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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 75,880

ANTHONY WILLIAMS,

Respondent.

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ANTHONY LEE WILLIAMS,

Petitioner,

v. CASE NO. 76,010

STATE OF FLORIDA,

Respondent.

_______________________/

REPLY BRIEF OF PETITIONER (76,010)

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SECOND JUDICIAL CIRCUIT

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REPLY BRIEF OF PETITIONER (76,010)

I. PRELIMINARY STATEMENT

Anthony Lee Williams will refer to the parties and the record in the same manner used in the Answer Brief of Respondent (75,880)/Initial Brief of Petitioner (76,010). Reference to the brief of the state filed July 18, 1990, will be by use of the symbol "SB" followed by the appropriate page number in parentheses.

II. ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING WILLIAMS' MOTION TO EXCLUDE THE IN-COURT IDENTIFICATION TESTIMONY OF WILLIAMS BY ARTHUR JERNIGAN, SINCE SUCH TESTIMONY WAS THE RESULT OF AN UNNECESSARILY SUGGESTIVE IDENTIFICATION PROCEDURE, THEREBY DEPRIVING THE DEFENDANT OF DUE PROCESS OF LAW AS GUARANTEED BY BOTH THE CONSTITUTION OF THE STATE OF FLORIDA AND THE CONSTITUTION OF THE UNITED STATES.

The defendant wishes to first point out what the state has not argued. Issues I and II are issues upon which the Court has discretion to rule. See Trushin v. State, 425 So.2d 1126 (Fla. 1983). The state's arguments on both of these issues go to the merits raised, and no argument is made that the Court should exercise its discretion and not rule upon them. It thus appears that the state has voiced no objection whatsoever to the Court ruling on the merits of Issues I and II.

On the merits, Williams must stress the unusual facts that are present in this case. This is the only case known to Williams in which the witness in question absolutely admitted that his in court identification of the defendant was not based upon his viewing him at the time of the crime, but rather was based upon seeing the defendant, alone, in the custody of the police. The witness, Jernigan, did not merely happen upon the scene but instead came to be there pursuant to action taken by the alleged victim.

The two cases cited in the district court's opinion are the same two relied upon heavily by the state in its brief.

Both cases, State v. Cromartie, 422 So.2d 842 (Fla. 1982) and Downer v. State, 375 So.2d 840 (Fla. 1979) are manifestly inapplicable to the facts of and law applicable to the case at hand.

In Downer, the witness, Ms. Gelson, could not make an in court identification, and the question before the Court was whether a less than conclusive identification of the defendant made pursuant to a "show up" conducted by defense counsel before trial could be treated as substantive evidence. The issue here is the admissibility of an in court identification made after the witness testified, in effect, that the in court identification could not have been made at all absent a one-on-one display of the defendant to the witness by the police before trial. The Court correctly realized that "...the true thrust of appellant's attack is to the weight, not the admissibility, of the identifications of Ms. Gelson." 375 So.2d at 847. Indeed, it does not appear that the defense in Downer even argued that the out of court procedure in that case was impermissibly suggestive, which is the essence of the claim in this case. This view is buttressed by the fact that it was the defense, not the prosecution, in Downer who orchestrated the out of court procedure. Here, the defense is vigorously questioning the admissibility of the evidence.

State v. Cromartie, supra, arose from a pre-trial order that had granted a motion to suppress evidence of an out of court identification. Like the instant case, Cromartie involved a procedure where the suspect was shown to the witnesses

shortly after the crime was committed. That is where the similarities end, however. The Court in Cromartie held that the procedure did not violate due process since the three witnesses had a clear view of the suspect, he matched the description given by the witnesses, and only a short time elapsed between the time of the crime and the procedure. In short, the court ruled that the procedure was not "unnecessarily suggestive." The identification was based upon the witnesses' observations at the time of the offense.

The defendant again notes that, since Cromartie arose pre-trial, the court was not even presented with the question presented here, namely, the admissibility of an in court identification. More significantly, unlike Cromartie, the witness here testified affirmatively that his in court identification was not based on his observations of the suspect at the time of the offense. Not only did the witness, who was a state witness so testify, but in addition the state presented no evidence to the contrary.

Using only one sentence, the state claims "...any perceived error is harmless as the victim positively identified Williams." (SB-9). This terse "analysis", Williams argues, falls far short of the requirements of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The state has not claimed the error is harmless beyond a reasonable doubt. Pursuant to DiGuilio, the state has the burden of demonstrating that the error is harmless beyond a reasonable doubt. DiGuilio not only requires an "...examination of the permissible evidence on which the jury

could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." 491 So.2d at 1138. The Court in DiGuilio explicitly pointed out that "...harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence." 491 So.2d at 1136. Here, the state appears to be arguing that the error is harmless simply because the element of identity was proved by a witness other than Mr. Jernigan. This type of argument is clearly insufficient under DiGuilio. Since the state has not presented the Court with a prima facie demonstration that the error is harmless, Williams requests the Court to reverse without regard to the harmless error doctrine. State v. Lee, 531 So.2d 133 (Fla. 1988).

Respectfully submitted,

BARBARA M. LINTHICUM
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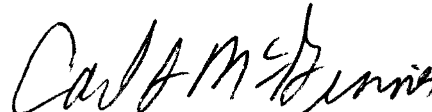
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply has been furnished by hand-delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Anthony Lee Williams, #A-908846, Baker Correctional Inst., Post Office Box 500, Olustee, Florida, 32072, on this 16th day of August, 1990.

CARL S. McGINNES