IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY,

Appellant/Cross-Appellee,

v. Case No.: 79,217

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF CROSS-APPELLANT

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Preliminary Statement

Appellee/Cross-Appellant, the State of Florida, the prosecuting authority in the trial court, will be referred to in this brief as the state. Appellant/Cross-Appellee, CHADWICK WILLACY, the defendant in the trial court, will be referred to in this brief as Willacy. Any record references to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS[1]

Issues on Cross Appeal

As to Issue IX:

In his written motion to suppress, Willacy moved only to suppress Barton's September 6, 1990, out-of-court identification (R 3306-07). At the hearing, Willacy referred to this motion as one to suppress an in-court identification (R 2906). Immediately after making this characterization, defense counsel stated that the basis for the motion was an unlawful, out-of-court showup identification and that he wanted to avoid an in-court identification based on this showup (R 2907).

The prosecutor conceded the impermissible showup (R 2908), and argued that the remaining issue for determination by the court was whether Barton could make an in-court identification based on an unrelated, independent recollection (R 2909). Defense counsel agreed (R 2910), but the trial court observed that the motion to suppress addressed only the show-up issue, not the in-court identification issue (R 2910).

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[1] This Court should note that, once again, Willacy has not complied with Fla. R. App. P. 9.210(b)(4), by failing to include a summary of his argument.

After Barton and Santiago testified, the prosecutor argued that Barton's September 5, 1990, identification was a sufficient independent recollection to permit an in-court identification:

> I think that the Court is aware of what the legal issues are, and it boils down to essentially whether or not the young man had sufficient opportunity and sufficient view of the suspect at the time of the crime. Although this was kind of the tail end of the crime, it was a continuation of it that the Court can determine that he could make an identification.
>
> I hesitate to use the word "identification" because he's very frank and says all he can say is it looks like the man and I can't be positive that it's him but it looks like it. At any rate, he can present that testimony based on an independent recollection at the time of the crime as opposed to what happened at the time of the showup.
>
> It's not . . . a situation where there's a showup, and at that time there was a positive identification made which tends to show, the State would say, that this young man did not let whatever may have happened improperly influence him unduly, or he would have probably said, "That's the guy right there, and I got no question about it." He's not that immalleable a witness, and he is going to tell us what he believes is the truth, and he's not going to let that influence him, and he's told us on the stand that he can set aside that portion of his observations of this defendant and rely upon what he saw of the man in the car and that he had an opportunity over a period of several minutes to look at the person. He looked at him over his shoulder, and while he did not have a reason to believe a crime was being

> committed, there was an unusual situation that caused him to kind of stare or gawk at this guy much more than you would ordinarily.
>
> Then, of course, we have the time frame. As the Court knows, he was first approached about this the very next day, within approximately twenty-four hours of when he had the view. He became aware that it was significant so that it would be more firmly locked in his mind at that point in time.
>
> The State's position is we've shown -- number one, we've shown an independent basis for his testimony, and two, that this witness has shown through his testimony that he could set aside the impermissible viewing of the defendant and give his testimony as to how closely the defendant may resemble the person he saw based on what he observed the day of the crime.

(R 2969-71). In its written order granting suppression, the trial court referred only to the September 6th out-of-court show-up identification as illegal (R 3340).

SUMMARY OF THE ARGUMENT

Issues on Cross Appeal

As to Issue IX:

Judge Yawn abused his discretion in suppressing Barton's in-court identification of Willacy. Because the events witnessed by Barton on September 5, 1990, preceded the impermissibly suggestive identification procedure used by police on September 6, 1990, Barton's testimony concerning September 5th would have been based on an independent recollection and thus been both probative and relevant.

ARGUMENT

Issues on Cross Appeal

Issue IX

WHETHER THE JUDGE YAWN ABUSED HIS DISCRETION IN INTERPRETING JUDGE BUDNICK'S ORDER GRANTING SUPPRESSION OF BARTON'S SEPTEMBER 6, 1990, OUT-OF-COURT IDENTIFICATION OF WILLACY AS PRECLUDING BARTON'S SEPTEMBER 5, 1990, OBSERVATIONS OF A BLACK MALE IN A RED AND WHITE FORD LTD.

In addressing Willacy's admitted "fail[ure] to understand the state's argument''on this point, Answer Brief at 24, the state suggests that this issue might be more appropriately phrased, "Whether Judge Yawn abused his discretion in suppressing the in-court identification of Willacy by Barton." Unfortunately, this issue is made somewhat confusing by the ambiguous nature of defense counsel's oral and written motions to suppress and Judge Budnick's oral and written findings.

What is clear from the record is that, in his written motion, Willacy moved only to suppress the September 6, 1990, out-of-court show-up identification by Barton, i.e., when police officers took Barton to a housing unit and Barton identified Willacy as the man he had seen the day before driving the two-toned Ford LTD (R 3306-07). Orally, however, Willacy characterized his motion as one seeking to suppress an in-court identification (R 2906). Argument by

counsel related to both out-of-court identifications and the proposed in-court identification (R 2907-10, 2969-77). Orally, Judge Budnick stated only that "I'm going to grant the Motion to Suppress." (R 2977). However, in his written order, Judge Budnick held that only the "suggestive show up" out-of-court identification was suppressed (R 3340). Based on previous argument and these two holdings, the prosecutor understood Budnick's order to suppress any in-court identification, as well as the show-up identification (R 1136).

Considering both Judge Budnick's comment before hearing testimony on defense counsel's written motion to suppress, i.e., that the written motion addressed only the showup issue (R 2910), and his written order suppressing only the show-up identification, Judge Budnick's oral ruling that "I'm going to grant the Motion to Suppress" should be interpreted as relating only to the show-up identification. Despite the prosecutor's understandable confusion as to what Judge Budnick actually had suppressed, Judge Yawn abused his discretion in suppressing an in-court identification by Barton. Suppression of the September 6th show-up identification removed any possibility of improper police conduct affecting Barton's ability to identify Willacy in-court based solely on his recollection of September 5, 1990.

This is the precise point which seems to elude defense counsel. The whole purpose behind suppression of a suggestive identification is to "remove the 'taint' imposed upon that evidence by . . . illegal government activity." United States v. Crews, 445 U.S. 463, 471 (1980). See Manson v. Brathwaite, 432 U.S. 98 (1977); see also Bundy v. State, 455 So. 2d 330 (Fla. 1984) (suppression rule does not apply where witness had observed defendant earlier in a newspaper); Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984) (identification evidence not impermissibly suggestive if "confrontation" occurs by happenstance). Thus, once Judge Budnick suppressed the September 6th illegal show-up identification and any subsequent in-court identification based on that out-of-court identification, the taint had been eliminated. The events witnessed by Barton on September 5th suffered from no taint, as Barton witnessed them as a matter of course, before the police engaged in any improper conduct. "In short, [Barton]'s capacity to identify [Willacy] in court [would not have] resulted from [and would not have been] biased by the unlawful police conduct committed long after [Barton] had developed that capacity." Crews, 445 U.S. at 473.

The proper test to be applied in this situation is "'[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made

has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" United States v. Wade, 388 U.S. 218, 241 (1967) (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963). See also id. at 240 (the government must be given "the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the [illegal] lineup identification."). This Court itself has held that an in-court identification may not be admitted unless it is found to be reliable and "based solely on the witness'[s] independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation." Edwards v. State, 538 So. 2d 440, 442 (Fla. 1989).

The record shows that Judge Yawn applied the wrong test in determining that Barton could not render an in-court identification. Specifically, Judge Yawn based his decision on his belief that, because Judge Budnick had suppressed the September 6th identification testimony, and this testimony necessarily would have been based on the September 5th identification testimony, i.e., they were "part and parcel of the same thing" (R 1160), no in-court identification could be given. This is not the proper test to apply, as evidenced by the above cited cases. Similarly, in Wade, the

trial court suppressed an in-court identification, holding that the testimony of the witnesses "may well have been colored by the illegal procedure." 388 U.S. at 242. In remanding the case, the United States Supreme Court stated that the trial court had applied the wrong test.

Further, the facts in the instant case support a determination that Barton's in-court identification would have been reliable and based on a wholly independent recollection of Willacy from September 5th. Barton testified that, as he walked home from school on September 5, 1990, he noticed a red and white Ford LTD (R 2921) in the drainage ditch "driving forward and reverse" that "caught his attention and made [him] . . . take a second look" (R 2918). Barton thought "[i]t was strange that [the car] would be that close to the ditch" (R 2918). See also (R 2936) (Barton kept looking at the car because "[i]t just seemed unusual" for it to be parked so near the ditch).[2] Barton stated that his vantage point was in front of the car, about 20 to 25 feet away from this car (R 2918). He observed a black male, about 25 years of age (R 2927), short hair on the sides, medium length hair on top, skinny face, sitting tall in the car, muscular build (well defined chest

[2] These two record references -- (R 2918) and (R 2936) -- clearly refute defense counsel's assertion that "there was nothing unusual about [Barton's] observation of the car or the driver . . . ." Reply/Answer Brief at 24.

and arms) (R 2920-21). Barton looked at this car as he walked past, and looked over his shoulder three or four times after he had walked past (R 2922). Barton recalled seeing this car before it was parked in the ditch, when it pulled out of the parking lot and drove down a side street (R 2922). Barton also testified that he thought he could identify Willacy in-court based strictly upon his observations on September 5th (R 2931), based on Willacy's distinguishing features (R 2946).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court, in the event of a reversal of either Willacy's convictions or sentences, to reverse the trial court's suppression of Barton's in-court identification of Willacy and to reverse the sentencing court's determination that the state failed to establish the cold, calculated and premeditated aggravating factor beyond a reasonable doubt.[3]

Respectfully submitted,

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[3] The state relies on the argument presented in its Answer Brief of Appellee/Initial Brief of Cross-Appellant as to Issue X concerning the cold, calculated and premeditated aggravating factor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to KURT ERLENBACH, of ERLENBACH & ERLENBACH, P.A., 503 South Palm Avenue, Titusville, Florida 32796, this 1st day of December, 1993.

GYPSY BAILEY
Assistant Attorney General