

RECEIVED, 8/29/2013 10:28:36, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1050

JAMES WARMINGTON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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ARGUMENT

EVIDENCE AT TRIAL THAT WARMINGTON FAILED TO PRODUCE FOR THE POLICE DOCUMENTATION OF HIS INNOCENCE PRIOR TO HIS ARREST WAS IMPROPER BURDEN SHIFTING WHICH VIOLATED THE DUE PROCESS CLAUSE OF BOTH THE FLORIDA AND UNITED STATES CONSTITUTION AND, THEREFORE, THIS COURT SHOULD QUASH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL WHICH APPROVED THIS IMPERMISSIBLE BURDEN SHIFTING TESTIMONY.

The issue this Court must decide is whether the constitutional protection that prohibits the state from shifting the burden of proof to the defendant at trial also applies when the state introduces evidence at trial that defendant failed to produce documentation of his innocence prior to trial during a police investigation. The state makes numerous arguments to support their position that a comment on a defendant's failure to produce documentation of his innocence to a police prior to the trial is not burden shifting. None of these arguments have merit.

The cases cited by the Petitioner are not distinguishable

In the initial brief Petitioner cited this Court's opinion in *Hayes v. State*, 660 So.2d 257 (Fla. 1995), and several district court opinions which specifically recognized that it is improper burden shifting when the state comments on the fact that defendant failed to produce or obtain evidence prior to trial to establish his innocence.¹ The state claims that these cases are distinguishable from this case since in this case the

¹ *Cribbs v. State*, 111 So.3d 298 (Fla. 1st DCA 2013); *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009); and *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004).

testimony was meant to show “what the officer may have said or thought,” prior to trial, whereas in the cases cited by Petitioner the state improperly introduced evidence that defendant failed to investigate prior to trial.

The objectionable testimony in this case wherein the officer said that he arrested Petitioner after he asked Petitioner to produce documentation and Petitioner failed to do so, was not elicited to show what the officer said or thought. Instead, it was meant to show that Petitioner failed to produce documentation to support his claim of innocence. Therefore, just like in *Hayes, Ramirez, Miele and Cribbs*, the testimony of the detective clearly gave the jury the improper impression that Petitioner had the burden of proving his innocence prior to trial which is clearly prohibited.

The state also attempts to distinguish *Hayes, Ramirez, Miele and Cribbs* since, in this case the officer was merely performing his duties for which he had been hired as a police officer and, therefore, it was not improper burden shifting to elicit any historical fact that occurred during this lawful investigation. This attempted distinction of the above cited cases also has no merit. As argued in the initial brief through a comparison with the loitering and prowling statute, the mere fact that the officer was doing his job as an investigator does not mean that anything that happens during his investigation is admissible evidence at trial. *See State v. Ecker*, 311 So.2d 104 (Fla. 1975).²

² In its brief the state correctly argues that *Ecker* is a case dealing with comments on

Since this court in *Hayes, supra*, a case that is indistinguishable from this case, has already ruled that it is improper to introduce evidence at trial that prior to trial defendant failed to do something to establish his innocence, this Court should reject the state's argument that improper burden shifting did not occur in this case.

Burden Shifting does not only refer to things that occur at trial.

The State in its brief argues that there was no burden shifting in this case since what a party says during a voluntary non custodial interview, out of court, has nothing to do with shifting the burden of proof. While the state correctly argues that the state has the right to introduce evidence of anything that a party says during a non custodial police interview, this has nothing to do with this case. Petitioner has never argued in this case that anything he said during his interview with the detective should be kept from the jury. The only argument being made in this case is that it was error for the detective to testify that defendant **failed to produce documentation of his innocence.**

The state also argues that defendant invited the response from the detective that he failed to produce documentation of his innocence since he told the detective that he loaned money to the victims and therefore, there was no improper burden shifting. A review of the two cases cited by the state to support this argument, along with the facts

silence and this case is dealing with improper burden shifting. Petitioner only cited *Ecker* as a means of refuting the state's argument that as long as the police are doing their duty the state has the right to introduce whatever happens during this interaction under the theory that it is just an historical fact.

in this case, will clearly establish that Petitioner did not invite the state to introduce the improper burden shifting testimony that he failed to produce documentation of his innocence prior to trial.

The state cites this Court's decision in *Scott v. State*, 66 So.3d 923 (Fla. 2011), which recognizes that there is an exception to improper burden shifting if the defendant invites the response. In *Scott*, the state introduced a call allegedly made by Scott from the jail. The defense argued that the state witnesses scripted the call and that it was not Scott on the tape. During rebuttal closing argument the state argued that Scott could have had his alibi witnesses listen to the tape and testify that it was not Scott's voice. This Court rejected defendant's argument that this argument was improper burden shifting since it was not objected to below, and that defendant invited the response by the prosecutor by bringing up the issue that the tape was doctored by state witnesses.

Whereas in *Scott*, the defendant clearly invited the alleged burden shifting comment by the prosecutor, there is nothing in this case which even remotely could be considered an invitation by Petitioner to bring out the fact that he failed to produce documentation of his innocence prior to his arrest. The detective claimed that Petitioner told him that he made a loan to the victim. Petitioner never told the detective that he gave the Pistols a note, nor did he ever tell the detective that he had a note. Therefore, unlike the facts in *Scott*, Petitioner did not invite this improper burden shifting testimony from the arresting officer.

The state also cites the case of *United States v. Leeseberg*, 767 F.Supp 1091 (D.Kan. 1991), to support their position that there was no improper burden shifting in this case. Not only is *Leeseberg* not binding in this Court, but more importantly, the facts in *Leeseburg* are clearly distinguishable from the fact in this case. In *Leeseburg* the defendant was charged with misapplying bank funds. During the Government's case-in-chief a bank examiner testified to statements made by the defendant during the bank's board of directors' meeting. It was at this meeting that the board confronted Leeseberg with evidence of a \$100,000 transaction they believed was improper. The examiner said the \$100,000 transaction was a gift to be used for the bank. According to the examiner, Leeseberg claimed he considered the gift to be a loan and **had prepared a note which evidenced his claim.** The examiner and other witnesses testified that when they requested Leeseberg to retrieve the document from his home, Leeseberg either refused to do so or did not respond to the request. No objection was made to this testimony.

On redirect, the Government asked the examiner if he would expect one accused of misappropriating monies would retrieve a document that the accused person claims to possess in order to prove the existence of the document. **The defendant objected to this question and the court sustained the objection.** Immediately after that question was asked defendant's motion for mistrial was denied.

After Leeseburg was convicted his attorney filed a motion for new trial arguing

that the question to the examiner concerning whether he would have expected Leeseburg to produce the note was improper burden shifting. In *Leeseburg*, the objectionable question of whether the witness would have expected *Leeseburg* to produce the note he had claimed he had was sustained. Based upon the fact that the court had sustained the objection and given the jury proper instructions on the burden of proof the motion for new trial was denied.

This case is distinguishable from *Leeseburg* since in this case, Petitioner never told the detective that he had a note and the trial judge **overruled** Petitioner's objection to the introduction of evidence that Petitioner never produced any documentation of his innocence and therefore, allowed the jury to consider this improper burden shifting testimony which did not happen in *Leeseburg* since the objection was sustained.

The state also contends that there was no improper burden shifting since police routinely testify about what they find in a search and when they testify that nothing else was found this is not improper burden shifting. As argued in the initial brief there is a big difference between a police officer testifying about what he finds or does not find in a search as compared to an officer testifying that defendant failed to produce documentation of his innocence during a police investigation. When an officer testifies to what he finds and does not find in a search there is no inference that the defendant had an obligation to produce evidence of his innocence. Therefore, this comparison made by the state should be rejected.

Since none of the state's arguments justify the conclusion that improper burden shifting does not apply to a defendant's failure to produce documentation of his innocence prior to trial, this Court pursuant to *Hayes, supra*, should reject these arguments.

The Petitioner's right to silence was not violated

Despite the fact that the Petitioner's right to remain silent was not and is not an issue in this case, the state cites to several cases that hold that if a defendant waives his right to remain silent and answers some of the police questions, but refuses to answer others, the state can bring these facts to the jury's attention. These cases have nothing to do with the issue the court must resolve in this case. This case is not about what defendant said and what he did not say and, therefore, defendant's right to remain silent has nothing to do with this case. This case is about whether a police officer can testify that he decided to arrest a defendant because the defendant failed to produce documentation of his innocence. As Judge Ramirez in his dissent recognized, if this is not improper burden shifting it is hard to know what is.

The trial judge did not abuse his discretion in denying motion for mistrial.

The State in its brief argues that the trial judge did not abuse his discretion in denying Petitioner's motion for mistrial, since Petitioner's initial objection to the state's attempt to shift the burden of proof was sustained, and defense counsel never requested a curative instruction prior to moving for a mistrial. Petitioner initially

objected to the testimony of the detective that the purpose of the detective's visit to defendant's home was to allow defendant to dispel any alarms the detective may have. Defense counsel's objection to this improper testimony was sustained and defense counsel indicated he had a motion. Whether defendant waived his motion for mistrial or not as to this question since defense counsel did not request a curative instruction has no relevance to this appeal since the only issue this Court must resolve is whether the trial judge erred in **overruling** Petitioner's objections to the introduction of evidence that defendant failed to produce documentation of his innocence.³ Once the trial judge overruled the objection to this improper testimony, Petitioner had no obligation to request a curative instruction nor move for a mistrial since the trial judge wrongfully concluded that the testimony that Petitioner failed to produce documentation of his innocence was admissible. *See Ralston v. State*, 555 So.2d 443, 444 (Fla. 4th DCA 1990)(observing that "any curative instruction would have been futile after the trial court overruled the objection and specifically stated that it found the objectionable evidence to be proper"); *Johnson v. Canteen Corp.*, 528 So.2d 1364, 1365 (Fla. 3d DCA 1988)(holding plaintiff "was not required to seek additional forms of relief in order to preserve the matter for appeal" "[o]nce her objection to [the witness's] testimony was overruled")(citing *Simpson v. State*, 418 So.2d 984 (Fla.1982)); *see also Salazar v. State*, 991 So.2d 364, 382 (Fla.2008) (Pariente, J., dissenting) (recognizing

³ Petitioner also requested a mistrial based on this improper testimony which was denied. (T. 239).

two standards of review for “the introduction of improper comments depending on whether the trial court properly recognized the error and sustained [an] objection or gave a curative instruction (abuse of discretion) or whether the trial court failed to recognize the error and improperly overruled the objection (harmless error to the comments, abuse of discretion to the denial of the mistrial)” (*citing Belcher v. State*, 961 So.2d 239, 255 (Fla.2007)); *Robinson v. State*, 881 So.2d 29, 31 n. 1 (Fla. 1st DCA 2004) (Ervin, J., dissenting) (agreeing “with the majority's tacit conclusion that the error was preserved, despite the failure of defense counsel to seek either a curative instruction or a mistrial, because of the contemporaneous objection, which was overruled”) (*citing Holton v. State*, 573 So.2d 284 (Fla.1990)).

Since the issue this Court must resolve is whether the trial judge erred in overruling Petitioner's objection to the impermissible burden shifting argument, the state has the burden of proving beyond a reasonable doubt that the error was harmless.

Harmless error

The state argues that the error was harmless since this Court can presume that the jury knew to disregard the one isolated comment during the five-day trial which shifted the burden of proof to the Petitioner. Once again the problem with the state's argument is that the trial judge overruled Petitioner's objection to the comment that Petitioner failed to produce documentation of his innocence. Therefore, unlike the *Leeseburg* case which was cited by the state, wherein the trial judge sustained the objection to the

alleged improper burden shifting testimony, the trial judge in this case by overruling the objection to this testimony allowed the jury to consider this inadmissible testimony. As argued in the initial brief, since it is impossible for the state to establish beyond a reasonable doubt that the jury did not rely upon the improper burden shifting testimony when reaching their verdict a new trial is warranted.

CONCLUSION

Based upon the foregoing, this Honorable Court is respectfully requested to quash the opinion of the Third District Court of Appeal and grant Mr. Warmington a new trial.

Respectfully submitted,

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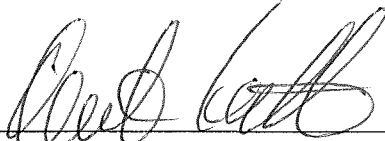
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CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically CrimAppMIA@MyFloridaLegal.com to the Office of the Attorney General, Criminal Division, on this 29th day of August, 2013.



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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.



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