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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA,
FOURTH DISTRICT

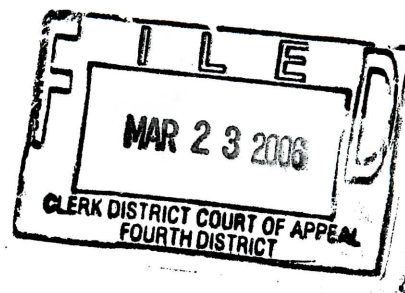
BILLY BANKS, SR.,

Appellant

vs.

STATE OF FLORIDA,

Appellee.



Case No. 4D05-4197

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL
CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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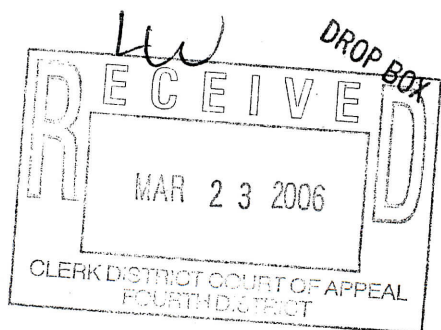


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PRELIMINARY STATEMENT

Appellee was the prosecution and appellant was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida.

In this brief, the parties will be referred to as they appear before this Court, except that appellee may also be referred to as "the State."

The following symbols will be used:

IB = Appellant's Initial Brief

R = Record on Appeal

SR = Supplemental Record

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts for purposes of this appeal, subject to the additions and clarifications set forth in the argument portion of this brief.

SUMMARY ARGUMENT

POINT I

The State concedes that double jeopardy bars appellant's convictions in Count 7, Count 8, and Count 10 of the Amended Information.

POINT II

The trial court did not abuse its discretion by denying appellant's seventh request for a continuance, which was made less than two weeks before trial. Appellant was arrested in September of 2003 for the heinous crimes he committed in the late 1960s and early 1970s. Appellant was on notice that the charges against him were based upon eyewitness testimony of the victims ever since the Information was filed in this case. Despite the fact that (1) appellant's case had been pending since 2003, (2) appellant identified Dr. Campbell as his expert in March of 2004, and (3) appellant previously received six continuances in this case, appellant requested yet another continuance eleven days before the April 25, 2005 trial date due to Dr. Campbell's unavailability. A review of the factors set forth by this Court in D.N. v. State, 855 So. 2d 258 (Fla. 4th DCA 2003) reveals the trial court did not abuse its discretion by denying appellant's seventh request for a continuance.

ARGUMENT

POINT I

THE STATE CONCEDES APPELLANT'S CONVICTIONS ON
COUNT 7, COUNT 8, AND COUNT 10 SHOULD BE REVERSED,
BUT HIS CONVICTIONS AND LIFE SENTENCES ON COUNTS 1-6
AND COUNT 9 SHOULD BE AFFIRMED

Due to manner in which appellant was charged in this case, the State concedes that double jeopardy bars appellant's convictions in Count 7, Count 8, and Count 10 of the Amended Information. All of appellant's other convictions and sentences should be affirmed.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
BY DENYING APPELLANT'S REQUEST FOR A CONTINUANCE

"The decision to grant or deny a continuance is a matter within the sound discretion of the trial judge; the decision should not be disturbed absent an abuse of discretion." Gorby v. State, 819 So. 2d 664, 683 (Fla. 2002); Smith v. State, 762 So. 2d 929, 931 (Fla. 4th DCA 2000) (a motion for continuance "is directed to the sound, judicial discretion of the court. The denial of such a motion should not be reversed unless it clearly and affirmatively appears on the record that the denial was a palpable abuse of discretion."). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is

abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Accordingly, the proper standard of review in this case is whether the trial court abused its discretion by denying appellant's request for a continuance.

Appellant was arrested in September of 2003 for the heinous crimes he committed in the late 1960s and early 1970s. (R. 414-446). Ever since the Information was filed in this case, appellant was on notice that the charges against him were based upon eyewitness testimony of the victims. In March of 2004, appellant sought to retain Dr. Campbell as an expert for his case. (R. 484). Appellant was granted six continuances by the trial court in this case. (IB. 10).

Despite the fact that (1) appellant's case had been pending since 2003, (2) appellant identified Dr. Campbell as his expert in March of 2004, and (3) appellant previously received six continuances in this case, appellant requested yet another continuance eleven days before the April 25, 2005 trial date due to Dr. Campbell's unavailability. (R. 517). The trial court apparently denied appellant's request for a seventh extension, but there is nothing in the record stating the basis for the trial court's ruling. (R. 545).

In D.N. v. State, 855 So. 2d 258 (Fla. 4th DCA 2003), this Court applied seven factors to consider whether the trial court's

denial of a continuance was improper. Those factors included "(1) the time actually available for preparation, (2) the likelihood of prejudice from the denial, (3) the defendant's role in shortening preparation time, (4) the complexity of the case, (5) the availability of discovery, (6) the adequacy of counsel actually provided, and (7) the skill and experience of chosen counsel and his pre-retention experience with the defendant or the alleged crime." Id. at 260. Application of these factors, as set forth below, reveals the trial court did not abuse its discretion by denying appellant's request for a continuance.

Appellant had more than enough time to prepare for trial, and he apparently concedes the "time actually available for preparation" factor set forth in D.N. supports the trial court's ruling. (IB. 10-11). Appellant was on notice about the issue of the victims' memories since charges were filed against him in 2003. Appellant identified Dr. Campbell as his expert more than one year before the trial, yet failed to ensure that he would be available during the trial period in this case. Furthermore, appellant previously requested six continuances, and the trial court granted every one. Thus, it is clear that appellant had more than enough time to prepare for this case.

The likelihood of prejudice from denying appellant's seventh request for a continuance was relatively low. Nothing in the record demonstrates that Dr. Campbell's "expert" testimony

regarding "the effect of time on memory" would have been admissible at trial. The State's research has not revealed any Florida case law permitting the admission of "memory expert" testimony, especially when the "expert" has not examined the persons whose memories are in question. Nothing in Dr. Campbell's curriculum vitae indicates he has ever been certified as a "memory expert." (R. 520-533). In fact, Dr. Campbell's curriculum vitae reveals he has never been certified as an expert in the Nineteenth Judicial Circuit for any purposes whatsoever. (R. 530). In any event, it is axiomatic that memories fade with time, so appellant did not need an expert on "the effect of time on memory" to advise the jury of this common sense notion. See, e.g., Szembruch v. State, 910 So. 2d 372 (Fla. 5th DCA 2005) ("It is common knowledge that over extended periods of time, witnesses' memories fade, witnesses and victims disappear . . .").

Since any shortening in the preparation time in this case was caused entirely by appellant, the third factor set forth in D.N. is inapplicable in this case. Contrary to appellant's suggestion, the complexity of this case was relatively low. (IB. 10). This case involved a classic "he said, she said" scenario with the only twists being that (1) there were two separate victims and (2) the sexual abuse perpetrated by appellant occurred in the late 1960s and early 1970s. Thus, it is clear the complexity of this case was low. See Fernandez v. State, 639 So. 2d 658, 659 (Fla. 3d DCA

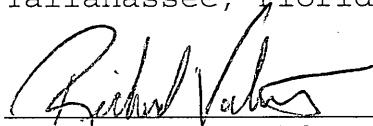
1994) ("The majority of the evidence presented in this case consisted of the testimony of the victim and the defendants. Simply put, there was a swearing match between the victim and the defendants."). The record in this case also reveals, and appellant concedes, that discovery was readily available, and that his counsel was more than adequate in this case. (IB. 10). Accordingly, appellant's argument on this point should be rejected.

The evidence in this case shows that any error caused by the trial court's ruling was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Therefore, this Court should reject appellant's argument and affirm his convictions and sentences.

CONCLUSION

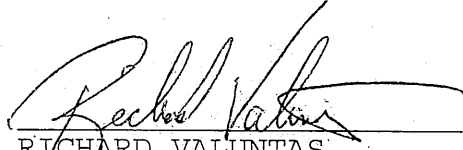
WHEREFORE based on the foregoing arguments and authorities cited herein, appellee respectfully requests this Court affirm appellant's convictions and sentences.

Respectfully submitted,
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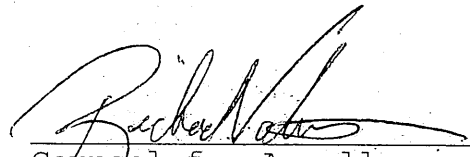
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been forwarded forwarded via courier to: Elisabeth Porter, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on March 23rd, 2006.


RICHARD VALUNTAS
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.


Counsel for Appellee