IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF THE STATE OF FLORIDA

John Dobbs,
Appellant,

vs.

DCA Case No. 5D07-1057

State of Florida,
Appellee.

STRICKEN PER 1/29/8 PRE

Appeal from the Circuit Court
In and For Orange County, Florida

Pro Se Amended Inital Brief of Appellant

FILED
JAN 29 2008
SUSAN WRIGHT
Clerk 5th DISTRICT COURT OF APPEAL

John Dobbs DC# C00618
Apalachee C.I. Q4-203U
35 Apalachee Drive
Sneads, Florida 32460

To Be Added To The Record
and Amended Inital Brief of appointed
counsel by → Jame S. Purdy
Public Defender
Seventh Judicial Circuit

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FIFTH DISTRICT

Kevin R. Holtz
Assistant Public Defender
Florida Bar No. 0161624
444 Seabreeze Boulevard, Suit 210
Daytona Beach, Florida 32118
Phone: (386) 252-3367
(Counsel for Appellant)

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Cases Cited:

A.L.H. -V- State, 773 So.2d 1192 (Fla. 4th DCA 2000)
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Booker V. State, 503 So.2d 888 (Fla. 1987)
State V. Burton, 314 So.2d 136 (Fla. 1975)
U.S. -V- Deberry, 430 F.3rd 1294 (10th Cir. 2005)
U.S. -V- Miller, 263 F.3rd 1 (2nd Cir. 2001)
U.S. -V- Mayer, 490 F.3d 1129 (9th Cir. 2007)
Young V. State, 786 So.2d 641 (Fla. 4th DCA 2001)
Riley V. State, 866 So.2d 779, 780 (Fla. 5th DCA 2004)
Proctor V. State, 845 So.2d 1007 (Fla. 5th DCA 2003)
Demetrius V. State, 864 So.2d 1208 (Fla. 4th DCA 2004)
Greenwood V. State, 802 So.2d 401, 402 (Fla. 4th DCA 2002)
State V. Shearer, 628 So.2d 1102 (Fla. 1993)
Ellis V. State, 696 So.2d 458, 459 (Fla. 4th DCA 1997)
U.S. -V- Rivera Pedin, 861 F.2d 1522 1529-30 (11th Cir. 1988)
Harding V. Walls, 300 F.3d 824 (7th Cir. 2002)
United States V. Thompson, 117 F.3d 824 (7th Cir. 1997)
Herrick V. State, 590 So.2d 1109 (Fla. 2nd DCA 1991)
United States V. Agurs, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976)
Giglio -V- United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972)
Napue V. Illinois, 350 U.S. 264, 3 L.Ed. 2d 1217, 79 S.Ct. 1173 (1959)
United States V. Hogan, 712 F.2d 757, 759-60 (2nd Cir. 1983)
U.S. -V- Teffera, 985 F.2d 1082, 1089 n.6 (DC Cir 1993) (dictum)
U.S. -V- Garza, 608 F.2d 659, 666 (5th Cir. 1979)
U.S. -V- Young, 17 F.3d 1201, 1203-05 (9th Cir. 1994)
U.S. -V- McLaughlin, 89 F. Supp. 2d 617 (E.D. Pa. 2000)
Strickland V. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948 144 L.Ed.2d 286 (1999)
Thomas V. Calderon, 120 F.3d 1045 (9th Cir. 1997)
Valien V. Public Health Trust of Dade County, 473 So.2d 1305 (3rd DCA 1984) approved 507 So.2d 596 (Fla. 1987)

Table of Citations

Cases Cited:

State V. Glosson, 462 So. 2d 1082 (Fla. 1985)
U.S. -V- Hankton, 432 F. 3d 779 (7th Cir. 2005)
U.S. -V- Doe, 297 F. 3d 76 (2nd Cir. 2002)
U.S. -V- Burke, 425 F. 3d 400 (7th Cir. 2005)
Phillip V. Woodford, 267 F. 3d 966 (9th Cir. 2001)
Stanton V. State, 746 So. 2d 1229 (Fla. 3rd DCA 1999)
Burrell V. State, 602 So. 2d 628 (Fla. 2nd DCA 1992)
Lightborne V. State, 742 So. 2d 363 (Fla. 4th DCA 1999)
Pieczynski V. State, 516 So. 2d 1048, 1049 (Fla. 3rd DCA 1987)
Butler V. State, 493 So. 2d 451, 452 (Fla. 1986)
Holiday V. State, 753 So. 2d 1264, 1269 (Fla. 2000)
Smith V. State, 521 So. 2d 106, 107-108 (Fla. 1988)
U.S. -V- Sanchez-Lima, 161 F. 3d 545 (9th Cir. 1998)
Carter -V. Kentucky, 450 U.S. 288, 101 S. Ct. 1112 L. Ed. 2d 241 (1981)
Goodwin V. Balkcom, 684 F. 2d 794 (11th Cir. 1982)

Other Authorities Cited

Florida Rules of Criminal Procedure - Rule 3.140 (g)
Florida Rules of Criminal Procedure - Rule 3.134
4th Amendment of the United States Constitution
5th Amendment of the United States Constitution
14th Amendment of the United States Constitution
Section 776.013 (3), Florida Statutes (2006)
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Section 776.041 (2), Florida Statutes (2006)
Section 782.04(2), Florida Statutes (2006)
Section 784.021(1)(a) Florida Statutes (2006)
Section 790.15 (2) Florida Statutes (2006)

Preliminary Statement

In this brief, the following in regards to remarks may not be word for word, being the trial transcript is unavailable to me at this time; but they are derived from notes taken during my presence at the trial.

The 6 elements of necessity are verbatim being I kept my copy of the Jury Instructions.

Statement of the Case

This appeal is from the judgments and sentences for one count of second degree murder (with a weapon); two counts of aggravated battery (with a weapon); and one count of aggravated assault (with a firearm) in the Circuit Court for the Ninth Judicial Circuit, Orange County, Florida. Appellant, John Dobbs, was arrested following an altercation with atleast four males in the parking lot of an adult entertainment club. The State charged Mr. Dobbs in a five count information filed in the Circuit Court for the Ninth Judicial Circuit, Orange County, Florida, by way of Clerk of court Lydia Gardner, Nov. 20, 2006 4:37 pm, with one count of second degree murder (with a weapon), two counts of aggravated battery with a deadly weapon or causing great bodily harm, one count of aggravated assault with a firearm, one count of shooting from a vehicle. Appellant, John Dobbs asserted self defense in the first 4 counts of the information. Appellant denied indulging in the 5th count shooting from a vehicle of which he was acquitted.

Statement of the Facts

Although, accusations as to who started the altercation and where as well as how it started, Mr. Dobbs who was the only African-American male in the altercation claiming to have been approached and attacked; and 3 of the 4 Hispanic males claiming to have been approached and attacked. Mr. Dobbs was the only person arrested in a situation where 5 people admit to being in the fight and evidence shows at least 6 according to testimony. He was also the only man searched by police who otherwise only searched the scene.

The five count information filed in the Circuit Court of Orange County, State of Florida Nov. 20 2006 4:37 pm by Lydia Gardner Clerk of Court does not conform to formallitys perscribed by federal and State constitutional law or rules of procedure and is facially and legally insufficent, in that it did not meet the requirement of certification of oath as well as verification by signature.

The special Jury Instruction of necessity given by the trial court is in direct conflict with Florida's Justifiable use of force statutory law.

Prosecuting assistant State attorney Kimberly Laskoff pursued the conviction of Mr. Dobbs relentlessly, regarless of proof of perjury by her primary complaining witness, insufficient evidence, improperly filed charges, and despite being torn between two scenerios in direct conflict with one another. One scenerio described by States complaining witnesses and the other by States impartial witnesses, the latter actually supporting the accused's version of events and discrediting the complaintants. This prosecutor chose to create her own scenerio, which was loyal to neither the testimony of her complaining witnesses nor her impartial witnesses, but loyal only to convicting Mr. Dobbs.

Summary of Argument

Standards / Issue

Point I

As for the unsigned and unnotarized charge information filed on Nov. 20th 2006 at 4:37 pm, by Orange County Clerk of court Lydia Gardner. The Appellant asserts it to be a violation of his Civil and Constitutional rights as it is violation of due process and prosecutorial misconduct, being he was prosecuted relentlessly, regardless of the fact. He asserts that the absence of a State attorney or assistant State attorney's signature and certification of oath upon the information filed as an accusatorial affidavit, is a fundamental error to the justice finding procedure, in which formal charges must be filed to further detain and/or prosecute. He asserts these violations and prejudice with the establishment of the following:

(A) Florida Rules of Criminal Procedure - Rule 3.140 (g) Signature, oath, and certification; information - Section 10, DR, Florida Constitution, requires that informations be under oath of the prosecuting attorney of the court in which the information is filed. Article V, Section 4(5), Florida Constitution, contains the same requirement concerning informations filed by the prosecuting attorney in a criminal court of record. This proposal also does not deviate from present Florida Statutory law as found in Section 906.04, Florida Statutes. This Statute has recieved judicial approval. It should be noted here that the prosecutor's statement under oath is defined as to the purpose served by the signature.

(B) Florida Rules of Criminal Procedure - Rule 3.134

States that "in no event shall any defendant remain in custody beyond 40 days unless they have been formally charged."

(C) The 4th Amendment of the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

(D) The 5th Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(E) The 14th Amendment of the United States Constitution

All persons born or naturalized in the United States, and subject to the reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Point II

Addressing improper jury instructions in light of the apellants claim of self defense and the amendment of the Justifiable use of Force Statute.

The State argued in its opening and closing statements that the defendant should have left. The Jury Instruction insinuated that retreat was necessary to prove innocence. Yet, according to Justifiable use of force Statute 776.013 section 3 established Oct. 1 2005, regarding the duty to retreat: A person who is not engaged in an unlawful activity and who is attacked by any

place where he or she has a right to be, has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

Appellant testified that his use of deadly force was justified based on the number, aggression and relentlessness of his attackers, also that they had and used weapons. He asserts that his ~~assumption~~ exercise + claim of justified use of force is valid and supported by Fla. Statute 776.013(3). But the error was not only in the insinuation that he must retreat, but in the inclusion of the elements of necessity. Where it was stated that in order to find that the defendant acted in justifiable use of deadly force the jury must find these 6 elements:

1) the defendant reasonably believed a danger existed which was not ~~initi~~ intentionally caused by the defendant,
2) the danger threatened significant harm to the defendant or a 3rd person,
3) the threatened harm had to have been real imminent and impending,
4) the defendant had no reasonable means to avoid the danger except by committing 2nd degree murder or manslaughter,
5) the 2nd degree murder or manslaughter must have been committed out of necessity to avoid the danger, and
6) the harm the defendant avoided must overweigh the harm caused by committing 2nd degree murder or manslaughter.

These 6 elements of necessity were applied to count one. Counts 2 and 3 also held these elements in its jury instruction, with the exception that the words '2nd degree murder or manslaughter' were substituted by the words 'aggravated battery'.

Appellant submits that each count suffers the same violation in its jury instruction's implementation of the necessity elements and is in direct conflict with Florida Statutory law. He argues the improprieties as a

whole and under the same premise.

Point III

Appellant asserts 'Prosecutorial Misconduct' established by the following facts:

(A) The complaining witnesses trial testimony completely contradicted their sworn accounts to police, of the events which took place the night of the incident. Statements which were the initial source and purpose for Mr. Dobbs' arrest.

(B) Charge information must be filed by the prosecuting attorney 'underoath' meaning after being first duly sworn and verifing through his/her certified signature their identity and that they 'institute' meaning initiate the prosecution in good faith. These formal requirements for authenticity must take place prior to the information being filed by the clerk of court. When this criteria is not met, fraud has been committed.

(C) This information was made available to the defendant mid December 2006 via discovery which was given to the defendant by his public defender Ms. Catherine Chien who stated that she had just recieved it from the prosecutor and hadn't gone over it yet. Note: There is no reason the information filed Nov. 20, 2006, should not have been signed and certified by mid December 2006; unless the validity of the charges were of great issue. Obviously Someone pushed it through the clerk of court without authorization.

(D) Prosecuting Assistant State Attorney Kimberly Laskoff, acted as witness and prosecutor during her closing argument by making unfounded accusations regarding the specifics of the altercation in order to secure a conviction. She alleged that the reason for the defendants injuries in regards to cut is that "he cut himself". This statement is not supported by any evidence or testimony by witnesses on either side. She alleges motive by stating "he was upset because his girlfriend was upset", which is again unfounded. She alleged that Mr. Dobbs attacked the complaining witnesses at his

own vehicle, which is again unfounded, and not supported by evidence or testimony by witnesses on either side. The only scenerio where Mr. Dobbs is the aggressor; is the scenerio of the complaining witnesses, in which Mr. Dobbs allegedly attacks the 4 of them at their vehicle. This scenerio was not adopted by the prosecution, more than likely because it goes against the 'weight of the evidence' provided by the states own impartial witnesses and blood samples taken from Mr. Dobbs' vehicle and the scene. Further more she alleges to the jury that the Defendant possessed the Knife in his hand from the begining of the altercation, and demonstrates to the jury that the defendant held the Knife upsidedown. When there was no testimony to verify how the Knife was held other than the defendants testimony, because all partys involved as well as witnesses admit to never having seen Mr. Dobbs with the Knife and no one knew they were stabbed until the altercation was over. Mr Dobbs testified to holding the Knife right side up.

Argument

Point I

The trial court erred allowing violation of Due Process where the state was allowed to prosecute based on information filed by Clerk of Court lacking Signature verification and Certificate of Oath.

The Appellant contends that this violation is of Constitutional magnitude. He asserts that it is a violation of his 4th and 14th amendment rights and that after Knowledge of this violation comes before the court, any further detainment and prosecutorial argument is a violation of his 5th Amendment right; because accordingly no person shall be subject to the same offense to be twice put in jeopardy of life or limb.

Genera improprieties that occur in a state proceeding is cognizable if they result in fundamental unfairness. The formal filing of charges under oath of State or assistant State attorney is fundamental to the government granting such attorney the right to prosecute. The word 'formal' which is defined as 'following accepted conventions or rules', is of great significance; being it distinguishes purpose and weight of allegations. Thus the filing of charges by the clerk of court, while while the accusation, does not conform to State or U.S. constitutional requirements is violation of due process and apellants detainment and prosecution from that point on flagrant prosecutorial misconduct.

The Appellant asserts his prosecution to be intrinsically fraudulent, a deliberate miscarriage of justice; and ask that this Court acknowledge that the only plausible remedy is to order his emergency release and restitution.

A prosecutor is presumed to have Knowledge of all documents in the State attorneys files (See) A.L.H. -V- State, 773 So.2d 1192 (Fla. 4th DCA 2000). Leading case on fraud on the Court, which must be intrinsic fraud, deserves no protection and due process requires that every opportunity to expose fraud and obtain relief from it be given. (SEE)

State V. Glover, 564 So.2d 191, at 193 (Fla. 5th DCA 1990); Becker V. State, 503 So.2d 888 (Fla. 1987); and State V. Burton, 314 So.2d 136 (Fla. 1975).

The Appellant asserts that there is no other remedy because: Both statutes of limitations and the due process clause protect suspects by forclosing tardy prosecutions. (See) U.S.-V-Deberry, 430 F.3d 1294 (10th Cir. 2005). 'Due Process' requires that a convicted person not be sentenced on materially untrue assumptions or misinformation. (SEE) U.S.-V-Miller, 263 F.3rd 1 (2nd Cir. 2001).

The Appellant asserts due process violation, being he was the only one arrested and detained for a public fight which involved at least 5 people, and while 3 accuse him of starting it, he and his girlfriend accuse the 4; and witnesses verified that he was approached by the 4. (SEE) U.S.-V-Mayer, 490 F.3d 1129 (9th Cir. 2007) held that 'An indictment that results from selective prosecution will be dismissed.'

The Appellant respectfully request that this court nullify the charges against him because they are facially and legally insufficient. Rending the information ineffective. And asks that the court equally stress the importance of formality with State prosecutors as with the following findings in regards to the defense.

In Young V. State, 786 So.2d 641 (Fla 4th DCA 2001) 'the court affirmed the order summarily denying the Appellants post-conviction motion, due to his unnotarized oath and his failure to comply with required language of oaths found in Fla. R. Crim. P. 3.987' In Riley V. State, 866 So.2d 779, 780 (Fla. 5th DCA 2004) Concerning a defective oath in a petition for belated appeal. The court stated "Riley now attempts to remedy that omission but has failed. At the end of his petition there is a notary certificate; however no where in the certificate, or in the petition for that matter is there a statement by Riley subjecting him to perjury penalties if his statements are false." (See also) Proctor V. State, 845 So.2d 1007 (Fla. 5th DCA 2003).

The State did not sign or notarize the oath verifying that the prosecution would take place in good faith. The appellant asserts that it did

not. In Demetrius V. State, 864 So.2d 1208 (Fla.4th DCA 2004) the Court stated "Appellant seeks review of an order that denied his motion for additional jail credit. We affirm because the motion contained a defective verification clause." (See also) Greenwood V. State, 802 So.2d 401, 402 (Fla. 4th DCA 2001). In the seminal case concerning the oath requirement State V. Shearer, 628 So.2d 1102 (Fla. 1993), the Florida Supreme Court found that in order for an oath to be legally sufficient it must "protect against perjury".

In Ellis V. State, 696 So.2d 458, 459 (Fla.4th DCA 1997) the court summarily denied the appellant's motion for post-~~covicti~~ conviction relief because it did not contain a proper oath and verification as required by rule 3.850 Fla.R.Crim.P. In accordance with these finding the ~~defen~~ appellant Mr. Dobbs' request that any arguments and post ponements requested by appelle be denied because the information filed did not contain a proper oath and verification as required by rule 3.140(g) Fla.R.Crim.P., and asserts his findings in regards to the information filed Nov. 20th 2006 at 4:37 pm to be one of the many violations of due process responsible for his wrongful imprisonment.

Argument

Point II

The trial court erred in allowing misleading Jury instruction of Necessity Elements which Negate Appellants only Defense

The Appellant asserts Elements 4 thru 6 of the necessity sections in the jury instructions insinuate to the jury that the defendant is alread found guilty of a crime.

For example in regards to count one #'s 4 thru 6 read as follows: 4) the defendant had no reasonable means to avoid the danger except by committing 2Nd Degree murder or manslaughter, (This element of the instruction alreadyfinds Mr. Dobbs guilty by stating that 2Nd Degree murder ~~was committed~~ or manslaughter was committed for a fact, regardless of the situation and stresses that in that situation he must have used every possible means to avoid taking the life of his assailant. It refers to the defendant as a murder or someone guilty of manslaughter rather than a man who utilized Justifiable use of deadly force in self defence which is not composed of the same ingredients ~~as~~ which catergorize 2Nd degree murder or manslaughter which are always crimes. Furthermore it deems it necessary to retreat, which is contrary to Florida law in reference to self defense. The language of the element demands that if the jury were asked ~~to~~ simply to answer yes or no to whether Mr. Dobbs Committed 2Nd Degree murder or manslaughter the answer must be yes to one of the two.)

5) the 2nd degree murder or manslaughter must have been committed out of necessity to avoid the danger, (This element once again finds Mr. Dobbs guilty of a crime, reinforces the weight of the necessity ~~or~~ section as a ~~lit~~ whole and stresses the illusion that retreat was possible and necessary, because while a justifiable use of force or use of deadly force may be necessary murder or manslaughter is never necessary)

6) the harm the defendant avoided must over-weigh the harm caused by committing 2nd degree murder or manslaughter. (Once again Mr. Dobbs is found guilty of the crime through the language of the element before the verdict. Yet this time there is a twist. This element mislead the jury even further to have them contemplating whether or not Mr. Dobbs knew for sure that his assailant had ~~predisposed~~ murder on his mind and shifts the burden of proof totally upon the defense. Because the only thing that overweighs ~~2nd~~ 2nd degree murder or manslaughter is 1st degree murder. Meaning the defendant must provide some sort of evidence or testimony that his assallant planned to murder him or said that he would kill him. Still if the defendant had proven such a thing he would have been found to have committed 2nd degree murder or manslaughter.)

The Appellant asserts that these "must find" elements of necessity prejudiced the jury against him, and negated his defense, as well as shifted the burden of proof relieving the prosecutor of her burden totally. He asserts that based on these instructions there was no way for the jury to find him 'not guilty' of committing 2nd degree murder or manslaughter, with out disregarding the instruction.

Appellant asserts that his defense was not necessarily that someone had to die, but that this unfortunate occurance came about during his adamant defense of himself and his girlfriend and that he at the time did fear for his own life as well as hers. The jury instruction did not provide ~~that~~ the jury with the fact that the State has the burden of proving beyond a reasonable doubt that Mr. Dobbs did not act in self defense. In fact it eleminated self defense as a defense, and rendered useless the Justifiable use of deadly force with Fla. Statute 776.013(3) where one is granted the right to stand their ground and meet force with force to prevent death or great bodily harm or the Commission of a forcible felony.

The Appellant asserts that, while he did recieve great bodily harm which is evident from his numerous injuries and according to the statute warrants justifiable use of deadly force. whether his assailants had intent on killing him from the begining he is not sure; but he was sure

that they were willing to kill him.

"A confusing and misleading jury instruction constitutes reversible error if there exists a reasonable possibility that the instruction contributed to the conviction". Pieczynski V. State, 516 So.2d 1048, 1049 (Fla. 3rd DCA 1987). "The court should not give instructions which are confusing, contradictory or misleading". Butler V. State, 493 So.2d 451, 452 (Fla. 1986). An instruction which tends to confuse rather than enlighten the jury ~~and~~ is cause for reversal if it may have misled the jury and caused them to arrive at a conclusion that otherwise they would not have reached. It is fundamental error when an instruction is so flawed as to deprive the defendant of his self defense argument. Holiday V. State, 753 So.2d 1264, 1269 (Fla. 2000); Smith V. State, 521 So.2d 106, 107-108 (Fla. 1988)

Appellant submits that the word 'prevent' as used in Florida Statute 776.013(3) does not conflict with the conventional definition of the word which means 'to keep from happening'. While the word 'avoid' as ~~means~~ used in the language of the elements of necessity means 'to keep away from' which is contrary to statutory law where there is no duty to retreat and one is permitted to stand their ground. Also the defendant asserts that his injuries are proof of the reality of the danger and establishes his prima facie case of self defense, because according to the standard jury instruction use of ~~ded~~ deadly force is granted to prevent reasonably conceived imminent danger. The word 'imminent' meaning 'near at hand, mediate rather than immediate, close rather than touching'. Yet it is clear from his situation as described by himself his girlfriend as well as impartial witnesses that the danger he faced was, at hand, immediate, real and touching.

U.S. -V- Sanchez-Lima, 161 F.3d 545 (9th Cir. 1998) District courts failure to give jury instruction that clearly indicated that the government had burden of disproving self defense was reversible error. Carter V. Kentucky, 450 U.S. 288, 101 S.Ct. 1112 L.Ed. 2d 241 (1981) Defense counsels arguments to the jury cannot substitute for or cure defective jury instruction (see also) Goodwin V. Balkcom, 684 F.2d 794 (11th Cir. 1982)

Argument

Point III

The trial court erred in allowing Prosecutorial Misconduct where State acted as both witness and Prosecutor during closing argument misleading Jury as to actual proven facts of the case and negating Appellants only defense with unfounded theories

In U.S. V- Rivera Pedin, 861 F.2d 1522 1529-30 (11th Cir. 1988) The federal court found that a reversal was required when the prosecutor failed to correct the government witnesse's testimony known to be false. Harding V. Walls, 300 F.3d 824 (7th Cir. 2002), United States V. Thompson, 117 F.3d 824 (7th Cir. 1997), Leading case on State Knowingly utilizing perjured testimony. Herrick V. State, 590 So.2d 1109 (Fla. 2nd DCA 1991) Key prosecution witness recants testimony.

Due process must be considered compromised when the State tries a defendant upon information known to be based upon perjured material testimony without informing the court, opposing counsel and the jury United States V. Agurs, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976). This predicated upon the belief that deliberate deception of the court and the jury by presentation of evidence known by the prosecutor to be false involves a corruption of the truth seeking function of the trial process, United States V. Agurs, Supra and is incompatible with rudimentary demands upon justice. Giglio V. United States, 405 U.S. 150, 31 L.Ed. 2d 104, 92 S.Ct. 763 (1972).

Moreover, deliberate deception is inconsistent with any principle implicit in any concept of ordered liberty, Napue V. Illinois, 350 U.S. 264, 3 L.Ed. 2d 1217, 79 S.Ct. 1173 (1959), and with the ethical obligation of prosecutor standards for criminal Justice Sections 3-3.5, 3-48, and 3-49 (2d Ed. 1980). A defendant should be shielded against prosecutorial excess when the prosecutor is allowed to proceed upon an empty indictment. United States V. Hogan, 712 F.2d 757, 759-60 (2d Cir. 1983); Pelchat, 494 N.E. 2d 447 at 453.

In U.S. -V- Teffera, 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993)(dictum) The prosecutor repeated references in closing argument to alleged eye contact between co-defendants at time of arrest not supported by evidence, clearly improper, and would merit reversal dispite any curative instructions because 'phantom evidence' Key part of governments closing remarks and other evidence weak.

In U.S. -V- Garza, 608 F.2d 659, 666 (5th Cir. 1979) the court observed in overturning a conviction because of improper prosecutor comments, despite a corrective instruction, because once such statements are made, the damage is hard to undo. Reversal was required when prosecutor elicited testimony that evidence found taped underneath dash board of defendants truck ~~and evidence~~ when prosecutor informed evidence found in paper bag in cab of truck and evidence of guilt not overwhelming (U.S. -V- Young, 17 F.3d 1201, 1203-05 (9th Cir. 1994)

The fact that the complaining witnesses testified that the defendant attacked the 4 of them at their car which evidence shows was parked 55 feet from his, while he and his girlfriend testified that he was attacked by the 4 of them at his, creates two conflicting scenerios. The impartial witnesses testified that the defendant was approach by the 4 men and surrounded, at his vehicle; which supports Mr. Dobbs testimony. (Being surrounded leaves one no way to retreat but by force). In turn the prosecutor alleged that Mr. Dobbs attacked the complaining witnesses at his own car. Therefore the state's attorney had known the complaining witnesses were lying and chose to adapt and distort the defendants version of events in her determination to convict. In U.S. -V- McLauglin, 89 F. Supp. 2d 617 (E.D. Pa. 2000) It was held that the Governments use of perjured testimony warranted new trial.

Strickland V. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948, 144 L.Ed. 2d 286 (1999) Brady claim must raise: "The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and ~~must pred~~ prejudice must have ensued." "Prejudice is measured by determining whether favorable evidence could

reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict". In Thomas V. Calderon, 120 F.3d 1045 (9th Cir. 1997) The state's prosecutor's pursuit of fundamentall inconsistent theories required reversal.

Mr. Dobbs was denied transcripts of the 2 911 calls in regards to the incident which occured Oct. 25 2006. He requested the transcript and/or audio more than 5 times prior to his ~~2nd~~ 2nd pretrial hearing Feb. 15 2007 and again once at trial and once at the sentencing. He was told by his public defender Catherine Chien that the State denied having them. After the sentencing his mother whom he granted power of attorney was told that they did have them. She was given a price, but after she paid for them, just before they were to be sent to her; she was told that they had just been destroyed and her funds were refunded.

Where a party has intentionally destroyed evidence, some courts have held that an inference will be raised that the evidence would be favorable to the other party (Valien V. Public Health Trust of Dade County, 473 So.2d 1305 (3rd DCA 1984) and approved 507 So. 2d 596 (Fla. 1987).

As well, the Florida Constitution provides that no person shall be deprived of life, liberty or property without due process of law. "Art 1 section 9, Fla. Const. The state violates that section when it requires a person to stand trial and defend himself against charges that it knows are based on perjured material evidence. Governmental misconduct that violates due process rights under the Florida Constitution requires dismissal of criminal charges". State V. Glosson, 462 So.2d 1082 (Fla. 1985).

U.S. -V- Hankton, 432 F.3d 774 (7th Cir. 2005) A defendant has the due process right to be sentenced on the basis of accurate information.

U.S. -V- Doe 297 F.3d 76 (2nd Cir. 2002) Defendant has Fifth Amendment right to a grand jury indictment. U.S. -V- Burke, 425 F.3d 400 (7th Cir. 2005) and Phillips V. Woodford, 267 F.3d 966 (9th Cir. 2001) Governments knowing use of false testimony or failure to correct testimony, violates due process. Still a prosecutor is presumed to have knowledge of all documents in the states attorney files. A.L.H. -V- State 773 So.2d 1192 (Fla 4th DCA 2000).

As to 'Due Process violation' a petitioner presenting such a claim must show no rational trier of fact, viewing the evidence in light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt.

It is fundamental error where crime is totally unsupported by evidence (see) Stanton V. State, 746 So.2d 1229 (Fla. 3rd DCA 1999). A conviction lacking essential elements of a crime is fundamental error (see) Burrell V. State, 602 So.2d 628 (Fla. 2nd DCA 1992).

It is the Appellants hope that if need be he may bring out the neglected evidence as newly discovered evidence. Lightborne V. State 742 So.2d 363 (Fla. 4th DCA 1999) Demonstates newly discoverd evidence claims utilizing Brady, Giglio, & Henry violations.

Conclusion

Based on the legal argument and authority contained herein, Appellant respectfully request this Honorable Court vacate the judgment and sentence for second degree murder, two counts of aggravated battery, as well as aggravated assault and release Mr. Dobbs from custody. If this Court does not deem it proper to grant initial relief requested, Mr. Dobbs request this Honorable Court vacate all judgement and sentences and remand to the trial court for a new trial. Thank You.

Respectfully submitted,

John Dobbs

John Dobbs #C00618
Apalachee C.I. Q4-2034
35 Apalachee Drive
Sneads, Florida 32460

Certificate of Service

I hereby certify that a true and correct copy of the foregoing is being sent to the clerk of court District court of Appeal Fifth District 300 South Beach street, Daytona Beach, Florida 32114-5097. This 24th day of January, 2008.

Sincerely

John Dobbs

John Dobbs

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