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IN THE SUPREME COURT OF FLORIDA

WILLIE ALLEN LYNCH,

Petitioner,

vs.

Case No. SC2019-0298
(First DCA No. 1D16-3290)
(Lower Court No. 2016CF19A)

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW OF THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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I. STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal in Lynch v. State, 260 So. 3d 1166 (Fla. 1st DCA 2018), motion for rehearing denied January 17, 2019. Willie Allen Lynch (Petitioner) was tried and convicted of sale of cocaine and sentenced to eight years in prison to be followed by five years of probation. Two undercover detectives with the Jacksonville Sheriff's Office (JSO) purchased crack cocaine from an unknown African American male on a public street in Jacksonville. The undercover detectives did not arrest the man at the time of the sale because they did not want to jeopardize an unrelated, ongoing investigation. One of the investigators used a cell phone to surreptitiously take several photos of the drug seller. With no idea who the drug seller was, the detectives later emailed the photographs to a JSO crime analyst who imported them into a facial recognition computer program maintained by the Hillsborough County Sheriff's Department. The analyst used the computer program to compare the photos of the drug seller to photos of African American males in a database of Duval County jail booking photos. The facial recognition program returned multiple possible matches to the drug seller's photo. One of the possible matches was Petitioner. The analyst sent Petitioner's photo, biographical information, and criminal history to the detectives and told them that she thought Petitioner was the

drug seller. The analyst did not send the detectives any photos of the other potential matches returned by the facial recognition program. Petitioner was then charged on December 31, 2015, with the cocaine sale.

Petitioner alleged ineffective assistance of counsel against his appointed lawyer and requested a Nelson[1] hearing on three separate occasions between February 16, 2016, and March 31, 2016. At each of these Nelson hearings the trial court found that Petitioner's appointed counsel was not ineffective. On March 31, 2016, Petitioner requested to represent himself. The trial court denied his request. On April 22, 2016, the trial court granted Petitioner's request to represent himself with appointed counsel as standby counsel. On April 27, 2016, Petitioner's appointed standby counsel deposed the JSO analyst, whose name was not originally disclosed in the State's discovery exhibit. It was at this deposition, eight days before the final pretrial hearing, that the defense learned of the police's use of the facial recognition computer program to identify Petitioner as the drug seller. The analyst testified at her deposition that the computer program puts some amount of stars underneath the photo it believes is more likely than the other photos to be a match and arranges the photos based on likeliness of a match. She did not know the maximum number of stars a particular photo could have. She

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[1] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

testified that the program does not give certainty percentages for its match determinations. She did not know how the computer program's algorithms worked.

Eight days later, at the final pretrial hearing, Petitioner requested to represent himself without standby counsel. The trial court granted his request. The trial was scheduled to begin on May 10, 2016. On May 9, 2016, Petitioner moved for a two-week continuance so that he could subpoena his witnesses, including the analyst, for trial. His appointed counsel had not subpoenaed the analyst for trial while she was his counsel or standby counsel. Petitioner stated to the trial court that he needed "a chance to get [his] witnesses," that he had not had an opportunity to subpoena his witnesses, and that it was vital to his defense. The trial court denied Petitioner's continuance.

Petitioner also moved the trial court to order the State to turn over the photos of the other potential matches returned by the analyst's facial recognition search. The State had never turned over the photos, though they were in the possession of its agent: the JSO analyst. In response, the State indicated that it was not planning to call the analyst or introduce evidence of "the biometric software that was used to identify the defendant." The State was concerned that the facial recognition

program would not satisfy Daubert's[2] admissibility requirements. The trial court ruled that the State did not have to turn over the photographs of the other potential matches. The trial court told Petitioner he was entitled to ask at trial about the identification procedure that was utilized in this case[3].

Petitioner appealed his conviction to the First District Court of Appeal. The First District Court of Appeal affirmed Petitioner's conviction. Petitioner now seeks discretionary review.

II. SUMMARY OF THE ARGUMENT

The First District's holding in Lynch that the trial court did not abuse its discretion by denying Petitioner's motion to continue directly conflicts with the Fourth District's holding in Sessions v. State, 965 So. 2d 194 (Fla. 4th DCA 2007). Sessions requires the trial court to consider a list of specific factors before ruling on a motion to continue when either counsel for a defendant or a pro se defendant himself asserts that he needs more time to prepare a defense for trial. The trial court in the instant case did not consider the Sessions factors before denying

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[2] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). At the time of Petitioner's trial Daubert was thought to be the standard for admitting scientific evidence in Florida.

[3] Petitioner's request to have the analyst subpoenaed was denied, and the State did not subpoena the analyst. Petitioner was unable to solicit any testimony regarding the identification procedure at trial.

Petitioner's motion to continue. The First District's finding in Lynch that no reversible error occurred directly contradicts the holding in Sessions. As a result, this Court has jurisdiction.

The First District's finding in Lynch that the trial court did not commit reversible error when it failed to conduct an adequate Richardson[4] hearing is in direct conflict with the Fourth District's holding in Brown v. State, 640 So. 2d 106 (Fla. 4th DCA 1994). Brown requires the trial court to conduct an adequate Richardson hearing when there is a potential discovery violation. The trial court in the instant case did not conduct an adequate Richardson hearing. The conflict between Lynch and Brown provides this Court with jurisdiction.

The First District's construction of the Due Process Clause of the Federal Constitution not to require the State to turn over the exculpatory photos of the other potential matches to the drug seller returned by the facial recognition program was error and provides this Court with discretionary jurisdiction.

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[4] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

III. ARGUMENT

I. This Court should resolve a conflict between the First District's holding in Lynch and the Fourth District's holding in Sessions.

This Court has jurisdiction to review the First District's decision in Lynch under Article V, section 3(b)(3), of the Florida Constitution. The First District's opinion in Lynch conflicts with the Fourth District's opinion in Sessions. In Sessions, the Fourth District, citing D.N. v. State, 855 So. 2d 258, 260 (Fla. 4th DCA 2003), held that a trial court must consider the following specific factors when deciding on a defendant's request for a continuance after being allowed to represent himself:

> (1) time available for preparation; (2) likelihood of prejudice from the denial; (3) defendant's role in shortening preparation time; (4) complexity of the case; (5) availability of discovery; (6) adequacy of counsel actually provided; and (7) skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime.

Sessions at 194. This holding has been recognized and followed previously by the First District in Madison v. State, 132 So. 3d 237, 240 (Fla. 1st DCA 2013) ("timeliness being among the seven factors that we, and by implication a trial court, *must* consider in balancing the interests at stake"). These factors were originally announced in McKay v. State, 504 So. 2d 1280, 1282 (Fla. 1st DCA

1986). Three additional factors to be considered by the trial court when deciding whether to grant a continuance were announced in Jackson v. State, 979 So. 2d 442, 445 (Fla. 4th DCA 2008), and recognized in Madison:

> (1) whether the defendant's request was made in bad faith or for the purpose of delay, (2) whether the State's case would be prejudiced by a continuance, or (3) whether the trial court's schedule would not permit a continuance.

Madison at 242. The First District, in Madison, viewed the additional three factors "as subsumed within the McKay factors," which must be considered when a trial court rules on a defendant's request for a continuance. Madison at 242.

In the instant case, the trial court did not consider the McKay factors when it denied Petitioner's request for a two-week continuance so that he could subpoena his witnesses and present his defense at trial. The First District in Lynch concluded that the trial court did not commit reversible error. The First District's conclusion in Lynch conflicts with the holdings in Sessions, D.N., and Madison.

II. This Court should resolve a conflict between the First District's holding in Lynch and the Fourth District's holding in Brown.

This Court has jurisdiction to review the First District's decision in Lynch under Article V, section 3(b)(3), of the Florida Constitution. The First District's opinion in Lynch conflicts with the Fourth District's opinion in Brown. In Brown, the Fourth District held that a trial court has an affirmative obligation to hold a

Richardson hearing once it is put on notice that there has been a discovery violation. Brown at 107. During a Richardson hearing, the trial court must first determine whether a discovery violation actually occurred. Giles v. State, 916 So. 2d 55, 57 (Fla. 2d DCA 2005). If the trial court determines there was a violation, then it must assess whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect it had on the defendant's ability to prepare for trial. Id. A trial court's rulings regarding the three-prongs of Richardson are reviewed for an abuse of discretion, but its discretion can be exercised only following a proper inquiry. Brown v. State, 165 So. 3d 726, 729 (Fla. 4th DCA 2015). Where there has been an inadequate Richardson hearing the discovery violation is reviewed for harmless error. Brown at 729. However, the discovery violation can be found harmless only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation. Id. It is the State's burden to show that the error was harmless. Id. The State must show in the record that the defendant was not prejudiced by the discovery violation. Id. The State's burden to show that a discovery violation was harmless is extraordinarily high. Id.

In Lynch, the trial court was placed on notice by Petitioner's request that the trial court order the State to turn over the photographs of the other potential matches returned by the facial recognition computer program, which were in the

sole possession of the State's agent and which had not previously been given to the defense. The defense did not even learn that a facial recognition computer program had been used to identify Petitioner as a suspect in this case until eight days before the final pretrial hearing. The trial court did not make any of the required Richardson findings. The photographs were never produced by the State for the trial court to review. The trial court did not consider Appellant's argument that these other possible matches were potential suspects who Appellant should have been provided with in preparation for his trial, where he was arguing misidentification as his defense. The State presented nothing in the record to show that the discovery violation was not harmless. The Lynch court held that the trial court did not err. The holding in Lynch conflicts with holdings from the Second and Fourth Districts in Giles, Brown, and Brown, which require a trial court to make certain, specific findings during a Richardson hearing.

III. The First District's construction of the Due Process Clause in Lynch provides this Court with discretionary jurisdiction.

This Court has jurisdiction to review the First District's decision in Lynch under Article V, section 3(b)(3), of the Florida Constitution. The Due Process Clause of the Federal Constitution requires the State to turn over all exculpatory information within its possession or control to a criminal defendant. Brady v.

Maryland, 373 U.S. 83 (1963). The First District's opinion in Lynch construing this Constitutional requirement not to include the photos of the other potential matches returned by the facial recognition computer program was error. This Court's jurisdiction is properly invoked. See Potvin v. Keller, 313 So. 2d 703, n. 1 (Fla. 1975) (holding that this Court's discretionary jurisdiction was properly invoked where the district court ruled that there had been "no constitutional infirmity" in the lower court. This Court stated, "This construction of the United States Constitution was sufficient to confer jurisdiction for our review.").

The photos of the other potential matches to the drug seller were exculpatory in that they were other potential suspects. These photos were not shown to the detectives or the jury. Obviously, if there were photographs of other suspects who were possible matches for the drug seller, these photos could have cast doubt upon the identification of Petitioner as the drug seller. Petitioner's sole defense at trial was misidentification. The photos of the other potential matches were exculpatory, and Petitioner should have been able to present those in his defense at trial. The First District's holding to the contrary in Lynch was error.

IV. CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Court exercise its discretion to accept jurisdiction of this case.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic mail to Trisha Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, and by US Mail to Willie Allen Lynch, DOC#293846, at Putnam Correctional Institution, 128 Yelvington Road, East Palatka, Florida 32131, on February 28, 2019. I hereby certify that this brief has been prepared using Times New Roman 14-point font.

Respectfully submitted,

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