No Request

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IN THE SUPREME COURT OF FLORIDA

ORIGINAL

DERRICK ACKERS,
a/k/a DERICK ACRES,

Petitioner/Appellant,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 80,037

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT **OF APPEAL**

PETITIONER'S BRIEF **ON** THE **MERITS**

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL **CIRCUIT**

ANNE MOORMAN REEVES
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COUNSEL FOR PETITIONER

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RESTATEMENT OF THE CASE AND FACTS

In his jurisdictional brief, Derrick Ackers, the petitioner in this cause, asserted conflict between the Fifth District Court of Appeal's entertaining the state's appeal of the order granting Ackers's motion in limine and this court's decision in McPhadder v. State, 475 So.2d 1215 (Fla. 1985).

Ackers was found guilty of robbery at a Kentucky Fried Chicken restaurant (KFC). Before Ackers's trial for a Popeye's robbery, the state filed notice that it intended to introduce similar fact evidence, and attached the KFC information (CR90-9660/A). Upon hearing, Judge Formet granted a motion in limine to exclude the KFC case, based on the state's failure to show sufficient similarity (R406).

The state appealed the order, and Ackers moved to dismiss the appeal for lack of jurisdiction. Ackers cited Rule of Appellate Procedure 9.140, allowing interlocutory appeal of confessions, of admissions, and of evidence obtained through search and seizure. The rule allows no other appeals of non-final orders. The district court denied the motion to dismiss, on the authority of State v. Palmore, 495 So.2d 1170 (Fla. 1986); State v. Ono, 552 So.2d 234 (Fla. 5th DCA 1989); State v. Katiba, 502 So.2d 1274 (Fla. 5th DCA 1987).

The district court reversed the trial court's suppression order, finding that the evidence should not be excluded under the Williams rule. This court accepted jurisdiction upon Ackers's notice to invoke jurisdiction based on conflict.

SUMMARY OF THE ARGUMENT

The caselaw issuing from this court and from the district courts permits nonfinal review only of a certain class of orders, pursuant to Rule of Appellate Procedure 9.140. This class comprises orders suppressing evidence obtained through confession, admissions, or search and seizure. The evidence that is the subject of this appeal is none of these. Rather, it is a previous trial in which the petitioner was found guilty of robbery, and the order excluding it was improperly heard by the Fifth District Court of Appeal.

ARGUMENT

THE DISTRICT COURT IMPROPERLY REVIEWED A NONFINAL ORDER THAT DID NOT ADDRESS SUPPRESSION OF EVIDENCE GAINED BY CONFESSION, ADMISSIONS, OR SEARCH AND SEIZURE, CONTRARY TO RULE OF APPELLATE PROCEDURE 9.140 AND DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS.

The conflict issue is simply stated: Is an order suppressing the trial record of a previous case because of absence of Williams rule similarity an appealable non-final order under Rule of Appellate Procedure 9.140 as that rule is interpreted by this court and other district courts? The answer is equally straightforward. The answer is "No." This rule tracks section 924.071, Florida Statutes (1991), and permits appeal of a class of interlocutory orders dismissing search warrants, suppressing evidence obtained by search and seizure, and suppressing confessions or admissions.

By its terms, the rule precludes appeal of the order in question here. It is not a confession, admission, or seized evidence regarding the instant robbery that the state wants to bring in. It is a case in which Ackers was found guilty of robbing a Kentucky Fried Chicken restaurant (KFC). Thus, the order is not appealable.

The state tries to bring the order within the aegis of Rule 9.140 by asserting that motions in limine are appealable as suppression orders and because they are suppression orders. This analysis of the law is not altogether accurate, and it can be supported only by taking portions of opinions out of context and

reading into them the meaning wanted. See e.g., State v. Segura, 378 So.2d 1240, 1242 (Fla. 2d DCA 1979) ("motion in limine was in effect a motion to suppress and subject to our review on appeal").

Looking to the substance of the decisions reveals the principle the courts have followed in applying Rule 9.140, no matter what name they have used. Examination of the cases demonstrates clearly that orders on motions in limine are appealable when they deal with suppression of a confession, of an admission, or of evidence obtained through search and seizure. This should surprise no one, as such events are precisely those set out in the rule. In other words, orders on motions in limine are reviewable not because they suppress evidence, but when they suppress a prescribed kind of evidence.

The following cases illustrate this analysis of the courts' behavior: (1) State v. Palmore, 495 So.2d 1170 (Fla. 1986) (order reviewable where statement suppressed contained admissions); (2) McPhadder v. State, 475 So.2d 1215 (Fla. 1985) (order not reviewable where it concerned testimony of unavailable witness); (3) State v. Andres, 552 So.2d 1151 (Fla. 3d DCA 1989) (order suppressing self-incriminating tape is reviewable); (4) State v. Segura, 378 So.2d 1240 (Fla. 2d DCA 1979) (order reviewable where coconspirators' statements were suppressed). However these courts chose to define their considerations, the result was that orders suppressing admissions are appealable. The crucial feature, then, is either the nature of the evidence

suppressed, or the nature of its acquisition.

In his consideration of Ackers's motion in limine, Judge Formet found the similarities too weak to allow the KFC crime into evidence at the Popeye's trial, and ordered it suppressed. This is a non-appealable non-final order. It does not become appealable merely because it is an order suppressing evidence. Rather, to be appealable, it must have dealt with admissions, confession, or search and seizure.

In the KFC case, the evidence included witness testimony that Ackers had talked about committing the KFC robbery. If such evidence had been excluded from the KFC trial, the suppression order could certainly have been appealed under Rule 9.140. But a confession in one trial about one case cannot be admitted into evidence in another trial about a different case simply because the defendant is one and the same. Standing by itself, this is an example of improperly putting on prior bad acts.

Finally, the state should not be allowed to petition for writ of certiorari by which to review the trial court's order. The test is whether the order negates the state's ability to prosecute. State v. Pettis, 520 So.2d 250 (Fla. 1988); State v. Lockman, 522 So.2d 482 (Fla. 5th DCA 1988) (contents of suppressed tape is substance of state's case). The state has made no showing that it will be prevented from prosecuting Ackers if it cannot bring in the KFC trial. Although the prosecutor claimed that he would be unwilling to go to trial without the Williams rule evidence of the KFC robbery, a naked claim should

not be enough to demonstrate irreparable injury to the state's case. Indeed, it is difficult to see where the injury lies, when the state has two eye witnesses (R417-418, 433-434, Case No. CR90-9660). See Ackers's motion to dismiss, Appendix D of Petitioner's jurisdictional brief.

Nor did Judge Formet depart from the essential requirements of the law. He simply glossed his decision to grant suppression on lack of similarity. His comment was eminently sensible: A previous trial which resulted in conviction could become the "focus" of the present trial. Where the two crimes do not evince a common plan or scheme, and are not admissible under Williams, such a statement is quite proper.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, petitioner respectfully requests that this honorable court quash the decision of the district court and remand this cause for proceedings consistent with the decisions of this court and other district courts.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal: and mailed to Derrick Ackers, Inmate No. A-334558, #F-217L, Jackson Corr. Inst., P.O. Box 4900, Malone, Florida 32245, on this 26th day of October, 1992.

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS,	)	
a/k/a DERICK ACRES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	COURT **CASE NO. 80,037**
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

A P P E N D I X

91-697 PA

IN THE **DISTRICT COURT** OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 91-735

DERRICK ACKERS,

Appellee.

Opinion filed May 15, 1992

Appeal from the Circuit Court
for Orange County,
Gary L. Formet, Sr., Judge.

Robert A. Butterworth,
Attorney General, Tallahassee, and
Nancy Ryan, Assistant Attorney General,
Daytona Beach, for Appellant.

James B. Gibson, Public Defender.
and Paolo G. Annino, Assistant Public
Defender, Daytona Beach, for Appellee.

SHARP, W., J.

The state appeals from the trial court's order which granted defense counsel's motion *in limine* to exclude similar fact evidence concerning Acker's commission of another crime in order to prove his identity and connection with the robbery with a firearm charge being prosecuted in this case. The trial court ruled that the facts and circumstances of the other robbery for which Ackers had been convicted were not 'sufficiently similar to allow admission 'pursuant to the *Williams*[1] rule. We disagree **and** reverse.

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[1] Williams v. State, 110 So.2d 654 (Fla.), ***cert. denied,*** 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

In this case Ackers and a codefendant, Studstill, were charged with robbing a Popeye's Fried Chicken restaurant on North Orange Blossom Trail in Orlando on September 1, 1991. According to the police reports and charging affidavits, two black males accosted two employees who were emptying a garbage can behind the restaurant at 12:20 a.m. on September 1, 1991. One carried a handgun and the other, a broomstick.

They ordered the employees back into the restaurant, gathered together all the other employees (then present), and forced them to lie on the floor. They made the manager turn over close to $2,000 in cash from the safe which was then open. One shot a bullet at a camera mounted on the wall. No fingerprints were found but the bullet was recovered and the gun from which it was shot was identified as Studstill's, and was used in the prior robbery. Two other black males waited in a dark-colored Mercury Cougar, which served as the getaway car.

The other robbery, for which Ackers and Studstill had been convicted, took place approximately two weeks before the robbery in this case, at approximately 12:30 a.m. They robbed a Kentucky Fried Chicken restaurant, also located on North Orange Blossom Trail in Orlando, As the manager and another employee were turning off the lights and leaving by the front entrance, three black males met them and forced them back into the restaurant. Two carried guns and the third carried a broomstick. They wore masks.

The robber carrying the broomstick struck the employee. The others, with guns forced the manager to open the safe. They then forced him onto the floor. One fired a gun twice; a bullet barely missed the manager's head. The robbers put the employees into the cooler and left with about $4,000 in cash. Ackers' fingerprints were identified at that robbery.

Due to anonymous tips, Studstill was stopped by the police, driving a Mercury Cougar. A dark-colored Mercury Cougar had been seen at both robberies. A handgun was found in the car. It was later proven to have been the gun that fired the bullets at both robberies.

Although there were some differences in the manner in which the two robberies were carried out -- wearing masks; two not three robbers -- the similarities of the *modus operandi* are striking. The robberies took place within a two-week time span at fast-food restaurants located near one another on North Orange Blossom Trail in Orlando, just at closing time. Restaurant employees were interrupted just outside and forced back in. They were forced to the ground. The safes were robbed. A gun was fired. The robbers fled with cash. The robbers carried one or two guns and a broomstick.

These fact similarities are sufficient to establish a unique crime pattern pursuant to *Williams v. State,* 110 So.2d 654 (Fla.), *cert. denied,* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959) and codified in section 90.404(2)(a), Florida Statutes (1991). Evidence of Acker's participation in the earlier robbery may be admitted to establish Acker's identity and participation in the robbery charged *in* this case. *Duckett v. State,* 568 So.2d 891 (Fla. 1990); *Rogers v. State,* 511 So.2d 526 (Fla. 1987).[2]

REVERSED and REMANDED for further proceedings.

GRIFFIN and DIAMANTIS, JJ., concur.

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[2] The trial court's concern that the earlier robbery may become the focal point of this case can be prevented by the trial court's limiting the proof of the earlier robbery to its essential elements and by giving appropriate jury instructions.