IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC00-1161
(LCN 4D98-4175)

ANTHONY BANKS,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

MISCELLANEOUS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts subject to the additions and clarifications set forth below and in the argument portion of this brief which are necessary to resolve the legal issues presented upon appeal. In addition, Respondent relies upon those facts set forth in the opinion of the Fourth District Court of Appeal in the instant case, Foster v. State, 25 Fla. L. Weekly D1717 (4th DCA July 19, 2000)(App. A).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's decision should be affirmed because that court properly characterized the testimony as verbal act evidence. The statement at issue was not offered to prove the truth of the matter asserted therein. Rather, it was introduced as a verbal act to prove Petitioner's complicity with Goodman in the charged crime. Also, assuming *arguendo* that the statements are hearsay, they are nonetheless admissible as adoptive admissions, which is an exception to the hearsay rule. Finally, even assuming *arguendo* the statement was improperly admitted, the error was harmless.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL'S DECISION SHOULD BE AFFIRMED BECAUSE THAT COURT PROPERLY CHARACTERIZED THE TESTIMONY AS VERBAL ACT EVIDENCE (Restated).

The Fourth District Court of Appeal's decision should be affirmed because that court properly characterized the testimony as verbal act evidence. In this case, contrary to Petitioner's assertion, the State did not argue the truth of Goodwin's statements in closing. Instead, the focus was on the acts of Petitioner in response to the verbal statements made by Goodwin. As the Fourth District Court of Appeal correctly stated, "To prove its case against Banks as a principal, the state was required to show that Banks did some act to assist Goodman in the commission of the crime; mere knowledge or presence at the scene are insufficient to establish participation." Banks v. State, 755 So.2d 142, 144 (Fla. 4th DCA 2000).

The State, unlike the prosecutor in Breedlove v. State, 413 So.2d 1 (Fla. 1982) never argued to the jury that what Goodman stated was in fact the truth. Rather, the sole purpose of Goodman's statements, like the callers in Chacon v. State, 102 So.2d 578 (Fla. 1957), was to demonstrate the *effect* they had on Banks- i.e. these statements, once disclosed in his presence, prompted Banks to act as an accessory in furtherance of the crime.

Petitioner attempts to distinguish Decile v. State, 516 So.2d 1139 (Fla. 4th DCA 1987) and Stevens v. State, 642 So.2d 828 (Fla. 2d DCA 1994)(IB 19-20) from the case at bar. Respondent submits that the Fourth District Court of Appeal correctly relied on cases to support its conclusion in the one at bar. Indeed, absent proof of some act of assistance by Petitioner, the State would have been unable to establish the former's participation in the crime. *See*, Staten v. State, 519 So.2d 622 (Fla. 1988). Goodman's statement was relevant evidence tending to prove this.

The facts in Stevens are very similar to those at bar except that the declarant of the subject statements was the codefendant. Id. The defendant argued that introduction of the statements made by the codefendant violated the Bruton[1] rule. Stevens. The Second District Court of Appeal disagreed finding, as the Fourth District did in the case *sub judice*, "Appellant's participation could not have been demonstrated any other way. Since the testimony was not offered for its truth, it is not hearsay, and cannot violated [sic] the Bruton rule." Id. at 829. Despite this, Petitioner focuses on a segment of the prosecutor's closing argument to support his position that Goodman's statement was admitted solely to prove the truth of the matter asserted therein (IB 16).

Respondent disagrees. Goodman's statement, as related by

[1]Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Roaden's testimony was that the former knew that the latter was:

> straight up, that [she] was okay and that him and [Petitioner] had had a discussion while they were gone about the undercover vehicle being across the street at the Amoco and that if they saw that vehicle again, then they would know that [Roaden] was either the cops or a snitch or trying to set them up....

(T 69).

As Petitioner states in his brief, while Goodman was relating this to Roaden, Petitioner leaned to examine Roaden (T 69-70). Whether Goodman's actually knew whether Roaden was "straight up," and "okay" was never an issue in the case. In other words, it is immaterial whether Goodman's knowledge regarding Roaden as being "straight up" is true. Rather, his statements, which were made in Petitioner's presence while he was examining Roaden, constitute verbal act that tend to prove Petitioner's complicity in the crime. Thus, when Goodman's statements are viewed in the context in which they were made, it becomes clear that they were offered to prove the nature of the transaction, as opposed to proving the truth of the statements. Decile. Further, Respondent submits that the prosecutor argued no more than this during closing.

Petitioner also argues that the Fourth District Court of Appeal "incorrectly sanctioned the prosecutor's use of the testimony as substantive evidence of Petitioner's intent to participate in the transaction" (IB 20). In this regard, Petitioner's reliance on Consalvo v. State, 697 So.2d 805 (Fla.

1996) is misplaced. Consalvo dealt with the improper use of collateral crimes evidence by the prosecutor in closing argument. There, Consalvo was on trial for burglary/murder. Id. Evidence that he committed a different burglary was permitted only because "it was inextricably intertwined with the instant [charge of] murder. However, the...burglary was never admitted as similar fact evidence during trial. Nevertheless, during closing argument, the prosecutor pointed out the similarities between the...burglary and the [current charged] burglary/murder." Id. at 813.

The Court found that the use of this evidence in this manner by the prosecutor "exceeded the scope for which they were admitted–i.e., to establish the entire context out of which the criminal action occurred." Id. at 813. Here, the prosecutor's argument that Goodman said Petitioner was "cool, he's straight up... Do you know what that means?", was not an argument as to the truth of the matters asserted in Goodman's statements. Rather, here, particularly when the prosecutor's argument is returned to context (T 143), it is *clear* that he was arguing to the jury the *effect* of Goodman's statements on Petitioner's conduct. Hence, not only were these verbal acts properly admitted, they were properly argued as such by the prosecutor.

Moreover, Respondent submits that Petitioner's reliance on Conley v. State, 620 So.2d 180 (Fla. 1993) and Keen v. State, 25 Fla. L. Weekly S754 (September 28, 2000) is erroneous as well. In

Conley, the defendant was convicted of armed burglary, sexual battery with a deadly weapon, and armed robbery with a firearm. Id. at 182. At issue in that case was the admission of the hearsay contents of the police dispatch report, which consisted of a report of "a man chasing a female down the street... The man supposedly had some type of gun or rifle." Id.

In closing, the prosecutor referred to this statement and argued that the victim's testimony, combined with the corroborating testimony of the police officer proved that the defendant carried a rifle during the criminal episode. Id. This Court found that the admission and subsequent use by the prosecutor of this hearsay evidence was improper, because same fell within no recognized exception to the hearsay rule and it was offered to prove the truth of the matter asserted, i.e. that the defendant was armed when he committed the offenses. Id. at 182-83. The Court rejected the State's argument, accepted by the Fourth District Court of Appeal, that the report was introduced "because it was merely offered to prove why the officer went to the scene to investigate." Id. at 182. The Court further found that the error was not harmless. Id. at 183.

Likewise in Keen, the defendant was convicted of premeditated first degree murder. Id. During the guilt phase, the state introduced hearsay evidence through the investigating detective that he "had received information from two insurance companies that

they had received information that the case was not a missing persons case, but a *murder*." Id. (emphasis in original). Indeed, the state's theory was that the defendant killed the victim, his wife, in order to collect on two life insurance policies. Id. The State argued that the admission of this information was proper because it was not hearsay in that it was not elicited to prove the truth of the matter asserted, but "only to show a sequence of events." Id.

As it did in Conley and Wilding v. State, 674 So.2d 114 (Fla. 1996), the Keen Court rejected this contention because, first, such information is generally not a material issue in such a case, and second, the statement was used by the State during closing argument for "substantive support not 'sequence of events' purposes." Id.

Respondent submits that the facts *sub judice* are a far cry from those in Conley and Keen. Indeed, contrary to Petitioner's contention, Goodman's statements do not contain such "substantive support" as do those in Conley and Keen. Whereas the statements in those two cases bear *directly* on the ultimate issues in those cases, Goodman's statement, coupled with Petitioner's actions, are *indirect* or circumstantial non-hearsay evidence offered to prove that Petitioner acted to assist Goodman in the commission of the crime. Thus, this is not a situation like in Conley and Keen where Goodman, for example, told Roaden that Petitioner was his partner and wanted to sell her drugs and the prosecutor then used this

statement in closing to argue that Petitioner delivered cocaine to Roaden.

Further, even assuming *arguendo* the statements are hearsay, Respondent submits that they are nonetheless admissible as an exception to the hearsay rule since they constitute an adoptive admission by Petitioner. Specifically, a "statement that is offered against a party and is ... A statement of which the party has manifested an adoption or belief in its truth...." Section 90.803(18)(b), Fla. Stat. (2000); Nelson v. State, 748 So.2d 237 (Fla. 1999); Privett v. State, 417 So.2d 805 (Fla. 5th DCA 1982).

In Nelson, this Court, applying six (6) factors enumerated in Privett, held that the defendant's silence in the face of his codefendant's statements regarding the former's involvement in a murder constituted an adoptive admission. Nelson, 748 So.2d at 243. The Privitt factors include:

> 1. The statement must have been heard by the party claimed to have acquiesced.
>
> 2. The statement must have been understood by him.
>
> 3. The subject matter of the statement is within the knowledge of the person.
>
> 4. There were no physical or emotional impediments to the person responding.
>
> 5. The personal make-up of the speaker or his relationship to the party or event are not such as to make it unreasonable to expect a denial.
>
> 6. The statement itself must be such as

> would, if untrue, call for a denial under the circumstances.
>
> The essential inquiry thus becomes whether a reasonable person would have denied the statements under the circumstances. McCormick, Evidence, § 270 (2d ed.1972). Florida has incorporated this rule into its Evidence Code as section 90.803(18)(b), Florida Statutes (1981)....

Nelson, 748 So.2d at 242-43.

Applying this principle to the case at bar, Respondent submits that the statements clearly fall under this exception to the hearsay rule. First, there is no dispute that Goodman's statements were heard by petitioner, since he was sitting right next to the former in the car when they were uttered. Also, the statements are straightforward and thus, Petitioner certainly had to have understood what they meant. Further, Respondent submits that the subject matter of the statement is arguably within Petitioner's knowledge. Petitioner has not shown to have suffered from any physical or emotional conditions which would impede his ability to respond to same.

Also, given that Goodman was a cohort in the transaction, Respondent submits that it would not have been unreasonable to expect a denial from Petitioner. Finally, the nature of the statements implicate Petitioner in criminal wrongdoing. This is true since they indicate that he and Goodman spoke regarding the police undercover vehicle as well as the possibility that Roaden was a snitch or a cop "trying to set them up." Thus, such a

statement would certainly prompt a denial from Petitioner if it were untrue. Consequently, even assuming the statement is hearsay, it is still admissible as an adoptive admission. Nelson; Privett. In addition, Respondent submits that, given the statement qualifies as an adoptive admission under s. 803(18)(b), "there can be no Confrontation Clause violation." Nelson, 748 So.2d at 243.

Finally, Respondent submits that even assuming the statement is inadmissible hearsay, its admission is harmless error beyond a reasonable doubt in that there is no reasonable possibility that it affected the outcome of this case. *See* Section 924.051(7), Fla. Stat. (2000); Goodwin v. State, 751 So.2d 537 (Fla.1999); State v. DiGuilio, 491 So.2d 1129 (Fla.1986). The state presented competent substantial evidence that showed that Petitioner intended for the crime to occur, and that he participated in it. Roaden testified that Petitioner *saw* the drug deal, because Roaden put her hands inside the vehicle in which Goodman and Petitioner were sitting, and according to Roaden, any one who was sitting inside that car could see the exchange of money for cocaine (T 70). Thus, even if Petitioner could not hear what was going on, he certainly *saw* the drug transaction and thus acquired the knowledge at that point about it. Yet, instead of withdrawing from the scene, Petitioner continued to assist his co-defendant by driving him and escaping

from the scene. *Cf.* T.B. v. State, 732 So.2d 1163 (Fla. 1st DCA 1999) (after the defendant acquired knowledge of the crime, he continued to follow his co-defendant and thus "manifested his intent to participate in and assist his brother's act").

The state's circumstantial evidence of Petitioner's intent to participate in the crimes was: Petitioner drove Goodman around; Petitioner heard that Roaden was interested in buying narcotics; Petitioner drove back to the scene to consummate the deal with Goodman; Petitioner saw the actual transaction in the car; and Petitioner continued to assist Goodman by driving the car and escaping the scene. The damage of admitting Goodman's statements to Roaden was at best minimal, because it was the (admissible) non-hearsay portion of Roaden's statements to Goodman which constituted the crux of the damaging testimony to Petitioner. Thus, even if error, Respondent submits it was harmless.

CONCLUSION

The State respectfully requests this Court to AFFIRM the decision of the Fourth District Court of Appeal in Banks v. State, 755 So.2d 142 (Fla. 4th DCA 2000).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “Respondent's Brief on the Merits” has been furnished by Courier to: MARCY ALLEN, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, on this _____ day of January, 2001.

_____
Of Counsel