SUPREME COURT OF FLORIDA

CASE NO. 74,708

TRAVIS GILLION,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA CRIMINAL DIVISION

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ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Honorable Edward Fine, Presiding. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida, will accept the Statement of the Case and Facts as set forth in the Initial Brief of Petitioner with the following additions and clarifications.

A positive identification was made of Mr. Gillion by officer Tenety (R.193) and the person heading toward Tenety's car was identified as being Mr. Gillion (R.146).

SUMMARY OF THE ARGUMENT

References by a state witness to the fact that a defendant was arrested in a high crime area appears to be reversible error. At bar, the testimony at issue did not consist of a reference that Petitioner was arrested in a high crime area but rather consisted of the mere identification of a neighborhood as being a high crime area. This is a crucial distinction and such an identification does not amount to reversible error.

A description of the general area when given in a context unrelated to the arrest of the defendant, as was done in our case, can not be said to amount to a showing of bad propensity or character and can not amount to reversible error. Any error would nevertheless be harmless under the facts of this case.

ARGUMENT

THE MERE IDENTIFICATION OF A LOCATION AS A HIGH CRIME AREA DOES NOT UNDULY PREJUDICE A DEFENDANT WHO IS ARRESTED THERE AND NO ERROR IS COMMITTED BY MAKING SUCH A REFERENCE (Restated).

Well settled is our law that a trial judge has wide discretion in areas concerning admission of evidence and rulings on admissibility will be left undisturbed absent an abuse of discretion. Welty v. State, 402 So.2d 1159 (Fla. 1981). No such abuse has been shown hence the ruling must be affirmed.

In affirming the ruling of the trial court, the Fourth District Court of Appeal certified the following question as being one of great public importance:

> DOES THE MERE IDENTIFICATION OF A LOCATION AS A HIGH-CRIME AREA UNDULY PREJUDICE A DEFENDANT WHO IS ARRESTED THERE?

The Respondent states that it does not.

The law that has evolved in our state as to propriety of describing the geographical area of an offense is that references by a state witness to the fact that a defendant was arrested in a high crime area appears to be reversible error. Black v. State, 14 FLW 1542 (Fla. 4th DCA July 7, 1989); Huffman v. State, 500 So.2d 349 (Fla. 4th DCA 1987); Beneby v. State, 354 So.2d 98 (Fla. 4th DCA 1978). At bar, the testimony at issue did not consist of a reference that

Petitioner was arrested in a high crime area but rather consisted of the mere identification of a neighborhood as being a high crime area. This is a crucial distinction and such an identification does not create reversible error.

The testimony at issue consisted of the prosecutor asking Agent Mintus what he (Mintus) observed on the night at issue. Mintus stated that ..."I drove through the area and I observed several individuals. I observed cocaine, street cocaine transactions take place." (R.136). The subsequent motion for mistrial was denied. This testimony did not consist of a reference that a defendant was arrested in a high crime area as could constitute reversible error.

Examples of reversible error are found in Black v. State, supra, (police officer testified that on the day in question, he and his partner had been watching several areas of drug activities called "crack houses," and in particular the " crack house" where appellant was arrested, which was a vacant, partially-built garage where the officers had previously made numerous arrests." Beneby v. State, supra, (In response as to why the officer was in the area at the time of the arrest, he answered, "Well, there had been several narcotic arrests made in that area; and the bar at 22nd and Sims has quite a reputation for narcotics in that area. That was the reason we went up there in that alley").

The court in Beneby held that the fact that the policeman knew the scene as being within a reputed narcotics area did not tend to prove anything in issue and could only

serve to unduly prejudice the jury and the only reason that the evidence was submitted by the state was to show bad character or propensity.

By contrast, the testimony in our case did not consist of a witness stating that he knew the scene as being within a reputed narcotics area. All this testimony consisted of was a description of what the officer saw while he was driving through an area which observations were of street cocaine transactions. In Huffman v. State, supra, it was held to be proper when a state witness, in a case where the defendant was arrested on a Greyhound bus, to state that Fort Lauderdale police officers have arrested many people using buses to transport drugs north.

It was held that common sense would tell the jurors that drugs travel north by car, bus, boat, or plane, and that innocent people also use these modes of transportation. In our case, the testimony was that as the officer drove through the area, he observed cocaine transactions taking place (R.136). Subsequent testimony was that the officer observed somebody approaching the other officer's car and that he had seen the same individual several times before on that day (R.143).

As in Huffman, common sense would tell the jurors that innocent people also use these streets and Mr. Gillion's previously being seen on those streets does not necessarily make him a cocaine dealer. Furthermore, in both this case and in Huffman, remedial actions were taken by the trial

court. A curative instruction was given in Huffman and in our case, the court instructed the state to get off the point about known drug dealers (R.146) and only talk about the incident itself (R.160).

It could be said that references that one was arrested in a high crime area is irrelevant and solely shows bad character or propensity, Beneby, supra. However, as the Fourth District stated in the present opinion, to merely say that while driving through an area a police officer observed several narcotic transactions taking place and several street narcotics dealers does not appear to either finger the defendant as one of the dealers, or necessarily impugn the character of the neighborhood.

A description of the general area when given in a context unrelated to the arrest of the defendant, as was done in our case, can not be said to amount to a showing of bad propensity or character and hence can not amount to reversible error. It makes no sense to state otherwise.

The state should not have to try its case in a vacuum as Petitioner suggests. The observations of the officer are intertwined with the present case and serve to show the context of the crime and to give the jury a feel for what was going on at the time. See Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986) (discussion of inseparable crime evidence that explains or throws light upon the crime being prosecuted).

Petitioner's brief abounds with cases that are not on

point. Young v. State, 141 Fla. 529, 195 So. 569 (Fla. 1939), deals with testimony about the location of the residence of the defendant and the subsequent impugning of that location as a bad area. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965), also deals with the defendant's premises. We do not have this situation as we are dealing with the description of a public street and not a private residence. The time honored sanctity of the protection of the home is not implicated here. The other key cases are premised on Beneby v. State, which does not apply, or on Williams v. State, 110 So.2d 654 (Fla. 1959) which is not implicated in this case.

As to the colloquy about the defendant selling cocaine, the Fourth District properly found that defense counsel opened the door for the answer given. Slip op. at 4. Counsel for Appellant asked the officer whether the officer never saw Travis sell any cocaine. The officer answered "on that date? " (R.158). The motion for mistrial was properly denied as the trial court stated that the question was not specific about the date (R.158). The trial judge was correct.

In Haager v. State, 83 Fla. 41, 90 So. 812, 815 (1922), the following question was asked on cross-examination: "Did he say or do anything then?" The court stated that the question did not limit the conversation and was hence entirely too broad. Similarly, in East Coast Lumber Co. v. Ellis-Young Co., 55 Fla. 256, 45 So. 826, 827 (1908), the following question was asked: "Mr. Williams, did you ever

hear Mr. Carraway state anything in reference to the ownership of these lands?" It was stated by the Court that this question was certainly too broad and not confined to any time or place or restricted to any admissions.

Respondent submits that the question at issue was also too broad and that counsel assumed the risk for the answer that he got. Indeed, the response "on that date?" is logical when faced with such a question. For Petitioner to claim error from this when he was the one who initiated it must be barred under the doctrine of invited error. A party may not invite error and then be heard to complain of that error on appeal. Pope v. State, 441 So.2d 1073 (Fla. 1983).

Finally, assuming the trial court did err in its rulings, the harmless error rule would still mandate affirming this present conviction.

Officer Mintus testified that it was clear daylight when this offense occurred (R.140). After Officer Tenety radioed that he had been robbed and described the person, Mintus felt he knew who had done this (R.147-148). Mintus had seen Petitioner wearing a distinctive item around his neck - a bandana with a chain intertwined through it. Mintus observed this prior to sending Tenety out and Tenety stated that the robber had a bandana with gold on it around his neck (R.149).

Officer Tenety testified that he had no doubt that Petitioner handed the cocaine to him (R.172) and that it was Petitioner who punched him and snapped his gold chain (R.174). Tenety got a good look at Petitioner's face (R.178)

and also described the bandana with the gold braid going through it (R.183). Tenety then returned to the police station and looked at an 18 picture photo lineup. Tenety picked out Petitioner's photo 15-20 minutes after he had last seen him (R.193).

The evidence against Petitioner was clear and the " entire transcript" was not "red lighted" by improprieties the way it was in Beneby. Furthermore, identity was not at issue as Appellant suggests. The evidence is clear that Petitioner was the culprit. Furthermore, the fact that Mintus considered the bandana jewelry and not clothing did not turn the cross-examination into a vigorous one. The remainder of the cross-examination consisted of merely criticizing the field tactics of the officers.

The ruling of the circuit and appellate court must be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and citations of authority therein, it is respectfully requested that the opinion of the Fourth District Court of Appeal be affirmed by this Honorable Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by courier to Marcy K. Allen, Assistant Public Defender, 15th Judicial Circuit of Florida, The Government Center, 301 N. Olive Ave, 9th Floor, West Palm Beach, Florida 33401 this 3rd day of November, 1989.

Of Counsel