IN THE SUPREME COURT OF FLORIDA

SIRRON JOHNSON,	:	
Petitioner,	:	
v.	:	CASE NO. 93,915
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

PETITIONER'S REPLY BRIEF

_____

On Review from the District Court
of Appeal, First District,
State of Florida

_____

STEVEN A. BEEN
Public Defender's Office
Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2436 ext. 114
Florida Bar No. 335142
Attorney for Petitioner

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PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE AND FACTS

The state asserts that petitioner's merits brief fails to present the facts clearly, but does not indicate what information the brief omitted or presented unclearly. Petitioner stands by the statement of facts in the initial brief. The state's fact statement is misleading in its failure to include facts supporting the petitioner's position. The portion of the answer brief's fact statement pertaining to the challenged identifications does not even describe the encounter that petitioner contends was an unnecessarily suggestive identification. (Answer brief, 3-7). The state's description of the trial court's order denying the motion to suppress the identifications gives the impression that the decision was primarily based on the circumstances of the identifications, with DNA evidence merely thrown in as an afterthought. (Answer brief 7). Actually, the only factor to which the order gives great weight is the DNA evidence. (1R158-160).

One fact petitioner failed to include in the initial brief, but which is pertinent to the witnesses' opportunity to view the perpetrator, is White's testimony that the crime lasted about ten minutes. (2R288).

ARGUMENT

ISSUE I THE TRIAL COURT USED THE WRONG TEST TO DECIDE WHETHER TO SUPPRESS EYEWITNESS IDENTIFICATIONS INDUCED BY A SUGGESTIVE PROCEDURE. THE JUDGE DETERMINED THAT THE CHALLENGED IDENTIFICATIONS WOULD BE ADMITTED BECAUSE PETITIONER WAS MOST LIKELY GUILTY, INSTEAD OF DETERMINING THE LIKELIHOOD THAT THE WITNESSES IDENTIFIED JOHNSON BECAUSE OF THE IMPROPER SUGGESTION RATHER THAN THEIR OWN RECOLLECTION.

Jurisdiction

The state seems to assert that the Court has erred in accepting jurisdiction in this case, but the state's brief never actually disputes that the district court's opinion conflicts with Edwards v. State, 538 So.2d 440 (Fla. 1989).

Preservation

The state does not assert that petitioner failed to file a timely motion to suppress White and Bronner's identifications, failed to object to the judge's consideration of DNA on the identification issue, or failed to renew the motion to suppress White and Bronner's identifications at trial. Rather, the state's preservation argument seems to be that because petitioner also moved to suppress Rose's identification, but did not assert denial of the motion to suppress Rose's identification as a ground for appeal, his attack on Rose's identification is a basis for reversal not presented to the trial court. What the state is

apparently criticizing is that petitioner's initial brief identified reasons why the jurors might have found Rose's identification of Johnson unpersuasive. This was pertinent to the harmless error question of whether there is a reasonable possibility that without the challenged identifications, the verdict would have been different. It is true that at trial, defense counsel did not tell the trial judge why denial of the motion to suppress was harmful. This is not required. Harmless error analysis is part of the appellate decision making process, not the trial preservation process.

Standard of Review

The state does not directly respond to petitioner's contention that only the trial court's findings of facts are entitled to a presumption of correctness, while the reliability analysis requires de novo review. Of the four cases the state cites as pertaining to standard of review, only one deals with a challenged suggestive identification: Livingston v. Johnson, 107 F.3d 297 (5th Cir. 1997), cert. den. 118 S.Ct. 204, 139 L.Ed.2d 141 (1997). Petitioner repeats here the portion of Livingston quoted in the initial brief:

> The question of whether identification evidence is constitutionally admissible is a mixed question of law and fact and is not entitled to a presumption of correctness. However, the factual findings underlying the

> determination of the admissibility of identification testimony are entitled to that presumption.

107 F.3d 309.

Use of DNA Evidence to Determine Reliability

The state gives essentially two reasons to believe it was not error for the trial court to consider DNA evidence in assessing the reliability of the challenged identifications. First, the state points out that the list of reliability factors in Neil v. Biggers, 409 U.S. 188 (1972), is not an exclusive list. Petitioner's argument is not, however, that DNA and other evidence unrelated to the identification may not be considered because they are not on the Biggers list. Petitioner's contention is that the dispositive issue under Biggers, Manson v. Brathwaite, 432 U.S. 98 (1977), and Edwards v. State, 538 So.2d 440 (Fla. 1989), is not whether the defendant is probably guilty; the dispositive issue is the likelihood the identification was made from the witness's own memory, untainted by the state's suggestive identification. The trial court's error was not only in considering evidence that does not bear on the this issue, but also in deciding the wrong issue. The trial judge refused to suppress White and Bronner's identifications because he thought Johnson was probably guilty, regardless of whether White and Bronner's identifications were based on their own untainted

memories.

Second, the state asserts that Chaney v. State, 267 So.2d 65 (Fla. 1972), Washington v. State, 653 So.2d 362 (Fla. 1994), cert. den., 116 S.Ct. 387, 133 L.Ed.2d 309 (1995), and Baxter v. State, 355 So.2d 1234 (Fla. 2d DCA 1978), cert. den., 365 So. 2d 709 (Fla. 1978), hold evidence of guilt unrelated to an identification to be pertinent to the reliability of the identification. The state ignores, however, petitioner's argument in the initial brief that these cases do not justify the use of evidence of guilt unrelated to the identification itself. Also, the state ignores the language of Brathwaite quoted in the initial brief, which indicates that other evidence of guilt may not be considered, and the state ignores the language of Edwards, quoted in the initial brief, which states that the issue is whether the witness's identification was based on her own memory, untainted by the state's suggestive procedure. The state provides no reason to reject petitioner's contention that the trial court erred in considering DNA evidence on the suggestive identification issue, and erred in deciding not to suppress because he believed petitioner was likely guilty, without finding that the witnesses relied on their own untainted memory.

Reliability of Identification

The state argues that the any reason to doubt the

reliability of the identifications is removed by White and Bronner's certainty and emotional reaction upon being shown Johnson's photograph. (Answer brief, 28). This was not the trial judge's opinion. His finding on certainty was:

> Each witness was resolute in her identification of the Defendant. Of course, Ms. White and Ms. Bronner were resolute in their earlier identifications made of another individual.

(1R158-159). As the trial judge realized, White and Bronner's certainty could not mean much in light of their certainty a year before, when they identified Jesse Ellis. Also, as noted in the initial brief, the research shows that certainty of identification does not correspond to accuracy of identification.

Neither do White and Bronner's emotional reactions give reason to believe they recognized Johnson from their own untainted memories. The trial judge did not even mention their emotional reactions in the legal conclusions portion of his order. (1R157-160). He had good reason to give no weight to this evidence. White and Bronner were each told, explicitly or implicitly, that she was being shown a photograph of the man who raped her. Their emotional reactions could have come from a belief produced by what they were told, rather than from any recognition from their own memory. A rape victim whose attacker is completely masked, and never sees his face, may nonetheless

experience a strong emotional reaction when the police show her a photograph and tell her this is the man who raped her.

In the initial brief, petitioner pointed out that the photograph of Jesse Ellis that White and Bronner identified shortly after the crime looks nothing like the photograph of Johnson they identified a year later, and looks very much like the more recent photograph of Ellis they were also shown at the later meeting. That White and Bronner would positively identify the police's first suspect, and then a year later positively identify the police's next suspect, who looked nothing like the first suspect, petitioner asserted was powerful evidence supporting the contention that the later identification was the product of suggestion, not untainted memory. That White and Bronner would even say that the photo spread picture of Ellis looked like the photograph of Johnson and not like the recent photograph of Ellis, when the photographs themselves belied this assertion, shows the extent to which White and Bronner were subject to the prosecutor's suggestion. The initial brief urged this Court to inspect the photographs, which are in the record on appeal.

The state's response to this argument, (Answer brief, 27, ftn. 5), is that this Court should not reweigh the evidence. Actually, reweighing the evidence is exactly what this Court must

do. The Court accepts the trial court's findings of fact that are supported by competent substantial evidence, but de novo review of the legal conclusions does involve a weighing of the significance of the facts. Petitioner does not ask this Court to reject any of the trial court's findings of fact. The trial judge did not accept, however, and implicitly rejected, the state's contention that White and Bronner's prior identification of Ellis could be explained away by saying that the identified photograph of Ellis looked like Johnson, and not like Ellis. The judge made no mention of this contention in his order, and if he had accepted the state's view, he would not have discounted the significance of White and Bronner's certainty in identifying Johnson by pointing out their earlier certainty in identifying Ellis. In any event, the fact that Ellis's photo spread picture resembles the more recent photographs of him, and does not resemble the photograph of Johnson the witnesses identified, is clear from the exhibits, which this Court is as free to inspect as was the trial judge.

With his initial brief on the merits, petitioner filed a motion to direct the trial court to transmit the composite drawings the witnesses had helped prepare, because, although admitted at trial and thus a part of the record on appeal as defined by the rules, the clerk had not sent those exhibits to

the district court, and petitioner had failed to have that omission corrected while the case was before the district court. Petitioner wanted the composite drawings available to this Court because to compare comparison those drawings with the photograph of Johnson. Such a comparison would refute any argument the state might make that the drawings show that Johnson's image was in the witnesses' minds before the suggestive identification took place. Since the state has not made this argument, and the trial judge did not make any such finding, the need for the Court to view the drawings has lessened. If the Court should find that inspecting the composite drawings would be helpful, however, petitioner asks that the order in effect denying petitioner's motion to transmit the composite drawings be revisited. There is no rule that prevents this Court from inspecting anything that was admitted at trial, and is thus by definition a part of the record on appeal, even if not seen by the district court.[1]

Invited Error

The state asserts that by showing White and Bronner the photographs and photograph spread at the pre-trial hearing on the motion to suppress, petitioner waived any argument that White and

[1]A more detailed explanation of why it is proper and appropriate for this Court to obtain trial exhibits even if not seen by the district court is contained in petitioner's Response to State's Motion in Opposition.

Bronner's identifications were tainted. (Answer brief, 30). At the suppression hearing, the prosecutor objected to the defense asking White and Bronner to identify the photographs used in the challenged identification procedure. (2R23-25). The judge overruled the objection, but assured the state that he would not consider whatever happened at the suppression hearing to be relevant to the issue of whether the in-court identification was tainted. (2R23-25). Petitioner's argument is not that the witnesses were re-tainted at the suppression hearing. Rather, petitioner's argument is that the circumstances of the challenged identification indicate that neither the identification in the prosecutor's office nor the identification in court was the product of the witnesses' untainted memory. That the witnesses saw the photographs again when they identified them at the suppression hearing does not bear on whether the previous circumstances ruled out a fair in-court identification, and does not constitute a waiver of the issue.

Harmless Error

The state suggests in a footnote (Answer brief, 31) that the harmless error standard of State v. DiGuillio, 429 So.2d 1129 (Fla. 1986), should not be applied here because the DiGuillio test should only be used in cases of constitutional error. It is not clear why the state describes the error here as non-

constitutional. Petitioner's contention is that the use of White and Bronner's identification evidence violated his rights under the due process clauses of the Florida and federal constitutions. This Court has applied DiGuillio to numerous non-constitutional cases, but even if it were now to be limited to constitutional error, the error here is clearly of a constitutional nature.

The state asserts that the force of White and Bronner's identification testimony was diminished by instructions to the jury to consider the testimony only on the issue of identification, and by cross examination bringing out White and Bronner's previous identification of Ellis. The limiting instruction could not have made White and Bronner's testimony less effective, since identification was the sole contested issue in the case. It is precisely the effect of White and Bronner's testimony on the overall proof of identity that made it so damaging to the defense.

As to the previous identification of Ellis, this would certainly suggest a reason to doubt the reliability of the identification of petitioner. The problem is that without White and Bronner's testimony, the defense would only have had to persuade the jury that one eyewitness might be mistaken. Once their testimony was admitted, the defense had to try convince the jury that three different women had each mistakenly identified

Johnson as the perpetrator. Even though there were grounds to question the reliability of each identification separately, taken together, their probative force is far greater than that of any one identification.

The state also argues that Rose's identification alone would have been very persuasive because of her ample opportunity to view her attacker, and that the DNA match would have been very persuasive because of the statistical evidence indicating that Johnson was the only person on earth who could have been the attacker. The state does not acknowledge, however, the evidence pointed out in the initial brief that could well have given the jurors reason to doubt both Rose's identification and the significance of the DNA match. The harmless error determination is not whether there is strong evidence of guilt. The issue is whether, given all the properly admitted evidence, there is a reasonable possibility the erroneously admitted evidence affected the verdict. Here, there was a reasonable basis on which the jury could have found the properly admitted evidence to fail to prove guilt beyond a reasonable doubt, and the improperly admitted evidence greatly increased the probative force of the state's case. In such circumstances, the error cannot be deemed harmless.

ISSUE II APPELLANT'S DEPARTURE SENTENCE IS INVALID BECAUSE THE TRIAL JUDGE FAILED TO ORALLY ARTICULATE THE REASONS FOR DEPARTURE AT THE TIME SENTENCE WAS IMPOSED. THIS ISSUE SHOULD BE ADDRESSED DESPITE PETITIONER'S FAILURE TO RAISE IT AT THE TRIAL LEVEL.

Preservation

The answer brief points out that the district court declined to address the sentencing error because it was not preserved, but the state fails to respond at all to petitioner's arguments that the error should nevertheless be addressed under the rule of State v. Rhoden, 448 So. 2d 1013 (Fla. 1984).

Merits

The state seems to assert that the requirement of oral articulation of departure reasons at sentencing contained in Fla. R. Crim. Proc. 3.702(d)(18)(A) is invalid because the rule "does not take precedence over a statute as the rule merely is the procedural implementation of the statute." (Answer brief, 34). The answer brief does not identify any statute that conflicts with the rule, and petitioner has not been able to find any. Indeed, the guidelines statute indicates that the legislature anticipated that oral reasons for departure would be given at sentencing:

> A state prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent is a departure sentence and must be accompanied by

> a written statement delineating the reasons for the departure, filed within 7 days after the date of sentencing. A written transcription of orally stated reasons for departure from the guidelines at sentencing is permissible if it is filed by the court within 7 days after the date of sentencing.

Section 921.0016(1)(c), Fla. Stat. (Emphasis added).

Even if there were a conflict between the rule and a statute, the requirement that a judge orally articulate the reasons for departing from the guidelines when imposing sentence is procedural. The rule does not specify or restrict the sentence that may be imposed. It only prescribes the procedure for departing from the guidelines. As this Court has recognized, Smith v. State, 537 So. 2d 982 (Fla. 1989), the sentencing guidelines rules are partly substantive and partly procedural, and to the extent that they are procedural, they are valid regardless of legislative enactment. When there is a conflict between a statute and a court rule on a procedural matter, as discussed in the initial brief, the rule governs.

The state points out that appellant has not identified any decision reversing a departure sentence and remanding for a guidelines sentence because reasons for departure were not orally articulated at sentencing. The initial brief did cite State v. Payne, 684 So. 2d 863 (Fla. 2d DCA 1996), which reversed a departure sentence under the 1994 guidelines both for failure to

provide written reasons and for failure to sufficiently orally articulate reasons. The remedy for failure to comply with the 1994 rule requiring oral articulation of departure reasons at the time sentence is imposed, however, has not yet been addressed by the courts. The one case the state claims is on point, Lee v. State, 486 So.2d 709 (Fla. 5th DCA 1986), is an old guidelines case, decided not only before the rule appellant relies on, but even before Ree v. State, 565 So. 2d 1329 (Fla. 1990), and Pope v. State, 561 So. 2d 554, 556 (Fla. 1990). It is the rationale of Ree and Pope, applied to the new rule, that mandates reversal for a guidelines sentence. Since Lee predated Ree and Pope, it can have no bearing on their application to the new rule.

The state cites other old guidelines cases for the proposition that it is the written departure order, not oral articulation, that is important. Those cases, however, all applied the pre-1994 rule, which required written reasons, not oral articulation, at the time sentence was imposed. The requirement that the judge orally articulate reasons when sentence is imposed has the same function under the 1994 rule that contemporaneous written reasons had under the old rule. The state has given no reason to reject petitioner's contention that the remedy for failure to comply with the 1994 requirement of oral reasons at sentencing should be the same as the remedy for

failure to comply with the pre-1994 requirement of contemporaneous written reasons: remand for a guidelines sentence.

CONCLUSION

Petitioner's convictions should be reversed based on the erroneous admission of tainted eyewitness identification evidence. Petitioner's departure sentence should be reversed based on the judge's failure to orally articulate departure reasons at sentencing, and the case remanded for a guidelines sentence.

Respectfully submitted,

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STEVEN A. BEEN
Florida Bar No. 335142
Public Defender's Office
Leon County Courthouse Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2436 x114
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Assistant Attorney General Giselle Lylen Rivera, The Capitol, Plaza Level, Tallahassee, Florida, on this ____ day of March, 1999.

_____
STEVEN A. BEEN