93-097C

OCT 28 1993

REPLY BRIEF
FOR APPELLANT

IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

APPEAL NO. A93A2140

ROBERT E. THOMPSON,	:
	:
Appellant	:
	:
v.	:
	:
THE STATE	:
	:
Appellee	:

ON APPEAL FROM THE SUPERIOR COURT OF BIBB COUNTY

REPLY BRIEF OF APPELLANT

F. ROBERT RALEY
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ATTORNEY FOR APPELLANT

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REPLY BRIEF OF APPELLANT

In reply to the State's brief, appellant shows that said brief, as did the presentation of evidence on the trial of the case, combines and confuses every Count of the indictment, as though each Count applied to each appellant, when in fact this was not the case.

We submit that the brief of the State is further evidence of the confusion that was placed on the jury in the trial of this case. It is therefore impossible to respond to appellee's brief in a short reply brief, but we submit that the record will indicate that the trial of the case was just as confusing as is the appellee's brief herein.

In its brief, the State merely brushes aside the arguments made by appellant, citing virtually no law in support of its position, but merely submits that no error, if there was any error, made any particular difference. We submit that this is not correct.

First of all, there were no findings as to the predicate acts, as we understand the law to require. In the case of Purvis v. State, 208 Ga. App. 653 (1993), as stated in the first paragraph of the decision, the jury expressly found Purvis guilty of three (3) of the alleged "predicate" acts. In that case, even though the jury found him specifically guilty of these predicate acts, the Court reversed that decision, because there was no evidence sufficient to support two (2) of those predicate acts. In any event, a specific finding of the alleged predicate acts was made by the jury in that case.

In the instant case, no specific findings as to predicate acts was made by the jury. We therefore submit that the RICO conviction cannot stand. We further submit that the jury was so confused by the evidence in this case, as well as by the charge of the Court, that it made a finding of guilty on the Racketeering Act, without finding guilt on any two (2) predicate acts as such, but made findings on numerous substantive acts, some of which did duplicate predicate acts, but were not necessarily the same numbers.

As to appellant Chancellor, we submit that almost all of the predicate and substantive acts in the indictment occurred after he had terminated his short stay with this organization, of which he was never a major actor, although the State contends that an unsigned document which they found

in appellant Thompson's briefcase indicated that he was either the secretary or treasurer of the organization. The evidence showed that he had no authority to sign a check; no authority to pay a bill; no authority to enter in any way into the operation of the business; but merely received a commission for sales which he made, which totalled approximately One Thousand Two Hundred to One Thousand and Five Hundred Dollars ($1,200.00 - $1,500.00) in all.

The State argues that the appellant was entitled to a general verdict only. However, the RICO statute requires more than a general verdict. It requires a specific finding of at least two (2) predicate acts. We submit that this was not done, as to either appellant Thompson or appellant Chancellor, and that the verdict should not stand.

The State argues that there was theft by deception in some instances because the lien holder had not consented to a transfer. We submit that there was no law cited, nor is there any law that we are aware of, in the State of Georgia, that requires the lien holder to consent to a transfer on an automobile. Certainly, there was no evidence of such, and no law to support such.

In its brief, the State argues against both appellant Chancellor's and appellant Thompson's briefs, the State makes the snide remark that anyone who believes that Chancellor or Thompson were mere salesmen, might be

was brought to the State's attention that the testimony was perjured and that the evidence was altered. This evidence was offered by the State early on in the trial, and the State put the same witness on the stand at a later time, after having learned that the document offered on behalf of Lance Russett had been altered throughout, the defense attorney having given the State a copy of a faxed original of this document, which was dated some three (3) or four (4) weeks subsequent to the date of the sale, and the State merely determined that it would do nothing to correct this problem. The testimony of Lance Russett was the most damaging testimony in the entire trial. From the moment he testified, the jury was obviously willing to believe anything that the State said against these two (2) appellants. We have covered this in our brief, and the record certainly is replete with evidence concerning same. The State contends that it did not know of the alleged alteration "at the time" Russett was called. Perhaps it did not, but it did at the time that he was recalled. Yet, the State made no effort whatever to correct this perjured testimony. It was not the appellant's place to have to correct the State's error. The State wants to put the burden on the appellant to prove his innocence. This is not his obligation, nor should it be.

interested in one of the nice "repossessed" cars they have for sale. First of all, they were not selling repossessed cars. They were selling cars that had not been repossessed. Then the State cites the case of McNeal v. State, 159 Ga. App. 441 (2), in which a defendant was convicted of selling two (2) cars without disclosing prior existing liens. We submit that the prior existing liens on these vehicles were not disclosed to the purchasers, whereas in this case, the liens were not only disclosed to the purchasers, but the documentary evidence offered by the State itself shows that a "month to month assumption" agreement was signed by each party, in which the amount owing was shown; the amount of monthly payment was shown; the number of months to be paid was shown; and the total amount of the purchase was shown. It is further stated under "property ownership" as follows: "It is understood and agreed by all parties to this agreement and assumption, that on the last date of the last payment made and the balance owing has been discharged, the title and ownership of the property herein described shall be rendered to be free and clear of any and all liens and registered solely to me." Therefore, McNeal v. State in no way applies to the fact situation in the instant case.

Perhaps the most alarming argument made by the State pertains to prosecutorial misconduct, or the failure of the State to cure perjured testimony and evidence, when it

Nor was the document given to the State by the defense prior to the second testimony of Russett, inadmissible. If any document was offered which should have been inadmissible, it would have been the document which Russett presented. The correct document given to the State would have not necessarily been inadmissible under any evidentiary requirement, but certainly, the State had an obligation to bring Russett back to the stand and question him concerning this, once it was brought to the State's attention.

Nor did the Court cure the problem by dismissing the Russett predicate acts and removing them from consideration of the jury. For all we know, even after that occurred, the jury may already have made a finding on those predicate acts. We do not know, because the jury did not specify a finding on any predicate act. But we do know that the testimony of Russett was not believable because the Judge himself said he did not believe it. Yet he let it go; the State let it go; and it was not removed from the jury until after all the other evidence had been offered, and the jury had gone out with the case after having been charged by the Court. Nor was this evidence in the exclusive possession of the appellant. This evidence, being a part of the evidence which was subject to the search warrant executed by the State, was or should have been in the possession of the State

the entire time. The reason that the appellant became so alarmed when these documents were offered and the testimony of Russett was offered, was because the original was not offered into evidence by the State. A copy was offered into evidence. Although the State had previously sent one (1) witness all the way back to Jacksonville, Florida to obtain his original copy, rather than to introduce a copy of a document which he possessed, and which was not even in question. The error was not cured by the Court's removing it from the jury's consideration, after the jury was out with the case. It is possible that it could not have been cured under any circumstances, unless the State had carried its obligation, both legally and morally, and brought Russett back and questioned him concerning the document and his testimony. The State did not choose to do that, and we submit that it had an obligation to do so, and that the verdict should be reversed based upon this fact alone. Nothing that the defense could have offered from that point forward would have made any difference.

The third point deals with the Court's charge which was enumerated by the appellant, dealt with the Court giving the "exception" and that exception being that as to Count I and the way it was read to the jury. This may explain why the jury made a finding on that against both appellants, when the evidence was not at all clear concerning that Count, and

it is conceivable that the jury could have found the appellants guilty of the substantive acts, and not guilty of the RICO Count. But by telling the jury that they could find one (1) defendant guilty of one (1) substantive Count and not another, and find the other defendant guilty of that substantive Count but not another, and then stating that there was an exception to that, was clearly misleading to the jury, as to Count I. There was nothing incorrect about the first part of the charge, but to add the "exception" pertaining to Count I, indicated to the jury that there was an exception to being able to find a defendant guilty of one (1) Count and not another, and that that exception pertained only to Count I.

We would also submit to the Court that there were findings of guilt on the substantive Counts in cases where there was no evidence that anyone suffered any loss; that anyone did not get what they bargained for and understood what they were getting; and that there was simply no crime committed or proven by the State. These were also predicate Counts, and it is impossible to determine what predicate Counts the jury had in mind, if any, in finding the appellants guilty of the RICO Count.

CONCLUSION

We respectfully submit to the Court that this case was tried in such a manner, evidence offered in such a manner, and the charge of the Court so confusing in places, that no jury could probably have made an intelligent determination as to guilt or innocence under the RICO Count. The State would have to show a conspiracy or an enterprise of which both appellants, Thompson and Chancellor, were a part. We submit that this case should be reversed and re-tried with the evidence properly offered to the jury as to predicate Counts only, and not predicate and substantive Counts to be included as a RICO prosecution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

GEORGIA, BIBB COUNTY.

This is to certify that I have this date served a true and correct copy of the within and foregoing, **REPLY BRIEF OF APPELLANT,** upon opposing counsel by depositing same in the United States mail with adequate postage affixed thereto to insure delivery, addressed as follows:

Mr. Willis Sparks and
Mrs. Kim Shumate
District Attorney's Office
Macon Judicial Circuit
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Macon, Georgia 31201

This 27TH day of October, 1993.

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