IN THE SUPREME COURT OF FLORIDA

ANTHONY BANKS,

Petitioner,

vs. CASE NO. SC00-1161
(L. T. #4D98-4175)

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

MARCY K. ALLEN
Assistant Public Defender
Counsel for Anthony Banks
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Florida Bar No. 332161

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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. The record on appeal and and trial transcripts consist of 4 volumes. The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. The trial transcripts are consecutively numbered independently of the record on appeal. All references to the transcripts will be by the symbol “T” followed by the appropriate page number in parenthesis. All emphasis has been added by Petitioner unless otherwise noted.

CERTIFICATE OF FONT

Counsel for Petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon his statement of the case and facts as set forth in his initial brief.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL INCORRECTLY APPROVED THE ADMISSION OF HEARSAY TESTIMONY BY CHARACTERIZING IT AS VERBAL ACT EVIDENCE.

Respondent argues that Rhoden's hearsay testimony was admissible under Section 90.803(18)(b), Florida Statute (1998) as an adoptive admission by Petitioner. The state did not advance this contention in the Circuit Court or in the Fourth District Court of Appeal. It should not succeed in this Court.

Section 90.803(18)(b), Florida Statute (1998) allows admission of "[a] statement of which the party has manifested his adoption or belief in the truth" as an exception to the hearsay rule. "The otherwise hearsay statement can only be admitted when it can be shown that in the context in which the statement was made, it was so accusatory in character that the defendant's silence may be inferred to have been assent to its truth." Daughtery v. State, 269 So. 2d 426, 427 (Fla. 1st DCA 1972).

The factors to be considered in determining whether a statement is admissible under this exception were accurately related by Respondent and 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.

Nelson v. State, 748 So. 2d 237, 242-243 (Fla. 1999), quoting Privett v. State, 417 So. 2d 805, 806 (Fla. 5th DCA 1982).

As with all hearsay exceptions, the proponent of the evidence has the burden of laying the predicate for admission of the testimony. Ehrhardt, Florida Evidence § 803 at page 685 (2000 Ed.) ("The burden is on counsel offering hearsay evidence to introduce evidence of each foundation fact necessary for admission under a specific hearsay exception. Before evidence can be introduced under an exception, the trial court must make a factual determination that each of the foundation requirements is present [footnote omitted]").

Nelson v. State, 748 So. 2d at 242 involved a classic situation of 2 co-defendants discussing their commission of a homicide in front of two witnesses. The co-defendants were tried separately. At the defendant's trial, the witnesses were permitted to testify to statements made by the co-defendant in the presence of the defendant. This Court determined that the witness' testimony detailed admissions by silence and were thus admissible as an exception to the hearsay rule. The co-defendant's statements were heard and understood by the defendant. There was no evidence that the defendant had any physical or emotional impediment. The

co-defendant's statements which related the defendant's part in committing the homicide were so accusatory as to warrant a denial if untrue.

By contrast, here, Respondent did not lay a proper foundation for admission of Rhoden's hearsay testimony as an adoptive admission. This is not surprising since the prosecution did not seek to admit the testimony under this exception in the trial court. See J.J.H. v. State, 651 So. 2d 1239, 1241 n. 6 (Fla. 5th DCA 1995) ("The state neither argued that the statement was admissible as an admission by silence, nor presented evidence from which the trial court could have reached such a conclusion.")

First, the prosecution did not present evidence that Petitioner heard the conversation, much less understood its content. While he was present in the car when it occurred, unlike the defendant in Nelson, Petitioner did not participate in the conversation. Thus, his presence does not show that he spoke English or was able to hear what was said. Moreover, on re-cross-examination by defense counsel, Rhoden testified that "other than the fact that his body language indicated to me that he was listening to the conversation," there was nothing to indicate that Petitioner understood English (T 87). Thus, the state did not establish the first two prongs of the predicate.

Next, the state did not present any evidence that the subject matter of the conversation was within Petitioner's knowledge or understood by him. Again, the testimony at trial suggests

otherwise. After testifying that she asked Goodman whether Petitioner was straight up, at the request of the prosecutor, Rhoden explained the meaning of the expression "straight up" to the jury and characterized it as "street terminology" (T 63). Another street term, "fifty cent piece," was also defined by Rhoden at the state's request (T 63). This evidence suggests that the language used during the course of the conversation was not ordinarily understandable. Further, the state did not present any evidence that Petitioner was any more familiar with this street terminology than the average juror. On this record, the prosecution did not lay the third part of the predicate.

As to the existence of a physical or emotional impediment which would prevent Petitioner from responding, the record is silent. Petitioner submits that Respondent, as the proponent of the hearsay testimony, was obliged to present some evidence that no impediment existed. Absent some minimal showing by Respondent, there is no reason to shift the burden to Petitioner to come forward with evidence of an impediment.

Most significantly, the statements were not accusatory in nature so as to require a denial. Daugherty v. State, 269 So. 2d at 426 is instructive on this aspect of the predicate. In Daughtery, the defendant was charged with armed robbery of a grocery store. The store owner testified that a few boys entered his store three times. The last time, the defendant took money from him at gunpoint. Another witness testified that he saw the boys

before the incident when they were one block away from the store. He noticed a gun in the defendant's pocket. When he approached the group, one of the boys said "We are going to hit the store so you better get out." 269 So. 2d at 427. The First District Court of Appeal held that the statement was inadmissible hearsay, not an admission by silence:

> An admission by silence is not applicable in the instant case as the statement was not accusatory as regarding the appellant, but rather was made by someone else to a third party.

269 So. 2d at 427.

At bar, Rhoden's testimony that Goodman replied that Petitioner was cool, okay and with him when asked if Petitioner was straight up was not an accusatory statement. Unlike the discussions in Nelson, this statement did not refer to a criminal act already committed by Petitioner which required a denial. Similarly, Rhoden's repetition of Goodman's statements voicing their concern that Rhoden was a police officer or a snitch did not imply that Petitioner had already participated in a crime. Rather, as in Daughtery, the statements were made by someone else to a third party and were thus, inadmissible hearsay.

As the state did not lay a predicate to admit Rhoden's hearsay testimony as an adoptive admission, Section 90.803(18)(b), Florida Statute (1998) does not apply and this Court should not affirm the decision under review on that basis.

Finally, any suggestion that the improper admission of

Rhoden's hearsay testimony is harmless error must fail. Absent the inadmissible evidence, the evidence showed that Petitioner was present during Goodman's discussions with Rhoden, Petitioner drove Goodman to a second location, Petitioner was present when the transaction occurred and Petitioner left the scene when the transaction was completed. This evidence is insufficient to sustain a conviction as an aider and abettor. A defendant's presence at the scene of a crime even with knowledge that it is occurring coupled with flight from the scene is insufficient to establish participation in the crime C.P.P. v. State, 479 So. 2d 858 (Fla. 1st DCA 1985).

To prove participation, the state relied on the hearsay testimony. As the prosecutor candidly conceded during the hearing on the motion in limine, "[i]t's the entire case." (T 13). Recognizing it's importance, the prosecutor emphasized the objectionable testimony during his closing argument and relied upon it as substantive evidence of Petitioner's guilt (T 142-143). Under these circumstances it would be unreasonable to conclude beyond a reasonable doubt that the improperly admitted testimony did not affect the verdict. Goodwin v. State, 751 So. 2d 537, 541 (Fla. 1999)("The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."); State

v. Diguilio, 491 So. 2d 1129 (Fla. 1986) (same).

In his Initial Brief on the Merits, Petitioner has shown that the decision of the Fourth District Court of Appeal incorrectly affirmed the trial court's admission of hearsay evidence under the guise of verbal act. This Court should reverse the decision of the District Court of Appeal with directions to afford Petitioner a new trial.

CONCLUSION

Based upon the argument and authorities cited above, this Court should reverse the decision of the Fourth District Court of Appeal in Banks v. State, 755 So. 2d 142 (Fla. 4th DCA 2000).

Respectfully Submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

_____
MARCY K. ALLEN
Assistant Public Defender
Counsel for Anthony Banks
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 332161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to AUGUST A. BONAVITA, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this _____ day of February, 2001.

_____
MARCY K. ALLEN
Assistant Public Defender