

IN THE SUPREME COURT OF FLORIDA

ROBERT ARGUELLES,)
)
 Petitioner,)
)
 vs.) CASE NO. SC01-1569
) 4TH DCA NO. 4D00-1602
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S REPLY BRIEF ON THE MERITS

On review from the Circuit Court
of the Seventeenth Judicial Circuit,
In and For Broward County, Florida
[Criminal Division].

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ARGUMENT

Point 1.

**ADMISSION OF HEARSAY STATEMENTS OF THE CODEFENDANT PURSUANT TO
THE COCONSPIRATOR EXCEPTION TO THE HEARSAY RULE WAS ERROR AND
WITHOUT THOSE STATEMENTS REVERSAL OR DISCHARGE IS REQUIRED**

The state first argues that the three statements characterized as "verbal acts" by the Fourth District were admissible as such to support admission of the other coconspirator hearsay. If the Fourth District's description of the first two verbal acts are limited in the manner the state interprets them, then the state is correct, and the first two statements are verbal acts.¹ However, under no interpretation could the third statement be a verbal act, and it is upon this statement that the Fourth District heavily relied to find sufficient independent evidence to support admission of the coconspirator hearsay.

For verbal act (1), described by the Fourth District as "the initial set up of the drug deal at the first meeting with Gomez," one portion of this conversation can truly be characterized as a verbal act, and that is when, at the first meet, Gajate and Gomez "talked about the quantity, price, and

¹ See *RAB15*: "In the first statement, Gajate merely arranges the transaction with Gomez. In the second statement, Gajate merely says that he has the money. Neither statement even mentions Petitioner."

location of the deal." *Arguelles v. State*, 791 So. 2d 500, 501 (Fla. 4th DCA 2001). Verbal act(2) is described by the Fourth District as the informant relating that Gajate said "he had the money at the second meeting." This single statement, standing on its own, would also be admissible as a verbal act.

These two statements, read in the limited fashion adopted by the state, merely explain the transaction, and meet the definition of a verbal act:

"Verbal act" evidence has been defined as:

A verbal act is an utterance of an operative fact that gives rise to legal consequences. Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it.

Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 801.11[3] (Joseph McLaughlin, ed. Matthew Bender 2d ed.2000); see also Charles W. Ehrhardt, *Florida Evidence* § 801.6 (2000 ed.). For utterances to be admissible as verbal acts, (1) the conduct to be characterized by the words must be independently material to the issue; (2) the conduct must be equivocal; (3) the words must aid in giving legal significance to the conduct; and (4) the words must accompany the conduct. See 6 Wigmore, *Evidence* § 1772 (Chadbourn rev. ed.1976).

Banks v. State, 790 So. 2d 1094, 1097-98 (Fla.2001).

Most significantly, the limited statements identified as verbal acts one and two are equivocal, merely aid in giving legal significance to the acts, and do not implicate the

petitioner. The reverse is true for verbal act (3), which expressly implicates petitioner, and cannot be admitted as independent evidence of conspiracy to support admission of the remaining statements.

There is no reasonable interpretation of the statement identified as verbal act (3) that would make it admissible as a verbal act. As related by the Fourth District, that statement by the informant was: "(3) that he [Gajate] needed to show the cocaine to Green and appellant before the transaction was completed because they had the last word." *Arguelles*, 791 So. 2d at 503-04. This statement is not "admitted merely to show that it was actually made, not to prove the truth of what was asserted in it." *Banks*, 790 So. 2d at 1098, quoting *Weinstein*, *supra*. Neither is it "equivocal," or merely "aid in the giving of legal significance to the acts." *Banks*, *supra*, quoting *Wigmore*²; rather, it is directed to petitioner's participation

² According to Wigmore, an equivocal statement means "[t]he utterance serves merely to assist in completing and giving legal significance to the conduct. Hence it is not needed when the conduct is already complete and definite in itself. The conduct must be equivocal or incomplete as a legal act before the utterances can be admissible[.]" 6 Wigmore, *Evidence* Sec. 1774 (Chadbourne rev. ed. 1976). Wigmore teaches that for a statement to meet the criteria of aiding in giving legal significance to the conduct, "The utterances must be such as serve the assumed purpose, namely, give more definite significance to the equivocal or indefinite conduct, by adding a missing part. *They must be such as do merely this, and not*

in the conspiracy, as the Fourth District expressly found and expressly used it for: "Gajate's statement that appellant and Green needed to approve of the deal before it was complete, a verbal act, provided competent evidence from which the trial court could have concluded that appellant participated in the conspiracy." *Arguelles*, 791 So. 2d at 504. This is precisely what is precluded by *Banks* and the verbal act theory of admissibility: "[t]hese statements by Goodman to Roaden did not serve to explain the nature of the act or transaction, but rather directly implicated Banks in the transaction." *Banks*, 790 So. 2d at 1098.

The state proffers other possible uses of the statement, arguing, directly contrary to the finding of the Fourth District, that purported verbal act statement (3) "was properly admitted as a verbal act because it served to prove the nature of the subsequent act by Gajate, directing Gomez to go back to the waiting car with him so that his 'buddy' and codefendant could approve of the transaction."³ The state thus urges "[t]his

more." 6 Wigmore, *Evidence* Sec. 1775 (Chadbourne rev. ed. 1976) (Emphasis supplied).

³ The state has apparently confused Gajate (the alleged coparticipant) with Gomez (the informant). According to the informant Gomez's testimony at trial: "He [Gajate] said to me to go with him over to where his friends were," so they could approve, just before the agents arrested him. T340.

statement was not offered for its truth, i.e., whether Petitioner and Codefendant Green needed to approve of the cocaine, but to explain the conduct of Petitioner and Codefendant Green of driving around the parking lot passing empty spaces for seven minutes while they waited for Gajate's return, and Gajate's direction to Gomez to leave the money and accompany him back to the restaurant."⁴ AB16, 17 (emphasis supplied). The state also seeks to distinguish *Banks* by this reasoning. AB17-18.

But there is no need to "explain" why the two were headed back to the car and why petitioner and Green drove around the parking lot, except to consider it for its (incriminating) truth that petitioner was a participant in the conspiracy. And interpretation of the statement in the tortured way suggested by the state still does not bring it within the criteria defining a verbal act: it is not "equivocal," and does not merely "aid in giving legal significance to the conduct;" it is not, in short, simply "an utterance of an operative fact that gives rise to legal consequences." *Banks*, 790 So. 2d at 1097. The state's logic shows the third statement is not limited transactional

⁴ Yet later in its argument, the state inconsistently admits "[t]hey were verbal acts offered to prove the conspiracy and Petitioner's participation in it." RAB18.

talk at all, and to have any materiality can only be used for its truth to incriminate the petitioner in one way or the other. Certainly, the Fourth District read it that way when it concluded the statement "provided competent evidence from which the trial court could have concluded that appellant participated in the conspiracy." *Arguelles*, 791 So. 2d at 504.

The state also cites *Stevens v. State*, 642 So. 2d 828, 829 (Fla. 2d DCA 1994), and tries to analogize that case to this one. But *Stevens* is a classic verbal act, where the person speaks directly to making a transaction between himself and another. In *Stevens*, the verbal act is a third person saying to the informant: "I need a dime." *Stevens* would be analogous to this case if it upheld the third person's statement "my buddy needs a dime," and the buddy was the defendant, but it doesn't. In *Decile v. State*, 516 So. 2d 1139, 1140 (Fla. 4th DCA 1987), also cited by the state, the appellant himself was overheard saying "I need eight." *Decile* is distinguishable because the overheard conversations were between the informant and the defendant, not, as here, between the informant and the codefendant, and the conversation here is used to directly implicate someone other than the person making the statement. The state also relies on *McPhadder v. State*, 452 So. 2d 1017 (Fla. 1st DCA 1984), *quashed*, 475 So. 2d 1215 (Fla. 1985), but it

is of doubtful precedent since it was quashed on jurisdictional grounds. Even if it has continued precedential value, *McPhadder* contains no facts to know whether it applies here or not.

The state alternatively argues it introduced sufficient independent evidence of the conspiracy and petitioner's participation apart from the verbal acts. *RAB* 20-23. The Fourth District apparently did not agree, having directly relied on verbal act (3) as "competent evidence from which the trial court could have concluded that appellant participated in the conspiracy" *Arguelles*, 791 So. 2d at 504, and petitioner has otherwise addressed this argument in his Initial Brief. *PIB* 18-24.

The state also argues Gajate's statements are admissible under the coconspirator exception to the hearsay rule, a position that would erase this court's plain requirement that the state cannot use the codefendant's hearsay as independent evidence of the conspiracy. *Brooks v. State*, 787 So. 2d 765, 778 (Fla. 2001) ("The State must prove the existence of the conspiracy and each member's participation in it by a preponderance of the evidence *independent* of the hearsay statements sought to be admitted")(emphasis in original); *Foster v. State*, 679 So. 2d 747, 753 (Fla. 1996); *Romani v. State*, 542 So. 2d 984, 985 n. 3 & 986 (Fla. 1989).

Obviously, if the state adequately showed a conspiracy and petitioner's participation based on other, independent nonhearsay evidence, Gajate's statements implicating petitioner would be admissible as coconspirator hearsay. However, the state failed to introduce sufficient evidence of such a conspiracy, so none of the coconspirator hearsay was admissible.

Petitioner has addressed the harmfulness of the error in the initial brief on the merits. *PIB* 25-26.

Point 2.

**THE EVIDENCE OF CONSPIRACY TO
TRAFFIC IN COCAINE IS INSUFFICIENT**

Petitioner relies on his Initial Brief on the merits.

Point 3.

**THERE IS INSUFFICIENT EVIDENCE
TO PROVE TRAFFICKING IN COCAINE**

Petitioner relies on his Initial Brief on the merits.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, petitioner respectfully requests this Court reverse the convictions and sentences on both counts or order discharge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Heidi L. Bettendorf, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401, by courier this 28th day of March, 2002.

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CERTIFICATE OF FONT

Counsel for Petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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