07 w/app.

FILED
SID J. WHITE
JAN 24 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

CARLTON BLACK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 77,130
DCA NO. 89-2912

PETITIONER'S BRIEF ON THE MERITS

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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 Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

All emphasis has been supplied by Petitioner unless otherwise noted.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Carlton George Black, Petitioner, was charged by information by the State of Florida on August 27, 1987, with possession of cocaine in Count I and possession of drug paraphernalia in Count II (R170). Petitioner was found guilty as charged as to both counts after a jury trial (R171). After appeal from this judgment of conviction on these counts, this court reversed and remanded for a new trial (R175), in the case of Black v. State, 545 So.2d 498 (Fla. 4th DCA 1989).

Petitioner was then retried on these counts.

A motion in limine was made that there be no mention that the structure Petitioner was found in was a crack house or to give opinions on the type of individuals that frequented this place. The prosecutor agreed and informed the court additionally he had instructed the officers not to mention the location was a high drug area (R3).

Officer James Polan, the state's first witness, testified to the following: That on August 11, 1987, he and his partner David Lewis, were in plain clothes, targeting narcotic transactions of buyers and sellers (R20-21). He was lead to approach the abandoned structure when he saw a "white male walking through the area" (R21). When asked why this had significance to him, Officer Polan responded that it is because it is a "high crime area" (R22). Appellant objected to this response and moved for a mistrial (R22). Appellant argued that "the whole idea, you don't want to inject the idea that this prior thing's going on there to prejudice the jury

such as crack house or high crime area" (R22). The judge denied the motion for a mistrial (R25). Petitioner declined the suggestion of a curative instruction (R25) because he felt it would exacerbate the situation (R23).

The state rested (R84) and Petitioner moved for a Judgment of Acquittal (R85). The court denied the motion (R93). Petitioner rested and renewed his motion (R96).

The jury returned a verdict of not guilty of possession of cocaine in Count I and guilty of possession of drug paraphernalia in Count II (R160-161).

Petitioner received a sentence of 365 days in Broward County Jail with credit for 365 days time served (R185).

Timely notice of appeal was taken from the above judgment and sentence (R186). On November 21, 1990, the Fourth District Court of Appeal affirmed Petitioner's conviction and sentence and certified the following question as one of public importance:

> Does the mere identification of a location as a hight crime area unduly prejudice a defendant who is arrested there?

On December 17, 1990, Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. On December 31, 1990 this Court issued an order setting a briefing schedule for this cause.

SUMMARY OF THE ARGUMENT

The officer's remarks that he was targeting narcotics transactions for buyers and sellers, and that this was done in a "high crime area", were irrelevant and unduly prejudicial.

ARGUMENT

POINT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL WHEN THE OFFICER TESTIFIED HE WAS TARGETING NARCOTICS TRANSACTIONS, BUYERS AND SELLERS, IN A "HIGH CRIME AREA".

On direct examination of the arresting officer the prosecutor asked the officer if there was anything specific that he was targeting on the day of Petitioner's arrest (R21). The officer responded that he was targeting narcotic transactions for buyers and sellers (R21). The prosecutor then asked the officer what led up to his contact with Petitioner (R21). The officer stated that he "located several subjects inside an abandoned structure" (R21). In response to the prosecutor's question as to what led the officer to approach this abandoned structure, the officer responded that he saw a white male walking through this area (R21). Then, in response to the prosecutor's inquiry as to why this has any significance, the officer responded that "well this is a high crime area" (R22). Petitioner objected and moved for a mistrial (R22). The motion was denied (R25). The Fourth District Court of Appeal in rejecting petitioner's challenge to the erroneous admission of this testimony, certified the following question to this Court as 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?

Petitioner submits that the appropriate answer is a qualified yes. The significant focus of this cause is really whether such evidence

is relevant to the issue of petitioner's guilt or innocence. Petitioner submits it is not. Further, any marginal relevance is far outweighed by the prejudicial impact of such testimony on the trier of fact.

A. TESTIMONY CHARACTERIZING THE LOCATION OF ARREST AS HIGH CRIME AREA IS ERROR.

In Gillion v. State, 15 FLW 72 (Fla. January 10, 1991) this Court clearly stated that it was error to admit testimony of the location of defendant's arrest. There is a body of case law finding error in the admission of the nature of a locale of dubious character where it was not of relevance to a material issue. Black v. State, 545 So.2d 498 (Fla. 4th DCA 1989) (error to admit testimony making references to base house and that vagrants are not normal people); Beneby v. State, 354 So.2d 98 (Fla. 4th DCA) cert. denied, 356 So.2d 1220 (Fla. 1978) (error to admit testimony that several narcotics arrests made at location of defendant's arrest for possession of heroin); Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982) (error to admit testimony in defendant's trial for sale and possession of marijuana of prior unrelated sale of narcotics at same location as that involved in defendant's cause); Periu v. State, 490 So.2d 1327 (Fla. 3d DCA 1986) (in defendant's trial for grand theft of a motor vehicle, error to admit testimony that other stolen vehicles recovered at defendant's body shop); See also Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1989) (in defendant's trial for burglary, error to admit testimony that the same business was burglarized the night before the event in question); Blanco v. State, 452 So.2d 520 (Fla. 1984) cert. denied,

469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985) (in homicide prosecution, no error to exclude defense evidence that two (2) weeks earlier, an armed robbery occurred at a residence situated behind the home where the murder occurred upon a speculative defense theory that someone else may have done the crime)[1].

All relevant evidence is admissible unless excluded by law. §90.402, Fla. Stat. To be relevant, evidence must prove or tend to prove a fact in issue. Stano v. State, 473 So.2d 1282 (Fla.) cert. denied, 474 U.S. 1093, 106 S.Ct. 879 (1985); §90.401, Fla. Stat. Where however the prejudicial effect of such evidence overshadows any probative value relevant evidence must be excluded. §90.403, Fla. Stat. Likewise, evidence which suggests an accused's criminal propensity but which does not tend to prove a fact at issue is inadmissible. Williams v. State, 110 So.2d 654 (Fla.) cert.denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); §90.404, Fla. Stat.

It has long been held that while reference to a location may be relevant to a material issue, the nature of that location is not

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[1] Error which arises from the admission of testimony of the reputation of a place as evidence of a defendant's guilt because he committed a crime at that location has been recognized in other jurisdictions. See State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (N.C. 1965) wherein the court wrote:

> North Carolina is included among those jurisdictions which hold "that evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor law violations involving a charge of unlawful sale or possession of intoxicants at particular premises."
>
> 144 S.E. 2d at 46.

necessarily also relevant. Young v. State, 141 Fla. 529, 195 So. 569 (Fla. 1939). In Young, this Court found that the defendant's street address was admissible in her trial for causing death by culpable negligence. It was, however, error for the prosecutor to argue that the street was situated in a "red light" district so as to infer that defendant was a whore. The testimony was irrelevant and constituted an improper attack upon the defendant's character which had not been placed at issue. The defendant's character was impugned through association with a particular area without showing the defendant's connection to that area other than that of mere residence. Admission of such evidence violates the rule excluding testimony which is "res inter alios acta"[2]. Roach v. State, 108 Fla. 222, 146 So. 240 (1933). As this Court recognized long ago in Watkins v. State, 121 Fla. 58, 163 So. 292, 293 (1935):

> The rule "res inter alios acta" forbids the introduction against an accused of evidence of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, the reason being that such evidence would be to oppress the party affected, by compelling him to be prepared to rebut facts of which he would have no notice under the logical relevancy rule of evidence, as well as prejudicing the accused by drawing away the minds of the jurors from the point in issue (citation omitted).
>
> In civil as well as in criminal cases, facts which on principles of sound logic tend to sustain or impeach a pertinent hypothesis of an issue are to be deemed relevant and admitted in evidence, unless proscribed by

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[2] "A thing done between others or between third parties or strangers (citation omitted)" Black's Law Dictionary, 3d Edition (1933).

> some positive prohibition of law. But this rule is always subject to the well-recognized exception that proof of collateral facts "res inter alios acta" are never to be admitted, especially in a criminal case where the facts laid before the jury to convict an accused person should consist exclusively of the transaction which forms the subject of the indictment and matters relating thereto, and which alone the defendant can be expected to come prepared to answer (citation omitted).

Absent a showing of some connection between the defendant, the infamous location of his arrest and the crime of which he is accused, prejudice results from the erroneous admission of testimony describing the nature of the area because the jury is lead to consider an improper "construction of inference upon inferences". State v. Norris, 168 So.2d 541, 543 (Fla. 1964).

B. THE ERROR IN THIS CASE WAS NOT HARMLESS.

Admission of this erroneous evidence which branded petitioner a criminal by virtue of his presence at an infamous local along with infamous others was not harmless error.

The prejudice which arises from the reference to evidence of guilt through association is so severe that it may not be cured by instruction. U.S. v. Romo, 669 F.2d 285, 289-290 (5th Cir. 1982). See also Finklea v. State, 471 So.2d 596 (Fla. 1st DCA 1985) (where state introduces evidence of unrelated criminal activity failure to request curative instruction does not bar appellate review for the wrongfully admitted evidence is too prejudicial for the jury to disregard). Where collateral crime evidence is erroneously admitted, its harm is presumed. Straight v. State, 397 So.2d 903, 908 (Fla.) cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d

418 (1981). This Court reaffirmed the rationale for this principle in Keen v. State, 504 So.2d 396, 401 (Fla. 1987):

> As we explained over a half a century ago:
>
> > Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty (Citation omitted).

Harmless error analysis places the burden upon the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

> Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at 1135. This Court revisited the focus of harmless error analysis in the context of collateral crime errors in State v. Lee, 531 So.2d 133 (Fla. 1988). Again, this Court approved the DiGuilio test. Even where the evidence is more than ample to support the verdict, an error may be harmful where it is significant to the state's case and may have affected the jury's verdict of guilt.

Due to the error the trier of fact is free to speculate that because a person is located in an area notorious for its narcotics sales, the accused too must be engaged in such illicit activity. The trier of fact may find the accused guilty not because of his conduct but by association with an area recognized for such activity. The tendency of the fact finder to convict based upon a

defendant's presence at the scene of a crime absent more is evinced by convictions which are later reversed due to such legally insufficient evidence. M.F. v. State, 549 So.2d 225 (Fla. 3d DCA 1989)[3]. Thus, the Fifth Circuit Court of Appeal has repeatedly condemned efforts to suggest guilt by association for it encourages reliance upon improper innuendo rather than focus upon the defendant's guilt for the crime charged. U.S. v. Ochoa, 609 F.2d 198, 204-206 (5th Cir. 1980) (error to cross-examine defendant on bad conduct of family and friends); U.S. v. Forrest, 620 F.2d 446, 451 (5th Cir. 1980) (proof of defendant's guilt through association with kingpin husband); U.S. v. Singleterry, 646 F.2d 1014, 1018 (5th Cir. 1981) cert. denied 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 518 (1982) ("What is relevant is the long established rule that a defendant's guilt may not be proven by showing he associates with unsavory characters").

At bar the statements made that the officer was targeting narcotics transactions, buyers and sellers, in a high crime area are irrelevant to the issue of Petitioner's guilt or innocence. They do not tend to prove anything in issue, but can only serve to unduly prejudice the jury into believing that Petitioner has a propensity to commit drug crimes if he is in a reputed drug area.

These statements, when taken together, lead to the conclusion that the officers were targeting a reputed drug area. Although

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[3] Even the Supreme Court of the United States has paused to note that mere presence at the scene of a crime is insufficient proof to support a conviction. U.S. v. Williams, 341 U.S. 58, 64 n.4 71 S.Ct. 595, 599 n.4 (1951).

there are, of course, crimes other than drug buying and selling that the officer could have been targeting in this "high crime area", these were not the crimes being targeted. Drug crimes, buyers and sellers, in this "high crime area" were the focus of their operation.

This is contrary to the well settled rule in Young, supra for the nature of the area was of no probative value in resolving any material issue.

As pointed out in Beneby v. State, 354 So.2d 98 (Fla. 4th DCA 1978), cert. denied 359 So.2d 1220 (Fla. 1978) the location where defendant possessed the drug is irrelevant. Id. at 99. At bar, it is irrelevant to the issue of guilt whether Petitioner possessed drugs in a "high crime" area or a low crime area. The fact that the officer was targeting buyers and sellers in a high crime area doesn't tend to prove anything in issue and could only serve to unduly prejudice the jury. See Beneby v. State, 354 So.2d 98 (Fla. 4th DCA 1978), cert. denied 359 So.2d 1220 (Fla. 1978). In Beneby this court focused on testimony which alleged the area was a reputed narcotics area which was found to be irrelevant and prejudicial. Id. at 99. The clear thrust of the statements that the officer was targeting buyers and sellers of drugs in a high crime area, was that this was a reputed narcotics area. The only relevant inference that can be drawn from such statements is that Petitioner was guilty of this case through his association with a known drug area.

One may not exclude the likelihood that the impropriety did

not contribute to the verdict. DiGuilio, Keen; Lee. Thus, this Court should quash the decision of the Fourth District Court of Appeal, reverse petitioner's convictions with directions to remand the cause for a new trial.

CONCLUSION

Petitioner respectfully requests that this Court answer the certified question in the affirmative and reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereto has been furnished to Sylvia Alonso, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 2nd day of January, 1990.

Nancy Perez
Of Counsel

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

CARLTON BLACK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 77,130
	)	DCA NO. 89-2912
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I X

TO

PETITIONER'S BRIEF ON THE MERITS

Criminal law—Jury instructions—Trial court's pre-trial instruction concerning read back of testimony not preserved for appellate review by timely objection—Separate conviction for improper use of firearm violated double jeopardy clause

DAVID VELAZQUEZ, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 89-0702. Opinion filed November 21, 1990. Appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge. Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Patricia G. Lampert, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We affirm appellant's conviction and sentence for attempted murder including the imposition of a mandatory minimum sentence for the use of a firearm.

Appellant failed to timely object to the trial court's pre-trial instruction concerning the read back of testimony and therefore this issue has not been preserved. *See Farrow v. State*, No. 89-0367 (Fla. 4th DCA Nov. 14, 1990) (receding from *Hendrickson v. State*, 556 So.2d 440 (Fla. 4th DCA 1990) and *George v. State*, 548 So.2d 867 (Fla. 4th DCA 1989)). We reverse, however, appellant's conviction for the separate crime of improper display of a firearm as being violative of double jeopardy under the supreme court's holding in *Hall v. State*, 517 So.2d 678 (Fla. 1988).[1]

AFFIRMED IN PART; REVERSED IN PART. (HERSEY, C.J., ANSTEAD and DELL, JJ., concur.)

[1]Hall has been superseded by statute, however, the acts giving rise to the charges occurred prior to the effective date of section 775.021(4), Florida Statutes (Supp. 1988).

* * *

Jurisdiction—Dissolution of marriage—Modification—Pendency of case in supreme court on certified question from district court of appeal deprives trial court of jurisdiction to modify judgment—Husband's petition for elimination of permanent alimony and lump sum alimony from final judgment is not relief "pending appeal" as contemplated within appellate rule permitting party to petition trial court for temporary relief pending appeal

TOBITHA CROFTON THOMPSON, Petitioner, v. HONORABLE JAMES R. STEWART, JR., Respondent. 4th District. Case No. 90-1891. Opinion filed November 21, 1990. Petition for writ of prohibition to the Circuit Court of Palm Beach County. Ronald Sales and Jane Kreusler-Walsh of Klein and Walsh, P.A., West Palm Beach, for petitioner. Paul F. King of Edna L. Caruso, P.A., West Palm Beach, and Esler & Kirschbaum, P.A., Fort Lauderdale, for respondent.

(PER CURIAM.) We grant the writ of prohibition and quash the trial court's order setting the supplemental petition for modification for trial. The trial court does not have jurisdiction to modify an order under appeal. *Campbell v. Campbell*, 436 So.2d 374 (Fla. 5th DCA 1983), *rev. dismissed*, 453 So.2d 1364 (Fla. 1984); *Buckley v. Buckley*, 343 So.2d 890 (Fla. 4th DCA 1977), *appeal dismissed*, 362 So.2d 1050 (Fla. 1978); *Kalmutz v. Kalmutz*, 299 So.2d 30 (Fla. 4th DCA 1974). The underlying final judgment of dissolution is now pending in the Supreme Court on a certified question from this court. The pendency of the case in the Supreme Court deprives the trial court of jurisdiction to modify the judgment. *See State v. Meneses*, 392 So.2d 905 (Fla. 1981). The husband may of course request relinquishment of jurisdiction from the court having jurisdiction if he deems it advisable, or he may petition the trial court for temporary relief *pending appeal* in accordance with Florida Rule of Appellate Procedure 9.600(c). However, it is clear from the petition that he seeks elimination of permanent alimony and lump sum alimony from the final judgment, which is not relief "pending appeal" as contemplated within the appellate rule. (ANSTEAD, GUNTHER and WARNER, JJ., concur.)

* * *

Criminal law—Question certified whether mere identification of location as high crime area unduly prejudices defendant who is arrested there

CARLTON BLACK, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 89-2912. Opinion filed November 21, 1990. Appeal from the Circuit Court for Broward County; Paul Lawrence Backman, Judge. Richard L. Jorandby, Public Defender, and Joseph S. Shook, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Sylvia H. Alonso, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) As we did in *Gillion v. State*, 547 So.2d 719 (Fla. 4th DCA 1989), we certify the following question as 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?

AFFIRMED. (DOWNEY, GUNTHER and WARNER, JJ., concur.)

* * *

Juveniles—Appeals—Certiorari—State seeking review of trial court order granting juvenile's motion to suppress evidence—Petition denied

IN THE INTEREST OF: T.K., a child. 4th District. Case No. 90-1369. Opinion filed November 21, 1990. Appeal of a non-final order from the Circuit Court for Broward County; John A. Miller, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Miles Ferris, Assistant Attorney General, West Palm Beach, for Appellant-State of Florida. Richard L. Jorandby, Public Defender, and Jill Hanekamp, Assistant Public Defender, West Palm Beach, for Appellee-T.K., a child.

(PER CURIAM.) The state has filed a non-final appeal from a pre-trial order granting appellee's motion to suppress evidence in a delinquency proceeding. We treat the state's notice of appeal as a petition for writ of certiorari and deny the petition. *See State v. Pettis*, 520 So.2d 250 (Fla. 1988) and *State v. M.G.*, 550 So.2d 1122 (Fla. 3d DCA), *rev. denied*, 551 So.2d 462 (Fla. 1989).

CERTIORARI DENIED. (GLICKSTEIN, DELL and STONE, JJ., concur.)

* * *

Wrongful death—Counties—Automobile accident allegedly resulting from negligent design, construction, and maintenance of highway and surrounding shoulders—Trial court erred in not allowing plaintiffs to present evidence of other similar accidents on roadway in question to prove that county had notice of existing dangerous conditions—Error to refuse to let former county commissioner testify that he had on numerous occasions advised commission during budget meetings of the conditions and need for rectification—Highway patrol officer's testimony regarding prior similar accident in same vicinity not inadmissible hearsay where officer had personal knowledge and observation of accident—Evidence of notice to county not irrelevant—Trial court acted prematurely in granting defendant's motion for directed verdict where plaintiffs had not demonstrated that they could not make a prima facie case to go to the jury

GASSAB HALUM, as Personal Representative of the Estate of YASSER HALUM, and SADIE WRIGHT, as Personal Representative of the Estate of TEENA WRIGHT, Appellants, v. PALM BEACH COUNTY, a subdivision of the State of Florida, Appellee. 4th District. Case No. 89-2888. Opinion filed November 21, 1990. Appeal from the Circuit Court for Palm Beach County; Edward H. Swanko, Judge. Allen R. Seaman of Varner, Stafford, Cole & Seaman, P.A., Lake Worth, for appellants. Ronald K. McRae, Assistant County Attorney, West Palm Beach, and John Beranek of Aurell, Radey, Hinkle & Thomas, Tallahassee, for appellee.

(DOWNEY, J.) Appellants, Gassab Halum and Sadie Wright, as personal representatives of the estates of two of three deceased victims of an automobile accident, appealed from a final judgment entered upon a directed verdict against them and in favor of appellee, Palm Beach County.

The case arises out of an automobile accident that occurred as

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereto has been furnished to Sylvia Alonso, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 2d day of January, 1990.

Nancy Perez
Of Counsel