

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2009

NORMAN PICKEL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D07-240

[August 12, 2009]

FARMER, J.

In the world of trial evidence, DNA may well be the whole meghilla. It is the single, most formidable evidence in proving many sexual offenses. Because of its scientific reliability, it is often regarded as conclusive. Once inculpatory DNA evidence is well and truly laid before the jury, a guilty verdict is all but a downhill slide on a glacier.

The admission of DNA evidence has two aspects. It demands a scientific foundation of both molecular-biochemical and statistical convention: first, a sample specimen related to a crime must be shown to match the DNA of an identified person (*viz.*, defendant); second, expert statistical testimony must quantify and explain the odds of someone other than defendant having that same DNA.¹ When both parts of the foundation have been shown to point to defendant, the effect can be overpowering. Therefore the structure of both the State's presentation and the defense's right to attack its forensic foundation, is vital. Adequate time for the defense to prepare is indispensable.

Defendant was charged with capital sexual battery. After an extensive pretrial period,² the State disclosed its expert for the second aspect of the DNA evidence only on the first day of trial. In a *Richardson* hearing the State attempted to justify its massively overdue disclosure by arguing

¹ See *Brim v. State*, 695 So.2d 268, 271 (Fla. 1997) ("The fact that a match is found in the first step of the DNA testing process may be 'meaningless' without qualitative or quantitative estimates demonstrating the significance of the match").

² Defendant: in custody January 2006; trial: December 11-15, 2006.

that its population geneticist is its usual witness in such cases, indeed the only one the State has ever called for this purpose. The expert witness told the court he had testified in as many as 150 trials in Broward County. Defense counsel responded that she had never heard of him before the disclosure, did not know he would be called as a State's witness, and thus had no opportunity to take his deposition to prepare for trial. Her testimony was not rebutted.

In denying the motion for the continuance, the trial court found this an inadvertent discovery violation. The court also found defense counsel had been furnished reports regarding the DNA analysis. Finally, the trial judge stressed that defense counsel had not even attempted to depose the witness in the three days of trial since disclosure.

The witness testified. Defendant was convicted. We have the appeal.

The issue is the denial of the continuance to afford a reasonable time for the defense to prepare for this crucial witness. It is significant that this particular assistant public defender had never before faced a DNA statistical expert in a courtroom. The greater experience of other assistant public defenders in the same county is irrelevant to the circumstances she was confronting for the first time. She was to be given — at best — the nights following three long days of trial to prepare to counterattack the most critical expert witness of all. After trial begins in a life felony case, there is no reasonable chance for defense counsel to prepare to meet and counter a newly disclosed expert as important as this one.

To be sure, the State had months to prepare its own DNA statistical expert. Balanced against the several months afforded the State, by the trial judge's reckoning the defense could plausibly be given only a handful of hours at the end of three grueling days in court to prepare to test the foundational reliability of the DNA. Rushed hotel depositions in the nighttime by exhausted defense counsel cannot possibly balance the scales of preparation.³ In our judgment, the circumstances required no further showing by defense counsel as to why she needed a continuance or what she might have accomplished thereby. The lack of disclosure

³ See *Grau v. Branham*, 626 So.2d 1059, 1061 (Fla. 4th DCA 1993) (“we strongly feel that once the trial starts the parties’ attorneys should be allowed to concentrate on the presentation of the evidence at hand. Neither side should be required to engage in frantic discovery to avoid being prejudiced by the intentional tactics of the other party. *Binger* certainly does not require the trial court to admit this testimony”).

until trial had already begun, and her lack of sophistication in the subject, irrefutably set up an overriding necessity.

Disclosing a population geneticist on the first day of trial is in the nature of a structural delict. The effect is the same whether intentional or negligent. It sends defense counsel into battle without arms. It should not matter that the State's failure is thought inadvertent.

Nor is it fair to place a burden on defense counsel to anticipate disclosure and somehow prepare for it. It was the State's burden to disclose. In civil trials, the failure of the other side to disclose an expert witness before trial is usually understood to authorize opposing counsel to prepare for a trial without such evidence.⁴ There is no reason why it should not be thus for criminal defense counsel.

If the State is to send an accused to prison for the rest of his life, the least it can do is give him and his lawyer fair notice of all particulars of the DNA evidence it plans to present. As a matter of elemental justice we must recognize that the nature of DNA makes any failure to disclose such evidence well before trial strikingly consequential. Hence we do not think the trial judge's finding of no prejudice is supported by the record. Defendant could hardly have been more unfairly prejudiced.

Reversed for a new trial.

POLEN, J., concurs.

GROSS, C.J., dissents with opinion.

GROSS, C.J., dissenting.

The majority has applied the wrong standard of review to this case, which involves the state's disclosure of a witness on the first day of trial, before the jury was selected. The majority has incorrectly applied the concept of "prejudice" that is central to the analysis required by *Richardson v. State*, 246 So. 2d 771 (Fla. 1971). The majority fails to grasp the type of testimony the late disclosed witness was to give. The majority fails to appreciate the extent of the state's disclosure of information, which the trial judge properly took into account in her *Richardson* ruling. For these reasons, I dissent.

⁴ See *Grau*, 626 So.2d at 1062 ("The wrongs of the attorney should not harm the innocent defendant who in good faith engaged in discovery and conducted the trial by the rules").

The state first disclosed the name of Dr. Martin Tracey, a population geneticist, on the first day of trial prior to jury selection, Monday, December 11, 2006. The state called Tracey as a witness on Thursday. It was only then that the defense raised a *Richardson* objection to his testimony and moved for a continuance. The trial judge conducted a full *Richardson* hearing and her extensive ruling fills eight pages of the trial transcript. She overruled the objection and denied the motion for continuance.

As set forth by the supreme court in *Brim v. State*, 695 So. 2d 268, 269 (Fla. 1997), the DNA testing process consists of two separate steps. The first step uses principles of molecular biology and chemistry to determine whether two DNA samples match or look the same. *Id.* “The second step relies on principles of statistics and population genetics to give statistical significance to the DNA match, by indicating the statistical frequency with which such matches might occur in the population.” *Arnold v. State*, 807 So. 2d 136, 140 (Fla. 4th DCA 2002) (citing *Brim*, 695 So. 2d at 269-70).

Tracey’s testimony concerned the second step of the DNA testing process. Significantly, the information he conveyed to the jury was provided to the defense months before. Tracey explained that given the match between the defendant’s DNA profile and the profile obtained from the evidence (testified to by another witness), the chances were “one in 58 trillion” that someone else in the population other than the defendant had that same profile. This exact information is contained in Table 2 of the Bode lab reports that the state gave to defense counsel in January and July 2006. These reports contained the same charts that Tracey referenced and explained in his testimony. The crux of his testimony was thus disclosed over 9 months before trial.

“During a *Richardson* hearing, the trial court must inquire as to whether the violation (1) was willful or inadvertent; (2) was substantial or trivial; and (3) had a prejudicial effect on the aggrieved party’s trial preparation.” *State v. Evans*, 770 So. 2d 1174, 1183 (Fla. 2000). In the context of a *Richardson* violation, “the defense is procedurally prejudiced if there is a reasonable possibility that the defendant’s trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefited the defendant.” *State v. Schopp*, 653 So. 2d 1016,1020 (Fla.1995).

In this case, the trial court held a full *Richardson* hearing⁵ and decided that the defense was not procedurally prejudiced by the disclosure of Tracey’s name on the first day of trial. When the trial court has held a *Richardson* hearing, its decision is subject to reversal only upon a showing that it abused its discretion. See *Gethers v. State*, 620 So. 2d 201, 202 (Fla. 4th DCA 1993); *Banda v. State*, 536 So. 2d 221, 223 (Fla. 1988); *Michaels v. State*, 505 So. 2d 694 (Fla. 4th DCA 1987); *Whites v. State*, 730 So. 2d 762, 764 (Fla. 5th DCA 1999); *Smith v. State*, 499 So. 2d 912 (Fla. 1st DCA 1986). “Discretion is abused only where no reasonable [person] would take the view adopted by the trial court.” *Cox v. State*, 819 So. 2d 705, 713 (Fla. 2002) (quoting *Trease v. State*, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (*Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990))).

Procedural prejudice resulting from a *Richardson* violation demonstrates three characteristics not present in this case. First, the discovery violation injects facts into the case that have not been previously disclosed. Second, the undisclosed information is case specific, not information generally available. Third, knowledge of the

⁵Most cases that reverse for discovery violations do so because the trial judge has *not* conducted a full *Richardson* hearing, usually because the court erroneously found that no discovery violation had occurred. There is a difference between a procedural prejudice analysis in the context of a full *Richardson* hearing and deciding whether a discovery violation amounted to harmless error where there has not been a full *Richardson* hearing that considered the issue of procedural prejudice. As the supreme court wrote in *Scipio v. State*, 928 So. 2d 1138, 1149 (Fla. 2006):

An analysis of procedural prejudice does not ask how the undisclosed piece of evidence affected the case as it was actually presented to the jury. Rather, it considers how the defense might have responded had it known about the undisclosed piece of evidence and contemplates the possibility that the defense could have acted to counter the harmful effects of the discovery violation. By contrast, an analysis of substantive prejudice would ask whether it was possible that the error affected the jury’s verdict. While this standard itself is a high one for the State to overcome, it is of an entirely different quality than a procedural prejudice analysis.

Id. (citations omitted). These “deficient” *Richardson* hearing cases engage in a harmless error analysis—can it be said “beyond a reasonable doubt that the defendant was not procedurally prejudiced by the [discovery] violation.” *Evans*, 770 So. 2d at 1183.

undisclosed information would have altered the way the defense prepared for trial.

For example, in *Stern v. State*, 739 So. 2d 1203 (Fla. 4th DCA 1999), the defendant was charged with selling sunglasses bearing counterfeit designer trademarks. The state timely disclosed copies of Fendi and Armani trademark registrations, but failed to produce certificates of authenticity for the registrations until the day of trial. We found no abuse of discretion in the trial court's finding that the discovery violation was not "prejudicial to the preparation" of the defense, noting that the "substantive portion of the trademark registrations had been provided" to the defense prior to trial. *Id.* at 1206. The certificates were not case specific; a standard form of this nature would accompany any valid trademark registration. Most importantly, there was no indication of how the defense would have prepared differently had the actual document, rather than its substance, been timely disclosed. *See also Gethers v. State*, 620 So. 2d 201 (Fla. 4th DCA 1993) (affirming order finding no prejudice where defendant's late disclosed statement "supported" the strategy of defense).

On the other hand, cases where courts have reversed a trial judge's finding of no procedural prejudice involve the nondisclosure of case specific evidence which would have changed the defendant's strategy or theory of defense at trial.

Thus, in *McDowell v. State*, 903 So. 2d 290 (Fla. 4th DCA 2005), the charge of possession of an unauthorized short-barreled shotgun was based on the defendant's constructive possession of a residence where the shotgun was found. The state failed to disclose the defendant's statement to a police officer that he lived at that address. Aside from this undisclosed statement, there was no evidence that the defendant lived at the residence. We reversed the trial judge's finding of no procedural prejudice, observing that had defense counsel been aware of the defendant's statement, he was "unlikely to have pursued the adopted strategy that the 'defendant didn't live in the apartment where they found the shotgun.'" *Id.* at 292.

Similarly, in *Hatcher v. State*, 568 So. 2d 472 (Fla. 1st DCA 1990), the defendant was charged with leaving the scene of an accident. Initially, the state contended that the defendant had to have been aware of the accident merely "by virtue of how it occurred." *Id.* at 474. Undisclosed witnesses testified at trial that they expressly told the defendant that he had caused an accident. The first district held that procedural prejudice

to the defense was “inherent” where the state changed its “theory of the case after the defendant has testified.” *Id.* at 475.

The fifth district found procedural prejudice in a case where the defense did not learn of the existence of DNA evidence until the middle of trial. In *Rojas v. State*, 904 So. 2d 598 (Fla. 5th DCA 2005), the defendant was charged with attempted robbery. His defense was to attack the eyewitness identification. Over objection, the state introduced an undisclosed DNA lab report indicating that DNA taken from hairs located on a mask found near the crime scene matched the defendant’s DNA. The fifth district reversed for a new trial, concluding that the defendant’s trial preparation or strategy would have been materially different had it known of the DNA evidence.

Here, the trial judge’s determination that the defense had not been procedurally prejudiced was entirely reasonable, so there was no abuse of discretion. None of the hallmarks of procedural prejudice were present. Tracey’s testimony did not inject new facts into the case; they had been disclosed for months. The statistical information was not case specific, but was generally applicable in all DNA cases. The defense never said how it would have changed its strategy or theory of defense had Tracey’s name been timely disclosed, instead of just the substance of his testimony.

The defense was aware of the substance of the testimony by July 2006 from the reports disclosed by the state. The statistical aspect of the DNA evidence had been available to the defense for months. Also, as the trial judge noted, Tracey was the only DNA statistical expert that the Broward state attorney’s office had ever used. He had testified in as many as 150 trials in Broward County and the public defender’s office had participated in a majority of them.⁶ In another context, the supreme court has written that “a public defender’s office is the functional equivalent of a law firm.” *Bowie v. State*, 559 So. 2d 1113, 1115 (Fla. 1990). In the months before trial, lawyers in the same law firm can be expected to talk, so the defense lawyer had both the knowledge and the resources to anticipate and prepare for Tracey’s testimony.

⁶Dr. Tracey is a commonly used expert and his name frequently appears as an expert used in Florida cases. See, e.g., *Owen v. State*, 986 So. 2d 534, 549 (Fla. 2008); *Kelley v. State*, 974 So. 2d 1047, 1050 (Fla. 2007); *Douglas v. State*, 878 So. 2d 1246, 1252 n.4 (Fla. 2004); *Armstrong v. State*, 862 So. 2d 705, 712 (Fla. 2003); *Yisrael v. State*, 827 So. 2d 1113, 1114 (Fla. 4th DCA 2002); *Arnold v. State*, 807 So. 2d 136, 139 (Fla. 4th DCA 2002); *Johnson v. State*, 717 So. 2d 1057, 1061 (Fla. 1st DCA 1998).

Tracey's testimony was not case specific. It was a necessary link in any DNA case that established the statistical probability that a particular sample of DNA would match anyone in the population other than the defendant. This testimony would be virtually the same in any case for any defendant whose DNA profile matched the evidence. Tracey's testimony generally explained how these statistics are generated. For this, he referenced an FBI population database that is commonly used and publicly available on the internet. Although the defense had the necessary information to prepare for this aspect of the case, it did not do so.

By the time jury selection began on Monday, the trial judge had granted eleven continuances, nine of which were charged to the defense. Defense counsel did not move for a continuance on *Richardson* grounds on Monday, before the jury was sworn. She waited until Thursday, when every witness but Tracey had testified. She made no attempt to speak with Tracey or depose him on Monday, Tuesday, or Wednesday, when he would have been available.

Most significantly, the defense has never identified what it might have done differently had Tracey's name been disclosed, instead of just the lab report. The initial brief states that the defendant "did not have the opportunity to . . . develop impeachment and rebuttal testimony," but does not say what the testimony is or how it could be accomplished. The brief was filed over two years after trial, which is certainly enough time to figure out what the "impeachment and rebuttal" testimony would be so that it could be specifically described. At trial, the defense attorney could not say what she would have done differently, even though she had known the substance of the testimony for months. Even her motion for new trial talks in generalities and not specifics.

It was thus well within the trial judge's discretion to conclude that there was no procedural prejudice, that the defense would have done nothing differently had Tracey's name been disclosed when the charges were filed. The defense had always faced "one in 58 trillion" odds with the DNA testimony and did nothing to try and change the equation. Rather, the defense chose to cast a hollow objection into the legal waters in the hope that a judge would bite. You never know.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ana J. Gardiner, Judge; L.T. Case No. 05-19567CF10A.

Carey Haughwout, Public Defender, and Patrick B. Burke, Assistant Public Defender, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.