IN THE SUPREME COURT OF FLORIDA

GERALD PETION

Petitioner/Appellant,

vs.

CASE N0: SC09-664
Lower Tribunal No: 4D06-3888

STATE OF FLORIDA,

Respondent/Appellee
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

CAREY HAUGHWOUT
Public Defender

ALAN T. LIPSON
Assistant Public Defender
Florida Bar No. 0151810
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600,appeals@pd15.org

Attorney for Petitioner, Gerald Petion

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED PAGE

FLORIDA STATUTES

INTRODUCTION

Pursuant to Fla. R. App. P. 9.120(d) and 9.210(a) and (b), Petitioner-Appellant, GERALD PETION, files this Brief on Jurisdiction. Petitioner will be referred to throughout this brief as defendant, appellant or petitioner and the State of Florida will be referred to as the respondent or the state. All emphasis has been added unless otherwise indicated. The following symbols will be used:

"R" - Pleadings filed as of record

"T" - Transcript of Testimony of Trial

STATEMENT OF THE CASE AND FACTS

Defendant was charged by information with Trafficking in Cocaine (Count I), Possession of Cannabis with Intent to Sell (Count II), Giving a False Identification to a Police Officer (Count III) and Possession of Drug Paraphernalia (Count IV). (R 3-4)

Defendant waived trial by jury. (T 3-6, 9-12, R 5) Non jury trial commenced on September 6, 2006. (T 1-95)

BSO Deputies Conway and Sergeant Morse effected a traffic stop of the vehicle which defendant was driving, but did not own. There were three other black male passengers in the vehicle, one in the front passenger seat and two in the back. (T 31, 48, 49) Deputy Conway requested to see defendant's driver's license, registration, etc. (T 31) Defendant produced a driver's license; however the photograph on the license was not the defendant's. (T 32, 52,66) The deputy then asked the defendant to give him the date of birth and address on the license, but defendant was unable to do so. (T 32,52-53,67) A check on the driver's license reflected that it did not match the defendant. (T 33) Thereupon, Deputy Conway ordered the defendant to step out of the vehicle and placed him under arrest for giving a false identification to a law enforcement officer. (T 33, 54, 67) After handcuffing the defendant behind his back, he performed a pat down search. (T 34, 54-55) The deputy found in the right front pocket of defendant's pants suspect crack cocaine in an orange M&M mini container;

he recovered from his left front pocket 26 bags of suspect powder cocaine. (T 35, 68, 69) The suspect crack and powder cocaine field tested positive. (T 35) BSO Sergeant Morse, a 13 year veteran, who has had special narcotics training and made many narcotics arrests, testified that the container and baggies are indicative of, or consistent with, street level narcotics transactions. (T 69-70)

After the defendant was searched, the passengers were ordered to exit the vehicle and produce identification. (T 79) A search of the vehicle revealed that underneath a jacket located on the driver's seat were 12 bags of suspect marijuana, which field tested positive. In addition, clear plastic bags were discovered in the front console. (T 36-37,38,43, 57,70) Sergeant Morse testified the packaging was also consistent with the sale and delivery of narcotics. (T 71). $183 was also found in the defendant's possession. (T 39, 71)

The car was not registered to the defendant or to any of the other occupants. (T 57) No one claimed ownership of the jacket of which there was no indicia that it belonged to defendant. (T 58) Nobody claimed ownership of the marijuana or any of the other narcotics. (T 40,58, 71) The lid of the center console was closed at the time the deputy opened it and discovered the plastic bags. (T 58-59) Also found in a glass cup in the center console of the vehicle were 30-50 pieces of paper with the initials "GP" and a telephone number written on them. (T 90-91, 93-94) Over objection of

defense counsel, Sergeant Morse testified that it is common for street level narcotics dealers to hand out contact references for potential buyers to contact them. (T 91)The cocaine and marijuana tested positive. (T 16)

At the conclusion of the non jury trial, the trial court found defendant guilty of the lesser included offense of possession of cocaine with intent to sell on Count I, guilty as charged of possession of marijuana with intent to sell and giving false information to a police officer and not guilty of possession of drug paraphernalia. (T 118, R 35) He was sentenced to 46 months incarceration on Counts I and II and to time served on Count III; all sentences were ordered to be served concurrently. (T 121, R 39-49) A timely notice of appeal was filed. (R 50)

On appeal, the Fourth District reversed defendant's conviction for possession of marijuana with intent to sell because the state failed to prove that defendant possessed the marijuana found inside the jointly occupied vehicle. The defendant also raised a second issue on appeal that the court over defense counsel's objection abused its discretion when it permitted Sergeant Morse to testify that it was common for street level narcotics dealers to hand out contact information to potential buyers, such as the initials and phone number on the slips of paper found in the vehicle. The district court agreed with the defendant that such testimony about generalized common practices of dug dealers is inadmissible as substantive proof of a particular defendants guilt.

However, in light of the fact that the trial was non jury, the court held:

> We, find, however, that any error in admitting this testimony was *harmless* in this case, which was tried without a jury. When a trial judge, sitting as the trier of fact, erroneously admits evidence, the trial judge is presumed to have disregarded that evidence. *C.W. v. State*, 793 So. 2d 74 (Fla. 4th DCA 2001). Although this presumption is rebuttable, nothing in the record suggests that the trial judge relied upon this inadmissible evidence.

Accordingly, defendant's conviction for possession of cocaine with intent to sell was affirmed. Petion v. State, 4 So. 3rd 83 (Fla. 2003).

SUMMARY OF THE ARGUMENT

Once the defendant, as in the instant case, has satisfied the burden of demonstrating that error has occurred, the harmless analysis should be employed by the appellate court even though the trial was a non-jury trial rather than a jury trial as held by the Third District Court in J.D. v. State, 553 So. 2d 1317 (Fla. 3rd DCA 1989). Like an appeal from a jury trial, the state, as the beneficiary of the error, appropriately will have the burden to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict and will be deterred from advertently or inadvertently introducing inadmissible evidence. In addition, placing the burden upon a defendant to demonstrate that an error harmfully affected the judgment or sentence is virtually impossible to meet. Goodwin v. State, 751 So. 2d 537 (Fla. 2000).

ARGUMENT

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT WHEN A TRIAL JUDGE, SITTING AS THE TRIER OF THE FACT, ERRONEOUSLY ADMITS EVIDENCE A PRESUMPTION (WHICH IS REBUTTABLE) ARISES THAT THE TRIAL JUDGE DISREGARDED THAT EVIDENCE.

Standard of Review

The issue raised herein is one of law which is subject to de novo review. Insko v. State, 969 So. 2d 992, 997 (Fla. 2007).

Argument

In concluding that the erroneously admitted evidence (over timely objection of defense counsel) constituted harmless error the Fourth District relied upon its holding in C.W. v. State, 793 So. 2d 74 (Fla. 4th DCA 2001) that when a trial judge, sitting as the trier of fact, erroneously admits evidence, the judge is presumed to have disregarded that evidence. For that proposition of law the C.W. case cited as authority the Third District's decision in State v. Arroyo, 422 So. 2d 50, 51 (Fla. 3rd DCA 1982) which in turn cited the decisions in Wythers v. State, 348 So. 2d 390 (Fla. 3rd DCA 1977) and Capitoli v. State, 175 So. 2d 210 (Fla. 2nd DCA 1965). All of these cases, in which the trial judge was sitting as the trier of the facts, are factually dissimilar than the instant case. In C.W., for example, prior to the adjudicatory hearing, the judge, as was his practice, reviewed the probable cause affidavit which contained hearsay

statements. He denied a motion to recuse himself and stated that his decision would be based solely on the evidence presented. The state in the Arroya case appealed an order granting a motion to suppress based upon an experiment. The appellate court reversed based upon the determination that the experiment was not relevant and the trial judge unquestionably relied upon it. In the Wythers case, the judge acknowledged that the comment on defendant's right to remain silent was improper and then specifically stated on the record the competent substantial evidence against the defendant. Base thereon, the Third District Court conclude that it could be inferred that the trial judge did not take into consideration this inadmissible evidence. Similarly, in Capitoli v. State, supra, the trial judge affirmatively stated he disregarded the evidence which was obtained as a result of an unlawful search and seizure and the testimony with respect thereto.

Moreover, in J.D. v. State, 553 So. 2d 1317 (Fla. 3rd DCA 1989) the Third District receded from the principle of law set forth in the Arroyo and Wythers cases that when a trial judge sits as the trier of fact, the judge is presumed to have disregarded any erroneously admitted evidence. Instead, the District Court adopted the "harmless error" test set forth by this Honorable Court in State v. Diguilio, 491 So. 2d 1129 (Fla. 1989):

> We understand the State's position to be that, inasmuch as the trial which we review here was a non-jury trial, the trial judge certainly knew to

> disregard the comment and, accordingly, we can rest assured that he has done so. The standard which the State urges would, then, be nothing more than one which requires this court's *subjective* interpretation of what the trial judge did or did not consider, inasmuch as the record presented for review is silent on this point. We respectfully decline the State's invitation, and prefer, as indicated above, instead to hold to an *objective* interpretation of the evidence presented in the record on review. When the record is examined in this light, two facts are clear: first, the quoted comment was, in fact, made; and, second, this court cannot find beyond a reasonable doubt *from the record* as *DiGuilio* requires, that the error complained of did not contribute to the adjudication of delinquency. Accordingly, the adjudication must be reversed and the matter remanded for a new trial. 553 So. 2d at 1319.

Finally, it would appear to defy logic and common sense to presume that a trial judge, sitting as the trier of fact, disregards any erroneously admitted evidence. Rather, the presumption should be to the contrary. A trial judge, who over timely objection of defense counsel admits evidence (which only subsequently is determined by an appellate court to be erroneous admitted), certainly believes that the evidence was properly admitted and, therefore would consider same in making the determination of whether the state had presented evidence to prove defendant's guilt beyond a reasonable doubt.

Appellant respectfully argues that the standard of review with respect to preserved errors should be same whether the trial was by jury or non-jury. In regard to this issue, appellant suggests that this Honorable Court's opinion in Goodwin v. State, 751 So. 2d 537 (Fla. 2000) is insightful as well as persuasive. In that case, as a result

of the enactment of Section 924.051(7), Fla. Stat., the issue (by certified question) presented for determination was whether there was a different standard of review depending upon the constitutional nature vel non of the trial error. Specifically, where the error was constitutional in nature "the harmless error analysis" was required under the holding in Diguilio, i.e. the burden is upon 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. However, if the error was not constitutional in nature, then pursuant Section 924.051(7), the burden is upon the appellant to demonstrate that the error did affect the verdict.

Upon answering the certified question in the negative and rejecting a double standard of review, this Honorable Court held that once a defendant has satisfied the burden of demonstrating that error has occurred, the standard of harmless error remains the applicable analysis to be employed in determining whether the error requires a reversal on direct appeal. In reaching this conclusion, this Court reasoned, inter alia, that since the state is the beneficiary of the error, the burden is appropriately placed on the state to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or alternatively stated, there is no reasonable possibility that the error contributed to the conviction. And although the harmless error rule places a heavy burden upon the state, it serves as a strong deterrent against prosecutors

advertently or inadvertently introducing inadmissible evidence. 751 So. 2d at 541. In addition, as recognized by this Court, placing the burden upon a defendant to demonstrate that an error harmfully affected the judgment or sentence is virtually impossible to meet. 751 So. 2d at 544. Most important, this Court noted such a shifting of the burden to the defendant would result in an abdication of judicial responsibility:

> Review of the record to ascertain whether the error is harmless is an essential and critical appellate function. For this reason, we hold that to shift the burden to the defendant would not only be an abdication of judicial responsibility, but could lead to the unjust result of an affirmance of a conviction even though the appellate court was not convinced beyond a reasonable doubt that the error did not affect the defendant's conviction. 751 So.2d at 546.

The above reasoning is equally applicable to appeals from a judgment of conviction and sentence arising from a non jury trial. Once the defendant, as in the instant case, has satisfied the burden of demonstrating that error has occurred, the harmless analysis should have been employed by the appellate court even though the trial wasa non-jury trial. Accordingly, the Fourth District applied the wrong standard of review in affirming appellant's conviction for possession of cocaine with intent to sell.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Petitioner-Appellant, GERALD PETION, respectfully requests this Honorable Court to enter an order vacating that part of the opinion of the district court affirming his conviction and sentence for possession of cocaine with intent to sell and remand the cause to the court to review the complained of error under the harmless error analysis.

Respectfully submitted,

CAREY HAUGHWOUT

Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

_____

ALAN T. LIPSON
Assistant Public Defender
Florida Bar No. 0151810

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by courier to Heidi L. Bettendorf, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401 by courier this 5th day of October, 2009.

_____

ALAN T. LIPSON

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing BRIEF ON THE MERITS complies with the font requirements of Fla. R. App.. 9.210(a)(2).

_____

ALAN T. LIPSON