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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,621

ANTHONY DUMAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

* *

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, ANTHONY DUMAS, was the Appellant in the District Court of Appeal and the Defendant in the trial court. Respondent, THE STATE OF FLORIDA, was the Appellee in the District Court of Appeal, and the prosecution in the trial court. In this brief, the parties will be referred to as the State and Petitioner. The symbol "R" will be used to designate the record on appeal. The symbol "T"

will be used to designate the transcript of the proceedings. All emphasis has been supplied unless otherwise indicated.

POINT INVOLVED ON APPEAL

WHETHER THE FAILURE OF THE RECORD TO AFFIRMATIVELY REFLECT THAT PETITIONER'S WAIVER OF A RIGHT TO TRIAL BY JURY WAS KNOWINGLY AND INTELLIGENTLY MADE IS PER SE REVERSIBLE ERROR WHERE THE RECORD DOES REFLECT A WAIVER SIGNED BY PETITIONER AND WHERE PETITIONER NEITHER AT TRIAL NOR ON DIRECT APPEAL ASSERTED THAT THE WAIVER WAS NOT KNOWINGLY AND INTELLIGENTLY MADE?

ARGUMENT

THE FAILURE OF THE RECORD TO AFFIRMATIVELY REFLECT THAT PETITIONER'S WAIVER OF A RIGHT TO TRIAL BY JURY WAS KNOWINGLY AND INTELLIGENTLY MADE IS NOT PER SE REVERSIBLE ERROR WHERE THE RECORD DOES REFLECT A WAIVER SIGNED BY PETITIONER AND WHERE PETITIONER NEITHER AT TRIAL OR ON DIRECT APPEAL ASSERTED THAT THE WAIVER WAS NOT KNOWINGLY AND INTELLIGENTLY MADE.

The Petitioner, although not explicitly stated, is urging this Court to adopt a per se reversible error rule in cases where a defendant's signed waiver of trial by jury appears in the record without any further evidence that the waiver was executed in open court. He asserts that the failure of the record to reflect a knowing, intelligent and voluntary waiver by Petitioner of his right to trial by jury requires reversal of his conviction. In order for Petitioner to prevail, he urges this Court to adopt either of the following new rules of law: (1) the retroactive application of a new court imposed requirement that the record must affirmatively reflect, through a colloquy between the court and the Defendant, that a defendant's waiver of his right to trial by jury was knowing, intelligent and voluntary; (2) the adoption by this Court of the rule of law announced in

Viggianni v. State, 390 So.2d 147 (Fla. 3d DCA 1980), rev. denied 402 So.2d 613 (Fla. 1981) and receded from in the case sub judice, to-wit: that Defendant's signature accomplished in open court and incorporated either in the transcript of the proceeding or otherwise made part of the record.

The State submits that the Third District correctly receded from Viggianni inasmuch as said rule of law imposed a rigid and inflexible standard for all cases in which there was a waiver of trial by jury. The rule of law announced by the Third District in Dumas comports with the requirement that a determination of whether there is an intelligent, competent, self-protecting waiver of jury trial by an accussed must depend upon the unique circumstances of each case. Adams v. United States, 317 U.S. 269, 63 S.Ct. 236, 87 L.E.2d 268 (1943).

In Dumas, the Third District held that a record showing waiver although there is no further evidence that the waiver was executed in open court is sufficient to find that waiver was knowingly and intelligently made in consonance with Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed.854 (1930). The court found that the trial court in accepting the counseled waiver, was entitled

to rely upon the presumption that in the regular course of the proceeding the Petitioner, through his attorney, learned of, and waived his constitutional right to trial by jury. The Court found that this presumption sprang from the Petitioner's signature on the information denoting waiver of jury trial and presumed that the Petitioner was advised by his attorney of his right to trial by jury, the consequences of relinquishing that right, and any advantages arising therefrom.[1]

The Third District applied the presumption in light of the fact that Petitioner did not allege that his waiver

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[1] Presumptions that counsel for a Defendant has fulfilled his professional and ethical objection to consult with and advise his client is not a novel concept. See, Williams v. State, 94 Fla. 264, 114 So. 241 (1927). (Where the record does not reflect an arraignment, court presumes that Defendant, who was represented by counsel, was arraigned and did plead, especially since the record did show that he went to trial on the merits); Simpson v. State, 181 So. 2d 185 (Fla. 1st DCA 1965). (Attorney who is appointed by court to consult with and advise accused is presumed to have fulfilled his ethical objections as an officer of the court to so do). Further, courts from other jurisdiction when faced with substantially similar circumstances as the case sub judice have, either explicity or implicitly, applied the presumption that the defense attorney informed his client of the right to jury trial, the consequences of the waiver, and any attendant advantages. See People v. Melero, 99 Ill.App.2d 208, 240 N.E.2d 756 (1968). (Trial court was entitled to rely on the professional responsibility of defendant's attorney that when he informed the court that his client waived a jury, it was knowingly and understandingly consented to by his client). People v. Sailor, 43 Ill.2d 256, 253 N.Ed. 397 (1969). (Same). United State v. Tobias,

was not knowingly or intelligently given, or that he was prejudiced by any failure of an in-court examination to ascertain whether the waiver of jury trial was knowing, free and intelligent. The effect of the presumption being merely procedural, it is not erroneous to shift the burden, absent record evidence to support his contention, to the accused to produce evidence to show the record showing of waiver was not made knowingly, freely and intelligently. See, United States v. Gordon, 712 F.2d 110 (5th Cir. 1983). (Absent claim of prejudice, the court presumed waiver of right to jury trial understandingly and intelligently made). United States v. Tobias, supra, (same); United States v. Scott, 583 F.2d 362 (7th Cir. 1978). (Same).

In accordance with Petitioner's failure to attack the waiver in the trial court, the fact that nothing in the record suggested that the waiver was not voluntary or intelligent, and that Petitioner did not even assert on direct appeal that the waiver was involuntary or intelligent, the District Court found the absence of a record inquiry as to waiver of jury trial, without more, is not

(Footnote 1 continues)

662 F.2d 381 (5th Cir. 1981), cert. denied 102 S.Ct. 2905 (1982). (Implicit; Defendant with counsel, signed written waiver and the court held that absent a claim of prejudice, it was presumed that the waiver was understandingly and intelligently made); United States v. Kidding, 560 F.2d 1303 (7th Cir. 1977). (Implicit). United States v. Goodwin, 446 F.2d 894 (9th Cir. 1971). (Implicit).

per se reversible error. The Third District further held that a Defendant may now, pursuant to Florida Rules of Criminal Procedure 3.850, seek review of the waiver of jury trial where he may allege for the first time, as fundamental error, that the waiver was not voluntary and intelligently made.

A comparible presumption of both this general rule and its application, though not typically so described, exists in the closely related area of withdrawal of guilty pleas. See Fla.R.Crim.P. 3.170(f). In Robinson v. State, 373 So.2d 898 (Fla. 1979) this Court was faced, as it related to a withdrawal of a guilty plea, with a substantially similar situation. The Defendant contended that he had a right to a general review of the guilty plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived. In effect he asserted a right of review without specific assertion of wrongdoing. This Court rejected the theory of an automatic review from a guilty plea. In so doing, this Court found:

> ...that an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea. If the record raises issues concerning the voluntary or intelligent character

of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea. If the action of the trial court on such motion were adverse to the defendant, it would be subject to review on direct appeal. The standards for the withdrawal of a guilty plea both before and after sentence were discussed in detail in Williams v. State, 316 So.2d 267 (Fla. 1975). After sentence is imposed, the burden is on the defendant to prove that a manifest injustice has occurred. Williams v. State, ABA Standards Relating to the Administration of Criminal Justice, Pleas of Guilty, 14-21. (1979). To adopt the view asserted by the appellant in this case would in effect eliminate both the necessity for a defendant to move for a withdrawal of his plea and the obligation to show a manifest injustice or prejudice as grounds for such a plea withdrawal after sentence.

* * *

(10) Attorneys have a responsibility to ensure that our system of justice functions properly. If counsel believes that the plea proceedings are defective or improper, he is ethically bound to immediately advise the trial judge of that fact. It is ethically wrong to ignore or cause technical or procedural errors to ensure an opportunity for reversal on appeal. We reiterate our holding in Hall v. State, 316 So.2d 279 (Fla. 1975), that both the prosecutor and the defense counsel are ethically bound

> to see that proper procedural steps are followed when a guilty plea is entered by a defendant. Our examination of the entire record in this case reflects that there was no error in the presentation and acceptance of appellant's negotiated plea of guilty.
>
> (11) We recognize that the failure of a defendant to raise the issue of the validity of the peal by an appeal does not prohibit him from subsequently seeking collateral relief if the issues have not been previously addressed and ruled upon.
>
> 373 So.2d at 902-3.

Accord, Wyatt v. United States, 591 F.2d 260 (4th Cir. 1979) (Rule of presumed regularity in jury waiver cases is comparable to withdrawal of guilty pleas, pursuant to Fed. R.Crim.P. 11 and 32d).

The Petitioner herein contends that the Third District erroneously applied the presumption of regularity to the case sub judice. Petitioner reasons that since a trial by jury is a fundamental constitutional right, a Defendant may not be deprived of the right without an intelligent, voluntary and knowing waiver. In support thereof, Petitioner now[2] relies on Carnley v. Cochran, 369 U.S. 506, 82 S.Ct.

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[2] In the Third District, Petitioner, in support of his argument that there is a constitutional requirement for an

884, 8 L.Ed.2d 70 (1982), which holds that there is reversible error under the due process clause of the Fourteenth Amendment where the record does not disclore that the Defendant voluntarily and understandingly waived his right to counsel.

That Carnley v. Cochran, supra, concerned waiver of right to counsel instead of waiver of trial by jury is a crucial distinction inasmuch as the assistance of counsel is often a requisite to the very existence of a fair trial. The United States Supreme Court in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 188 (1932) said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left with-

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(Footnote 2 continues)

affirmative showing of jury waiver, relied on Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) which holds that there is reversible error under the due process clause of the Fourteenth Amendment where the record does not disclose that the defendant voluntarily and understandingly entered a guilty plea. The

> out the aid of counsel he may be put on trial without a proper charge, and conviction upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare this defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he not be guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."
>
> 287 U.S. at 68-69,
> 53 S.Ct. at 64.

A Defendant's waiver of jury trial, entered with the assistance of counsel, is not fraught with the same

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(Footnote 2 continues)

Third District found that a waiver of a jury trial does not have the weighty consequences of a guilty plea since it does not foreclose an adversary proceeding on points of fact and law, nor does it preclude appellate review of the courts finding. Therefore, the Third District rejected this analogy and cited in support thereof United States v. Reyes-Miza de Polanco, 422 F.2d 1309 (9th Cir. 1970) cert. denied 397 U.S. 1081, 90 S.Ct. 1536, 25 L.Ed. 2d 817 (1970). See also, State v. Chase, 280 A.2d 550 (Maine 1971). (Defendant, by analogy to Boykin, contended that due process requires that the record show that the trial court made inquiry in open court and ascertain by direct response for Defendant that his waiver of jury trial was voluntarily and understandingly given. The court rejected this analogy for the same reasons as that of the Third District).

frailities inherent in the waiver of counsel situation. A counselled waiver of jury trial is a tactical decision, made by the Defendant after by being advised by his cousel of the nature of the right, and the reasons for waiving it.

The Petitioner, as well as the dissent in Dumas, relies heavily on People v. Losacano, 29 Ill.App.3d 103, 32q N.E.2d 835 (1975), for the proposition that a defendant's right to jury trial is certainly no less important a constitutional right than the right to counsel. However, a more careful reading of Losacano clearly show that it is inapposite to the case sub judice. In Losacano the Defendant appeared, without counsel, for arraignment. At arraignment, Defendant asked for appointed counsel, which request was denied. He then, without counsel, signed a not guilty form, which for contained a waiver of jury trial. The court found that the waiver of jury trial was not valid since it was done without counsel and the record was silent as to whether the defendant knew the consequences of his waiver. It is based on these facts that the court likened the right to counsel with the right to jury trial, and held that counselless waiver of jury trial cannot be assumed to be voluntarily and understandingly made where the record fails to disclose the same.

The holding in Losacano that the presumption of law that a waiver of jury trial was made with knowledge and understanding cannot arise where a defendant makes the waiver without the benefit of counsel is in accord with Florida case law. The Third District in Enrique v. State, 408 So.2d 635 (Fla. 3d DCA 1981) rev. denied 418 So.2d 1280 (Fla. 1982) held, on direct appeal, that the waiver of jury trial was not shown to have been knowingly and intelligently made despite the existence of a written waiver. The result in Enrique was based on the fact that Enrique was not represented by an attorney, there was no adequate on-the-record inquiry by the court, and there was no indication that the Defendant obtained from other sources the information necessary to make for an intelligent waiver.

A more analogous Illinois case in People v. Sailor, supra. In Sailor, the Defendant had a non-jury trial. On appeal, he contended that his waiver of jury trial was not knowingly and understandingly made. The record reflected that Defendant's counsel, in his presence, and without objection, expressly advised the trial court of the jury waiver. The Illinois Supreme Court rejected Defendant's contention on the ground that:

> The trial court was entitled to rely on the professional respon-

> sibility of defendant's attorney, that when he informed the court that his client waived jury, it was knowingly and understandingly consented to by his client. Defendant is not permitted to complain of an alleged error which was invited by his behavior and that of his attorney.
>
> 253 N.E.2d at 399.

Accord: Robinson v. State, supra. (Both the prosecutor and the defense counsel are ethically bound to see that proper procedural steps are followed where a guilty plea is entered by a defendant).

The Petitioner, after acknowledging that this Court has not directly addressed the issue of whether the record must affirmatively reflect a defendant's waiver of his right to trial by jury was in fact knowing, voluntary and intelligent, asserts that this Court's decision in Harris v. State, 438 So.2d 787 (Fla. 1983), supports such a requirement.

Upon closer scrutiny, it is clear that Petitioner's reliance on Harris is misplaced. In Harris, defendant contended that the trial court committed reversible error when he failed to give the jury the mandatory instruction on the necessarily included lesser offenses of first degree

murder, burglary, and robbery. He alleged that the trial court did not have the discretion to grant defense counsel's request that these instructions not be given or to accept defendant's waiver. The record reflected that defendant through counsel made a specific request that no instructions on necessarily included lesser offenses be included. Thereafter, the trial court took meticulous care to make sure that defendant knew of this request and consented thereto. This Court rejected defendant's contentions and found that the waiver was knowingly and intelligently made and held:

> But, for an effective waiver, there must be more than just a request from counsel that these instruction not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made. (Emphasis in original).
>
> 438 So.2d at 797.

It was under these circumstances that this Court equated the right to waive lesser included offenses with the right to waive trial by jury. This position in consistent with Williams v. State, 440 So.2d 1290 (Fla. 4th DCA 1981). In Williams, the defendant contended that he did not legally waive trial by jury. The Fourth District agreed since the only record evidence was a waiver signed

by defendant's counsel at the time of arraignment. The court, consistent with Harris, found that where counsel signs the waiver, it must be approved, on the record, by defendant. Further, on rehearing the court was advised of the Third District's opinion in Dumas. The Fourth District, finding that in Dumas the waiver was executed by the defendant, not his counsel, did not analyze Dumas further and denied the motion. By so doing the Fourth District, implicitly accepted the Dumas' analysis. See also Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982) rev. pending, Case No. 62,683. (With respect to waiver of criminal statute of limitations, there should be a waiver by defendant in writing made part of the record or at least an express oral waiver made in open court on the record by defendant personally or by his counsel in his presence; mere request by counsel for instructions on lesser included offense is not sufficient).

The Petitioner, borrowing language from and relying on Boykin v. Alabama, supra, contends that a knowing and understanding waiver of the right to jury trial cannot be presumed from a silent record. Since the record in the case sub judice in devoid of anything which indicates that Petitioner knowingly, intelligently and voluntarily waived his right to jury trial, the presumption of law established in Marshall v. Lonberger, ___U.S.___, 103 S.Ct. 843, 74

L.Ed.2d 646 (1983) was erroneous applied by the Third District. He asserts that since the presumption in Lonberger was utilized only to establish one particular element of a knowing and voluntary guilty plea, it is inapplicable to the case at bar. Said contention is based on the faulty reasoning that in the case sub judice the presumption is relied upon to establish each and every element of a knowing and voluntary waiver.

Although, the State has not been able to locate any cases directly on point, this Court's attention is directed to People v. Thompson, 38 Ill.App.3d 101, 347 N.E.2d 481 (1976). In Thompson, the defendants received a non-jury trial. On appeal, defendants contended that their waiver's were not valid since the record did not affirmatively indicate that neither defendants were advised of the right to a jury trial nor that either defendant personally waived the right. On appeal the record reflected the following colloquy:

> THE COURT: Put yourself on record.
>
> MR. LEVITT: Stanford Levitt. And I represent Ernest and Betty Thompson.
>
> MR. HOROWITZ: The State is ready for trial at this time.
>
> MR. LEVITT: The defense is ready, if the Court please.
>
> THE COURT: On both of these?

MR. HOROWITZ: Yes.

THE COURT: Is there going to be a jury?

MR. LEVITT: Non jury.

THE COURT: Bench trial. We will start as soon as we get through.

374 N.E.2d at 483.

The record also contained an entry by the Clerk that jury trial was waived. The Illinois court was faced with the identical assertion that waiver of the right to jury trial cannot be presumed from a silent record. The court found that in each of the cases under consideration the waiver of the right to jury trial was not presumed nor was the record silent on the question of waiver. The record showed that the waiver was made by counsel in open court in the presence of the defendants, who acquiesced in the waiver. The record was only silent as to the defendant's knowledge and intent. The court then applied the presumption of law that defendants' counsel informed the defendants of their right to a jury trial and the consequences of waiving that right, to find that the jury waiver was knowingly and intelligently made.

In the case sub judice, the record contained a waiver of jury trial signed by defendant. Therefore, the waiver

of the right to jury trial was not presenced from a silent record. Since the record reflected that the waiver was voluntary, the Third District applied the presumption of law to find that the waiver was knowingly and intelligently made. This application of the presumption is in accordance with Lonberger.

This position is supported by this Court's decision in Holmes v. State, 374 So.2d 944 (Fla. 1979). Holmes was a capital case where the defendant waived the sentencing jury. The record reflected that defendant was represented by counsel and that it contained an express waiver by counsel in the presence of the defendant. The record did not affirmatively reflect that the defendant waiver was knowingly and intelligently made. This Court found, that even in the absence of record evidence of waiver, the waiver was knowing, intelligent and voluntary. The court buttressed its holding by the fact that the defendant at trial did not complain of the absence of a sentencing jury nor did he at any time request the same.

The State submits, by this Court's decision in Holmes, it has embraced the presumption of law in question. This Court, by finding waiver in the record, found that Holmes waiver was voluntary. This Court then applied the presumption of law that defendant's counsel, absent a claim in

the record of prejudice, informed defendant of the right to a sentencing jury and the consequences of a waiver of that right. In the case sub judice, the Third District, in accordance with Holmes, found that defendant's signed waiver was record evidence of its voluntary nature. The Third District then applied the presumption of law, absent any claim in the record of prejudice, that defendant's counsel informed defendant of the right to trial by jury and the consequences of the waiver of that right. Based thereon, the Third District correctly held the waiver was knowingly, intelligently and voluntarily made.[3]

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[3] The majority, as well as the dissent, in Dumas both agree that the ABA Standards for Criminal Justice, Waiver of Trial by Jury 15-1.2(b) (Ed.2d 1980) is the better procedure. Therefore the State encourges this Court to adopt, for prospective application only, the ABA Standards which states:

> The court should not accept a waiver unless the defendant, after being advised by the court of his or her right to trial by jury, personally waives the right to trial by jury, either in writing or in open court for the record.

The new rule, if adopted, should be applied prospectively since it is not derived from the Constitution. See Ciummei v. Commonwealth, 378 Mass. 504, 392 N.E.2d 1180 (1979).

CONCLUSION

Based on the foregoing facts, authorities and arguments, the State respectfully requests this Court to affirm the decision of the Third District Court of Appeal, thereby affirming Petitioner's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS was furnished by mail to HOWARD K. BLUMBERG, Esquire, Attorney for Petitioner, 1351 N.W. 12th Street, Miami, Florida 33125, on this 4th day of April, 1984.

MICHAEL J. NEIMAND, Esquire
Assistant Attorney General

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