

IN THE SUPREME COURT OF FLORIDA

RICO JOHNSON,

Petitioner,

v.

CASE NO. SC17-845

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS

The State submits the following additions to Petitioner's Statement of Facts:

_____Agent Scovel testified that he listened to **thousands** of phone calls during the course of this 100 day investigation, sometimes in real time and sometimes after the fact. (T. 184, 367-68).

Agent Scovel was able to determine which voice was the Defendant's based on surveillance video footage showing the Defendant on the phone at the places where the phone calls took place while those calls were being simultaneously intercepted. (T. 351-53). While he was not personally observing the Defendant at the time the conversations were taking place, he saw that this was happening when he reviewed the surveillance video during the course of the investigation. (T. 350-51).

Additionally, Scovel had a five minute conversation with the Defendant in person while the search warrant was being executed at Howard's residence, and he listened to a DVD of the Defendant's twenty minute long testimony at a pre-trial hearing. (T. 167-71, 182-86, 190).

Based on listening to the conversations in person and on the numerous recordings, Scovel was familiar with the Defendant's voice, including the tone of his voice and the sound, manner, and inflection in the way that he speaks. (T. 171-72, 346-47).

Similar testimony was introduced regarding the identification of the voice of the co-conspirator, Edward Howard. Deputy Pederson

testified that he conducted a short, five minute interview with Howard while the search warrant was being executed at Howard's home. (T. 207-08, 281-82). He also listened to thousands of phone calls in the wire room, and he became very familiar with the subjects' voices, listening to them day in and day out. (T. 284).

Pederson testified that he heard Howard's voice "many, many, many times" during the course of the investigation as he listened to intercepted phone calls, and the conclusion that this was Howard speaking was reconfirmed when he talked to Howard in person. (T. 307-08). A voice on the phone and a voice in person sound the same as long as the audio is clear. (T. 285). Based upon his overall involvement in the investigation and his knowledge of the techniques connecting Howard with the phone calls, as well as the in-person conversation he had with Howard, Pederson was familiar with Howard's voice and recognized it on the taped phone calls. (T. 286-87).

Agent Scovel explained the coded language used in the phone calls between the Defendant and Howard, as well as Howard and others, summarizing each call for the jury after the calls were played and testifying that the Defendant and Howard agreed that the Defendant would supply a certain amount of cocaine and Howard would pay for it by selling it to others for a profit. The calls include extensive discussions of price, availability, quality, and meeting arrangements. (T. 730-33, 737-39, 742-43, 749-50, 754-57, 767-68, 771-72, 776-77, 778-79, 781, 783-84, 786, 789-90, 792, 795-96,

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SUMMARY OF ARGUMENT

The trial court acted well within its discretion in allowing the investigators to identify the voices on the recorded phone calls, where those investigators had a special familiarity with the voices based on their surveillance and their in-person conversations with the conspirators, and where the investigators were witnesses to the conspiracy.

The district court properly applied this Court's precedent in concluding that this testimony was reliable and helpful to the jury. Its decision should be approved by this Court.

ARGUMENT

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE TESTIMONY IDENTIFYING THE DEFENDANT'S VOICE, WHERE THE LAW ENFORCEMENT OFFICER HAD A SPECIAL FAMILIARITY WITH THE DEFENDANT'S VOICE AND WAS A WITNESS TO THE CONSPIRACY AS IT WAS TAKING PLACE.

The Defendant contends that the trial court erred in allowing testimony identifying his voice on various recorded phone calls. This claim has no merit and was properly rejected by the district court.

The Defendant asserts that the linchpin in determining the admissibility of voice identification testimony is reliability, and the State agrees with that assertion. The difference between the State's position and that of the Defendant lies in the application of this principle. The Defendant asserts that the standard for the admission of such testimony should be a stringent one, limited only to those witnesses who were physically present during the crime itself or those who knew the Defendant beforehand. The State submits that this Court's own decisions, as well as those of other courts, do not require such an unreasonably narrow limit, and the district court properly applied those decisions in allowing the voice identification testimony here.

As the Fifth District Court of Appeal discussed in its opinion below, voice identification testimony has been used in Florida for over 100 years, with this Court deeming such testimony "direct and

positive proof” of identity even when the witness was in the defendant’s presence for mere minutes and had no prior familiarity with the defendant’s voice. Johnson v. State, 215 So. 3d 644, 646-47 (Fla. 5th DCA 2017) (citing Mack v. State, 44 So. 706 (Fla. 1907), and Martin v. State, 129 So. 112 (Fla. 1930)). See also England v. State, 940 So. 2d 389, 400-01 (Fla. 2006) (witness may testify that he recognizes a voice as belonging to the accused, and such testimony is admissible as proof of identity).

The Defendant asserts that the long-standing test for the admission of such evidence was made more stringent by this Court’s decision in Evans v. State, 177 So. 3d 1219 (Fla. 2015). The district court discussed Evans at length in its opinion below and properly concluded that Evans did not preclude the admission of the voice identification evidence here. Johnson, 215 So. 3d at 648-53.

In Evans, this Court recognized that voice identification testimony is admissible, but held that such testimony can invade the province of the jury unless the testifying witness (1) was an eyewitness to the crime, (2) has some prior special familiarity with the voice of the defendant, or (3) is qualified as an expert in identification. 177 So. 3d at 1229.

There, unlike here, the detective who offered his opinion identifying the defendant’s voice on the 911 call became involved with the defendant only after the crime was complete, listening to the recording of the 911 call numerous times and identifying the

defendant's voice by comparing it to known jail recordings between the defendant and family members. Id. at 1228-29.

Basically, then, the officer had simply done what a voice identification expert, or a jury, would do - listen to two recordings and compare them. This Court concluded that such a lay opinion was not proper, as it invaded the province of the jury. Id. at 1229-30.

Here, in contrast, Agent Scovel did not simply come in and compare tapes after the Defendant's arrest. Instead, Scovel became familiar with the Defendant's voice by listening to thousands of hours of phone conversations during the course of investigating the conspiracy. He then confirmed for himself that the Defendant was in fact the person on the phone by speaking to him in person while the investigation was ongoing - during the execution of the search warrant. The lower court properly concluded that this extensive involvement demonstrated the "special familiarity" required in Evans. Johnson, 215 So. 3d at 651-52.

The Defendant argues that this requirement was not met because Scovel only heard the Defendant's voice after the investigation started; he had no familiarity with the Defendant prior to the crime being committed. This argument should be rejected by this Court. That the officers became familiar with the Defendant and his co-conspirator during the course of a three month investigation, rather than a chance encounter beforehand, is a distinction without a difference.

As noted above, this was not a case where the officers simply performed an after-the-fact comparison between two recordings. These officers listened to the voices on the phone calls thousands of times as the conspiracy was taking place, then confirmed their impressions by in-person conversations with the people they suspected.

If, as the Defendant insists, the overarching concern in these cases is reliability, then the fact that the officers came to recognize the voices during the course of the investigation rather than beforehand should make no difference. The existence of special familiarity is key, not the timing. Under the Defendant's proposed standard, Agent Scovel could have identified the Defendant's voice if he had happened to pull the Defendant over and write him a ticket weeks before the conspiracy started, but not if he heard the Defendant speak for *hours* during the course of the investigation. This makes no sense, and certainly adds nothing to the reliability of such testimony.

Had the deputy in Evans successfully made contact with the defendant when responding to his house the evening of the murder, and engaged in a lengthy conversation with him, the State submits that this would have unquestionably allowed him to identify the defendant's voice on the 911 call, as he would have gained a special familiarity with that voice. That he gained such knowledge during the course of the investigation, rather than in some arbitrary manner beforehand, should not preclude this testimony.

Indeed, numerous cases have found voice identification testimony admissible under similar circumstances, and the district court properly reached the same result here. See, e.g., Vilsaint v. State, 127 So. 3d 647, 650 (Fla. 4th DCA 2013) (trial court properly overruled defendant's objection to voice identification of defendant on jail calls where detective spoke to defendant for approximately ten to fifteen minutes prior to him being put in the cell, sufficient to allow him to identify defendant's voice on tape); United States v. Mendez, 643 Fed. Appx. 418, 425 (5th Cir.) (officers' testimony identifying voice on recordings of intercepted phone conversations between alleged conspirators were properly admitted where officers had spoken with conspirator in person and were familiar with his voice), cert. denied, 137 S. Ct. 164 (2016); United States v. Bush, 405 F.3d 909, 917-18 (10th Cir. 2005) (trial court properly admitted voice identification testimony by detective who had talked to defendant face-to-face).

In addition to his special familiarity with the Defendant's voice, Agent Scovel was also a witness to the crime, by any reasonable application of such a term, and the district court properly recognized the existence of that exception as well. Johnson, 215 So. 3d at 651. As the court explained:

[V]oice identification usually involves witnesses who did not see the criminal. And, there is seldom an "eyewitness" to a conspiracy, which, by definition, merely involves an agreement to commit a crime. Unlike Evans, where the officers became involved in the investigation after the crime was completed, here, the agents were witnesses to the conspiracy as it unfolded.

Unlike the typical property crime or crime of violence, a conspiracy is an ongoing crime that might span days, weeks, months, or years. Here, the conspiracy did not end until the conspirators were apprehended. During the course of the conspiracy, the agents listened to thousands of conversations, culminating in the discovery of a probable place and time for the exchange of drugs and money. That place was later identified as belonging to Howard. After studying the voices of the conspirators over an extensive period of time, the agents had the opportunity to confront the conspirators and hear their voices in person. As witnesses, under Evans, it was not inappropriate for the jury to receive their lay opinions.

Id.

To the extent the Defendant insists that Agent Scovel had to be actively listening while the calls were taking place, rather than after the fact (but still during the course of the investigation), this too was satisfied, as Scovel specifically testified that he would sometimes be in the wire room and listen to calls as they came in. (T. 367). Again, the district court properly applied this Court's decision in Evans.

Finally, while the Defendant now suggests that the State should have simply played the DVD testimony of the Defendant and let the jury evaluate his voice on its own in that manner, this was not necessary in light of the above testimony and is in fact directly contrary to the position taken by the Defendant below, where he objected to the DVD being placed into evidence. (T. 181-83). The Defendant did not testify at trial, and there was no way for the jury to identify the voices on the phone calls without testimony from those who were familiar with the voices.

The trial court acted well within its discretion in allowing the State to present this voice identification evidence, and the Defendant's argument to the contrary was properly rejected by the Fifth District Court of Appeal. Its decision properly applies this Court's precedent and should be approved.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief On the Merits has been furnished to Matthew Funderburk, counsel for Appellant, 444 Seabreeze Blvd., Ste. 210, Daytona Beach, Florida 32118, by e-service to appellante.efile@pd7.org and funderburk.matthew@pd7.org, this 6th day of September, 2017.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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