047

IN THE SUPREME COURT OF FLORIDA

RAYMOND JOHNSON, :

Petitioner, :

v. :

STATE OF FLORIDA, :

Respondent. :

_____/

CASE NO. 77,588

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

Raymond Johnson, petitioner, relies on his initial brief to reply to the argument advanced in the state's answer brief except for the following additions to Issues I and II.

II. ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR DIRECTED JUDGMENT OF ACQUITTAL.

Respondent suggests the proof in the case at bar was sufficient to withstand a motion for judgment of acquittal. Notably, respondent distinguishes none of the cases cited in petitioner's initial brief which stand for the proposition that, as a matter of law, presence at the scene of a crime and flight therefrom are insufficient to sustain a finding of guilt.

Respondent does suggest that the circumstances were that only petitioner, the victim, the victim's companion, and the filling-station attendant were present. This is not supported by the record. Mr. Chisholm, the attendant, testified there was no one else in the area fitting petitioner's description who was running; he did not say there were no other persons in the area other than himself, the victim, and the victim's companion. Chisholm's exact testimony on redirect examination concerning this issue was as follows:

> Q. (State): Mr. Chisholm, when you saw that individual, was he --- after the person had started yelling, was he walking or running?
>
> A. (Chisholm): When I saw which individual? Him (indicating defendant)?
>
> Q. (State): Uh-huh.
>
> A. (Chisholm): He was running.

Q. (State): Was there anyone else in the area fitting the description of him?

A. (Chisholm): No, there wasn't. No there was nobody.

Q. (State): Was there anybody else running in the area?

A. (Chisholm): No (T 29).

As is apparent from the foregoing colloquy, it was the State which qualified the questions as to whether there was anyone else in the area that fit the description of him or was running. The state, perhaps intentionally, did not ask if there was anyone else in the area.

Moreover, Chisholm, the only witness who identified petitioner, could only say petitioner was walking by the window of the store at one point, and at the next point was fifty yards away, running. While he placed petitioner at the business, he never placed petitioner by the vehicle from which the purse was stolen.

For the reasons argued herein and in petitioner's initial brief, the state failed to adduce sufficient evidence to sustain petitioner's conviction.

Petitioner's conviction should be reversed and remanded with directions that a judgment of acquittal be entered.

ISSUE II

UNDER THE FACTS IN THE CASE AT BAR, THE TRIAL COURT ERRED IN RULING ADMISSIBLE EVIDENCE OF FLIGHT AND FURTHER IN INSTRUCTING THE JURY THAT FLIGHT COULD BE CONSIDERED EVIDENCE OF GUILT.

Petitioner agrees with respondent that there was no objection to the testimony of the state witnesses that petitioner was seen running from the area where the crime was committed.

Of course, even lawfully admitted evidence of flight from the scene of the crime does not support a jury instruction on flight. Jackson v. State, 575 So.2d 181 (Fla. 1991).

Petitioner did object to evidence presented that petitioner, at a later time, fled at the sight of police officers. This evidence was erroneously admitted. As stated in Merritt v. State, 523 So.2d 573 (Fla. 1988):

> Flight evidence is admissible as relevant to the defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense.

Id. at 574.

In the case at bar, for the reasons argued in petitioner's initial brief, a conclusion that petitioner fled to avoid prosecution for theft of Green's purse is speculative at best.

Irrespective of the admissibility of the flight evidence at trial, a flight instruction, under the facts of this case, was error.

At the end of the trial, it was apparent that the only evidence the state had against petitioner was his presence at

the scene of the crime coupled with flight. Given this factual scenario, not only was the flight instruction error, it misled the jury into believing they could find flight sufficient evidence for conviction.

If this Court does not reverse petitioner's conviction and enter a judgment of acquittal based on the argument in Issue I, appellant's conviction should be reversed and the case remanded for a new trial.

III. CONCLUSION

Based on the argument and citation of authority herein, and the argument presented in petitioner's initial brief as to all issues, petitioner moves this Court grant the relief requested in petitioner's initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished by hand-delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner on this 13th day of May, 1991.

LYNN A. WILLIAMS