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IN THE SUPREME COURT OF FLORIDA

BRANDON HOLLOWAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC13-1356  
4th DCA Case No. 4D09-4264

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RESPONDENT'S BRIEF ON JURISDICTION

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## **STATEMENT OF THE CASE AND FACTS**

Petitioner seeks review of the decision issued by the Fourth District Court of Appeal on May 1, 2013. The decision states the following:

In this consolidated appeal, Brandon Holloway appeals his judgment and sentence for first degree murder and violation of probation. (At the time of his trial, Holloway was on probation for an unrelated offense. Accordingly, the court found that by committing murder, Holloway violated his probation.) We affirm.

Holloway argues that the trial court erred by: (1) denying his motion for judgment of acquittal on the murder charge; (2) admitting a witness's statement as past recollection recorded; (3) admitting a box of ammunition found in Holloway's home; (4) admitting Holloway's statement to police without redacting statements made by the interrogating officer; and (5) taking judicial notice of the fact that Holloway was on probation. Concluding that none of these claims have merit, we write only to address the admission of the box of ammunition.

"The standard of review for admissibility of evidence is abuse of discretion, limited by the rules of evidence." Tengbergen v. State, 9 So. 3d 729, 736 (Fla. 4th DCA 2009). Appellant argues that the court erred when it allowed the State to introduce evidence that a half box of .32 caliber bullets was found in Holloway's home because the evidence was irrelevant and prejudicial.

"Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401 Fla. Stat. (2009). Generally

speaking, evidence that a defendant was in possession of a gun or ammunition is admissible so long as it is sufficiently tied to the crime charged. For example, in Herman v. State, 396 So. 2d 222, 229 (Fla. 4th DCA 1981), we considered the trial court's decision to admit evidence that the defendant in a murder case—where the victim was killed with a shotgun—owned a shotgun. The defendant's shotgun was the same caliber as the shell casings found at the scene of the murder, but a ballistics expert testified that he could not say one way or the other whether the shotgun was the murder weapon. Id. We held that the evidence was relevant and admissible, reasoning:

The matching caliber was a circumstance of some probative value. The expert's testimony that he could not say one way or the other whether the shotgun admitted was the murder weapon, was not conclusive or binding on the jury which was free to determine credibility and weight to be ascribed. Under those circumstances, the jury would be entitled to consider the shotgun and give whatever weight was due in light of the expert's testimony.

Id. (internal citations omitted). See also Delhall v. State, 95 So. 3d 134, 155 (Fla. 2012) (holding that the trial court did not err admitting evidence of a 9mm cartridge found in a backpack owned by a murder defendant where the victim was shot with 9mm bullets, although not made by the same manufacturer as the cartridge found in the backpack).

Conversely, when the nexus between the weapon or ammunition and the crime is too

tenuous, such evidence is generally not relevant. In Cooper v. State, the Third District held that evidence of ammunition found on a murder defendant nine months after the murder which could not be definitively matched to the ammunition used in the murder was too tenuous to the crime to be admissible. 778 So.2d 542, 544 (Fla. 3d DCA 2001). See also Sosa v. State, 639 So. 2d 173, 174 (Fla. 3d DCA 1994) (holding that court erred in allowing .380 caliber cartridges found in murder defendant's vehicle into evidence when there was no evidence connecting them to the crime, especially in light of the fact that the investigating officer testified the bullet holes he discovered were consistent with .22 caliber ammunition).

Here, there was an adequate nexus between the ammunition found in Holloway's home and the crime to establish relevancy. The bullets found were the same caliber and material as those used to kill the victim. This in itself is probative. Herman, 396 So. 2d at 229. Further, the bullets were for a revolver or pistol, and the evidence established that the murder weapon was most likely a revolver. Finally, unlike Cooper, where the evidence was not discovered until nine months after the murder, here the bullets were found on the day of the murder. 778 So. 2d at 544. These facts created a sufficient nexus to the crime to establish relevance.

Holloway relies on the fact that the ballistics expert could not definitively state that the bullets found in the victim came from the case of bullets found in his home. However, as we held in Herman, this went to the weight of the evidence, not its relevancy. 396 So. 2d at 229. Accordingly, the trial court properly admitted evidence of the ammunition found in Holloway's home.

Holloway v. State, 114 So. 3d 296 (Fla. 4th DCA 2013) (footnote included in parenthesis).

### **SUMMARY OF THE ARGUMENT**

The decision from the Fourth District Court of Appeal does not conflict with the three cases cited by Petitioner. All the cases support the proposition that a nexus between the ammunition and the crime is necessary to establish relevancy.

### **ARGUMENT**

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL NOT DOES NOT CONFLICT WITH MOORE V. STATE, 1 SO. 3D 1177 (FLA. 5TH DCA 2009), COOPER V. STATE, 778 SO. 2D 542 (FLA. 3D DCA 2001), OR SOSA V. STATE, 639 SO. 2D 173 (FLA. 3D DCA 1994).

The decision of the Fourth District Court of Appeal recognized that a sufficient "nexus between the weapon or ammunition and the crime" is necessary to establish relevancy. See Holloway, 114 So. 3d at 297. The three cases cited by Petitioner apply the same rule.

In Moore v. State, 1 So. 3d 1177, 1179 (Fla. 5th DCA 2009), Moore claimed in a motion for postconviction relief that her attorney was ineffective for failing to object to a firearm taken from her home and photographs of other firearms stored in her home. Although Moore was tried for first degree murder with a firearm, none of the firearms at issue "could have fired the

caliber of projectile recovered from the victim." Id. In reversing the summary denial of Moore's claim, the Fifth District Court of Appeal reasoned that "if there was no evidence linking any of these firearms to the charged crime, evidence of the firearms would be irrelevant, and should have been excluded upon proper objection." Id. at 1178-79.

In Cooper v. State, 778 So. 2d 542, 543 (Fla. 3d DCA 2001), the trial court admitted ammunition found in Cooper's possession nine months after the homicide was committed. The seized bullets "were contained within a firearm which was proven not to be the murder weapon." Id. at 544. In finding that the trial court erroneously admitted the ammunition, the Third District Court of Appeal explained that "the nexus between the crime charged and the ammunition taken from defendant was too attenuated to make the ammunition relevant." Id.

The decision of the Third District Court of Appeal in Sosa v. State, 639 So. 2d 173 (Fla. 3d DCA 1994) involved an attempted murder charge that was based on a shooting. Although the decision primarily addressed the denial of a severance, the decision briefly discussed the admissibility of ammunition:

Also, we agree with the defendant that the trial court erred in allowing the .380 cartridges found in the defendant's vehicle into evidence. No weapon was found, no ballistics tests performed, and no link



whatsoever established between these rounds and the case at bar. See Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987). The testifying officer conceded that the rounds retrieved from the victim's car were more consistent with a .22 caliber than with a .380 caliber, and conceded to defense counsel's observation that: "the bullets [from defendant's car] could not have been fired in the gun that was fired at Mr. Bollinger." Thus, as to the rounds, with nothing to connect them to the crime for which Sosa was charged, the rounds are not relevant to the case. Id. at 589. § 90.401, Fla. Stat. (1993).

Sosa, 639 So. 2d at 174.

Thus, all three cases cited by Petitioner all support the reasoning of the Fourth District Court of Appeal that a nexus between the ammunition and crime is necessary to establish relevancy. Since there was an adequate nexus between the bullets and the crime in Holloway, the trial court properly admitted the bullets.

In his summary of the argument, Petitioner makes the absurd assertion that Cooper and Sosa reach opposite conclusions "on similar facts." Unlike the ammunition recovered nine months after the crime in Cooper, the ammunition in the instant case was "found on the day of the murder." See Holloway, 114 So. 3d at 297. Unlike the bullets that could not have been fired at the victim in Sosa, the bullets in the instant case "were the same caliber and material as those used to kill the victim."

See Holloway, 114 So. 3d at 297. The facts of the instant case are materially different than facts of Cooper, Sosa, and Moore. There is no conflict.

**CONCLUSION**

Since there is no conflict, this Court should deny the petition.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served by email on John Conway, Assistant Public Defender, Counsel for Petitioner, at 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 at JConway@pd15.state.fl.us, JHarrington@pd15.state.fl.us, and appeals@pd15.state.fl.us on August 7, 2013.

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/s/ MARK J. HAMEL  
Counsel for Respondent

**CERTIFICATE OF TYPEFACE COMPLIANCE**

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

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/s/ MARK J. HAMEL  
Counsel for Respondent