IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502016AP900199AXXXMB
L.T. NO.: 502015CT021688AXXXSB

PABLO JUAN SARMIENTO,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: FEB 0 5 2019

Appeal from the County Court in and for Palm Beach County,
Judge Leonard Hanser.


For Appellant: Benjamin Eisenberg, Esq.
Office of the Public Defender
421 Third Street
West Palm Beach, FL 33401
appeals@pd15.org

For Appellee: Michael Scott Del Sontro, Esq.
Office of the State Attorney
401 North Dixie Highway
West Palm Beach, FL 33401
criminalappeals@sa15.org


PER CURIAM.

Appellant Pablo Sarmiento appeals his conviction for Driving under the Influence. On appeal, Appellant argues that the trial court (1) abused its discretion by overruling defense counsel's hearsay objections to certain testimony, and (2) reversibly erred in failing to conduct a *Richardson*[1] hearing after one of the State's witnesses provided expert testimony despite the

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

State's failure to list him as an expert witness. We decline to address Appellant's first issue because we find that the trial court's failure to conduct a *Richardson* hearing following the State's discovery violation necessitates reversing for a new trial.

Appellant pleaded not guilty to one count of Driving under the Influence and proceeded to trial. In response to Appellant's Demand for Discovery, the State filed a Witness List in which it listed the agency inspector for Palm Beach County's Intoxilyzer instruments as a Category A witness; it did not, however, designate him (or any other Category A witness) as an expert witness.

Prior to trial, defense counsel filed a Motion in Limine seeking to preclude the State from "qualifying any previously disclosed witness as an expert, or otherwise having such a witness testify as to a subject requiring an expert opinion." The State agreed to defense counsel's Motion. At trial, however, the State called the agency inspector and, over defense counsel's objections, elicited extensive testimony about how the Intoxilyzer functions and analyzes breath samples:

| | |
|---|---|
| STATE: | Officer, what is the intoxilyzer, or when the instrument takes a breath, what happens before it gives a result? |
| DEFENSE: | Objection. Calls for expert testimony. |
| THE COURT: | Overruled. |
| WITNESS: | The instrument is looking for a specific type of alcohol, ethanol or ethyl methyl, that's the alcohol that's in your alcoholic beverages. Somebody blows into the instrument, it works on a principle called infrared light absorption -- |
| DEFENSE: | Your Honor, we would be renewing our objection at this point as it's calling for expert testimony and this witness is not qualified. |
| THE COURT: | Overruled. |
| WITNESS: | What happens is that alcohol molecules will absorb this infrared light, so inside this instrument is a sample chamber. |

At one end of the chamber is an infrared light source; at the other end there is some filters. It will -- any alcohol will absorb infrared light that's introduced into the sample chamber, whatever light is not absorbed will come out the other end and be filtered out by these two filters. And there is a calculation made, and you get grams per 210 liters of breath.

STATE: And how many breath samples does someone have to give?

WITNESS: They have to give two.

STATE: And why is that?

WITNESS: The second sample is going to confirm the results of the first sample. It's going to show that the samples are as close to each other as possible, and also it's going to show that you didn't have problems between the two samples; maybe some type of radio frequency interference, maybe a mouth-alcohol issue, or some type of interfering which is something else in the person's system.

STATE: And you said, "mouth alcohol," what is mouth alcohol?

WITNESS: That would be --

DEFENSE: Objection. Calls for expert testimony.

THE COURT: Overruled.

During a bench conference following similar objections, defense counsel argued the agency inspector was "going into how the machine works," which is a subject "outside the scope of a lay witness," and asserted that such testimony "would be a discovery violation as there is no expert witness listed." The trial court overruled Appellant's objection *without* holding a *Richardson* hearing.

When a defendant alleges the State has violated its discovery obligations under Rule 3.220, the trial court must conduct a two-step inquiry. First, the court must determine whether a discovery

violation has actually taken place. *Sinclair v. State*, 657 So. 2d 1138, 1140 (Fla. 1995). If the court finds that a discovery violation has occurred, it must then conduct a *Richardson* hearing to determine "whether the state's violation was inadvertent or willful, trivial or substantial, and what effect, if any, the violation had on the defense's ability to properly prepare for trial." *Whitfield v. State*, 479 So. 2d 208, 215 (Fla. 4th DCA 1985). The *Richardson* hearing is required upon finding of a violation because "only after the court has made an inquiry into all of the surrounding circumstances" can the court properly exercise its discretion in determining the appropriate sanction. *Richardson*, 246 So. 2d at 775. If, however, the court finds that there has been no discovery violation, there is no need to conduct a *Richardson* hearing. *Whitfield*, 479 So. 2d at 216; *State v. McFadden*, 50 So. 3d 1131, 1134 (Fla. 2010).

When an appellant claims the trial court erred in its determination of an alleged discovery violation, the reviewing court also must undertake a two-step inquiry. First, the reviewing court must determine whether a discovery violation has, indeed, taken place. *Curry v. State*, 1 So. 3d 394, 398 (Fla. 1st DCA 2009). If the reviewing court finds that a violation has taken place, the court must then determine whether any error in the trial court's determination of the issue, or, alternatively, whether the trial court's failure to conduct a *Richardson* hearing, was harmless. *Id.* at 399.

Florida Rule of Criminal Procedure 3.220(b)(1)(A)(i) requires the State to disclose, as Category A witnesses, "expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify." Florida courts have interpreted Rule 3.220(b)(1)(A)(i) to require that when a witness is going to testify as an expert, the witness list provided in discovery must specifically designate that person as an expert witness. *E.g.*, *Kipp v. State*, 128 So. 3d 879, 881

(Fla. 4th DCA 2013). As the Fourth District Court of Appeal stated in *Kipp*, "It is not enough to list such witnesses as Category A witnesses; the state is also required to indicate that the witness will testify as an expert." *Id.* Florida Rule of Criminal Procedure 3.220(j) further provides that "[i]f subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material . . . ."

*Thomas v. State* is squarely on point. 63 So. 3d 55 (Fla. 4th DCA 2011). In *Thomas,* the Fourth District Court of Appeal found a discovery violation where a witness who was listed as a Category A witness, but who had not been designated as an expert, was permitted to testify at trial as an expert. *Id.* at 59. Likewise, in *Louis v. State*, the Second District Court of Appeal found the State's attempt to qualify an officer as an expert witness at trial to be a discovery violation because the officer was only designated as a Category A witness during discovery. 851 So. 2d 773, 776 (Fla. 2d DCA 2003). Therefore, the State commits a discovery violation when it attempts to elicit expert testimony from a witness not previously designated as an expert on its witness list.

Accordingly, we find the State's failure here to designate the agency inspector as an expert witness on its Witness List constitutes a discovery violation. That being the case, the trial court was obligated to conduct a *Richardson* hearing upon Appellant's objection, and its failure to do so was error. *Curry*, 1 So. 3d at 398; *Thomas*, 63 So. 3d at 60. We must therefore determine whether the trial court's error in this regard was harmless. *Curry*, 1 So. 3d at 399.

The standard for finding that a discovery violation was harmless is "extremely high." *Cox v. State*, 819 So. 2d 705, 712 (Fla. 2002) (quoting *Pomeranz v. State*, 703 So. 2d 465, 468 (Fla. 1997)). When a reviewing court determines that a trial court erred in failing to conduct a

*Richardson* hearing, the appropriate inquiry is whether the error procedurally prejudiced the defense. The Florida Supreme Court described this analysis in *Scipio v. State*, 928 So. 2d 1138 (Fla. 2006):

> [W]hen reviewing a claim of error based upon a *Richardson* violation, the reviewing court's focus should be on procedural and not substantive prejudice . . . . "As used in this context, 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 benefitted the defendant. In making this determination, every conceivable course of action should be considered. . . . [I]f the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful."

928 So. 2d at 1147 (quoting *State v. Schopp*, 653 So. 2d 1016 (Fla. 1995)). The Florida Supreme Court pronounced in *Schopp* that "[t]he question of 'prejudice' in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder but rather upon its impact on the defendant's ability to prepare for trial." 653 So. 2d at 1019 (quoting *Smith v. State*, 500 So. 2d 125, 126 (Fla. 1986)). In conducting this analysis, the Court should analyze whether the defense's "trial preparation or strategy" would have been materially different had the defendant had the benefit of the missing discovery. *Scipio*, 928 So. 2d at 1147. When a reviewing court is left only with the ability to speculate as to what different trial preparation or strategy a defendant would have employed, harmless error has not been shown beyond a reasonable doubt. *Id.* at 1150. Further, "[w]here no *Richardson* hearing is held, a criminal defendant may be deemed 'procedurally prejudiced' on theories the defense was not afforded an explicit opportunity to assert in the trial court . . . ." *Hall v. State*, 738 So. 2d 374, 379 (Fla. 1st DCA 1999).

Florida courts have found harmful error where the State does not list a witness as an expert and the trial court fails to conduct a *Richardson* hearing. *See, e.g.*, *Kipp*, 128 So. 3d at 883 (stating

that "the vast majority of cases will not have a record sufficient to support a finding of harmless error"). In *Ward v. State*, the Fourth District Court of Appeal held that the State's failure to list a testifying officer as an expert witness procedurally prejudiced the defendant even though his testimony was brief, reasoning that "the state has an 'extraordinarily high' burden in establishing that a discovery violation is harmless." 165 So. 3d 789, 793 (Fla. 4th DCA 2015). Similarly, in *Bess v. State*, the court held that the trial court's failure to conduct a *Richardson* hearing procedurally prejudiced the defendant where a nurse, who the State failed to designate as an expert, testified to an opinion that contradicted defense counsel's theory of the case. 208 So. 3d 1213, 1215 (Fla. 5th DCA 2017).

As in the cases above, we here cannot find that the trial court's failure to conduct a *Richardson* hearing was harmless. On appeal, Appellant argued how the violation materially hindered his trial preparation or strategy, and a review of the record below demonstrates the testimony in question served to contradict defense counsel's theory of the case, which challenged the accuracy and reliability of the breathalyzer instrument.

Accordingly, Appellant's conviction is **REVERSED**, and this matter is **REMANDED** to the trial court for a new trial.

FEUER, KELLEY, and CARACUZZO, JJ., concur.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502016AP900199AXXXMB
L.T. NO.: 502015CT021688AXXXSB

PABLO JUAN SARMIENTO,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

_____/

Opinion/Decision filed: FEB 0 5 2019

Appeal from County Court in and for
Palm Beach County, Florida;
Judge Leonard Hanser

Appealed: June 24, 2016

DATE OF PANEL: JULY 17, 2017

PANEL JUDGES: FEUER, KELLEY, CARACUZZO

AFFIRMED/REVERSED/OTHER: REVERSED

PER CURIAM OPINION/DECISION BY: PER CURIAM

| CONCURRING: | DISSENTING: With/Without Opinion | CONCURRING SPECIALLY: With/Without Opinion |
|---|---|---|
| DATE: 2/5/19 J. | J. | J. |
| DATE: 2/5/19 J. | J. | J. |
| DATE: 2/5/2019 J. | J. | J. |