IN THE SUPREME COURT OF FLORIDA

RICHARD HAROLD ANDERSON, :

Appellant, :

vs. : Case No. 72,127

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

PAUL C. HELM
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant Richard Harold Anderson in reply to the Brief of Appellee, the State of Florida. References to the record on appeal are designated by "R" and the page number. Appellant will rely upon his arguments in the Initial Brief of Appellant on Issues III, IV, VI, and VII.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS TO DISMISS AND FOR ARREST OF JUDGMENT BECAUSE THE STATE VIOLATED DUE PROCESS BY FAILING TO CORRECT THE PRINCIPAL WITNESS'S PERJURED TESTIMONY BEFORE THE GRAND JURY.

Appellee argues, at pages 5-8 of the Brief of Appellee, that Appellant's motion to dismiss was untimely because defense counsel knew Connie Beasley's grand jury testimony was perjured prior to trial but waited until the trial began and jeopardy attached to move to dismiss. In fact, defense counsel learned on February 5, 1988, that Beasley's grand jury testimony was inconsistent with her other statements. (R3560, 3567) Trial began on February 8, 1988. (R1, 5) However, defense counsel did not know which of Beasley's many inconsistent versions of the offense she claimed to be true and which she admitted to be perjured until Beasley testified at trial. She then admitted that her grand jury testimony was perjured. (R543, 544, 587, 593-595) This admission led to defense

counsel's motion to dismiss the indictment. (R439-949) Since the motion was made within a reasonable time after Beasley admitted her perjury and before the case was submitted to the jury, it should be deemed timely.

The double jeopardy clause of the Fifth Amendment to the United States Constitution has no bearing upon the timeliness of Appellant's motion to dismiss. When a criminal trial is terminated prior to verdict at the defendant's request on grounds unrelated to guilt or innocence, the prosecution may seek appellate review of the trial court's decision although a second trial would be required by reversal. United States v. DiFrancesco, 449 U.S. 117, 130, 101 S.Ct. 426, 66 L.Ed.2d 328, 341 (1980). Similarly, when a defendant successfully appeals his conviction on any ground other than the legal insufficiency of the evidence, double jeopardy does not bar further prosecution on the same charge. Tibbs v. Florida, 457 U.S. 31, 40-42, 102 S.Ct. 2211, 72 L.Ed.2d 652, 660-661 (1982); United States v. Scott, 437 U.S. 82, 88-91, 98 S.Ct. 2187, 57 L.Ed.2d 65, 72-74 (1978).

Appellee also argues, at pages 9-12 of the Brief of Appellee, that the prosecutor had no duty to present impeaching information to the grand jury and that Beasley's perjury was not material. The State's position seems to be that so long as Beasley consistently said Appellant committed the offense it does not matter that she changed every other aspect of her story, including whether she was even present when Grantham was killed. Appellant disagrees and maintains that the basic facts, the who, where, when, why, and how

of the offense, are material. Moreover, the basic due process principle that the State may not knowingly use false evidence applies to testimony which goes to the credibility of the witness. Napue v. Illinois, 360 U.S. 264, 268, 79 S.Ct. 1173, 3 L.Ed.2d 1217, 1221 (1959). Beasley's credibility was, after all, the single most critical issue in this case.

ISSUE II

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF CONNIE BEASLEY'S PRIOR CONSISTENT STATEMENTS TO POLICE OFFICERS MADE AFTER SHE HAD TIME AND MOTIVE TO TESTIFY.

Appellee mistakenly argues that Appellant has changed his argument from trial to appeal. Brief of Appellee, pages 14 and 19. Appellant has consistently maintained that Connie Beasley lied from the beginning. (R1388) Initial Brief of Appellant, pages 45 and 46.

Appellee confuses motive with accomplishment. Beasley admitted that she lied to the investigators to protect herself. (R540-543, 569, 574-576, 579, 580) Thus, her motive to falsify was to protect herself. This motive arose when the offense occurred, weeks before she made any statements to the investigators. Beasley's "sweet deal" with the prosecutor was not her motive to fabricate, instead, the successful plea negotiation was the accomplishment of her goal.

ISSUE V

THE TRIAL COURT ERRED BY ADMITTING A DEFENSE WITNESS'S PRIOR INCONSISTENT STATEMENTS TO THE PROSECUTOR IN A DEPOSITION AS SUBSTANTIVE EVIDENCE.

Appellee's reliance upon Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983), and Delgado-Santos v. State, 471 So.2d 74, 78 n.6 (Fla. 3d DCA 1985), affirmed, 497 So.2d 1199 (Fla. 1986), Brief of Appellee, pages 31 and 32, is misplaced. In Diamond, the Third District ruled that a witness's prior inconsistent, written statement under oath taken by the state attorney was admissible as substantive evidence in favor of the defendant under section 90.801(2)(a), Florida Statutes (1981). 436 So.2d at 365-366. However, in the footnote to Delgado-Santos, the Third District explained that the decision in Diamond neither discussed nor decided whether a state attorney investigation was an "other proceeding" within the meaning of the statute because the State did not contest the point. 471 So.2d at 78 n.6. Nor did the Third District decide that question in the Delgado-Santos decision.

The Second District ruled in the State's favor on this question in Smith v. State, 539 So.3d 514, 515 (Fla. 2d DCA 1989), but it relied upon Diamond and the Delgado-Santos footnote as authority. The Smith decision also preceeded this Court's decision in Dudley v. State, 545 So.2d 857 (Fla. 1989). In Dudley, this Court ruled that a witness's statement to a detective and an assistant state attorney could not be admitted as substantive evidence because such a law enforcement investigation was not an

"other proceeding" within the meaning of section 90.801(2)(a). 545 So.2d at 858-859. Thus, the decision in Dudley appears to overrule both Diamond and Smith. Appellant respectfully urges this Court to abide by its decision in Dudley and to apply that decision to reverse his conviction for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 22d day of February, 1990.

Respectfully submitted,

Paul C. Helm

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

PAUL C. HELM
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

PCH/an