IN THE SUPREME COURT OF FLORIDA

JOSEPH NAHUME GREEN, JR.,

Appellant,

v.

CASE NO. 83,003

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

A FUNDAMENTAL INJUSTICE WILL OCCUR IF THIS COURT AFFIRMS GREEN'S CONVICTION FOR FIRST DEGREE MURDER AND SENTENCE OF DEATH.

The state, rather cleverly, seeks to limit the scope of the problem Green presented in this issue. By casting it as nothing more than a weight argument and a disagreement with this court's ruling in Tibbs v. State, 397 So. 2d 1120 (Fla. 1981); aff'd, Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), it has sought to limit this court's consideration of the full range of what the defendant presented in his Initial Brief. Green must reply to expose the soft words and honeyed argument as the bitter pill it is.

First, Green never asked this court to reweigh any evidence, or substitute its opinions regarding Green's guilt for that of the jury or the trial court. No where has he

asked this court to reweigh anything. "As presented here, the state presented an insubstantial amount of competent evidence to convict Green. In the interests of justice, this court should reverse the trial court's judgment and sentence and remand for a new trial." (Initial Brief at p. 27). Indeed, given his attack on Thompson's qualifications to testify as argued in Issue VI, he questions whether the state even presented any competent evidence on the only question the jury had to resolve: was Joseph Green the one who shot Judith Miscally? Rather than focussing on a weight argument, Green asks this court to consider, in the context of a capital appeal, what the terms, "fundamental injustice," "in the interests of justice," and "substantial, competent evidence" mean.

Green makes this latter suggestion because Rule 9.140(f) Fla. R. App. P. provides, in relevant part:

> In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

This provision suggests a review beyond that of mere sufficiency of the evidence because if this court did that type of examination, it would never remand for a new trial. That is, if the evidence was insufficient, this court would order the defendant discharged from the capital crime, not returned to the lower court for a new trial. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Other terms of art or legalisms suggest this court looks beyond the mere sufficiency of the evidence, particularly in capital cases. For example, this court in Stano

v. State, 473 So. 2d 1282, 1288 (Fla. 1985) said, as it has routinely done in many other capital cases, that "After reviewing this record, we find the conviction to be supported by competent, substantial evidence." This latter standard, suggesting a different type of appellate consideration that reweighing the evidence, means this court will examine the record before it to insure some significant quantity of evidence exists proving the defendant committed the charged crimes. Tibbs, at 1125.[1]

In Tibbs at 1126, this court talked about "fundamental injustices, unrelated to evidentiary shortcomings." Those injustices refer to matters such as the contemporaneous objection rule, which if strictly followed, might result in a defendant being punished for a crime for which he was not guilty. In this case, if the state is correct in Issues V and VII that Green failed to preserve those points for appellate review, this court should nevertheless reverse for a new trial because a fundamental injustice will occur were it to affirm his conviction for murder.

Thus, whether in the interests of justice or to correct a fundamental injustice, or because the state presented an insubstantial amount of competent evidence, this court should reverse the trial court's judgment and sentence and remand for a new trial.

"Finally, [eliminating a category of reversals based on weight] will eliminate any temptation appellate tribunals might have to direct a retrial merely styling reversals as based on 'weight' when in fact there is a lack of competent substantial evidence to support the verdict or judgment and the double jeopardy clause should operate to bar retrial." Tibbs at 1125-26. "Substantial" means "adequately or generously nourishing: abundant, plentiful." Webster's third New International Dictionary

Tibbs remains good, controlling law, and this court need only recognize that the facts presented in this case are so unusual that the limited exception acknowledged in that case applies here. Robinson v. State, 462 So. 2d 471, 477 (Fla. 1st DCA 1985). Green only asks this court to recognize what it acknowledged in that case: That in the interests of justice courts can, as they have always been able to do, correct fundamental injustices, especially where, as here, the state presented an insubstantial amount of competent evidence of Green's guilt.

Now, as to specific problems with the state's argument on this issue, on page 20, the state says "The trial judge should not act as an additional juror when reviewing the weight of the evidence." That, of course, contradicts Tibbs, and Rule 3.600(a)(2) Fla. R. Crim. P. which "enables the trial judge to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror." Tibbs, at 1123, f.n. 9.

On page 23 of its brief, the state says that "Underlying both of Green's first two issues are two premises: (a) the evidence is legally sufficient to convict Green at least of felony murder. . . " Green does not admit that.

On the same page, the state also argues that because Thompson had known Green, the eyewitness identification is more reliable. To the contrary, that he knew the defendant supports the theory that he supplied his name when pressed to identify who had killed Mrs. Miscally.

The state also says on page 23 that Thompson's "trial testimony was clear and

unwavering in his identification of Green as the person who shot the victim in the parking lot of Mapco." So what? By the time he testified, the state had rehearsed what it wanted him to say for our five times (T 1219). Moreover, his initial story strongly conflicted with what he would say at trial, and his recollection of what the assailant wore varied with the wind. At one point he could not recollect what the person wore (SR 26). Later, he put a holster on his hip and gave him a third hand (T 1183, 1233). With x-ray vision, he could identify the suspenders underneath his coat, and with the eyes of an eagle he could see pin stripes at a distance of 287 feet at night under poor lighting conditions. He saw all this with eyes filled to the brim with beer and a mind (or what there was of one) more concerned with looking for the police than observing or reporting the facts of a crime.

The state on this page and the next several then contends that the evidence "Green relies upon to argue that Thompson is mentally retarded refutes that assertion." First, Green never said this state witness was mentally retarded. What he said was "His IQ put him well within the mentally retarded range. . . " (Initial Brief at p. 22). As explained in footnote 21 in that brief and the cited reference, Section 393.063 Fla. Stats. (1993) requires a person to meet three criteria before he or she can qualify as mentally retarded. Briefly, they must 1) have an IQ less than 70, 2) have deficits in adaptive behavior, and 3) have demonstrated those characteristics before the age of 18.

Thompson qualifies as mentally retarded on two of the three elements, but he can function (albeit minimally) in modern society. That is, even though his intellectual

capacity places him in the bottom one percent of the human population, he can make sandwiches and beverages for himself. (Defense Exhibit 1, page 4)[2] He is, therefore, not mentally retarded.

That Thompson can put a piece of salami between two pieces of bread, however, says little about his ability to recall events, particularly those that had happened 18 months earlier.

Similarly, that this witness' intellectual capacity "places him no lower that at the very upper end of mild mental retardation" (Appellee's brief at p. 24, emphasis in brief) compares with saying Thompson is tall for a pygmy.

Thus, although the mentally retarded can commit crimes and be sentenced to death in Florida, Thompson's intellectual deficiencies, when coupled with his admitted heavy drinking on the night of the murder, his evident inability to get and keep his story straight, and his self interest in saying what the prosecutor wanted to hear, strongly indicate his testimony was so insubstantial that it could not by itself provide the necessary level of competent evidence this court looks for in affirming judgments of guilt.

The state, on page 25 of its brief, says that "Thompson's testimony was corroborated in a number of important respects." Green has never argued Thompson did not see Mrs. Miscally shot. The man saw something. The defendant contends only that there is insubstantial, competent evidence that he murdered her.

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, p 44.

The state says the police corroborated that Thompson had "a clear view of the crime scene." (Appellee's Brief at p. 25) Maybe Officer Reno had a clear view, but Thompson's opportunity came late at night. A major highway on which trucks and cars regularly travelled was between the two convenience stores (T 819, 1240). Additionally, this witness was looking for other policemen, not for a murder, so whatever view he may have had was obstructed with a beer soaked brain more concerned with evading the law than reporting or observing a crime.

The state, on page 26, says Green had an "unrefuted" need for money on the night of the murder. Not so. He had a regular job, and he worked for a man who had lent his employees money in the past. More to the point, his landlord was willing to take a partial payment for the overdue rent, probably because Green had always paid it when faced with eviction (T 1098, 1534). His girlfriend also had a steady job and received monthly social security checks (T 1515). Moreover, Green's actions on the night of the murder belie a man very concerned about anything. He had tried to panhandle a few dollars throughout the evening, unsuccessfully. He watched television until late. He and his girlfriend then walked about town bumming cigarettes. The purpose of Green's "alibi" was not so much to show that he was somewhere else when the murder occurred, but to exhibit his guilt free behavior. If, "The wicked flee when no man purseuth." Proverbs 28:1, why was Green sauntering about the main street of Starke immediately after the shooting? He simply did not act like someone who had any pressing need for money or who had just killed someone.

The state on pages 27 and 28 of its brief claims no one corroborated Mrs. Kintner's testimony. "No one else saw three assailants--not Judith Miscally, not Lonnie Thompson, and not John Goolsby. Nor did anyone else see a white Camaro at the crime scene. . . " Two points. First, loafers and loiterers had a habit of hanging around the Mapco store, so she may have seen such persons that evening (T 1399, 1406). Second, Lonnie Thompson, initially, said he saw a white car at the store (T 1259). That corroborates Mrs. Kintner's testimony.

The state further attacks Mrs. Kintner by noting that she did not "bother reporting her information to the police, even though her husband was a former police officer." She never went to the police because 1) Her husband-the former police officer-did it for her (T 1596). 2) The police were too busy with other people. 3) She had three children to attend to. 4) By the next day she thought the case was closed because the police had a suspect. 5) When she did not know if she should call the police, her husband said they would "get to her." (T 1597-98)

The state on page 28 says "Lonnie Thompson's testimony, by contrast, was, as the state argued at trial, 'corroborated on every significant aspect of his testimony.'" No one other than Thompson saw Mrs. Miscally carry a purse.[3] No one other than Thompson saw a struggle. No one other than Thompson identified the clothes the assailant wore. No one other than Thompson saw a holster on his hip. No one other than Thompson saw

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It was found in the truck (T 1442, 1487).

Green commit the crime. In fact, no one corroborated much of what Thompson saw.

Green's conclusion of this argument in his Initial Brief applies with greater force and bears repeating. "The state presented an insubstantial amount of competent evidence to convict Green. In the interest of justice, this court should reverse the trial court's judgment and sentence and remand for a new trial."

ISSUE III

THE STATE PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT GREEN PREMEDITATEDLY KILL JUDITH MISCALLY AS IT HAD CHARGED AND ARGUED, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS.

The assailant, whoever he was, had the intent to kill Judith Miscally. Green concedes that. Did he, however, have the premeditated intent to kill her? No. Rogers v. State, 660 So. 2d 237 (Fla. 1995): Jackson v. State, 575 So. 2d 181 (Fla. 1991).

The state relies on this court's recent opinion in Mungin v. State, 21 Fla. L. Weekly S66 (Fla. February 8, 1996). In that case Mungin shot a convenience store clerk once in the head and took about $60 from her. Two days earlier, he had shot and robbed a clerk at another convenience store. Later that day he shot yet another worker at a store in Tallahassee.

This court found that the state had failed to prove Mungin had committed the charged murder premeditatedly. Supporting its allegation he had done so, the state presented evidence Mungin had shot the victim once, he had used the gun before, and it required some significant effort to pull the trigger. On the other hand, Mungin never said he intended to kill the victim, no one saw the murder, and once he had shot her, he fled. Such circumstantial evidence failed to show premeditation.

This court, however, affirmed the conviction because the uncontroverted proof showed Mungin had committed the murder during the course of a robbery.

Such is not the case here. As in Mungin, though the assailant shot the victim once

there is no evidence he intended to do so. There was also no evidence about the effort needed to pull the weapon's trigger.[4] Even more favorable to Green, no one ever heard him say he intended to kill his victim, and immediately after the shooting he (or the assailant) fled. In short, the evidence of premeditation was even weaker here than in Mungin.

The state's proof also was much more insignificant that this defendant committed the homicide during the course of an attempted robbery. The state never charged Green with robbery because he took none of Mrs. Miscally's money. Though she said her assailant demanded it, he shot her after becoming angry when she started screaming. The jury could, therefore, have rejected the notion that he killed her during an attempted robbery. Unlike the facts proven in Mungin, those here present a reasonable hypothesis contrary to the state's felony murder theory. (Initial Brief at p. 36). As such, not only does the state's case fail to prove Green committed a premeditated murder, it never excluded the reasonable argument that the murder was not committed during the course of an attempted robbery, but simply as the defendant's emotional reaction to the victim's unexpected resistance. State v. Law, 559 So. 2d 187, 188 (Fla. 1989). This court should not simply reverse the trial court's judgment and sentence as requested in Green's Initial Brief. It should remand for a discharge on a charge of first degree murder.

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[4]The murder weapon was never found.

ISSUE IV

THE COURT ERRED IN OVERRULING GREEN'S OBJECTION TO THE STATE'S QUESTIONS OF HIS WITNESS, A KATRINA KINTNER, THAT SHOW WAS A RECOVERING ALCOHOLIC WHEN THERE WAS NO EVIDENCE SHE HAD DRUNK ANY ALCOHOL ON THE NIGHT OF THE MURDER, A VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The state, on page 37 of its brief, argues that "Having introduced the subject of Kintner's alcohol usage, Green should not be heard to complain about the State's cross-examination on the same issue." Green "complains" because his brief examination of Mrs. Kintner's drinking habits focussed exclusively on the night of the murder. It never opened the door to a general inquiry into her history of alcoholism. This court's opinion in Edwards v. State, 548 So. 2d 656 (Fla. 1989) controls.

As part of its harmless error claim, the state says it never mentioned her "prior alcohol usage in its closing argument (probably because it had an inconsequential affect on the credibility of her testimony)." (Answer brief at pp. 37-38) It did, however, discuss her testimony and credibility in its argument to the jury (T 1709-11), and as presented in Green's Initial Brief the only way they could have discredited it was her history of alcoholism. Thus, the state's improper cross-examination of her could not have been harmless beyond all reasonable doubt.

ISSUE V

THE COURT ERRED IN REFUSING TO SUPPRESS LONNIE THOMPSON'S IDENTIFICATION OF JOSEPH GREEN AS THE PERSON WHO KILLED JUDITH MISCALLY, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT.

The state says on page 39 of its brief that "There is no record support for Green's factual assertion that Thompson had to observe Green at the state for '15-20 minutes' before he could identify him." When ushered into the room at the police station with the one way mirror he watched "what was going on" in the adjoining room where Green sat for 15-20 minutes (T 2351-52).

The state, on pages 39-40 of its brief, tries to rehabilitate Thompson's abominable memory by noting that he had said, "You know a person by his size and everything, you know, and by his hair and stuff." (T 2360) True enough, but Thompson's memory had undergone an amazing transformation by the time of trial. Then this witness could recall seeing (from almost 100 yards away and at night) Green's pin striped pants, his suspenders, and a gun holster. He made no mention of his "hair and stuff."

The state's evident surprise that Green discounts Thompson's eyewitness identification because the witness had known the defendant for years belies a lack of understanding of the nature of those who have a very low intelligence. Such persons, when questioned by someone in authority, try to mask their intellectual deficiency by agreeing with the interrogator or giving responses that he or she wants to hear. Ellis and

Luckason, "Mentally Retarded Criminal Defendants," 53 Geo. Wash. L. Rev. 414 (1985). Thompson, perhaps not fully understanding what was going on when repeatedly questioned by the police, may have latched onto the first "skinny black male" (Joseph Green) he could remember so the police would leave him alone. He had tried that trick earlier that night by first claiming a white male had killed Mrs. Miscally. The police quickly pierced that veil, but were satisfied when he gave them a name, Joseph Green.

Thus, that Thompson knew Green, rather than strengthening the reliability of Thompson's identification, weakens it.

The state says this court should ignore the merits of this issue because Green never renewed him motion to suppress Thompson's identification when he testified. (Appellee's brief at pp 40-41). At the end of the trial, the defendant filed a Motion for New Trial or Arrest of Judgment (T 570-71), alleging as one of the grounds that the court had erred in denying his "Motion to Suppress Pretrial Identification." The court, "after full consideration," denied it (R 595). That ruling preserved this issue for review.

The state relies on this court's opinion in Willacy v. State, 640 So. 2d 1079, 1083 (Fla. 1994) for the proposition that an unnecessarily suggestive identification can be salvaged if the witness has an "independent recall absent the illegal police conduct." Here, the state never asked Thompson if his identification was based on what he saw the night of Mrs. Miscally's death rather than the suggestive methods used by the police. (See Initial Brief at p. 46, f.n. 16)

ISSUE VI

THE COURT ERRED IN DENYING GREEN'S MOTION FOR A CHANGE OF VENUE BASED ON THE LARGE NUMBER OF PROSPECTIVE MEMBERS OF THE VENIRE WHO HAD PRIOR KNOWLEDGE OF THE FACTS OF THE CASE AND WHO WOULD HAVE A DIFFICULT TIME PUTTING THAT INFORMATION ASIDE, A VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The state, on page 45 of its brief, and indeed in its reformulation of the issue as Green phrased it, makes a lot out of the assurances of the jurors that they "could decide the case solely on the evidence presented at trial." Yet, assurances of impartiality do not dispose of the venue question. Irvin v. Dowd, 366 U.S. 717, 727-28, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Moreover, that Green had peremptory challenges remaining likewise indicates as much as his frustration with seating a fair jury as his satisfaction. It signifies that he was satisfied with a jury consisting of Atilla the Hun and his horde because Godzilla and his family were all that were left. That he renewed his motion for a change of venue after he had expressed his "satisfaction" indicates this was the case (T 1804).

The state accepts the court's superficial justification for denying the motion for change of venue on page 44 of its brief. That is, because several prospective jurors had come from communities outside Starke and they probably knew nothing or little about the

case, the court believed "that we can pick a jury in this case." [5] Yet, as Green pointed out in his Initial Brief, Jurors Register and Rosinski had changed the way they lived because of Mrs. Miscally's murder, troubling disclosures that should have bothered the court. Moreover, others jurors had an unsettling familiarity with the crime scene and may have been more influenced by this homicide than their voir dire responses indicated. For example, immediately after the jury had been selected, the court gave it some standard, preliminary instructions. It was about to dismiss them for the day when Juror Farris asked a question. "I don't mean to sound comical, but at the Mapco, are we allowed to get gas there? That's where I usually go?" (T 654)

Thus, when the state noted that "not all of the defense challenges were based on knowledge of the crime," (Appellee's brief at p. 44, footnote omitted) it has missed the point of the Green's motion and the law on venue. The defendant could not find fair and impartial jurors, the crucial issue the court should have, but never, focussed on. Irvin, cited about at 722-23. ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.")

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[5]Juror knowledge is not the standard for determining impartiality. Instead, it is whether "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, at 723.

ISSUE VII

THE COURT ERRED IN ALLOWING THE STATE TO ADMIT, AS EXCITED UTTERANCES, STATEMENTS OF MRS. MISCALLY MADE AFTER SHE HAD BEEN SHOT AND BEFORE SHE DIED, IN VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT HIS ACCUSERS AND TO A FAIR TRIAL.

If a grey haired grandmother can ask "Where's the beef?" this overweight, balding appellate lawyer can ask "Where's the evidence?" The state argues, in effect, that this court should take judicial notice that what Mrs. Miscally said to Dwayne Hardee was an excited utterance. It makes this claim because in Rogers v.State, 660 So. 2d 237 (Fla. 1995), a hearsay declarant who had seen someone shot was "still under the requisite stress 10 minutes later even though she had only seen someone else getting shot, then the State does not see how it can be seriously questioned that Mrs. Miscally, have herself been shot (fatally as it turns out) less than five minutes before making her statement, was under nervous excitement and stress when she made the statement." (Appellee's brief at p. 48) That may be true, but the state presented no evidence to support that contention. Green, on the other hand, showed that she had her wits about her enough to 1) recognize Hardee, and 2) try and describe the gun used to shoot her when her initial efforts to do so failed.

Now the state makes its predictable "failure to preserve" argument because Green did not object when Hardee testified. Here is what happened. After the jury had been selected, the court considered and ruled on several motions in limine made by counsel.

One of them was the excited utterance statement. Immediately after, the trial started, and the first three witnesses merely set the scene for the shooting. Mr. Miscally told the jury about what he and his wife were doing the evening she was shot. John Goolsby told about what he saw. Robert Matroni talked about hearing the screams and responding to them. David Futch testified about responding to Robert's call for help and Officer Spriggle told the jury about what he saw when he arrived at the Mapco. Dwayne Hardee then testified. But see, Lindsey v. State, 636 So. 2d 1327 (Fla. 1994).

All this testimony could not have taken little more than an hour, and in any event there is nothing in it that would have alerted the most vigilant defense counsel or trial judges that the earlier ruling was now suspect.

ISSUE VIII

THE COURT ERRED IN DENYING GREEN'S MOTION TO SUPPRESS EVIDENCE SEIZED BY AUTHORITY OF A SEARCH WARRANT BECAUSE IT LACKED SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE TO SEARCH THE MOTEL ROOM HE WAS STAYING IN, A VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

The state, relying on the venerable Professor LaFave, claims that if it or its agents assert an informant is an eyewitness, such incantation protects him or her from any challenges from the defense. (Appellee's Brief at p. 50.) Such is not the law.

"Eyewitness" as used by LaFave and the courts is a term of art with a specific meaning, one that the state cannot use indiscriminately to cover the problems its informants have and which a magistrate should be aware of in determining if it should issue a search warrant. The "citizen informant" or eyewitness voluntarily comes forward out of a public-spirited desire to help in law enforcement. LaFave, Search and Seizure, 2d Ed. 1987, Section 3.4(a) p. 722; State v. Novack, 502 So. 990, 992 (Fla. 3d DCA 1987). He or she has no hidden motives to report a crime. Hence, the court issuing a search warrant can presume the truth of what this special type of informant reported. Roper v. State, 588 So. 2d 330, 332 (Fla. 5th DCA 1991). The eyewitness exception thus relieves the court of that routine obligation to determine if an informant was sufficiently reliable to justify finding probable cause.

The presumption, however, is rebuttable, and when the defense challenges the validity of the issuing magistrate's probable cause determination, the state must come

forward with evidence justifying the accepted legal fiction that eyewitnesses are reliable.

> The public and the Courts are entitled to examine the reliability of the source of information upon which the citizen's constitutional right to freedom from unreasonable searches and seizures must ultimately depend. This cannot be done where the executive branch of government makes a private determination of reliability of the source of such important information and institutes a system or practice that prevents the citizen and the Courts from scrutinizing that issue in open court in the traditional manner of confrontation and examination of witnesses under oath.

Williams v. State, 531 So. 2d 246, 248 (Fla. 5th DCA 1988).

So here, the state cannot hide behind the "eyewitness" term to hide Lonnie Thompson's severe credibility problems. Indeed, Thompson had such significant disabilities, that he was not the citizen informant or eyewitness as those terms are defined by LaFave or used by the courts. That is, he never voluntarily came forward and offered his information to the police. They had to search for him. In fact, immediately after the murder, when the police asked for information, he ignored their pleas (T 1253).

Also, when questioned, Thompson initially gave the police a wildly different story of what he had seen from the summary version of what the police recounted in the affidavit. A white man with blond hair had accosted and shot Mrs. Miscally. The assailant had even talked with this "eyewitness" earlier in the evening and told him something would happen that night (T 1259).

His description of the person who attacked Mrs. Miscally changed, however, when the police told him she had died (T 1356, SR 20). This occurred during a long, late night-

early morning questioning in which the law enforcement officers may have accused Thompson of the crime. That possibility, coupled with his low IQ, his drinking on the night of the murder, his dislike of the police, and his own criminal background distinguish him from the typical eyewitness or average citizen.

The police, thus, misused the "eyewitness" appellation. They cannot hide Thompson's severe credibility problems behind that term of art. Green has rebutted the presumption that eyewitness information is reliable, and the court erred in declining "the invitation to determine the credibility of eyewitnesses to the crime." (R 501)

The state, with admirable courage, then argues the search warrant did "not permit a general exploratory search; it describes specific objects to be seized." (Appellee's brief at p. 51). That description was "the clothing Joseph Nahume Green, Jr. was wearing on the evening of the 8th day of December 1992." (R 385). If nothing is left to the discretion of the officer executing the warrant, Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed.2d 231 (1927), let us try a little experiment. We will kick H.G. Wells out his time machine, deputize this court, and transport it back to December 9, 1992, Starke, Florida. With the warrant in hand (and we will allow this court/deputy to have the affidavit if it wishes) enter Green's motel room and take the clothes he had worn the previous evening. Oops, not his jogging shorts, and nope, not the overalls he wore to work that day. What did he wear? Looking at the "four corners" of the warrant or affidavit will give this court no clue. Rather than limiting it from seizing that which is particularly described, it is carte blanche authority to seize any piece of clothing. Such

wide ranging authority amounts to a general warrant.

The state seeks to cover all these deficiencies by relying on the "good faith" exception to the exclusionary rule. Its reasons are 1) the trial judge made a probable cause determination, 2) the affidavit provide additional specific identifying information about the clothing to be seized, 3) the executing officer was the affiant and knew what was to be searched for, and 4) the warrant could easily have incorporated the affidavit by specific reference. (Appellee's brief at pp. 52-53.) Green sees little here beyond what is required by the Fourth Amendment. If merely following the dictates of the Constitution invokes the good faith exception then the exclusionary rule loses all its force. Such is not the law.

The police could not have been acting in good faith when they applied for the search warrant. Omitting any information about Lonnie Thompson in the Affidavit simply by calling him an "eyewitness" was deceptive. Providing no description of the clothes to be seized, other than to say they were the ones worn by Green on December 8, was so vague that no officer executing the warrant other than perhaps Officer Reno would have had any idea what to seize. United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Good faith has no application here.

Finally, the state says whatever the errors occurred were harmless because "there was no dispute about what Green wore the evening of the murder." (Appellee's brief at p. 53) Not so.

The state had two significant problems with this case. One, of course, was Lonnie

Thompson. The other concerned the lack of physical evidence linking Green with the murder of Judith Miscally. It had no fingerprints, no blood, no hair, no stolen property, no gun, nothing, to tie this defendant to her death. All it had was Lonnie Thompson's testimony, and that had obvious problems. Mainly, Thompson had trouble remembering what the assailant wore. After he admitted a white man had not shot Mrs. Miscally he told the police he noticed only the "hair and stuff of the new assailant (T 2360) Later, he added some clothes, until by the time of trial, he recalled seeing Green wearing a pinstriped suit, a white shirt, suspenders, and a coat (T 1183, 1233). He saw all this late at night from a distance of 287 feet, while more intently watching for police, and after having drunk 12 "Tall Boys" or a gallon of beer (T 1212).

Introducing the suit the police seized tended to bolster what Thompson said at trial. It gave a reality, a credibility to his testimony that mere words could not supply. The state's case stands or falls on Lonnie Thompson's testimony. Introducing the suit may have provided the extra evidence, in an anemic prosecution, to have convinced the jury to have believed Thompson. This court cannot say with easy confidence that the evidence illegally seized had no impact on the jury's deliberations. State v. DiGuilio, 491 So. 1129 (Fla. 1986).

The trial court, therefore, erred in denying Green's motion to suppress, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IX

THE COURT FAILED TO CONDUCT AN ADEQUATE HEARING TO DETERMINE IF LONNIE THOMPSON WAS COMPETENT TO TESTIFY, AND IT COMPOUNDED THAT MISTAKE BY FINDING HIM SO QUALIFIED, A VIOLATION OF GREEN'S FOURTEENTH AMENDMENT RIGHTS.

The state claims on appeal that "the burden is on the objecting party to demonstrate a lack of competency." (Appellee's brief at p. 54) While that may be true, Green points out that the state never raised that argument at the trial level. Instead, it, rather than Green, went first by presenting evidence to show Thompson's competency. By not complaining at the trial level and demanding the defendant carry his burden, the state has waived any right to complain about that failure on appeal. C.f. Cannady v. State, 620 So. 2d 165 (Fla. 1993); (The procedural rules applicable to the defense are also enforced against the state.)

Moreover, by questioning his competence by motion and presenting evidence also supporting the doubt of his ability to testify truthfully, Green has shouldered at least his initial burden of rebutting the presumption of competency granted by Section 90.601 Fla. Stats. (1995). The state, then, must come forward to present evidence refuting that contention. Here, what it offered only supports Green's argument that Thompson was incompetent to testify.

Not only did the state initially present no evidence to determine if its witness could testify relevantly, its inquiry about his memory suggests it had doubts about its star

witness' ability to recall what had happened 18 months earlier. All it asked him was "Mr. Thompson, are you able to remember what you saw happen at the Mapco on December 8th?" (T 1154) It never demonstrated his recall by him asking specific questions of the facts of that night. From what came out at trial, it had good reason to walk lightly on the thin ice of Thompson's memory. As he admitted at trial, just minutes after the court found him competent to testify, the state had gone over his testimony with him four or five times before trial (T 1219).

The state spends a considerable amount of time and space arguing that Thompson is not mentally retarded. Green never said he was. (See his discussion regarding mental retardation in Issue I above.) His intelligence was in the mentally retarded range, and while that does not presumptively make him incompetent to testify, his other, intellectual problems, such as his inability to tell the truth, (See Initial Brief at pp. 73-74), make that deficiency significant.

That latter failing distinguishes this case from Kaelin v. State, 410 So. 2d 1355 (Fla. 4th DCA 1982). (Appellee's brief at pp. 56-57.) In that case, the severely retarded, hearing disabled victim identified Kaelin as the person who had sexually battered her. In agreeing with the trial court that she was competent to testify the Fourth District found that "Claire was firm in her identification of appellant as her assailant. She was likewise consistent in her description of the assaults." Id. at 1357.

Such cannot be said here. Thompson initially said a white man had killed Mrs. Miscally, and he went so far as to claim he had talked with him. Only later and during

his late night interrogation by the police, when he learned she had died did he change his testimony to implicate Green. Since then, of course, this witness has given wildly varying accounts of what the assailant purportedly wore. Kaelin provides no support to the state, but stands in contrast to this case.

This court should reverse the trial court's judgment and sentence and remand for a new trial.

CONCLUSION

Based on the arguments presented here and in the Initial Brief, Joseph Green respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence and remand for a new sentencing hearing before a jury.

Respectfully submitted,

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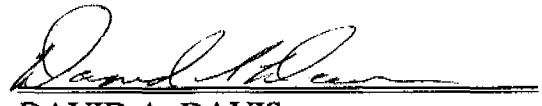
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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