IN THE SUPREME COURT OF FLORIDA

RICO JOHNSON,

Petitioner,

FSC Case No. SC17-845

vs.

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF CASE AND FACTS

A team of officers was tasked with investigating the sale and distribution of cocaine hydrochloride allegedly involving Rico Johnson, Edward Howard Jr. (the co-conspirator), and other individuals. (T 161-62) Part of the investigation involved intercepting and recording phone conversations of suspect individuals. (T 162) Officers listened to thousands of phone calls and over one hundred different people on the wiretap interceptor. (T 184) Ultimately, a total of sixteen individuals were identified and charged as a result of the investigation. (T 183) Johnson was one of the individuals arrested and charged with conspiracy to traffic in cocaine. (R 14)

Agent Matt Scovel was the lead agent in the investigation. (T 161) On October 22, 2014, officers made the decision to execute a search warrant at Howard's residence shortly after Johnson arrived. (T 188) They believed that a drug transaction was taking place involving large quantities of cocaine. (T 187) No cocaine was found that day and nothing illegal was attributed to Johnson. (T 188-89) Scovel confirmed that officers never witnessed any packages exchanged between Johnson and Howard. (T 963) Numerous phones were recovered from Johnson during the execution of the search warrant. (T 948) None of the numbers associated with the confiscated phones matched any of the numbers intercepted

pursuant to the wiretap. (T 189, 364-65) The officers did not attempt to track down any additional information on the confiscated phones. (T 949-50) Scovel was aware that additional information could have been obtained from the confiscated phones by providing the serial numbers to the cellular provider. (T 949)

During the execution of the search warrant, Scovel had a brief face-to-face conversation with Johnson. (T 162-63, 346) The conversation lasted approximately five minutes and the officer did a majority of the talking. (T 186) During the conversation, Johnson indicated that he was uncomfortable talking to the officer. (T 185) Scovel also listened to a DVD recording of a pre-trial hearing where Johnson testified for approximately twenty minutes, which was marked as State's Exhibit A for identification. (T 171, 346) The State attempted to enter the DVD into evidence, but did not want the jury to be able to listen to it, stating:

> STATE: I don't plan on asking that this go back to the jury room or at any time the jury to listen to it. ... Well, because it forms the basis of Agent Scovel's identification of Rico Johnson's voice. That's why I'm offering it into evidence right now. This going to be one of things as well [as] his personal contact with Rico Johnson that's going to provide the foundation for Agent Scovel to say that he recognizes Rico Johnson's voice.

(T 182)

The trial court did not “know of any time that something [was] in evidence that the jury [was] not entitled to see or hear.” (T 182-83) The State could not provide case law to support their position and moved on. Scovel stated that "[a]fter reviewing the DVD as well as my interview with [Johnson], I've just become familiar with his tone of voice and the way he speaks." (T 172)

The trial court allowed the State, through another officer, to conditionally enter recorded phone calls between Johnson and Howard Jr., including calls that did not involve Johnson. (T 240-50) Later, Scovel was recalled to identify Johnson's voice on a number of those recorded phone calls. Defense counsel objected on lack of predicate and authenticity grounds. (T 349) Scovel was not an expert in voice identification and had never received any specialized training on the subject. (T 186, 350) Prior to the investigation, Scovel had not engaged in a conversation with Johnson. (T 350) He never personally observed Johnson speaking on the phone while simultaneously listening to the intercepted calls. (T 350-51) Scovel was also not present when the inculpatory calls were being recorded live. (T 350) After this, counsel renewed their objection that the State could not properly identify Johnson’s voice. The trial court overruled the objection. (T 352)

Thereafter, Scovel identified two specific phone numbers where he

allegedly recognized Johnson's voice. (T 354-58) The subscriber information for those phone numbers could not be connected to Johnson or his family. (T 360-63) In addition, Scovel did not use any type of standard or control. For example, he did not obtain a known sample of Johnson's voice in order to compare it to recordings of phone calls used at trial that allegedly involved Johnson. (T 366)

Over objection, numerous calls between various individuals were entered into evidence and played for the jury. Scovel interpreted the content of these conversations. He testified that Johnson's voice was on a number of calls that discussed the buying and selling of cocaine. (T 354-58, 729-834, 845-932) The jury found Johnson guilty of conspiracy to traffic in cocaine. (T 1111-12; R 270) He was sentenced to fifteen years prison. (T 1115, 1118-19; R 275)

Johnson appealed to the Fifth District Court of Appeal and argued that Scovel did not possess the proper predicate to identify Johnson's voice on the recordings as outlined by this Court in *Evans v. State*, 177 So. 3d 1219 (Fla.2015), and that the officer's testimony invaded the province of the jury. The Fifth DCA affirmed, holding that Johnson's reliance on the precedent in *Evans* was misplaced. Even so, the court held that Scovel's testimony satisfied *Evans* because he possessed a prior special familiarity and reasoned that the testimony was helpful to the jury in determining whose voice was on the calls. The court also

held Scovel's testimony was proper because he was an earwitness, which extended the definition of eyewitness to include an individual that only heard, rather than saw, the crime. The Fifth DCA concluded that officers were able to study the voices of the conspirators over an extensive period of time, which culminated in a face-to-face conversation where they were able to hear their voices in person. As such, they could be considered witnesses under *Evans* and their testimony was proper.

Johnson filed his notice of intent to invoke jurisdiction on May 5, 2017, arguing that the Fifth DCA misapplied the precedent in *Evans*. This Court accepted jurisdiction on July 28, 2017.

SUMMARY OF ARGUMENT

The Fifth District Court's decision misapplied the precedent in *Evans* in two main ways. First, their decision was incorrect to conclude that Scovel acquired a prior special familiarity with Johnson's voice while the investigation was ongoing. This Court was clear that an officer cannot gain a prior familiarity with a suspect's voice once an investigation has begun. Second, the Fifth DCA misapplied the holding in *Evans* by classifying Scovel as an earwitness to the crime. The court justified their holding by noting the helpfulness of Scovel's testimony, citing federal authorities. It was unnecessary to garner support from federal authority when this Court's precedent in *Evans* was clear. Scovel was not present when the inculpatory phone calls were being recorded live. As such, he could not be considered an eyewitness or an earwitness.

Scovel's voice identification also invaded the province of the jury, as he was in no better position to identify Johnson's voice. The State possessed a known voice exemplar from Johnson but requested that the jury not hear it. It was only used to bolster his credibility in identifying Johnson's voice. In addition, the fact that Scovel was the lead agent in the investigation exacerbated the impropriety of his testimony. The Fifth DCA misapplied the precedent in *Evans* and Johnson should be entitled to a new trial.

ARGUMENT

AGENT SCOVEL, THE LEAD DETECTIVE, TESTIFIED TO RECOGNIZING JOHNSON'S VOICE ON A NUMBER OF RECORDED INCULPATORY PHONE CALLS WITHOUT THE PROPER PREDICATE AS ESTABLISHED BY THIS COURT IN *EVANS V. STATE*, 177 SO. 3D 1219 (FLA.2015).

Johnson argues that the Fifth District Court of Appeal's decision misapplied the precedent set forth in *Evans* in main two ways: first, Scovel could not have possessed a prior familiarity because his only interaction with Johnson occurred while the investigation was ongoing; second, Scovel could not be classified as an earwitness, nor an eyewitness, because he was not present when the inculpatory calls were being recorded live.

Because reliability is the linchpin in determining the admissibility of identification testimony, *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), and the role of witness identification is so important, especially when there is no physical evidence, this Court limited the witnesses able to give opinion testimony about the identity of a recorded voice in *Evans*. *Johnson v. State*, 215 So. 3d 644, 653 (Fla. 5th DCA 2017) (Orfinger, J., concurring in part, and dissenting in part). To ensure the reliability of opinions presented to the jury, *Evans* raised the standard for voice identification by requiring the witness offering an opinion on the identity of a

speaker to be either an eyewitness to the crime, a witness possessing some prior special familiarity with the voice of the accused, or an expert in voice identification. *Id*. As a result, *Evans* demands more than did earlier cases addressing this issue.

A. Agent Scovel did not possess a prior special familiarity with Johnson's voice because any familiarity he possessed was acquired while the investigation was ongoing

It is clear that the State had some doubt whether Scovel's minimal face-to-face interaction with Johnson during the execution of the search warrant was sufficient to identify his voice at trial. In anticipation of potential issues, the State made a DVD recording of Johnson's testimony at a pre-trial hearing in order for Scovel to review and become more familiar with Johnson's voice. According to *Evans*, neither of these attempts provided Scovel with a prior special familiarity, most notably because they occurred during the investigation or after its conclusion.

The detective in *Evans* was not an eyewitness to the crime, nor was he qualified as an expert in voice identification. *Evans*, 177 So. 3d at 1230. He testified though that he listened to known recordings of Evans from jail conversations and was able to recognize his voice based upon these recordings. This Court found that did not amount to a prior special familiarity. *Id*.

Here, Scovel was neither an eyewitness to the crime, nor an expert in voice identification. The only way he could properly identify Johnson's voice on the phone calls was if he possessed a prior special familiarity. Scovel did not possess this required familiarity and the review of Johnson's pre-trial hearing, similar to that of listening to jail conversations in *Evans*, was an insufficient method to meet this requirement.

Scovel's limited discussion with Johnson was also insufficient to provide him with a prior special familiarity. Before the investigation, Scovel had no contact with Johnson. During the investigation, Scovel spoke with Johnson only once, during the execution of the search warrant, and Johnson said little during that conversation. Other than this interaction, the only familiarity Scovel had with the voice he believed was Johnson's was through listening to the intercepted phone calls and the recording of the pre-trial testimony. This fell short of the requisite prior special familiarity. Indeed, this Court held that "a police officer investigating a particular suspect's voice *after the investigation is ongoing*...does not constitute the requisite prior familiarity with the suspect." *Id*. (Emphasis added). It is not disputed that Scovel's only conversation with Johnson occurred while the investigation was ongoing. Likewise, the review of Johnson's pre-trial testimony occurred close to the time of trial and was after the conclusion of the

investigation.

The Fifth District Court of Appeal concluded that Scovel possessed a prior special familiarity and stated that "[d]uring the course of the conspiracy," and "[a]fter 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." *Johnson*, 215 So. 3d at 651. The Fifth DCA continued that "prior to trial, the identification witness must have gained familiarity with the defendant that assists the witness in identifying him as the perpetrator and which the jury cannot itself acquire." *Id*. This holding contends that the timing of an officer's interaction with a voice is inconsequential. However, as the dissent correctly pointed out, *Evans* made it clear that an investigating officer does not obtain prior special familiarity with a suspect's voice if his or her first encounter with the voice occurred after a criminal investigation into the suspect's behavior has begun, regardless of whether at that time the crime had been completed. *Id*. at 655-56. Therefore, contrary to the Fifth DCA's holding, Scovel could not have possessed a prior special familiarity with Johnson.

B. Agent Scovel could not be classified as an eyewitness or an earwitness because he was not present when the inculpatory calls were being recorded

An eyewitness is someone who personally sees an event and can describe it

later. *Id*. at 653 (citing *Eyewitness*, Black's Law Dictionary (10th ed. 2014); *see also Earwitness*, Black's Law Dictionary (10th ed. 2014) (defining earwitness as witness who testifies about something he or she heard, but did not see). The Fifth DCA did "not interpret the term 'eyewitness,' as used in *Evans*, to exclude witnesses who hear, rather than see, the crime." *Id*. at 651. The court noted "there is seldom an 'eyewitness' to a conspiracy, which, by definition, merely involves an agreement to commit a crime." *Id*.

It is not disputed that Scovel eventually listened to the phone calls in question. It is also not disputed that the officers were intimately involved with investigating the conspiracy as it unfolded. The flaw in the Fifth DCA's reasoning lies in the fact that Scovel was never present when the calls were being recorded in real time. He only listened to them after they had been recorded. In addition, Scovel never witnessed Johnson speaking on the phone while simultaneously listening to or recording his phone call. Had Scovel been present at the moment the calls were intercepted and recorded, arguably, the Fifth DCA's interpretation could be correct. However, this was not the case. Therefore, Scovel could not be considered an eyewitness or an earwitness.

The Fifth DCA's reliance on *Mack v. State*, 44 So. 706 (Fla.1907), *Martin v. State*, 129 So. 112 (Fla.1930), and *Macias v. State*, 673 So. 2d 176 (Fla. 4th DCA

1996) is misplaced. The dissent was also correct that each of those cases involved the victim of the crime testifying as to what the perpetrator said while the crime was being committed. The victims in those cases were prototypical eyewitnesses to the crimes and as such, satisfied the requirements set forth in *Evans*. *Johnson*, 215 So. 3d at 654. Just as the officers in *Ruffin v. State*, 549 So. 2d 250 (Fla. 5th DCA 1989), and *Alvarez v. State*, 147 So. 3d 537 (Fla. 4th DCA 2014), were not eyewitnesses to a crime merely because they later watched a recorded video of the crime, Scovel was not an eyewitness (nor an earwitness) to the conspiracy merely because he later listened to the recorded inculpatory phone calls. *Id*.

In addition, the Fifth DCA attempted to justify their holding under the guise of the testimony's overall "helpfulness." *Id*. at 649-51. The court stated that "the evidentiary error in *Evans* involved section 90.701, Florida Statutes, which addresses the circumstances under which lay opinion testimony is admissible" and a central tenet of that statute is "that the testimony must be helpful to the jury in determining a fact at issue." *Id*. at 649. The court acknowledged that the word "helpfulness" does not appear in the Florida code, but, nonetheless concluded that the concept was implicit in the code and confirmed in *Alvarez*. *Id*.

Again, the dissent outlined compelling reasons that this justification was incorrect. First, the "better position than the jurors" language from *Alvarez* - which

the majority referred to as the "helpfulness" standard - was absent from *Evans*. *Id*. at 654. Second, *Alvarez* was issued prior to this Court's opinion in *Evans*. The precedent set forth in *Evans* created a heightened standard for voice identification by a witness and carved out three distinct ways in which that identification would be proper. Finally, the majority gathered support from the Federal Rule of Evidence 901 and federal cases. As noted by the dissent, the Florida and federal evidence codes are similar regarding lay opinion testimony, but those codes have been interpreted differently by each court. *Id*. at 655. Admittedly, had Johnson been prosecuted in federal court, Scovel's testimony would likely have been proper. *See United States v. Bush*, 405 F.3d 909, 919 (10th Cir. 2005) (holding voice identification need only rise to level of minimal familiarity); *United States v. Axselle*, 604 F.2d 1330, 1338 (10th Cir. 1979) (holding single telephone call, combined with hearing voice in court, is sufficient for voice identification testimony to go to jury). Given this Court's clear precedent in *Evans*, there was no need to look to federal rules for guidance or to add a helpfulness predicate. As such, the Fifth DCA's interpretation was incorrect and Scovel was not an eyewitness competent to render an opinion as to the voice heard on the recordings.

C. Agent Scovel's improper testimony invaded the province of the jury and its impropriety was exacerbated by the fact that he was the lead agent in the investigation

Non-eyewitnesses may testify as to the identification of persons depicted or heard on a recording so long as it is clear the witness is in a better position than the jurors to make those determinations. *Alvarez v. State*, 147 So. 3d 537, 542 (Fla. 4th DCA 2014). However, "[w]hen factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury." *Id*. *See also Charles v. State*, 79 So. 3d 233, 235 (Fla. 4th DCA 2012) (finding court erred in allowing detective to testify that he could not identify the defendant as the person on the surveillance video the first time he watched it, but "he was later able to piece things together and identify the person in the video" as the defendant).

Here, without the voice identification, the evidence against Johnson was minimal, at best. None of the numbers corresponding to the phones confiscated from Johnson matched any of the numbers listened to over the wiretap interceptor. Scovel identified two specific phone numbers at trial allegedly used by Johnson. However, neither of those numbers could be connected to him or his family. No packages were seen being exchanged by Johnson and no narcotics were ever associated with him. Scovel's voice identification testimony was crucial. However, he was in no better position than the jury to make that determination.

The recording of Johnson's voice, which aided Scovel's identification of it, could have been entered into evidence for the jury to hear. Like in *Evans*, the State made the decision not to provide the known exemplar to the jury. For reasons unknown, the State sought to enter the pre-trial testimony but requested that it not be made available to the jury. Seemingly, its sole purpose was to bolster Scovel's identification of Johnson's voice without giving the jury the same benefit. This was improper. As previously mentioned, Scovel's brief conversation during the investigation was insufficient to provide him with a prior familiarity. Since Scovel never had a conversation with Johnson prior to the investigation and otherwise lacked any familiarity with Johnson's voice, it was for the jury to decide whose voice was present on the inculpatory calls.

In *Evans*, this Court emphasized that the error there was magnified by the fact that the jury was aware that the testifying officer was the lead detective investigating the case. *Evans*, 177 So. 3d at 1230. "[E]rror in admitting improper testimony may be exacerbated where the testimony comes from a police officer." *Id*. (quoting *Martinez v. State*, 761 So. 2d 1074, 1080 (Fla.2000)). "When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible, is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave." *Id*. (quoting *Rodriguez v. State*,

609 So. 2d 493, 500 (Fla.1992)). "There is the danger that jurors will defer to what they perceive to be an officer's special training and access to background information not presented during trial." *Id*. (quoting *Charles*, 79 So. 3d at 235).

In fact, permitting questions that elicit a witness's position as a police officer when that witness is identifying a defendant's voice or image has been held to be reversible error even when the identification itself was permissible. *Id*. In *Evans*, the lead detective lent an aura of expertise to the voice identification because of his status as the officer in charge of the investigation, adding the imprimatur of his belief in the defendant's guilt. *Id*. at 1231.

Here, it was only Scovel who identified Johnson's voice on the suspect calls. The only evidence supporting the conspiracy was those calls. On these facts, the error was magnified by allowing Scovel to testify to this critical identification, especially given his position as the lead agent and the sparse evidence connecting Johnson to the conspiracy.

In sum, the precedent in *Evans* mandates that certain requirements must be met in the context of voice identification. The Fifth DCA's decision attempts to circumvent these heightened requirements under flawed reasoning. Because the precedent is clear, Johnson respectfully requests this Court quash the decision of the Fifth District Court of Appeal and remand his case for a new trial.

CONCLUSION

WHEREFORE, Johnson respectfully requests this Court quash the decision of the Fifth District Court of Appeal and reverse and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purpose of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and funderburk.matthew@pd7.org (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically to the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, at www.myflcourtaccess.com; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Mr. Rico Johnson, DC#M38226, Liberty C.I./Work Camp, 11064 NW Dempsey Barron Road, Bristol, Florida 32321 on this 17th day of August, 2017.

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