary hearing that he ran to the scene of the house when he saw the fire and, after briefly speaking with David Pearson, he went to the scene and spoke with Officer Lawless. Officer Lawless' report indicates that he arrived on the scene at 6:45 a.m. and the fire had just been extinguished. This comports with the trial testimony from firefighters indicating that they arrived at the scene at 6:33 a.m. and quickly extinguished the fire. (DAR:204-21). According to Officer Lawless' report, however, Donald Smith did not speak to him until approximately 11:30 a.m., almost five hours after the fire had been extinguished. This clearly contradicts the testimony given by Donald Smith at the evidentiary hearing.

Furthermore, Donald Smith would not have "snitched" on his best friend by testifying that Pearson raped Katrina Graddy and subsequently confessed to killing her. Donald Smith had every opportunity to inform the authorities at the time of the alleged events surrounding the murder of Katrina Graddy, but, by his own admission at the evidentiary hearing, he did not want to be labeled a snitch. Additionally, any statements Donald Smith

¹Appellee contends, without citation to any record source, that "the circuit court accepted Donald Smith's testimony as credible." Answer Brief of Appellee at 81. The court's order, however, never discusses this witness' testimony or his credibility.

made to others about the alleged rape or confession would not have been admissible at trial because they would constitute inadmissible hearsay. Thus, contrary to Appellee's assertion, he was not prejudiced by the alleged failure of the State to disclose Officer Lawless' report.

As to the Flemmie Birkins' documents, Appellee does not address the fact that a number of these documents were not suppressed by the State.² As such, the postconviction judge erred in finding that these materials constituted Brady material. Appellee contends that the various Birkins' documents were significant because they would have allowed the jury to realize that Birkins was a "horrible criminal" that was actually facing a lengthier prison sentence than the 3½ to 4½ year guideline range disclosed at Appellee's trial. While Appellee's jury was not aware that Birkins actually faced a scoresheet range of 9 to 12 years, the State submits that this slight scoresheet discrepancy was not material and would not have changed the outcome of the proceeding. Birkins pled open to his pending charges prior to Appellee's trial and

²The prosecuting attorney indicated at Birkins' sentencing hearing that he had provided defense counsel with a copy of Birkins' PSI, but defense counsel testified that she did not have it. As to Birkins' pro se motion for probation and the transcript of his sentencing hearing, the State submits that the court erred in finding that these items were Brady material because they were not suppressed by the State.

expected that he would be sentenced to three years with credit for time served pursuant to his plea. Appellee's trial counsel made sure the jury was aware that Birkins had a substantial number of felony convictions and faced a lengthy prison sentence, perhaps even a habitual offender sentence. Despite this criminal history, Birkins testified at Appellee's trial that he expected to be sentenced to three years as part of his open plea. Even if Appellee's trial counsel had the information contained in the various documents, it would not have influenced the jury's credibility determination of Birkins.

Contrary to collateral counsel's assertion that "Mr. Holton's prosecutor ensured that Birkins received a short period of incarceration at the jail," the prosecutor did not ensure any sentence for Birkins. At his sentencing hearing, the prosecutor merely noted that Birkins had testified in the Holton case without the benefit of any deal.³ Birkins' attorney successfully argued against incarceration in Florida State Prison based on

³The prosecutor noted that Birkins had never asked for anything in exchange for his testimony and had not even informed his own trial attorney that he was cooperating with the State. (Def. Ex. 10 at 6). Contrary to Appellee's statement in his brief, the prosecutor did not give "contradictory statements about whether Birkins accepted a plea to three years or not." Answer Brief of Appellee at 83. The prosecutor clearly noted that from the first time he had met Birkins, it was Birkins' understanding that he would receive a three year sentence pursuant to his plea. (Def. Ex. 10 at 6).

safety concerns. Mr. Birkins' attorney indicated that his client had just been "jumped" by one of Appellee's friends and Birkins had been threatened that if he was incarcerated, they would "do him in" while he was in prison. (Def. Ex. 10 at 7). When imposing Birkins' sentence, the trial judge stated:

The fairness of the defendant was he understood he was pleading to three years when he entered the plea and I feel to some extent that my hands are tied in that regard. I cannot justify placing the defendant on community control. I recognize that he will be endangered by being sentenced to Florida State Prison.

I think the record should also reflect that if this Court imposes the three year sentence that I'm at this time inclined to impose that with the time that he has served that he will probably be released within a year. (Def. Ex. 10 at 10). The judge then asked Birkins if he thought he would be any safer in county jail rather than prison. When Birkins indicated that he would be safer in county jail, the judge placed him on five years probation, the first two of which were community control with the first year being specified residence in the Hillsborough County Jail. (Def. Ex. 10 at 10-11). Clearly, a review of the transcript indicates that the prosecutor did not try and influence the judge's ultimate sentencing decision.

Even if this Court agrees with the postconviction court that all of the Flemmie Birkins' documents were suppressed, the lower court's determination that Appellee suffered prejudice is

erroneous. The jury was aware that Birkins was a habitual felony offender that had numerous friends in law enforcement. Appellee's trial counsel argued extensively during her closing argument that Birkins' testimony about Appellee's confession was false and that Birkins was simply using the system to get a better sentence. The information contained in the materials would not have altered trial counsel's closing argument or the jury's ultimate evaluation of Birkins' testimony.

Although Birkins recanted in 2001 and testified that Appellee did not confess to murdering Katrina Graddy, the case law is clear that recanting testimony is "exceedingly unreliable." Johnson v. State, 769 So. 2d 990, 998 (Fla. 2000) (citing Bell v. State, 90 So. 2d 704, 705 (Fla. 1956)). Here, Birkins gave consistent statements at the time of Appellee's trial to detectives, to the attorneys in a sworn deposition, and at trial. Furthermore, Birkins passed a polygraph examination at the time. Thus, the State submits that his recanted testimony is unreliable.

Appellee erroneously contends that the circuit court accepted Birkins's 2001 testimony as credible. Answer Brief of Appellee at 89, 97. This contention is not supported by the trial court's order. The court never expressed any opinion as to Birkins' credibility and contrary to collateral counsel's

assertion, it is impossible to assume an implicit finding from the court's generic conclusion that Appellee suffered prejudice from the suppression of the evidence. In contrast to the court's failure to address Birkins' credibility, the postconviction court clearly rejected Johnny Newsome's recanted testimony from the evidentiary hearing.⁴ The court noted that Mr. Newsome had testified under oath at a deposition and at Appellee's trial to observing Appellee at the house with the victim on the night of her murder at about 11:00 p.m. Mr. Newsome also provided statements to the police regarding his observations. The postconviction court found all of his prior statements consistent. (PCR:812). The court's analysis applies equally to Flemmie Birkins, except with greater force. In addition to providing consistent statements to law enforcement officers and at his deposition and trial (like Mr. Newsome), Birkins also passed a polygraph examination. Accordingly, this Court should find that Birkins' recanted testimony is unreliable and not give it any weight.

⁴The court also rejected the testimony of Elasis Moore. Ms. Moore claimed at the evidentiary hearing that Carrie Nelson had told her she lied when she implicated Appellee in the murder. Ms. Moore also claimed that she was with Johnny Newsome on the night of the victim's murder and he could not have possibly observed Appellee at the house with the victim. The postconviction court found her testimony unpersuasive. (PCR:812).

Even when considering all of the Brady evidence cumulatively, Appellee's case has not been cast "in a whole new light" as claimed by collateral counsel. The jury was sufficiently aware of the circumstances surrounding Birkins' pending charges and his motivation for testifying. Although defense counsel did not present evidence surrounding the alleged rape of the victim by David Pearson, or of Pearson's alleged confession to Donald Smith, this evidence would not have created a reasonable probability that the outcome would have been different. Even assuming that any evidence surrounding the alleged rape would have been admissible, the jury would have concluded that there was no rape given the circumstances. Furthermore, as previously discussed, Donald Smith was not a credible witness and, assuming counsel could have located him for trial, he would not have snitched on his best friend, David Pearson. Thus, even considering the evidence cumulatively, the State submits that there is no reasonable probability that the outcome would have been different.

ISSUE II

THE TRIAL JUDGE ERRED IN GRANTING APPELLEE
RELIEF ON HIS CLAIM OF NEWLY DISCOVERED
EVIDENCE.

Appellant relies on the arguments set forth in the Initial
Brief.

ISSUE III

THE TRIAL JUDGE ERRED IN CONCLUDING THAT THE
CUMULATIVE EFFECT OF THE ALLEGED ERRORS
DEPRIVED APPELLEE OF A FAIR TRIAL.

Appellant relies on the arguments set forth in the Initial
Brief.

CONCLUSION

In conclusion, Appellant respectfully requests that this Honorable Court reverse the trial court's order granting Appellee a new trial.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
Telephone: (813) 801-0600
Facsimile: (813) 356-1292

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Linda McDermott, Assistant Capital Collateral Counsel, Capital Collateral Counsel - Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301, on this 27th day of September, 2002.

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR APPELLANT