

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2336

DCA NO. 3D05-2455

THE STATE OF FLORIDA,

Petitioner,

-vs-

KENDRICK DEMONTE EDWARDS,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the Respondent in the District Court of Appeal, Third District. Respondent, KENDRICK DEMONTE EDWARDS, was the Defendant in the trial court and the Appellant in the District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. They symbol "App." followed by a page number refers to the appendix to this brief, containing a conformed copy of the slip opinion of the District Court.

STATEMENT OF THE CASE AND FACTS

Respondent appealed his conviction for armed robbery, alleging that the State's use of inadmissible identification hearsay by a declarant who did not testify at trial severely prejudiced his case. On September 26, 2007, the lower court issued an opinion which reversed and remanded the matter for a new trial.

Pursuant to opinion below, the victim, Sean Tomlin, went to a convenience store in Miami late at night. As he was leaving, a car pulled up, and a man carrying a gun got out and approached him. The man pointed the gun at Tomlin and made him surrender his expensive, custom-made medallion and chain that he was wearing. The robber got in a car and fled. When the police arrived, they took the witnesses' description of the robber as a black male, dark complexion, six feet tall, 170 pounds, with a black T-shirt, black baseball cap, and white bandana over his face. The following day, Tomlin went to a flea market to order a replacement medallion. While at the flea market, he heard a man telling three male companions how he had told someone, "let me have this sh[]." Tomlin recognized the man as the robber and was able to see the stolen medallion. He ran to get a policeman, but the suspect ran away. The police did not

catch the suspect, but apprehended Nikeisha Eulaine, who was allegedly with the suspect. Eulaine did not testify at trial. (App. 1 - 3).

At trial, the defense pointed to several discrepancies in Tomlin's testimony. Over defense objection, Howett testified that Eulaine's information led to a suspect, although he did not specify who the suspect was. Eulaine did not testify at trial. Howett forwarded Eulaine's information to Goldblatt, who testified that he responded to the original robbery report and that the information he received from Howett led to a suspect. He said that Eulaine confirmed that she was with Defendant at the flea market, and Tomlin picked Defendant from the subsequent photo line-up. Defendant was then arrested. Goldblatt testified that Defendant gave his weight as 200 pounds, but that witnesses had described the robber as weighing around 170 pounds. The State, in closing, argued that Eulaine had confirmed that Defendant fled from the flea market. The defense objected and moved for mistrial, which was denied. The jury found Defendant guilty of armed robbery with a firearm and sentenced him to life in prison.

The lower court agreed with Defendant's contention that the State was improperly allowed to elicit hearsay testimony from the two police officers that Eulaine, who did not testify, had identified him as the person at the flea market and cited to *Postell v. State*, 398 So. 2d 851 (Fla. 3d DCA 1981), and its progeny, as authority to require reversal. The opinion held that because Eulaine did not testify, her identification of Defendant as the suspect at the flea market was inadmissible hearsay and could not be admitted as an exception under section 90.801(2)(c), Florida Statute (2002). Thus, the court concluded that the admission of this hearsay violated Defendant's right to confront the witness against him and was error. Further, the court held that the admission of Eulaine's hearsay testimony was harmful error.

Here, the non-testifying witness identified Edwards as being at the flea market. The State had no physical evidence, such as DNA or fingerprints, against him. The State never recovered the stolen necklace or the gun used in the crime. No witness described the robber's face because he was wearing a bandana and a baseball cap that covered his face except for his eyes. The only evidence the State had linking Edwards to the crime was Tomlin's testimony that he had seen the robber the next day at the flea market wearing the stolen necklace under a jersey and bragging about the robbery. However, Tomlin's credibility was impeached various times during his testimony. Clearly, the State needed Eulaine's identification or else their case against Edwards was considerably weaker. Consequently, this hearsay evidence could not have been harmless error. (App. 3 - 8).

Petitioner thereafter filed a Motion For Rehearing and Rehearing En Banc, which was denied by the lower court on November 9, 2007. Petitioner then filed a notice of intent to invoke this court's discretionary jurisdiction.

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *Keen v. State*, 775 So. 2d 263 (Fla. 2000); *Wilding v. State*, 674 So. 2d 114 (Fla. 1996); *Conley v. State*, 620 So. 2d 180 (Fla. 1993); *State v. Baird*, 572 So. 2d 904 (Fla. 1990) and *Mack v. State*, 44 So. 706 (1907) AND THE FIFTH DISTRICT COURT OF APPEAL OPINIONS OF *Wynn v. State*, 791 So.2d 1258 (Fla. 5th DCA 2001) AND *State v. Fischer*, 387 So. 2d 473 (Fla. 5th DCA 1980)?

SUMMARY OF THE ARGUMENT

The Third District's opinion is in conflict with *Keen v. State*, 775 So. 2d 263 (Fla. 2000); *Wilding v. State*, 674 So. 2d 114 (Fla. 1996); *Conley v. State*, 620 So. 2d 180 (Fla. 1993); *State v. Baird*, 572 So. 2d 904 (Fla. 1990) which hold that it is erroneous to admit accusatory information furnished by a non-testifying witness and *Mack v. State*, 44 So. 706 (1907), *Wynn v. State*, 791 So.2d 1258 (Fla. 5th DCA 2001) and *State v. Fischer*, 387 So. 2d 473 (Fla. 5th DCA

1980) which hold that where the victim was not able to see the face of an attacker, the identification can be made by voice or other characteristics which were visible.

ARGUMENT

THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *Keen v. State*, 775 So. 2d 263 (Fla. 2000); *Wilding v. State*, 674 So. 2d 114 (Fla. 1996); *Conley v. State*, 620 So. 2d 180 (Fla. 1993); *State v. Baird*, 572 So. 2d 904 (Fla. 1990) and *Mack v. State*, 44 So. 706 (1907) AND THE FIFTH DISTRICT COURT OF APPEAL OPINIONS OF *Wynn v. State*, 791 So.2d 1258 (Fla. 5th DCA 2001) AND *State v. Fischer*, 387 So. 2d 473 (Fla. 5th DCA 1980).

Direct and express conflict exists between the lower court's opinion in the instant case and this Court's opinions in *Keen v. State*, 775 So. 2d 263 (Fla. 2000), *Wilding v. State*, 674 So. 2d 114 (Fla. 1996), *Conley v. State*, 620 So. 2d 180 (Fla. 1993) and *State v. Baird*, 572 So. 2d 904 (Fla. 1990).

In *State v. Baird*, this Court held that it was error for an investigator to testify that he received information that the defendant, who was being tried for racketeering and bookmaking charges, was a major gambler and operating a major gambling operation in the area. The Court explained:

When the only purpose for admitting testimony relating accusatory information received from an informant is to show a logical sequence of events leading up to an arrest, the need for the evidence is slight and the likelihood of misuse is great. In light of the inherently prejudicial effect of an out-of-court statement that the defendant engaged in the criminal activity for which he is being tried, we agree that when the only relevance of such a statement is to show a logical sequence of events leading up to an arrest, the better practice is to allow the officer to state that

he acted upon a "tip" or "information received," without going into the details of the accusatory information. *Id.* at 908. (emphasis added). For various reasons, the Court ultimately found that the error was harmless.

The Court cited to Baird in *Conley v. State*, 620 So. 2d 180, 183 (Fla. 1993) for the proposition that "the inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information to establish the logical sequence of events outweighs the probative value of such evidence". (emphasis added). In *Wilding v. State*, 674 So. 2d 114 (Fla. 1996), which found reversible error in the admission of a detective's testimony that the police began their investigation of the defendant after receiving an anonymous tip identifying the defendant as the perpetrator, the Court approvingly took note of *Postell v. State*, 398 So. 2d 851 (Fla. 3d DCA), review denied, 441 So. 2d 384 (Fla. 1991) as standing for the proposition that where "the inescapable inference from testimony [concerning a tip received by police] is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated." The Court went on to characterize the information complained of in *Wilding* as "[p]lacing information before the jury that a non-testifying witness gave police reliable information implicating the defendant in the very crime charged..." *Id.* at 119. Similarly, in *Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000) (which found reversible error in allowing a detective to testify that an insurance company investigation had concluded that, contrary to the defendant's claim, the defendant's wife did not die accidentally, but was murdered) this Court held that the jury was led to believe that the non testifying witness had given the police evidence of Keen's guilt.

The lower court's opinion requiring reversal on the basis of the reference to the information provided by Eulaine is in direct and express conflict with Keen, Wilding, Conley, and Baird, because Eulaine, the non-testifying, did not furnish the police with evidence of Defendant's guilt. Eulaine was not at the scene of the robbery. Instead, she was at the flea market the day after the robbery. Lieutenant Howett testified that Eulaine's information led to a suspect, but he did not specify who the suspect was. Howett forwarded Eulaine's information to Goldblatt, who testified that the information he received from Howett led to a suspect. He said that Eulaine confirmed that she was with Defendant at the flea market, and Tomlin selected Defendant from the subsequent photo line-up. The State, in closing, stated that Eulaine had confirmed that Defendant fled from the flea market. None of these references to Eulaine contained the type of accusatory information required by this Court in order to be deemed to be erroneous.

Additionally, direct and express conflict exists between the lower court's opinion in the instant case and this Court's opinion in *Mack v. State*, 44 So. 706 (1907) and the Fifth District Court of Appeal opinions of *Wynn v. State*, 791 So.2d 1258 (Fla. 5th DCA 2001) and *State v. Fischer*, 387 So. 2d 473 (Fla. 5th DCA 1980).

In finding that the error in admitting testimony about the information obtained from Eulaine was not harmless error, the lower court's opinion made mention of the following:

No witness described the robber's face because he was wearing a bandana and a baseball cap that covered his face except for his eyes. The only evidence the State had linking Edwards to the crime was Tomlin's testimony that he had seen the robber the next day at the flea market wearing the stolen necklace under a jersey and bragging about the robbery. However, Tomlin's credibility was impeached various times during his testimony. Clearly, the State needed Eulaine's identification or else their case against Edwards was considerably weaker. Consequently, this hearsay evidence could not have been harmless error.

Edwards at 311.

In casting doubt on credibility of the identification of Defendant, the lower court's opinion entirely overlooked the significance of the victim's testimony that: 1) he saw the robber the next day at the flea market, 2) that the robber was wearing the stolen necklace under a jersey and 3) the robber was bragging about the robbery. It is well settled that a person may be identified as the perpetrator of a crime solely by means of voice recognition. In *Mack v. State*, 44 So. 706 (1907) this Court disagreed with the finding that voice identification by a rape victim was too uncertain and unreliable where the victim never saw her attacker. Similarly, in *State v. Fischer*, 387 So. 2d 473, 476 (Fla. 5th DCA 1980), a rape victim did not see her attacker, but was able to identify him by her tactile impressions made during the assault. The opinion noted several cases which permitted various forms of identification testimony when the witness was not able to see the attacker's face because the facial features of the assailant were covered by a mask. In *Wynn v. State*, 791 So.2d 1258 (Fla. 5th DCA 2001), the defendant was wearing a ski mask, but both victims were able to identify defendant from the way he talked, his big ears, and unique shoes, characteristics not hidden by the ski mask.

Accordingly, the fact that the victim did not see Defendant's face due to his concealing it with a bandana and cap does not mean that he was incapable of making an identification based on characteristics not hidden by the bandana and cap. Defendant's build, skin, head and eyes were visible to the victim. The identification was further validated by the victim overhearing the robber speaking at the flea market, which was just a day after the robbery, and the fact that the victim could see that the man at the flea market wearing the chain taken the previous evening. This all corroborated the validity of the identification. Thus, the lower court's finding that the admission of the reference to Eulaine's testimony was not harmless due to a weak identification is in direct and express conflict *Mack*, *Wynn*, and *Fischer*.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the Third District's opinion is in direct and express conflict with this Court's opinions in Keen, Wilding, Conley, Baird and Mack and the Fifth District opinions of Wynn and Fischer. Thus, the State respectfully requests that this Court accept jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was mailed to Thomas Regnier, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125-2611, on this 16th day of January, 2008.

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CERTIFICATION OF COMPLIANCE

Pursuant to the Court's Administrative Order regarding the type size of briefs filed in the Supreme Court of Florida, Respondent hereby certifies that the subject brief was typed in font Courier New, 12 point.

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