IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,130

CARLTON BLACK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

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RESPONDENT'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

Respondent was the appellee in the District Court of Appeal and the prosecution in the trial court. Petitioner was the appellant in the appeal proceedings and the defendant at trial.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal.

All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts as substantially true and correct except as modified by the facts herein, and with the following additions and/or clarifications:

During his opening statements to the jury, defense counsel made the following arguments:

> This is a situation where the police in their zeal, in good intentions to clean up a neighborhood, to clean up an area simply go into a house and--abandoned house and arrest everybody in sight, not only everybody on the inside of the house, but everybody on the outside.
>
> It will not be our contention throughout this trial that the police had bad intentions or that they want to see innocent people go to jail, but this just looking to clean up the streets and if you're in a spot you shouldn't be, you're going--you're facing some charges, and that's the situation that developed and finally has been brought before you here today.

(Emphasis added)(R. 15-16).

Defense counsel later added that:

> When the police finally just basically stormed in the house, went in there, they saw four people inside, and interestingly enough you will hear their testimony. Every single one of them was in the act of doing something illegal, which just happened to give them probable cause to arrest every single person in the house for possession of drug paraphernalia and I believe for possession of cocaine.

(Emphasis added)(R. 16).

SUMMARY OF THE ARGUMENT

The district court below properly affirmed the trial court's denial of petitioner's motion for mistrial following a witness' statement that "...this is a high crime area." Insofar as the trial court sustained the objection, petitioner's assertion that the testimony was irrelevant and therefore inadmissible is unavailing. By the same token, petitioner's refusal to have the trial court give a curative instruction to correct the error waives appellate review of same.

Nonetheless, petitioner was not prejudiced by the comment. During opening statements, petitioner conceded that the officers were in the area to "clean up the neighborhood," and petitioner himself admitted that he was present in a vacant garage where narcotics were present and where people were ingesting same. Moreover, in light of the jury's finding that petitioner was not guilty of possession of cocaine, and given the uncontroverted evidence regarding petitioner's possession of drug paraphernalia, it is obvious that any error was harmless.

ARGUMENT ON APPEAL

THE DISTRICT COURT DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR MISTRIAL FOLLOWING THE OFFICER'S STATEMENT THAT "THIS IS A HIGH CRIME AREA."

The exchange at issue before this Court relates to the following testimony by Officer James Polen:

> Q: Okay. And what led up to your contact of that individual [Petitioner]?
>
> A: Within that area, we located several subjects inside an abandoned structure.
>
> Q: Okay. What led you to approach this abandoned structure?
>
> A: We had a white male walking through the area of Northwest One Avenue.
>
> Q: Why does that have any significance to you?
>
> A: Well this is a high crime area--

(R. 21-22).

Petitioner objected to the above testimony; the trial court sustained same, and admonished the witness from testifying that he encountered petitioner in a high crime area (R. 22-27); however, petitioner rejected the trial court's offer for a curative instruction (R. 23, 25).

Petitioner claims that the trial court erred in denying his motion for mistrial because the officer's testimony regarding the area where petitioner was arrested was irrelevant. However, based on the exchange put forth above, it is clear that

the trial court recognized that the comment was irrelevant since he sustained petitioner's objection thereto. Indeed, even the prosecutor agreed that the testimony was improper (R. 24). As such, petitioner's argument that the testimony was inadmissible on relevancy grounds is unavailing.

To the contrary, the State maintains that any error was waived given petitioner's refusal to cure same by way of an instruction by the trial court. "The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." Duest v State, 462 So.2d 446, 448 (Fla. 1985); Green v State, 557 So.2d 894, 895 (Fla. 1st DCA 1990). Thus, in Robinson v State, 561 So.2d 1264 (Fla. 3d DCA 1990), the district court held that the curative instruction given by the trial court corrected the error committed by the arresting officer's description of the area as a "high drug area," which was "well known for the sale of narcotics." Similarly in Huffman v State, 500 So.2d 349 (Fla. 4th DCA 1987), the comment that, "officers have arrested many people using buses to transport drugs north" did not result in reversible error given the trial court's curative instruction as a result thereof.

Thus sub judice, any error which resulted from Officer Polen's remark could have been corrected by a curative instruction. See Hellman v State, 492 So.2d 1368 (Fla. 4th DCA 1986); Moore v State, 418 So.2d 435 (Fla. 3d DCA 1982). As a result, defense counsel's refusal to accept the trial court's

offer for an instruction or his failure to have the testimony stricken from the record waives appellate review of same. Wilson v State, 549 So.2d 702 (Fla. 1st DCA 1989); Lara v State, 464 So.2d 1173, 1180 (Fla. 1985); Ferguson v State, 417 So.2d 639, 642 (Fla. 1982). Moreover, the complained of statement was not so prejudicial so as to vitiate the entire trial. As such, the trial court did not abuse its discretion in denying petitioner's motion for mistrial. Cobb v State, 376 So.2d 2230 (Fla. 1979); Salvatore v State, 366 So.2d 745 (Fla. 1979).

Be that as it may, comments regarding the defendant's arrest in a high crime area is not per se reversible error. Gillion v State, 16 F.L.W. S72 (Fla. January 10, 1991); Davis v State, 562 So.2d 443 (Fla. 2nd DCA 1990); Jefferson v State, 560 So.2d 1374 (Fla. 5th DCA 1990). Contrary to petitioner's assertions otherwise, Gillion v State, 16 F.L.W. S72 did not hold that it was error to admit testimony of defendant's arrest (See Petitioner's Initial Brief at 6). Indeed, this Court recognized that:

> Such testimony, although not directly relevant to a specific element of the crimes for which Gillion stood accused, is relevant to clarify for the jury why this is where a drug buy would be made. That information is relevant for the jury to place in context testimony bearing directly on the legal issues of the case. To compel the state to put its case in a factual vacuum, devoid of such necessary background information, would be a disservice to the fact finder. "[C]onsiderable leeway is allowed even on direct examination for proof of facts that do not bear

> directly on the purely legal issues, but merely fill in the background of the narrative and give it interest, color, and lifelikeness." McCormick on Evidence §185, at 541 (3d ed. 1984).

Id.

In Black v State, 545 So.2d 498 (Fla. 4th DCA 1989) the defendant's conviction was reversed where the officer testified that the defendant was arrested in a garage where "no normal people lived" and that the garage was a "base house" where numerous past arrests had been made. Likewise in Beneby v State, 354 So.2d 98 (Fla. 4th DCA 1978), the defendant's conviction for possession of heroin was reversed as it was error to admit testimony that several narcotics arrests had been made at the location of the defendant's arrest.

Unlike the statements which constituted reversible error in Black and Beneby, the comment in the instant case was more amorphous, and did not single out petitioner or the specific location where he was arrested. Consequently the comments which constituted reversible error in Malcolm v State, 415 So.2d 891 (Fla. 3d DCA 1982), Periu v State, 490 So.2d 1327 (Fla. 3d DCA 1986), and Eberhard v State, 550 So.2d 102 (Fla. 1st DCA 1989), which are relied on by petitioner, were prejudicial because the location was described in a manner consistent with the specific offense for which the defendant was being tried. However, the comment sub judice only described the area as "high crime," and thus did not specify the area in a manner consistent with the offense petitioner was charged.

Finally, petitioner was not prejudiced by the officer's characterization of the area as one of "high crime." The State did not capitalize on the comment in opening or closing statements, unlike defense counsel, who in opening statements conceded that police were there to "clean up a neighborhood, to clean up an area." (R. 15-16). Moreover, petitioner did not negate the fact that he was present in a vacant garage where cocaine was present and where people were ingesting drugs (R. 108, 110-111, 113, 116). Hence, the officer's comment was cumulative of the argument and testimony by petitioner.

A reading of the record at bar indicates that petitioner contested the possession of cocaine charge, and practically conceded that he was in possession of drug paraphernalia (R. 15-19, 123-130, 142-144). In light of the foregoing, petitioner was not prejudiced by the comment as evidenced by petitioner's acquittal of the possession of cocaine charge (R. 181). But for petitioner's testimony to the contrary, the unrefuted evidence was that when the officers entered the abandoned structure, they observed petitioner and a white male sitting across from each other on the floor around a small table; the white male had a cocaine base can to his mouth with smoke emitting from it, and he passed the can to petitioner; the officers observed petitioner at the instant that he took possession of the cocaine base can (R. 30-32, 39, 41, 46-47, 61, 68, 71-72). Therefore, in light of petitioner's acquittal for possession of cocaine and the evidence regarding petitioner's

possession of drug paraphernalia, it is clear that the complained of comment did not influence the jury's finding that petitioner was guilty of possession of drug paraphernalia. As such, any error was harmless. Cicarelli v State, 531 So.2d 129 (Fla. 1988).

CONCLUSION

Based on the foregoing arguments and authorities cited herein, Respondent respectfully requests that the Fourth District Court's decision below be AFFIRMED.

Respectfully submitted,
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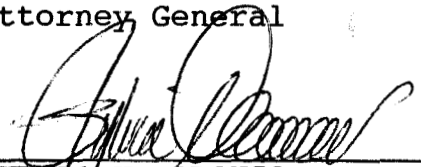
Attorney General



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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by courier to Nancy Perez, Assistant Public Defender, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 8th day of February, 1991.

Of Counsel