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FILED
SID J. WHITE
MAY 21 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,369

THE STATE OF FLORIDA,

Petitioner,

vs.

RICHARD WAYNE SHEPHERD,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON THE MERITS

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LIST OF CITATIONS AND AUTHORITIES

INTRODUCTION

Respondent was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. Petitioner was the prosecution in the trial court and the appellee in the District Court. In this brief, the parties will be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner's statements of the case and facts are acceptable to respondent and need no elaboration here.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY REVERSED RESPONDENT'S CONVICTIONS BASED UPON A STATEMENT MADE BY THE PROSECUTION DURING CLOSING ARGUMENT.

The test applied by the Third District was whether the comment "was clearly susceptible of being interpreted by the jury as referring to the defendant's failure to testify". Shepherd v. State, 436 So.2d 232 (Fla. 3d DCA 1983). Petitioner is frank to admit that this test was approved and followed by this Court in David v. State, 369 So.2d 943 (Fla. 1979). However, petitioner then asks this Court to recede from David because it is not in consonance with the test applied by Federal District Courts of Appeal.

There are several flaws in petitioner's position. First of all, it is apodictic that the decisions of this Court interpreting the Constitution of Florida are supreme and take precedence over decisions of the Federal Courts. Miles Laboratories v. Eckerd, 73 So.2d 680 (Fla. 1954).

Secondly, petitioner's argument ignores a vital and fundamental principle of Florida law - the principle of stare decisis. It played an important part in the development of English common law and its importance has not diminished with the passage of time. In the case of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), this Court set forth the principle that:

> "a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida. In the event of a conflict between the decision of a District Court of Appeal and this Court, the decision of this Court shall prevail until overruled by a subsequent decision of this Court".

It is submitted that petitioner has shown this Court no cogent reason why it should recede from the David case, supra, other than the fact that it differs somewhat from decisions of some Federal Appellate Courts.

The petitioner next contends that the comment in question in this cause is not a comment on the silence of the accused even under the test in David. It was, petitioner argues, merely a comment on the uncontradicted evidence. As respondent pointed out in his jurisdictional brief, the phrase "I haven't heard any" (defense) can hardly be construed to be a comment on uncontradicted evidence. To do so would require a Byzantine mind.

The frailty of the respondent's argument is best illustrated by the case of Fernandez v. State, 427 So.2d 265 (Fla. 2d DCA 1983). In that case, the prosecution, in his closing argument, said:

> "This morning when you first came in here Mr. Sharpstein said 'The defense rests'. I would suggest to you during the entire trial the defense has rested. I haven't heard a defense yet."

In reversing Fernandez's conviction, the Second District Court ruled:

> "The prosecutor's comment was clearly a comment on the defendant's failure to testify in the face of criminal accusations made against him." (Emphasis added).

The petitioner finally argues that due to the overwhelming evidence of respondent's guilt, the harmless error doctrine should apply to the prosecutor's comment. Perhaps, petitioner should revisit this Court's pronouncements in David, supra. There, this Court said:

> "A prosecutor's comment on defendant's failure to testify is a serious constitutional violation....
> .....
> Any comment which is 'fairly susceptible' of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error, without resort to the harmless error doctrine."

Petitioner fails to realize that we are not dealing here with simply a procedural error. We are dealing with the respondent's fundamental right to a fair trial. Perhaps petitioner is unaware of the following inspiring words of this Court in State v. Sarmiento, 397 So.2d 643 (Fla. 1981);

> :"..the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution. A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry. The criminal justice system must protect the rights of the innocent as swiftly and as certainly as it punishes the guilty, less it impinge upon the rights of those whom it, with good intentions, seeks to protect."

CONCLUSION

Based on the foregoing argument and authorities cited, the decision of the Third District Court of Appeal should be affirmed, and this cause should be remanded to the trial court for a new and fair trial.

Respectfully subitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida 33128 this 17th day of May, 1984.

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