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IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,365

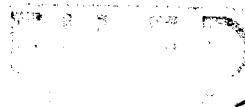
RUBEN LAWHORNE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL OF  
FLORIDA, THIRD DISTRICT

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INITIAL BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Ruben Lawhorne, was the appellant in the district court of appeal and the defendant in the trial court. Respondent, the State of Florida, was the appellee in the district court of appeal and the prosecution in the trial court. In this brief, the symbol "R" will be used to refer to the record on appeal. The symbol "TR" will be used to refer to the transcripts of testimony. All emphasis is supplied unless the contrary is indicated.

### STATEMENT OF THE CASE

On January 11, 1984 an information was filed charging the defendant, Ruben Lawhorne, with burglary, petit theft, trespass, and resisting an officer without violence (R. 1-4A). A jury trial on these charges was held on April 11-12, 1984 (R. 8-13). At the conclusion of the trial, the jury found Lawhorne not guilty of burglary, and guilty of petit theft, trespass, and resisting an officer without violence (R. 37-40).

On April 13, 1984 the court entered adjudications of guilt as to the offenses of petit theft, trespass, and resisting an officer without violence (R. 41-42). At a hearing on May 9, 1984 Lawhorne was sentenced to a 60-day term of imprisonment for the petit theft conviction, a consecutive one-year term of imprisonment for the trespass conviction, and a consecutive one-year term of imprisonment for the conviction of resisting an officer without violence (R. 45-48).

Notice of appeal to the District Court of Appeal, Third District, was filed May 9, 1984 (R. 50). A majority of that Court affirmed Lawhorne's convictions based on its disapproval of the practice of "anticipatory rehabilitation." Lawhorne v. State, 481 So.2d 19 (Fla. 3d DCA 1985). Rehearing was denied on January 20, 1986.

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the district court of appeal was filed February 19, 1986. This Court accepted jurisdiction of this case and dispensed with oral argument on June 24, 1986.

### STATEMENT OF THE FACTS

The evidence presented by the state established that on December 22, 1983, at approximately 8:30AM, U.S. Customs Officers Gary Beans and Darrell Smith were on patrol in the cargo area of Miami International Airport (TR. 17, 54-55). Both officers were wearing uniforms and badges, and they were riding in a vehicle with government insignias on the sides and government license plates (TR. 17-18, 56).

The officers observed the defendant, Ruben Lawhorne, enter the side of a cargo warehouse and come out with two cardboard boxes (TR. 18-19, 57). Lawhorne placed the boxes on the ground, walked over to a parked automobile, and drove the automobile up to the warehouse (TR. 19, 57). He placed one of the boxes in the trunk and the other box on the rear seat of the automobile (TR. 19, 57).

Lawhorne then drove away from the warehouse toward the area where the customs officers were sitting in their vehicle (TR. 19, 61). According to the testimony of the officers at trial, they drove toward Lawhorne's automobile, identified themselves as police officers, and ordered Lawhorne to stop (TR. 21-22, 62). Lawhorne drove around the officers' vehicle, across a strip of grass, and crashed into a gate (TR. 22, 63). He got out of the car and started running (TR. 24, 63). The officers ordered him to stop, but he kept running (TR. 24, 63). The officers chased Lawhorne, and subsequently apprehended him at the back of a building in the area (TR. 24, 64-65).

After placing Lawhorne under arrest, Officer Beans returned

to Lawhorne's automobile and observed the boxes that had been taken from the warehouse (TR. 26-27). The boxes were subsequently impounded by the police, and they were found to contain badminton sets (TR. 78-79, 81, 117-118).

The warehouse area in which the foregoing events took place is an area of restricted access (TR. 29). Private vehicles are not allowed in the area, and the area is maintained by Dade County airport security (TR. 29). A county decal is required to gain access to the area (TR. 29-30). Lawhorne's automobile did not have the required identification (TR. 29-30). Officer Thurl Corson, a Metro-Dade Police Officer assigned to the airport, testified that on November 2, 1983 he warned Lawhorne to stay out of the area unless he was authorized to enter the area by the Dade County Aviation Authority (TR. 120-121, 123-125).

Following the denial of his motion for judgment of acquittal at the close of the state's case, Lawhorne was called to the witness stand (TR. 132-133). Prior to Lawhorne's testimony, the prosecutor indicated that his records reflected that he had six prior felony convictions (TR. 133). Defense counsel acknowledged these prior convictions (TR. 133).

Lawhorne testified that he had been called to the airport warehouse area on December 22 to pick up two boxes (TR. 134-135). When he arrived at this area, the individual who had called him opened the gate and directed him to the area where the boxes were located (TR. 135, 150-151). Lawhorne testified that he knew that this individual wanted him to steal something (TR. 152). He also testified that aside from the fact that this

individual had opened the gate for him with a key, he had not received permission to be inside the air operations area (TR. 155). He backed his car up to the warehouse, picked up the boxes, and started to leave (TR. 136). He had no idea what was in the boxes (TR. 137).

As he was leaving, Lawhorne noticed a van speeding towards him (TR. 137). Lawhorne testified that he did not see any U.S. government markings on this van, and didn't see any flashing blue lights on the dashboard of the van (TR. 160-161). No one in the van identified themselves as a police officer or ordered him to stop (TR. 138). When the van turned around after passing Lawhorne's automobile, he realized that law enforcement officers might have been inside the van (TR. 161). He stepped on the accelerator and eventually crashed into the fence (TR. 138). After crashing into the fence, he got out of the car and started running (TR. 138). He did not hear anyone identify themselves as a police officer or order him to stop as he was running (TR. 158-159). Lawhorne testified that no one from the Dade County Aviation Department had ever told him to stay away from the area where this incident occurred (TR. 139).

On direct examination, Lawhorne was asked if he had ever been convicted of a crime, and he testified that he had been convicted approximately six times (TR. 139). Defense counsel then asked Lawhorne if he had gone to trial in those cases in which he had been previously convicted (TR. 139). The prosecutor's objection to this question was sustained (TR. 139-140). At a side-bar conference, defense counsel proffered that



he wanted to question Lawhorne as to certain details of his prior convictions because it was relevant to the issue of his credibility (TR. 140-141). The court ruled that neither the prosecution nor the defense could ask any questions concerning details of the prior convictions (TR. 141).

The jury subsequently acquitted Lawhorne on the burglary charge, and found him guilty of petit theft, trespass, and resisting an officer without violence (TR. 236-237).

### SUMMARY OF ARGUMENT

The well-established restrictions on inquiry into the nature of prior convictions of a witness apply only to the party impeaching that witness. The witness has the right, if he so desires, to offer any relevant testimony that would eliminate any adverse implications from evidence of his prior convictions.

After the defendant in the instant case testified on direct examination as to the number of his prior convictions, the trial judge refused to allow him to explain those convictions in an attempt to eliminate the adverse implications from them. The trial judge ruled that neither the prosecution nor the defense would be allowed to elicit any testimony concerning the defendant's prior convictions other than the number of those convictions. As the rule of exclusion only applied to the state as the impeaching party, and as the testimony offered by the defendant, the party being impeached, was relevant to eliminate the adverse implications from the prior convictions because it showed that the convictions did not materially affect the defendant's credibility, the trial judge erred in excluding that testimony. This error requires reversal because (1) the defendant was precluded from presenting this testimony at any point during the trial; and (2) the excluded testimony went directly to the issue of the defendant's credibility and there were numerous conflicts at the trial between the testimony of the state witnesses and Lawhorne's testimony.

In its decision in this case, a majority of the district court of appeal upheld the trial judge's ruling because the

defendant sought to testify about the specifics of his prior convictions on direct examination. This holding cannot be sustained because (1) the trial judge's ruling precluded the defendant from explaining his prior convictions at any time, not just on direct examination; and (2) the practice of "anticipatory rehabilitation" on direct examination has now been approved by this Court.

## ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO EXPLAIN HIS PRIOR CONVICTIONS IN AN ATTEMPT TO ELIMINATE THE ADVERSE IMPLICATIONS FROM THOSE CONVICTIONS BY SHOWING THAT THEY DID NOT MATERIALLY AFFECT HIS CREDIBILITY.

The defendant in this case, Ruben Lawhorne, testified in his own behalf at the trial. On direct examination, Lawhorne admitted that he had been previously convicted of a crime approximately six times (TR. 139). Following this admission, defense counsel attempted to have Lawhorne explain the circumstances of his prior convictions in an attempt to eliminate the adverse implications from those convictions (TR. 139). The prosecutor immediately objected, and the trial judge precluded defense counsel from asking any further questions concerning the prior convictions (TR. 139-140). The trial judge ruled that neither the prosecution nor the defense would be allowed to elicit any testimony concerning Lawhorne's prior convictions other than the number of those convictions (TR. 141).

While it is well-established that the impeaching party may not inquire further concerning prior convictions admitted by a witness, it is equally settled in Florida that these restrictions apply only to the impeaching party:

If the witness admits prior conviction of a crime, the inquiry by his adversary may not be pursued to the point of naming the crime for which he was convicted. If the witness so desires he may of his own volition state the nature of the crime and offer any relevant testimony that would eliminate any adverse implications. . . .

McArthur v. Cook, 99 So.2d 565, 567 (Fla. 1957); accord, Johnson v. State, 380 So.2d 1024 (Fla. 1979); Mead v. State, 86 So.2d 773

(Fla. 1956); Goodman v. State, 336 So.2d 1264 (Fla. 4th DCA 1976). In Noeling v. State, 40 So.2d 120 (Fla. 1949) this Court reversed a conviction based in part on the trial judge's refusal to allow the defendant to testify concerning his prior convictions. In that case, the defendant testified that he had four prior convictions. Following this testimony, defense counsel asked the defendant to name the offenses. The state objected and the objection was sustained. On appeal, the state argued that since it could not go into the nature of the defendant's prior convictions, the defendant should also be precluded from any such inquiry. This Court categorically rejected this contention, ruling that the defendant should have been allowed to testify concerning the nature of his prior convictions "to show whether they materially affected his credibility." 40 So.2d at 121.<sup>1</sup>

The blanket ruling made by the trial judge in the instant case precluding both the prosecution and the defense from inquiring into the details of Lawhorne's prior convictions was based on the same reasoning rejected by this Court in Noeling. The trial judge clearly erred in imposing on Lawhorne restrictions which

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Treatises on the law of evidence support the Florida rule allowing a witness to offer testimony in an attempt to eliminate the adverse implications from his prior convictions. Wigmore states that allowing a witness to offer some explanation of a conviction adduced for impeachment "would seem a harmless charity..." 4 Wigmore 251, Evidence § 1117 (Chadbourne rev. 1972). McCormick notes that "a substantial number of courts, while not opening the door to a retrial of the conviction, do permit the witness himself to make a brief and general statement in explanation, mitigation or denial of guilt, or recognize a discretion in the trial judge to permit it." McCormick, Evidence 89, § 43 (2d.ed. 1972).

applied only to the state as the impeaching party, thereby denying Lawhorne his right to offer relevant testimony to eliminate adverse implications from the evidence of his prior convictions.

The testimony which defense counsel sought to elicit from Lawhorne was aimed directly at reducing the impeachment value of the prior convictions, and thus this testimony was relevant rehabilitation evidence. Defense counsel sought to have Lawhorne inform the jury that his six prior convictions had not been the result of verdicts rendered in jury trials, but rather had resulted from his admissions of guilt in the entry of guilty pleas (TR. 139-141). Such testimony would have been relevant for two reasons. First, in judging Lawhorne's credibility, the jury might look at his six prior convictions and think that Lawhorne had testified as to his innocence before juries in each of those cases, and that the jurors in those cases had disbelieved his testimony. Such a consideration would certainly lead the jury in this case to disbelieve Lawhorne's testimony. By advising the jury that he had not testified as to his innocence before juries in his previous convictions, Lawhorne would have been able to remove any such damaging impression from the minds of the jurors.

Lawhorne's explanation concerning his guilty pleas in each of the prior convictions would also have been relevant to convince the jurors that although the prior convictions might have shown his bad character, such evidence of bad character did not establish his lack of credibility. The general theory behind impeachment by prior convictions is that such convictions establish the witness' bad character and that this evidence of bad *cites?*

character should be considered by the jury as detracting from the credibility of the witness. However, where the convictions resulted from guilty pleas, as in the present case, a strong argument can be made that as far as credibility is concerned, the fact that the witness admitted his guilt is more important than the attack on character effected by the convictions. Lawhorne's proffered testimony would have allowed him to present this argument to the jury.

Thus, the testimony offered by Lawhorne was relevant to eliminating the adverse implications from the evidence of his prior convictions because it showed that the convictions did not materially affect his credibility, and therefore this Court's decision in Noeling v. State, supra, establishes the admissibility of this testimony. In its decision in the instant case, however, a majority of the district court of appeal found Lawhorne's reliance on Noeling "misplaced" because he sought to testify about the specifics of his prior convictions on direct examination. Lawhorne v. State, 481 So.2d 19 (Fla. 3d DCA 1985). Relying on the decisions in Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985) and Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), a majority of the district court condemned the practice of "anticipatory rehabilitation" and affirmed Lawhorne's convictions notwithstanding the trial judge's refusal to allow him to testify concerning his prior convictions:

In the present case, the defendant's position might have merit if the testimony sought to be elicited had come after the defendant had been impeached by the state with his prior convictions, and defense counsel was seeking to rehabilitate him. The testimony

however, was sought during the direct examination of the defendant.

Lawhorne v. State, supra, 481 So.2d at 20 (footnote omitted).

This holding cannot be sustained for two reasons. First, as previously noted, the trial judge in this case did not simply preclude defense counsel from inquiring into the specifics of the prior convictions on direct examination. When defense counsel sought to question Lawhorne on direct examination concerning the specifics of his prior convictions, the trial judge issued the following ruling:

No. You're not going to ask that question. The question is how many times have you been convicted, period. There's to be by either side no further references to those cases. There's to be no reference of when, where, nothing. The question is, have you ever been convicted of a crime, yes or no. And if the answer is yes, its how many times. After that, you move right along. Let's proceed.

(TR. 141). This ruling clearly precluded Lawhorne from testifying as to the specifics of his prior convictions not only during direct examination, but also on redirect examination, or at any other time during the trial. As such, the trial judge's ruling contravenes the well-established rule in Florida allowing such questioning.

The decision of the district court also cannot be sustained because the practice of "anticipatory rehabilitation" on direct examination condemned by the district court has now been expressly sanctioned by this Court. In Bell v. State, 11 FLW 306 (Fla. July 10, 1986), this Court disapproved the Price decision relied on by the district court in the present case, and approved the decision in Bell v. State, 473 So.2d 734 (Fla. 2d DCA 1985)



which had sanctioned "anticipatory rehabilitation". Thus, the fact that Lawhorne sought to testify concerning the specifics of his prior convictions on direct examination cannot support the refusal to allow him to give such testimony.

The trial judge's refusal to allow Lawhorne to explain the circumstances of his prior convictions requires reversal of Lawhorne's judgments of conviction for trespass and resisting an officer without violence.<sup>2</sup> First, it must be remembered that the error in this case was not simply making Lawhorne wait until redirect to explain the circumstances of his prior convictions, but rather totally precluding him from giving such an explanation at any time. While simply requiring a party to wait until redirect to elicit rehabilitation evidence might very well be deemed to be harmless error, the total exclusion of such rehabilitation evidence is obviously a far more serious matter.

The harmfulness of the trial judge's erroneous exclusion of the rehabilitation evidence is also demonstrated by the fact that there were numerous conflicts at the trial between the testimony of the state witnesses and Lawhorne's testimony. For example, concerning the trespass charge, the information alleged that Lawhorne had unlawfully entered upon certain property in the vicinity of Miami International Airport "having received notice against entering given by actual communication..." (R. 3). To prove this charge, the state relied on the testimony of a police

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Lawhorne did not contest the charge of petit theft at his trial, therefore his conviction for that offense is not effected by the trial judge's erroneous restriction of his testimony.

officer working with the Dade County Aviation Authority who stated that on a specific date he had warned Lawhorne to stay out of the area unless he was authorized to enter the area by the Dade County Aviation Authority (TR. 123-125). Ruben Lawhorne, however, testified at trial that no one from the Dade County Aviation Department had ever told him to stay away from the area where he was arrested (TR. 139).

To resolve this conflict, as well as all the other conflicts in the testimony at trial, the jury had to determine whether to believe the state witnesses or Lawhorne. Obviously, a key factor for the jury in making this determination would have been the fact that Lawhorne had been impeached by his prior convictions. This being the case, it was essential for Lawhorne to be able to present evidence explaining the circumstances of those convictions so that he could attempt to convince the jury that the convictions were not a valid basis for resolving the conflicts in the testimony against Lawhorne. By denying Lawhorne the opportunity to present such evidence, the trial judge committed an error which requires reversal of Lawhorne's convictions for trespass and resisting an officer without violence.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that Court to reverse petitioner's judgments of conviction and sentences.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 17<sup>th</sup> day of July, 1986.

  
\_\_\_\_\_  
HOWARD K. BLUMBERG  
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