

IN THE SUPREME COURT OF FLORIDA

CASE NO.

TREMAYNE PARKER,

Petitioner,

-vs-

STATE OF FLORIDA,

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

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *State v. Parker*, 33 Fla. L. Weekly D2270 (Fla. 3d DCA September 24, 2008), on the grounds that the decision expressly construes a provision of the federal constitution, and expressly and directly conflicts with a decision of the Fourth District Court of Appeal. All references are to the appendix attached to this brief paginated separately and identified as “A.” followed by the page number(s).

STATEMENT OF THE CASE AND FACTS

Tremayne Parker is charged with first degree premeditated murder and possession of a firearm by a felon (A. 2). Parker moved to suppress out-of-court and in-court identifications by the victim’s girlfriend Venecia Anderson, on the ground that the procedure used to obtain the identifications was unnecessarily suggestive and gave rise to a substantial likelihood of misidentification (A. 2, 6-7). The trial court granted the motion to suppress (A. 2). The State then sought a writ of certiorari quashing the trial court’s order, which was granted by the Third District Court of Appeal (A. 2).

The Third District summarized the facts underlying the motion to suppress as follows: The victim Andre Hart was shot and killed at about 5:10 a.m. in front of his

home where he lived with Venecia Anderson (A. 2). Anderson heard gunfire, looked outside, and saw a man entering a car in front of the house (A. 2). She called 911 and described the man as a dark, tall and skinny black man, with a short scruffy beard and a low-cut Afro haircut, wearing a black crew-neck shirt (A. 2). Subsequently, in a sworn statement taken hours after the shooting, Ms. Anderson identified this man as “Tremayne.” (A. 3). Mr. Hart’s brother, Aaron Stirrup, told police that the “Tremayne” that Ms. Anderson referred to was Tremayne Parker, the defendant in this case (A. 2).

Anderson stated at the suppression motion that she had known Tremayne since she was fifteen years old, and had seen him five to six times previously near her sister’s house (A. 3). According to Anderson, there had been “bad blood” between the victim Hart and Tremayne after Tremayne killed Hart’s friend Kawanis Hammette (A. 4). Anderson once saw Tremayne threaten Hart by forming his hand to simulate a gun and pretending to shoot Hart (A. 4). She testified that Hart was afraid of Tremayne (A. 4). The day of Hart’s murder the police assembled a photographic line-up containing a picture of Tremayne Parker and showed it to Ms. Anderson (A. 5). Anderson failed to identify Parker as the shooter (A. 5). Instead, Ms. Anderson

selected a picture of an individual named Larry Duggins as someone who looked like Parker (A. 5). Anderson stated that she wished to view a live line-up (A. 5).

Before the live line-up Hart's brother Aaron Stirrup showed Anderson a picture of Tremayne Parker (A. 6). Unaware of Stirrup's actions, the police then conducted a live line-up where Anderson positively identified Tremayne Parker as the shooter (A. 6). The trial court suppressed this identification based upon the suggestiveness of Ms. Anderson being shown a picture of the defendant before the live line-up (A. 6).

In its certiorari petition to quash the trial court's order, the state argued that an identification is not suppressible unless law enforcement or some other state actor was responsible for the suggestive procedure (A. 7). The Third District Court of Appeal noted that this case presents "an issue of first impression in this jurisdiction." (A. 8). The Third District then framed the issue in this case as follows: "Whether a private citizen, who acts on his own . . . converts private action into state action by employing a suggestive procedure in the identification process. In other words, whether the exclusionary rule applies to identification procedures absent state action." (A. 8).

The Third District noted that the United States Supreme Court has applied the exclusionary rule to suggestive identification procedures pursuant to the due process clause (A. 10). But the Supreme Court "has not yet considered the effect of private

action upon due process in identification procedures.” (A. 10-11). The Third District observed that state action is necessary for suppression of a coerced confession, and reasoned that “it is reasonable to conclude that the Court’s position [with regard to suggestive identifications] will conform with its position regarding confessions” (A. 11). The Third District noted, “We have been unable to find . . . any Florida case in which a pre-trial identification or an in-court identification was suppressed on constitutional grounds absent improper or overly suggestive state action.” The Third District thus concluded that “United States and Florida law do not require application of the exclusionary rule in the admission of identification evidence absent state action.” (A. 12). Notice of invocation of this Court's discretionary jurisdiction was filed on October 22, 2008, and this brief of petitioner on jurisdiction follows.

SUMMARY OF ARGUMENT

The Third District Court of Appeal’s decision expressly construes the due process clause of the federal constitution. This decision also expressly conflicts with the Fourth District’s decision in *State v. Walker*, 429 So.2d 1301 (Fla. 4th DCA 1983).

This Court should exercise its discretionary jurisdiction in this case, which presents an important constitutional question not yet resolved in the state of Florida.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY CONSTRUES AMENDMENT XIV TO THE U.S. CONSTITUTION, AND EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT IN *State v. Walker*, 429 So.2d 1301 (Fla. 4th DCA 1983).

The Supreme Court of the United States has held that the use of impermissibly suggestive identification procedures in a criminal case, which give rise to a substantial likelihood of misidentification, violates a defendant's constitutional right of due process. Any identification obtained under such circumstances must be excluded. *See Foster v. California*, 394 U.S. 440 (1969); *Manson v. Brathwaite*, 432 U.S. 98 (1976); *Neil v. Biggers*, 409 U.S. 188 (1972).

This case presents the issue of whether culpable state acts are required in order for a trial court to properly suppress an identification pursuant to the due process clause, where the court has found the identification to be irreparably tainted and unreliable (A. 8). The Third District Court of Appeal held that constitutional due process does not require suppression of a tainted identification absent state action (A. 10-12). In so holding, the Third District expressly construes the Fourteenth Amendment due process clause of the federal constitution (A. 10-12). This Court may thus exercise its discretionary jurisdiction. *See Fla. R. App. P. 9.030(a)(2)(ii)*.

The decision of the Third District Court of Appeal also directly conflicts with the Fourth District's decision in *State v. Walker*, 429 So.2d 1301 (Fla. 4th DCA 1983).

Like the identifying witness in this case, the victim of the robbery at issue in *Walker* also failed to identify the defendant in a photographic lineup. The *Walker* victim was subsequently subpoenaed for the defendant's adjudicatory hearing in connection with a different charge. The record in *Walker* did not contain "the faintest suggestion that the victim was subpoenaed to the hearing by law enforcement for the purpose of setting up a tainted confession" *Id.* at 1305 (concurrence by Chief Judge Letts). Rather, the suggestive pretrial encounter between the victim and Walker was accidental. *Id.* at 1305-6. Thereafter, the victim testified in deposition that he recognized Walker as soon as he entered the courtroom. Despite the lack of any culpable state action, the Fourth District affirmed the trial court's suppression of the identification, stating

[I]n light of the victim's previous inability to identify respondent, we share the apprehension of the trial judge who later heard the motion to suppress the identification made under such suggestive circumstances . . . [T]here is support in the record for a conclusion that there was an absence of reliable features, and therefore, a substantial likelihood of misidentification.

Id. at 1303-4.

The holding in *Walker*, affirming suppression of a tainted identification in the absence of culpable state action, is in direct conflict with the holding of the Third District in this case. This Court may exercise its discretionary jurisdiction to resolve the conflict between the districts. *See* Fla. R. App. P. 9.030(a)(2)(iv).

This Court should exercise its discretionary jurisdiction in this case, as it presents an important constitutional question requiring resolution in Florida. Although not discussed by the Third District, several federal courts have addressed this issue and ruled to the contrary. These circuit courts have held that “the fact that police machinations did not cause the [suggestive] confrontations between the witness and the defendant” did not preclude suppression of a tainted identification. *Thigpin v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986); *See also United States v. Bouthot*, 878 F.2d 1506, 1514-16 (1st Cir. 1989) (suppression not precluded where “there was no impermissibly suggestive identification procedure conducted by the government”). *Accord Green v. Loggins*, 614 F.2d 219 (9th Cir. 1980); *Raheem v. Kelly*, 257 F.3d 122 (2d Cir. 2001). These courts “scrutinize all suggestive identifications, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process.” *Bouthot*, 878 F.2d at 1516.

The above cited federal cases rely on *Manson* and *Neil*, *supra*, where United States Supreme Court explained that deterrence of police misconduct is not the fundamental purpose for excluding identification evidence. *See Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 198-99. Rather, “the primary evil to be avoided is a very

substantial likelihood of irreparable misidentification.” *Neil* at 198. It is this “likelihood of misidentification that violates a defendant’s right to due process.” *Id.*

The Third District’s opinion in this case notes that state action is necessary for suppression of a coerced confession, and then reasons that “it is reasonable to conclude that the [United States Supreme] Court’s position [with regard to suggestive identifications] will conform with its position regarding confessions (A. 11). But the First and Ninth federal circuits have distinguished confession cases from those involving a tainted identification, finding that “a coerced confession is suppressed primarily to deter future violations of the Constitution [by state agents, whereas] overly suggestive identifications are suppressed primarily to avoid an unfair trial.” *Bouthot*, 878 F.2d at 1515-16. *Accord Green*, 614 F.2d at 222 (“the deterrence of such [wrongful police] conduct is not the primary purpose behind judicial review of tainted identification testimony. Rather, a court reviews a challenged in court identification essentially to determine whether the witness retains sufficient indicia of reliability”). These courts conclude that “it is certainly possible that an in-court identification by a prosecution witness may prove to be unreliable, even though the pre-trial encounter in question has not involved any culpable police conduct.” *Id.* at 222.

The Third District relies upon this Court's opinion in *Grant v. State*, 390 So. 2d 341 (Fla. 1980) (A. 12, footnote 1). But *Grant* does not address this issue. In *Grant*, the victim Ms. Campbell selected two pictures from a photo lineup, including one of the defendant. Before a live lineup Campbell saw another victim viewing a photo array. Campbell had no conversation with that victim, but thought that she was viewing the same photographs shown to Campbell. Campbell then identified the defendant again in the live lineup. This Court found that no unnecessarily suggestive procedure was used to obtain Campbell's live identification. This Court noted that "the police were unaware that Campbell saw a photo array immediately before the physical lineup, and in any event there was no evidence to show that viewing the photos in any way jaundiced the reliability of her identification at the lineup." *Id.* at 344.

The above quoted language does not hold that purposeful police action is required for suppression of an identification. Rather, this Court pointed to the accidental nature of Campbell's encounter with the other victim as support for the conclusion that the encounter did not involve any significant degree of suggestiveness.

"The accidental nature of a pre-trial encounter is important, not because there has been an absence of wrongful police activity, but because the circumstances

surrounding an accidental encounter are often directly relevant to the question of reliability of the [subsequent] identification.” *Green*, 614 F.2d at 222. By considering the lack of police misconduct as one factor bearing on reliability this Court did not require state action as a pre-condition for suppression.

The present case presents an important due process issue, where there is conflict between Florida’s district courts and conflicting federal cases. *Grant* does not resolve the issue. This Court should thus accept jurisdiction in this case .

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Penny H. Brill, Assistant State Attorney, 1320 N.W. 12th Ave., Miami, Florida, 33125, and to Richard Polin, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 28th day of October, 2008. Undersigned counsel further certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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