IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 95-CF-885

Reginald V. Upshur,

Appellant,

V.

United States,

Appellee.

On Appeal from
The Superior Court of the District of Columbia
Criminal Division — Serious Misdemeanors Branch
No. F 106-95

Reply Brief of Appellant

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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

REGINALD V. UPSHUR, **APPELLANT,** VS. **UNITED STATES,** **APPELLEE.**	No. 95-CF-885 (F 106-95)

REPLY BRIEF OF APPELLANT

ARGUMENT

In responding to Appellant's argument that the evidence against him should be suppressed, the Government relies heavily on testimony the Trial Court did not credit, and on an argument it did not advance in opposition to the motion to suppress. The Government's brief attempts to amend the testimony of its only witness, and asks this Court to conclude, in the absence of any evidence, that the officers were justified in using physical force to search Mr. Upshur.

The Government then attempts to recast Appellant's Sixth Amendment argument that he was denied a fair trial by an impartial adjudicator as a claim of judicial bias or prejudice, which rarely can result directly from proceedings like these. But its argument fails to take account of the central role the trial judge plays as finder of fact in a nonjury criminal trial, and the failure of the Trial Judge in Mr. Upshur's case to withhold judgment until he had heard all the evidence.

THE GOVERNMENT'S DEFENSE OF THE SEARCH DEPENDS ON FACTS NOT FOUND BY THE TRIAL COURT

In its Statement of Facts the Government notes that early in his suppression hearing testimony, on direct examination, Ofc. Jed D. Worrell stated that he saw Mr. Upshur give " 'the driver of the vehicle some money' and appeared to 'receive[] some objects in exchange.' " *Government's Brief*, at 3 (citations omitted). It repeats this assertion at page 15 of its brief, adding that "Officer Worrell could observe those actions well because he was at a 'good vantage point.' " *Id.* It then states that "Appellant repeatedly and incorrectly suggests that, at most,

appellant gave the driver of the car some money and received nothing in exchange, and, therefore, engaged only in a one-way transfer of money." *Id.*, at 15 n. 10. *See, also, Id.*, at 17 n.11.

After saying he saw Mr. Upshur "receive[] some objects in exchange," Ofc. Worrell retracted his initial account of the event, saying, "it was my contention, *based on the money changing hands*, him pulling his hand away from the car, . . . that *it could have been a possible* narcotics transaction that took place." Tr. 14 (emphasis added). The officer's almost immediate correction, still on direct examination, is confirmation that he did not see a two-way transaction, and he never again said he saw Mr. Upshur receive anything in return for the money. Ofc. Worrell's statement demonstrates that he was operating on a hunch that the one-way exchange of money he saw was followed by a transfer of drugs from the driver to Mr. Upshur.

Furthermore, if the Government were correct, there would have been no need for the Trial Judge to go through such contortions to find that police had reasonable, articulable suspicion to stop Mr. Upshur. The Judge stated:

> [Did] not Officer Worrell talk to an exchange, a two-way transfer *you might say*, because not only does he say he saw money pass from the defendant to the car driver, but he saw the defendant leave with his fists balled up after that, so that the officer *in a sense presents an inferential case, a circumstantial case of something having been exchanged.*
>
> He said after all, he said, *I didn't know what was going on*, he said, *maybe it was a narcotics sale*, he said, it was my contention, I think he meant my suspicion you see, *because he sees money going in one direction, and he doesn't see what comes in the other direction*, . . .

Tr. 38-39 (emphasis added). Clearly, the Trial Judge did not believe Ofc. Worrell actually saw Mr. Upshur receive any objects. It is equally clear that the Judge found Ofc. Worrell was operating on less than articulable suspicion when he got out of the cruiser to confront Mr. Upshur and, at most, the officer was justified in attempting to initiate a consensual conversation.

The Government is so intent on convincing this Court to credit Ofc. Worrell's initial statement that he saw Mr. Upshur receive some objects — from which the officer quickly retreated and a fact the Trial Court did not find — that it fails to cite a single precedent holding that a one-way transfer of money is sufficient, even in the presence of other factors, to create

reasonable, articulable suspicion. In every case cited in Appellant's main brief on the issue of one-way transfers the Government made an argument that tracks the Trial Court finding in this case — that police witnessed one act (*i.e.*, a person showing or giving an object to another) and "present[ed] an inferential case, a circumstantial case of something having been exchanged" for the object police saw. *See, Duhart v. United States*, 589 A.2d 895 (D.C. 1991); *Haywood v. United States*, 584 A.2d 552 (D.C. 1990); *Howell v. United States*, 434 A.2d 413 (D.C. 1981); *Vicks v. United States*, 310 A.2d 247 (D.C. 1973). But this Court found the Government's position unpersuasive in each of those cases.

THE GOVERNMENT'S DEFENSE OF THE SEARCH DEPENDS ON FACTS NOT IN EVIDENCE FOUND BY THE TRIAL COURT

The Government is equally intent on convincing the Court to disregard Ofc. Worrell's statement on cross examination demonstrating that he and Ofc. Weston were engaged in a custodial search for evidence, rather than making a *Terry* stop, when they grabbed Mr. Upshur. He said, "Officer Weston was trying to move him from one portion of the vehicle down, okay, and as he was pulling him down — actually what I did was I kept my hands on his hands and that's when I actually saw something drop from his hand." Tr. 57. According to the Government, "appellant selectively quotes from Officer Worrell's testimony and thereby mischaracterizes the import of his testimony. Taking Officer Worrell's statement in context, it is plain he meant, 'I kept my [eyes] on his hands,' and not 'I kept my hands on his hands.' " *Government's Brief*, at 11 n. 9.

Appellant's quotation of this testimony is more extensive than, and in all pertinent aspects identical to that of the Government. *See Appellant's Brief*, at 5-6, *Government Brief*, at 10-11. It is the Government, not Appellant, that attempts to change Ofc. Worrell's words and reinterpret his testimony in an effort to mask what the officer really said.[1]

[1] The Government misstated Mr. Upshur's testimony as well, creating the impression that Appellant said the driver who fled opened the car door, dropped the drugs on the ground, and then slammed the car door before speeding away. *Government's Brief*, at 12-13. Mr. Upshur actually testified that "Then as he [Tank] went by, okay, that's when they like slammed — when the officer told me to get out, he kind of like opened his door, he kind of slammed his door, then the officer that was behind me told me he saw some bags on the ground . . . " Tr. 62.

In a further effort to justify police actions as necessary to effectuate a *Terry* stop and frisk, the Government notes that "the trial court found that those actions by the officers were a safety measure. Tr. at 46 ('the officer was trying to secure the situation, trying to get the defendant in a situation that was safe so that he could pursue the matter')." *Government Brief*, at 18. But the Government did not ask a single question aimed at eliciting testimony from Ofc. Worrell that either officer believed Mr. Upshur posed a danger to them. Furthermore, the Prosecutor did not argue in opposition to the suppression motion that the actions of police were motivated by concerns for their safety.

Thus, the Government's entire argument that police had independent, reasonable, articulable suspicion to use physical force and conduct a search of Mr. Upshur should be disregarded, as should the Trial Court's rather nebulous finding that the officers were trying to "secure the situation" and "get the defendant in a situation that was safe." The only potential safety issue presented by this case was the fact that Mr. Upshur and the officers were standing in the middle of the street and two of them had nearly been struck by the car that sped away. That is hardly justification for a frisk, or for the officers' use of physical force to learn what was in his hand.

Even if the Court credits the Government's argument, it must consider that Ofc. Worrell's testimony demonstrates an absence of reasonable, articulable suspicion that Mr. Upshur posed a danger to police. The Government cites *Peay v. United States,* 597 A.2d 1318, 1321 (D.C. 1991)(*en banc*), for the proposition that an officer who encounters a suspect clutching something in his hand is justified in asking what the person is holding "because [the] officer 'might reasonably suspect not only that a criminal violation was taking place but that his own personal safety was at peril.' " *Government's Brief*, at 19. Under the circumstances of *Peay*, a stop inside a known crack house, police concern about their safety might well be reasonable.

It then cites several cases holding that police may use physical force, handcuffs and weapons in making *Terry* stops. For example, in *United States v. Merkley*, 988 F.2d 1062 (10th Cir. 1993) the Court upheld a stop in which, acting on a tip from a woman who said she heard one

of the suspects say, "I can't believe it, I'm going to kill her," police told the suspects at gunpoint to put their hands in the air and then placed the men in handcuffs. *Id.*, at 1063. Similarly, in *Cousart v. United States.*, 618 A.2d 96, 100-1 (D.C. 1992), *cert. denied,* 507 U.S. 1042 (1993) this Court ruled that officers carrying shotguns acted reasonably in ordering three occupants of a car that had just been involved in a chase to place their hands in the air where they could be seen, and then pointing the shotguns at the passengers after one of them lowered his hands out of view. The stop occurred at 3 a.m. in an area where several police officers had been shot in the preceding 30 days. *Id.*, at 98. In *United States v. Packer*, 15 F.3d 654 (7th Cir. 1994), the Court said it might have been reasonable under the circumstances of that case, if there had been reasonable, articulable suspicion for a *Terry* stop, for police to have used "take down" lights and to have ordered occupants of a car with fogged windows to place hands in the air, when approaching the car parked on the street at 1 a.m. Finding that an anonymous, very general tip did not provide grounds for the stop, the Court suppressed the shotgun that had been seized. *Id.*, at 657 n. 2. In an interdiction case, the D.C. Circuit found it reasonable for police to order a suspect to the ground and handcuff him only after the suspect fled on foot and disregarded orders to stop. *United States v. Jones*, 973 F.2d 928, 931 (D.C. Cir. 1992)("suspect is 'free to leave' a non-seizure interview, but when he does so by abruptly bolting after having consented to talk, the officers are free to draw the natural conclusions."). In *United States v. Laing*, 889 F.2d 291 (D.C. Cir. 1989), police went to an apartment with a search warrant obtained on the basis of information that it contained guns and drugs. When they arrived, Laing saw them and bolted toward the apartment door and, fearing he was armed, police physically stopped him, ordered him to the ground and ordered him to remove his hand from his pocket. Finding that, under the circumstances, police had a reasonable concern that he might be armed, the Court refused to suppress crack cocaine found in his sock. *Id.*, at 284-5.

While, in the abstract it is possible to argue that use of physical force to restrain a suspect may be reasonable in the context of some *Terry* stops, and may not convert such stops into arrests, the Government makes no attempt to demonstrate that use of force was necessary or even

reasonable in stopping Mr. Upshur. A finding that such generalized concerns for safety warrant use of physical force by police to restrain a citizen whenever the person is seen giving money to another person after dark, in a neighborhood where drug transactions are known to occur, would render the Fourth Amendment protection against unreasonable searches and seizures meaningless.

But the encounter with Mr. Upshur was on the street, and Ofc. Worrell's testimony was that he watched as Mr. Upshur reached into the car with money in his hand and pulled his hand away balled into a fist with nothing showing. From that time until Ofc. Worrell grabbed Mr. Upshur's arm, the balled fist was the focus of the officers' attention. It is beyond logic to believe that a man buying narcotics, so concerned about his safety that he carried a weapon, would hold the weapon in the hand with which he paid for and received the drugs. It is equally illogical that a seller of narcotics would sit calmly in his car as a man standing by his left shoulder reached in with a weapon.

At most, based on Ofc. Worrell's observation of a one-way exchange of money, Ofc. Worrell and Ofc. Weston would have been justified in asking Mr. Upshur what was in his hand, and he would have been equally justified in refusing to show them and in walking away without answering any questions. Instead, the officers grabbed his arm and forcibly attempted to find out what was in it. Such police actions cannot be sanctioned under the Fourth Amendment.

APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT

The Government's argument that Mr. Upshur was not entitled to a jury trial in this case because the crime of possession of cocaine is a "petty offense" is based entirely on the holding of a panel of this Court in *Foote v. United States*, No. 94-CM-1597, slip op. at 4-5 (Jan. 25, 1996), *petition for reh'g filed* (D.C. Feb. 22, 1996)(citing *Stevenson v. District of Columbia*, 562 A.2d 622, 623 n.1 (D.C. 1989)(*per curiam*)). Appellant challenges the basic premise of the *Foote* decision, that the legislative history of the Omnibus Criminal Justice Reform Amendment Act of 1994, Title I, D.C. Act 10-238, 41 D.C. Reg. 2608 (1994)(the "Misdemeanor Streamlining Act"),

is irrelevant to a determination of whether possession of cocaine is a serious crime for which a jury trial is required or a petty offense triable before a judge.

Because no one panel of this Court is empowered to overrule the decisions in *Foote* and *Stevenson, supra*, and because this issue presents a question of exceptional importance, Appellant, simultaneously with the filing of this Reply Brief, filed a Petition for Hearing *en Banc* pursuant to D.C. App. R. 40(d).

APPELLANT'S FIFTH & SIXTH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL ADJUDICATOR

Relying on the U.S. Supreme Court's decision in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the Government erroneously argues that Appellant's claim that he was denied a fair trial by an impartial adjudicator should be reviewed only for plain error because he did not raise this issue in the trial court. The fundamental flaw in this argument is that *Olano* only interprets Fed. R. Crim. P. 52(b), which "defines a single category of forfeited-but-reversible error." *Olano, supra*, at 1776. The federal rule's local analogue, D.C. Crim. R. 52(b), is identical and similarly is inapplicable to this appeal.

The issue Mr. Upshur raised is a constitutional right of which he cannot be deprived without a knowing, intelligent, voluntary waiver. As the Supreme Court explained, "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " 113 S.Ct. at 1777 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 32 L.Ed. 1461 (1938)). Mr. Upshur's right to an impartial adjudicator is no less a basic constitutional protection than the right to counsel at issue in *Johnson*.

Deprivations of "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair," including denial of an impartial adjudicator, are always prejudicial, and must be corrected whether raised in the trial court or not. *Olano, supra*, 1778 (citing *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302

(1991)). The Supreme Court noted in *Olano* that, under Rule 52(b), an appellate court need only correct an error that has been forfeited if the error "affect[s] substantial rights." *Id.*, at 1777.

Not only would it be inappropriate for this Court to follow the Government's suggestion to apply plain-error analysis, but it would be inappropriate to consider whether the Trial Court's actions were harmless.

> Despite the strong interests that support the harmless-error doctrine, the Court in *Chapman* [*v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] recognized that some constitutional errors require reversal without regard to the evidence in the particular case. . . . Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury.

Rose v. Clark, 478 U.S. 570, 577-8, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (1986)(citations omitted).

The Government's second error is in equating the deprivation of the right to an impartial adjudicator with judicial bias and prejudice arising from extrajudicial influences. The most obvious difference between the two, and perhaps the reason this Court has applied the harmless-error standard to the latter category, is that in judicial bias and prejudice situations the problem should be obvious to the trial judge, if not the parties, before or during the trial, when the judge may be recused. *See, e.g., Scott (Monroe W.) v. United States*, 559 A.2d 745, 755-56 (D.C. 1989)(*en banc*); *In re J.A.*, 601 A.2d 69, 75 n. 5 (D.C. 1991)(ordinary harmless-error analysis inadequate, court should apply heightened harmless error test of *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)).[2] *See, also, Liteky v. United States*, ___ U.S. ___, ___, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994)(judicial bias claims almost invariably "are proper grounds for appeal, not for recusal.").

[2] In addition, cases raising questions about judicial bias and prejudice may raise concerns beyond the constitutional right to a fair trial by an impartial adjudicator. As this Court noted in *Scott, supra*, 559 A.2d at 748-49, Canon 3(C)(1) of the Code of Judicial Conduct requires a judge to disqualify himself in any case in which there is an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question the judge's impartiality. While application of harmless-error analysis may be appropriate in addressing questions of prejudice arising under Canon 3(C) or D.C. Crim. R. 57 (making D.C. Civ. R. 63-I applicable in criminal cases), it is impermissible in cases, like Mr. Upshur's, arising under the Sixth Amendment.

Furthermore, in cases like Mr. Upshur's, questioning the impartiality of the adjudicator, whether it is a juror or the trial judge, the deprivation of rights usually is not obvious until the verdict is rendered, when the only effective cure is a new trial. Having ruled in *Scott, supra* 559 A.2d at 755-6, that "it hardly would be appropriate to place on a criminal defendant the burden to attack a judge's integrity. Rather, the duty to ensure judicial conduct in accordance with the Canons resides, at least in part," with the Court of Appeals. This Court cannot apply plain-error analysis in considering Mr. Upshur's Sixth Amendment claim as punishment for failing to raise the claim in the trial court.

Even if the analogy to judicial bias or prejudice is appropriate, the cases cited by the Government do not support its contention that Mr. Upshur's trial satisfied the requirements of the Sixth Amendment. In *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971 (1982), appellant challenged the trial judge's refusal to recuse himself from the sentencing process, not at trial. The appeal was brought under 28 U.S.C. §§ 144 and 455, and did not include a claim that appellants had been deprived of a fair trial by an impartial adjudicator, in that case a jury.

The primary issue before the Supreme Court in *Liteky, supra*, 114 S.Ct. at 1152, was whether 28 U.S.C. § 455(a) required recusal when the source of bias or prejudice was the judicial proceeding, rather than extrajudicial. Appellants claimed that the trial judge's interaction with defense counsel demonstrated such prejudice that it contaminated the jury verdict. *Id.*, at 1151. The Court concluded that "predispositions developed [by the judge] during the course of a trial will sometimes (albeit rarely) suffice" to call the jury verdict into question. *Id.*, at 1157. It made no attempt to set a standard for when such predispositions developed by a judge sitting as finder of fact will cast doubt on the verdict because the Sixth Amendment, not § 455(a), is applicable in the latter circumstance.

In *Browner v. District of Columbia*, 549 A.2d 1107 (D.C. 1988), appellants had been convicted of loan sharking in a nonjury trial. The basis for the claim of bias was that the trial judge had, shortly before the nonjury trial, presided over a two-week jury trial of appellants

including "all the facts . . . with the same witnesses on basically the same issue." *Id.*, at 1113. There was no allegation that the later conviction was based on information learned in the jury trial and not in evidence in the second trial. Not only was the bias claim lacking in substance, but the Court found that "review even on a plain error standard is unduly generous to appellants" because the defendants' did not file an affidavit of prejudice in the trial court before the second trial in compliance with Civ. R. 63-I. *Id.*

In *In re J.A.*, *supra*, an abuse and neglect proceeding, this Court acknowledged that "a judge has 'not only the right but the duty . . . to participate directly in the trial . . .' This is particularly true where the court sits without a jury and the trial judge functions as the trier of fact." *Id.*, at 76 (citation omitted). But it ordered a new trial before a different judge after finding that the Trial Court's questioning of appellant demonstrated bias, despite a finding that "it is entirely possible that . . .the trial judge could find by a preponderance of the evidence that the children were abused and neglected." *Id.*, at 78. This Court concluded that it "must not lose sight of the fact that the issue is not whether there was sufficient evidence to affirm the trial judge's finding of abuse, far more is at stake," including the risk of injustice to the mother denied custody and the public perception that the trial court decision was tainted by bias. *Id.*

Garrett v. United States, 642 A.2d 1312 (D.C. 1994), the only case cited by the Government involving a nonjury criminal trial, is markedly different from the case at bar. In that case trial counsel moved to withdraw on the day of trial, stating that she would have difficulty representing appellant because he intended to testify in his own defense. Although this Court concluded that counsel indirectly informed the trial judge her client planned to commit perjury, it refused to find that the judge was prejudiced. *Id.*, at 1315. The Court noted that appellant's statements to the trial judge indicated a desire to take the stand out of fear that jurors would hold it against him if he did not, and, in fact, he eventually chose not to testify. *Id.*, at 1316. Finally, the Court found no evidence that the trial judge prejudged appellant's guilt. "Nothing in the tone of the judge's inquiries and remarks to the appellant or his counsel indicates that he relied on any inadmissible evidence or improper argument," the Court stated. *Id.*

As Mr. Upshur's main brief indicates, there is ample evidence that the trial judge relied on information outside the record in ruling on the motion to suppress and in determining guilt. Furthermore, it is clear that the trial judge determined long before Mr. Upshur put on his defense that Ofc. Worrell's testimony was unassailable, despite the admonition that the finder of fact must "keep an open mind and not decide any issue in the case until after [the entire case is] submit[ted]." *Criminal Jury Instructions for the District of Columbia*, Instruction 1.03. (4th Ed. 1993).. *See, also*, Instruction 1.05 (You should reach your conclusion only during the final deliberations after all the evidence is in.). Although these precepts are stated in jury instructions, they are no less applicable to a judge sitting as trier of fact in a criminal case.

CONCLUSION

For the reasons stated above and in Appellant's main brief, and any others that may appear to the Court, Mr. Upshur respectfully requests that his conviction be vacated and that the evidence against him be suppressed as having been obtained in violation of his Fourth Amendment protection against unreasonable searches and seizures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Reginald V. Upshur, certify that on March 11, 1996 I served a true copy of the attached Reply Brief of Appellant by first-class mail on Chun T. Wright, Assistant U.S. Attorney, 555 Fourth Street, N.W., Washington, D.C. 20001.

Robert S. Becker