

STATE OF LOUISIANA

*

NO. 2000-K-2516

VERSUS

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COURT OF APPEAL

GEORGE LEE

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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PLOTKIN, J., DISSENTS IN PART AND CONCURS IN PART WITH REASONS:

I dissent from the majority on the conviction of “tampering” and the sentencing of Lionel Burns. The direct and circumstantial record evidence of the November 17, 2000 hearing is insufficient to convict relator of either tampering or planting evidence. The evidence demonstrates a reasonable hypothesis of innocence since no one testified that Burns planted the napkins in defendant George Lee’s pants or that he tampered with the evidence. More significantly, the prosecutor failed to prove the chain of exclusive custody of the pants from the time of seizure to the discovery of the napkins in question. Thus, if the conviction for tampering is reversed, the sentence of six months incarceration for a discovery violation is excessive.

I concur on all other issues.

Undue Scope of Review

The majority employs an invalid all-inclusive and expansive view of the record. This Court in State v. Lee, 2000-2357, unpub. (La. App. 4 Cir. 10/31/00) vacated and remanded the October 25, 2000 contempt hearing because the trial court failed to comply with the proper rules of criminal procedure. The trial court conducted a second contempt hearing on November 17, 2000. Thus, the majority record review is limited to the evidence generated at the second hearing. Nevertheless, the majority relies upon and accredits the trial court credibility judgments based upon his observations while presiding over various motions and three trials that occurred prior to November 17, 2000.

The majority states “[a]lthough we are not relying on the testimony elicited at the time of the first contempt hearing, in which the contemnor testified, we are convinced that the trial judge remembered well the demeanor and the testimony he heard at that time and all the interactions with the prosecution during this tortured path to judgment.”

Further complicating the credibility determinations is the undeniable fact that the trial court’s October 25, 2000 per curiam on contempt, is the cornerstone and premise for its November 17, 2000 per curiam. The

extrapolation of credibility from prior proceedings in this case on this issue, is specious, conjectural and problematical. The majority errs by accepting other evidence to be considered on the critical issue of credibility and thus on their conclusion of guilt. Therefore, only the evidence in the November 17, 2000 hearing should form the basis for a judgment on the matter, which is insufficient to support a conviction.

Chain of Custody of Lee's Pants

On August 24, 1999, Sergeant Ronald Ray and Sergeant Howard Gay seized Lee's uniforms. Neither could be certain that they directly searched his pants pockets. The uniforms were placed in a bag and turned over to the New Orleans Police Department evidence clerk Theresa Thompson, who received, tagged and bagged the trousers. Thompson testified that she was uncertain and had no independent memory of whether she searched the pants pockets.

On April 3, 2000, the seized evidence was opened in court, during the first trial. After a mistrial on that date, there is no testimony about who had custody, possession, access to or knew the location of Lee's uniform pants. It is not until October 18, 2000, the evening before trial, when Zaren James, a law clerk in the District Attorney's office, Anthony Novello, an ADA,

Keva Landrum, an ADA, and relator Lionel Burns, an ADA, while arranging the evidence in the court room for trial the next day, discovered the napkins in Lee's pants. The evidence was eventually placed back into a bag, and the bag into a box. Again, there is nothing in the record that disclosed or established the chain of custody until October 19, 2000, when Sergeant Ray on redirect examination removed the napkins from the rear pocket of Lee's pants.

The purpose of the chain of custody rule is to connect the tangible evidence to the accused. It preserves the integrity of the evidence. Mendoza v. Mashburn, 99-499 (La. App. 5 Cir. 11/10/99) 747 So. 2d 1159, 1172, writ denied, 2000-0037 (La. 2/18/00), 754 So. 2d 976.

In this case, there is a significant gap in the chain of custody. There is no evidence or foundation for admissibility as to the "tampered" napkins, because from April 3, 2000 to October 19, 2000, a seven month period, no one explained or accounted for the care, custody or control of the pants. As long as public or private access to the pants existed, it can be said that anyone planted or tampered with the evidence. Further, this is not the type of case where the seized evidence is specifically identified or recognizable and is subsequently introduced because of its visual identification, such as a gun or knife. The napkin, although possibly relevant herein, is not so unique

an object that the majority can conclude that it was inside the pocket of George Lee's pants when they were originally seized. The burden of proof of tampering is on the prosecutor to show beyond a reasonable doubt, based on direct and circumstantial evidence, that the defendant intentionally planted or tampered with the tangible object.

Mere speculation as to why the napkins were not produced in prior trials does not prove that this defendant tampered with or planted the evidence. No one testified that Lee's pockets were searched before the issue arose at trial. Thus, a reasonable hypothesis of innocence, which the prosecution must overcome, is that the napkins always existed in Lee's pants, but remained undiscovered or that any third person, such as clerks, other DA's or police officers, had access to the pants and tampered with them. The record evidence herein is that the mover failed to exclude the reasonable probability that anyone could have tampered with the pants during the unaccounted seven month period.

Insufficiency of the Evidence

The testimony presented at the November 17, 2000 hearing was insufficient to support a finding that Mr. Burns was in constructive contempt of court for tampering with evidence. There was no showing beyond a

reasonable doubt that Mr. Burns planted the napkins in the uniform pants of George Lee. The State's evidence against George Lee was handled by many people over the course of three trials. Assuming that the napkins were not in the pants pocket when they were discovered at Lee's home, anyone subsequently coming into contact with the pants could have placed the napkins into the pocket. Only by speculation could this court conclude that Mr. Burns placed the napkins inside the pocket, as alleged.

The fact that Lionel Burns discovered the napkins does not prove that he placed them in Lee's uniform pants. The majority concludes beyond a reasonable doubt, based on credibility determinations and circumstantial evidence, that Burns tampered with or planted the napkins. Mere discovery of napkins under these circumstances does not prove that Burns placed them there, because anyone with access to the pants could have put the napkins into the pocket. The circumstantial evidence fails to prove beyond a reasonable doubt that it was Burns who planted the napkins.

I would vacate and reverse the judgment of the trial court, finding Lionel Burns in constructive contempt of court for tampering with evidence.

Excessive Sentence

Here, the State intentionally withheld evidence from the defense, thus

the prosecution bears sole responsibility for the mistrial. However, Mr. Burns, according to the record, does not have a history of prior contemptuous behavior or procedural misconduct. In these circumstances, the sentence of six months imprisonment is excessive for the violation of discovery rules committed by Lionel Burns. Nevertheless, the actions of Mr. Burns are serious and should not go unpunished.

Accordingly, I would vacate and reverse the six month sentence imposed by the trial court and impose the maximum fine of \$500.

The majority remands to the trial court for resentencing. This action violates the doctrine of certainty and finality. Additionally, the trial court has already twice sentenced relator in response to this charge. The trial court provided adequate reasons for the sentence imposed. No useful purpose would be served to remand a sentence for an affirmed conviction.