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IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CURTIS CHAMPION GREEN,

Appellant,

vs. APPEAL NO. 86,983

STATE OF FLORIDA,

Appellee.

________________________________/

APPELLANT'S SUPPLEMENTARY BRIEF

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SUPPLEMENTARY POINT ON APPEAL AND SUMMARY ARGUMENT

WAS THE EVIDENCE PRODUCED AT TRIAL SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY.

Angelo Gay's testimony was so full of obvious errors and convenient omissions as to be totally beyond belief. The Franklin clan, Barney, Shirely, and Shirley's daughter, all retreated from their prior statements in an attempt to secure leniency for Barney. Far more evidence is available to cast the finger of suspicion on Gulledge, Barney, and the elusive truck driver than on Curtis Green. In light of that fact and the dubious nature of the evidence offered by Barney Franklin and his relatives, the State failed to meet the requirement of eliminating other possibilities. Further, the conflicting testimony offered over the years by the State's witnesses is not allowable.

SUPPLEMENTARY POINT

WAS THE EVIDENCE PRODUCED AT TRIAL SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY.

The only direct evidence produced at trial was the testimony of a semiprofessional snitch. Angelo Gay, the snitch, would have us believe that a white convict, previously unknown to him, would immediately choose to confess to him. Further, the confession would be made in the handful of minutes that they spent together. Previously, Gay, according to his testimony, had been equally trusted by Frank Potts, a notorious, alleged serial killer tried in Polk county (T 1894-22). This case, thus, represents the second high profile case where Mr. Gay stepped forward to supply vital information for the State. How convenient for him and the State! It is also worth noting that Mr. Gay is Black and his two confidants are white.

The confession to Gay is totally at odds with <u>all</u> of the other relevant testimony. According to Gay, Green said, "we picked her up in front of the jail and threw her out on Highway 60" (T 1896). Bartow Police Officer Joe Burgess testified (T 1673-5):

> "I was standing directly in front of our police department over on the sidewalk area in front of the police department...where Ms. Kulick was first observed, she was coming across and down right...And... she proceeded from there down to Boulevard, which is directly past our police department parking lot, and turned right...OKAY. DID YOU SEE HER AS SHE CAME BY?..Yes, sir...DO YOU REMEMBER WHAT YOU SAID TO HER?..I just

asked her where she was going at that time in the morning...After she passed, like I said, she went down...and then turned eastbound on Boulevard...I went to the car, which is parked in the rear of our police department, and proceeded to follow in the direction Ms. Kulick was going, which was down Boulevard. And she turned down Wilson. Which Wilson turns one block down and turns north or south. And she turned north. There is a little overpass with a railroad crossing here and up through that area down Wilson. The sighting I had of Ms. Kulick was right at Golden Gate Shopping Center. HOW LONG DO YOU THINK IT TOOK FROM ABOUT TWO O'CLOCK WHEN YOU FIRST SAW HER UNTIL YOU WENT AND GOT IN YOUR CAR AND DROVE DOWN TO THAT AREA AND LAST SAW HER? Probably five, ten minutes...WAS MS. KULICK STILL WALKING ALL OF THIS TIME? Yes, sir. DID YOU EVER SEE HER GET INTO ANY VEHICLE OR WHEN YOU LOST SIGHT OF HER SHE WAS STILL WALKING? She was still walking..."

The Golden Gate Shopping Center is several blocks away from the front of the Polk County Jail. It is on Van Fleet, or as it is also called "The 60 Bypass," which is heavily traveled by trucks and commercial vehicles.

Gay's version of events was that the victim was thrown out on Highway 60, although he limited that by saying, "one of these highways like that" (T 1896). The State's Exhibit number 49 plainly showed that the location where the victim was found was about seven miles, by the most direct route, from Highway 60 (T 1419). Thus we have a second major and obvious error in Gay's story. It is not too much to say that Gay got everything as mixed-up as he possibly could.

The Third District in Straughter v. State, 384 So.2d 218 (Fla. 3rd DCA 1980), considered a similar jailhouse confession and equally insufficient evidence. The Court knew how much weight to attach to such self-serving, amateur ef-

forts to curry favor with the State. It said:

> "The evidence placed the defendant in the vicinity of the killing and nothing more. The only evidence by which the State hoped to establish the essential element of a felony in the felony-murder case was the testimony of a cellmate of the defendant that the defendant had discussed with the witness the charges against the defendant. The cellmate's testimony was so ambiguous, so modified by 'I guess,' and so unexplained as to the street language used that it was worthless for the purpose for which it was presented."

Gay's version certainly bears the taint of ambiguity and worthlessness decried by the previously cited case. In addition to the two glaring errors already noted, he claimed Green said "they charged me with this seven years ago," another serious factual error (T 1896). Conveniently, Green never specified to him exactly what was done to the unnamed girl (T 1896). Green never told Gay the name of his buddy and Gay was convinced that they used a truck or van (T 1899), even though the finger of suspicion had been pointed at Green's car (T 1759-0). In short, the State never should have offered Gay's valueless testimony.

All of the circumstantial evidence was provided by Barney Franklin, the co-defendant, and Mr. Franklin's family. In every instance, they contradicted prior statements that each of them had given. Such testimony cannot be the basis for putting a man to death.

State v. Green, 667 So.2d 756 (Fla. 1995), involved a victim of child sexual abuse who recanted at trial, a reversal of the pattern in the instant case, although the principle is the same. The Court held:

> "We now turn to the second issue of whether the prior inconsistent statement of an alleged victim of child sexual abuse, even if said on multiple occasions, is sufficient, in and of itself, to sustain a conviction. We reach this question because, even though we find that the victim's deposition testimony was inadmissible, the victim made other prior inconsistent statements in this case that could be admitted at the trail under section 90.803(23), Florida Statutes (1989), the hearsay exception for statements made by child-abuse victims. Our decision in State v. Moore, 485 So.2d 1279 (Fla. 1986) (Moore II), is dispositive and requires a finding that this evidence, standing alone, is insufficient to convict Green."

State v. Moore, 485 So.2d 1279 (Fla. 1986), was cited by the prior case. It involved a murder and recanted grand jury testimony. The Court's recitation of the facts was:

> "Following the grand jury indictment, Tumblin, whose wife is respondent's niece, and Price, who is a good friend of respondent, recanted their grant jury testimony in sworn depositions, claiming that the facts they recounted were obtained from the police and they lied to the grand jury because of police coercion. After the recantation, respondent moved to dismiss the indictment on the grounds, inter alia, that the state 'has no crime-scene or circumstantial or scientific evidence that addresses the question of who committed that murder, or, to be more specific, no such evidence that identifies Gene Moore as the perpetrator' and 'the State has available to it no witnesses and no evidence that can identify Gene Moore at trial as the person who committed the murder charged in this case."

Based on those facts it found:

> "...as a matter of law, that in a criminal prosecution a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt."

Hurley v. State, 43 So.2d 179 (Fla. 1949), involved a murder to which there was no witness except the accused. She had made incriminating statements and then changed her story at trial. The Court's perception of the facts was:

> "The primary evidence against her was that she made

certain statements about her encounter with the deceased at the time she was taken in custody and then told a different story when she testified at the trial...There is no direct evidence as to who pulled the trigger, whether the gun was discharged from a jar or from other means."

Based on the factual context the Court found:

> "From this state of the evidence there is no support for the verdict but a presumption that defendant committed the act which caused the gun to discharge. It would be as reasonable to presume that the deceased or some other agency caused it...There must be evidence proving the offense charged or which points conclusively to defendant as the guilty party, otherwise the judgment should not be permitted to stand."

Only the co-defendant Barney Franklin, his wife Shirley Franklin, and Shirley's daughter Donna Snipes gave testimony which cast suspicion on Curtis Green, except of course for Angelo Gay. Barney Franklin did that by testifying at trial that Curtis Green was "hollering he was going to kill her" (T 1704) and later said, "I took care of business" (T 1716). This testimony was totally at odds with the earlier alibi he had originally given Green (T 1726-7). Further, it was only given after Franklin's arrest for murder and subsequent interrogation by the police (T 1742-4). Franklin maintained his own innocence and disclaimed firsthand knowledge of the murder.

Shirley Franklin claimed Green told her that he would kill Kulick because her father shot at him (T 1820). However, Clyde Price, Jr. who accompanied Curtis Green in the failed attempt to pick-up Kulick, testified that a gun was pointed at them and did not indicate that the firearm was

discharged (T 1601). Price also testified, in contrast to the Franklins and Snipes, that Curtis Green "was kind of quiet" and "didn't say much" after the gun incident. (T 1602) Price stated categorically that he didn't hear any threats by Green and he was the one that rode back with Green (T 1605-6). One is forced to conclude that the Franklins and Snipes lied or that Mr. Green's behavior changed radically after the departure of Price. Obviously, given the lack of self-interest on the part of Price and the inevitable self-interest of the others, the probability is high that the Franklins and Snipes lied. Certainly, they all contradicted their earlier statements which were given when their memories were fresh (T 1726-7, T 1832, T 1933).

The State sought to use another relative of Barney Franklin, his nephew James Michael Franklin, husband of Shirly's daughter. The proffer of James Michael Franklin's testimony was rejected. Consequently, his scurrilous and inflammatory remarks were not before the jury. He sought to link Green with an incident of prostitution, but as the testimony developed it turned out the whole affair was Franklin's idea. Green did not derive any profit from the trip, there was no actual testimony of prostitution, and Franklin was the moving force. This proffer is useful, however, to support the argument that all of this testimony, given in the face of prior statements, was a conspiracy on the part of Barney Franklin and his relatives, aided and

abetted by the zealous efforts of the State, to frame Curtis Green (T 1595-10).

Cox v. State, 555 So.2d 352 (Fla. 1989), stands for the proposition that "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction." United States v. Rojas, 537 F2d 216 (5 USCA 1976), stated "The test for sufficiency, whether the evidence relied upon by the government be direct or circumstantial, is whether reasonable jurors could find the evidence inconsistent with every hypothesis of innocence." Stewart v. State, 30 So.2d 489 (Fla. 1947), cited with approval, notwithstanding defendant's written confession, the following cases:

> "Armstrong v. State, 107 Fla. 494, 145 So. 212, 213, this Court held: 'This court is committed to the doctrine that a verdict of guilt of felony should not be upheld when based on guesswork or suspicion, and that, where the evidence, considered as a whole entirely fails to disclose any substantial proof of material facts necessary to be alleged and proved, a judgment of conviction will be reversed.'
>
> The Illinois court in the case of People v. Holtz, 294 Ill. 143, 128 N.E. 341, held: 'Mere proof that defendants had an opportunity to commit the homicide, without proof excluding an opportunity by anyone else to commit it, is not sufficient.'"

Kickasola v. State, 405 So.2d 200 (Fla. 3rd DCA 1981), declared "Because proof of possession in this case rested exclusively upon circumstantial evidence, that proof must not only be consistent with guilt but also inconsistent with any reasonable hypothesis of innocence." Wright v. State, 351 So.2d 1127 (Fla. 1st DCA 1977), holds "Criminal convictions

cannot be based upon probabilities nor suspicion." Boswer v. State, 265 So.2d 55 (Fla. 3rd DCA 1971), states "mere suspicion, no matter how great, does not warrant a conviction." Johnson v. State, 249 So.2d 452 (Fla. 4th DCA 1971), illustrates a factual situation patently insufficient to sustain a conviction in the following analysis:

> "Of the foregoing evidence, the only competent testimony touching on the identification of appellant Marion Johnson was the bartender's identification of him as being among the group of six men who had gone into the alley shortly before the crime occurred. However, at best this is only circumstantial evidence placing the appellant at the scene at or near the time the crime occurred. That circumstance would not be inconsistent with a theory that appellant actually had left the area before the crime occurred unaware of what was to transpire, or that he had remained there but had nothing whatever to do with the commission of the crime either directly or by way of aiding or encouraging it."

The record reveals several different scenarios far more likely than the one advanced to convict Curtis Green. Randy Gulledge, the Bartow bail bondsman, whose place of business is diagonally across from the Polk County Jail and across the street from the Bartow Police Department, fired Kulick on May 20th (T 1860), had a violent argument with her on May 21st (T 1861-7), was told on May 21st that she was pregnant with his child (T 1874-5), did not want to be the father of her child (T 1875), had no alibi (T 1876-7), and several weeks earlier had broken off an intimate personal relationship with her (T 1860-1). She was murdered on the night of May 21st-22nd at a time when she had made herself a pest to Gulledge and after Gulledge had caused her to be arrested

and face a certain prison term (T 1874-6). It is an understatement to say that Gulledge had far more motive to murder Kulick than Green could ever have had.

Immediately before going over to Randy Gulledge's office for a violent, drunken confrontation, Kulick had spent the evening getting smashed with the ubiquitous Barney Franklin (T 1708). They were old friends (T 1808-9). In fact, it was Barney that sent Curtis and Clyde to pick-up Kulick in the first place (T 1599). When they didn't do the job, he did it (T 1707). Shirley Franklin, Barney's wife, testified that Barney had scratches on his back immediately after Karen Kulick was killed (T 1827). Approximately three weeks after Kulick's death, Shirley moved out of the trailer she shared with Barney (T 1828). Curtis Green hardly knew Kulick (T 1625). That was not the case with Barney Franklin, a man serving time for sexual battery (T 1696). Again, the evidence is far stronger against this individual than Curtis Green.

What about the elusive truck driver? Officer Joe Burgess' testimony places Kulick on 60, a route heavily traveled by trucks (T 1677-8). The defense offered other testimony of an apparently disinterested third party that a female was picked up by a truck along that route at approximately the right time (T 2004-5). Testimony is overwhelming that Kulick was in a bad mood and spoiling for a fight (Gulledge and Burgess, etc.). It is not difficult to imag-

ine her rejecting unwanted advances from some trucker in a manner calculated to get her into trouble. There is also testimony placing a truck near the site where Kulick was found (T 2021-5). This scenario is more likely than the one ultimately presented to the jury.

Why did the State resort to inflammatory and improper tactics. It realized that the case against Curtis Green was weak and the need for a conviction strong. However, Green's conviction was not based on sufficient evidence. Necessity is the mother of invention.

CONCLUSION

Angelo Gay's testimony was so full of obvious errors and convenient omissions as to be totally beyond belief. The Franklin clan, Barney, Shirley, and Shirley's daughter, all retreated from their prior statements in an attempt to secure leniency for Barney. Their strategy worked! Finally, Gulledge, Barney, and the elusive truck driver are more likely suspects. It is impossible to maintain with any degree of equanimity that Curtis Green was proved guilty beyond and to the exclusion of any other possible scenario.

Respectfully submitted,

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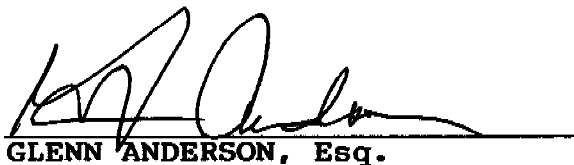
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to, Robert J. Landry, Assistant Attorney General, at 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607, this 17th day of October, 1997.



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