IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,621

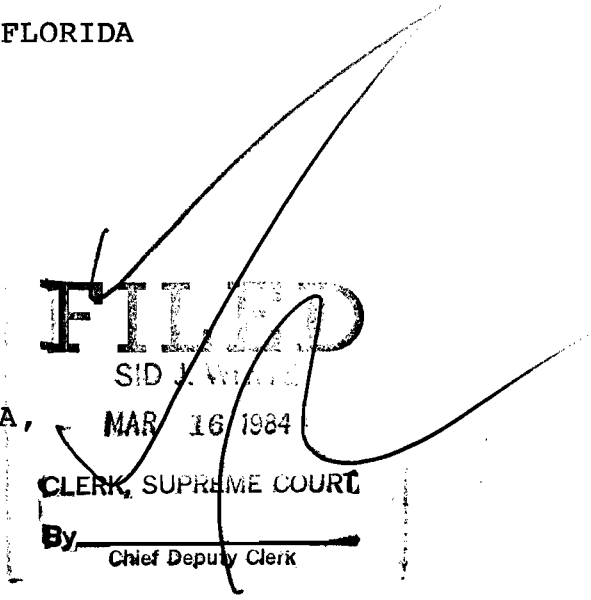
ANTHONY DUMAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



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

BRIEF OF PETITIONER ON THE MERITS

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ON PETITION FOR DISCRETIONARY REVIEW
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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 defendant and the State. The symbol "R" will be used to refer to the record on appeal in the district court. The symbol "TR" will be used to refer to the transcript of testimony in the district court. The symbol "SR" will be used to refer to portions of the supplemental record on appeal in the district court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On the face of the information filed against the defendant appears a stamp which reads: "waived trial by jury with consent of state." (R. 4). Above this stamp is the defendant's signature (R. 4). The following exchange appears in the record on the date the case was called for trial:

> PROSECUTOR: This [case of Anthony Dumas] was set for a bench trial at eight o'clock. We did not try the case.
> I believe we are in the process of plea negotiations at this time and we may pass it.
> Marilynn [defense counsel], is that correct?
> DEFENSE COUNSEL: That is correct.
> THE COURT: All right.
> (Thereupon, other matters were heard, after which the following proceedings were had:).
> THE COURT: Anthony Dumas.
> DEFENSE COUNSEL: We are ready for trial.

(TR.2). A non-jury trial was then held, at the conclusion of which the trial judge entered a finding of guilt (TR. 2-56). An adjudication of guilt was entered and the defendant was sentenced to a two year term of probation, with a special condition that he serve 364 days in the Dade County Jail (R. 12-12A; TR. 57).

On appeal to the District Court of Appeal, Third District, the State was directed to prepare and file a supplemental record consisting of the transcripts of each appearance of the defendant before the trial court previous to the commencement of the non-jury trial. The state subsequently filed this supplemental record on appeal, and nowhere in any of the transcripts included in that record is there any reference to the defendant's waiver of his right to jury trial (SR. 1-12).

After a three-judge panel of the district court of appeal

heard oral argument, rehearing en banc was ordered on the court's own motion pursuant to Florida Rule of Appellate Procedure 9.331(c). With two judges dissenting, the court affirmed the defendant's conviction, holding that:

> . . .record evidence showing an information stamped "waived trial by jury with consent of state", above which is the signature of the defendant, is sufficient, on a direct appeal from a judgment of conviction to support a finding of an effective waiver of that constitutional right.

Dumas v. State, 439 So.2d 246, 248 (Fla. 3d DCA 1983).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the district court of appeal was filed December 7, 1983. On February 23, 1984 this Court accepted jurisdiction and dispensed with oral argument.

ARGUMENT

THE DEFENDANT'S JUDGMENT OF CONVICTION MUST BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL BASED ON THE FAILURE OF THE RECORD TO REFLECT A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER BY THE DEFENDANT OF HIS RIGHT TO TRIAL BY JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION.

In the bottom right corner of the first page of the information filed against the defendant--a page also containing the caption, a list of the two charges contained in the information, the allegation of facts constituting the first count of the information, and various other notations--can be found the following stamp:

WAIVED TRIAL BY JURY
WITH CONSENT OF STATE

(R. 4). The defendant's signature appears above this stamp. The following exchange appears in the record on the date the case was called for trial:

> PROSECUTOR: This [case of Anthony Dumas] was set for a bench trial at eight o'clock. We did not try the case.
>
> I believe we are in the process of plea negotiations at this time, and we may pass it.
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> Marilynn [defense counsel], is that correct?
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> DEFENSE COUNSEL: That is correct.
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> THE COURT: All right.
>
> (Thereupon, other matters were heard, after which the following proceedings were had:).
>
> THE COURT: Anthony Dumas.
>
> DEFENSE COUNSEL: We are ready for trial.

(TR. 2).

The entire record concerning the defendant's waiver of his right to a jury trial consists of that colloquy and the stamp on the first page of the information. In its en banc decision, with

two judges dissenting, the District Court of Appeal, Third District, held this record sufficient to support a finding of an effective waiver of the defendant's constitutional right to a jury trial. Dumas v. State, 439 So.2d 246 (Fla. 3d DCA 1983). The defendant submits that the decision of the district court of appeal, characterized by the dissent as "taking [a] remarkably retrogressive step, one which is totally unprecedented in our state," id., at 255, must be quashed.

The right to trial by jury guaranteed by the Sixth Amendment, being "fundamental to the American scheme of justice", is applicable to the states through the due process clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968). Article I, Section 22 of the Florida Constitution independently guarantees the right to trial by jury:

> The right of trial by jury shall be secure to all and remain inviolate.

This Court has characterized the right of an accused to trial by jury as "one of the most fundamental rights guaranteed by our system of government." Floyd v. State, 90 So.2d 105, 106 (Fla. 1956).

Trial by jury being a fundamental constitutional right, a defendant may not be deprived of the right without an intelligent, voluntary and knowing waiver. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930). Every reasonable presumption is indulged against the existence of a waiver of a fundamental constitutional right, Johnson v.

Zerbst, supra, 304 U.S. at 464, 58 S.Ct. at 1023, and such a waiver cannot be presumed from a silent record. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d. 274 (1969).

Cases involving the right to counsel provide a good example of the type of showing required to support a finding of a valid waiver of a fundamental constitutional right. Those cases clearly establish not only that a waiver of the right to counsel must be knowing, voluntary, and intelligent, but also that the record must affirmatively demonstrate such a waiver:

> The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70 (1962). See also Farretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Florida case law firmly establishes that even though the record shows a waiver by the defendant of his right to counsel, such a waiver will not be upheld on appeal unless the record affirmatively demonstrates that the defendant's waiver was in fact knowing, voluntary and intelligent. See e.g. Smith v. State, ___So.2d___ (Fla. 1st DCA 1984)(Case Nos. AO-388 & AP-96; opinion filed January 25, 1984)(9 FLW 431); Robinson v. State, 368 So.2d 674 (Fla. 1st DCA 1979); Swift v. State, 440 So.2d 655 (Fla. 2d DCA 1983); Williams v. State, 427 So.2d 768 (Fla. 2d DCA 1983); McClain v. State, 353 So.2d 1215 (Fla. 3d DCA 1977), cert. denied 367 So.2d 1126 (Fla. 1979).

A defendant's right to jury trial is certainly no less

important a constitutional right than the right to counsel. One court dealing with the issue of waiver has expressly recognized the similarity of these two rights:

> Where the record is silent,as it is in this case, of anything from which it can be inferred defendant expressly and understandingly waived his right to trial by jury, we believe such deficiency is not merely error, as conceded by the state in this case, and can not be regarded as merely harmless error having no substantial effect either on the defendant's rights or the propriety of his conviction.
>
> * * *
>
> The right to trial by jury like the right to be represented by counsel are of such vital importance that the absence of prejudice can not be assumed where the record fails to disclose their proper waiver.

People v. Losacano, 29 Ill.App.3d 203, 329 NE 2d 835, 839-40 (1975). In the specific context of the right to a jury trial, the United States Supreme Court has stated the following on the issue of waiver:

> . . .Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

Patton v. United States, supra, 281 U.S. at 312-313, 50 S.Ct. at

263.

In accordance with these general constitutional principles concerning the fundamental nature of the constitutional right to jury trial and the requirement that any waiver of such a right be knowing, intelligent, and voluntary, two appellate courts in Florida have held that a defendant's knowing, voluntary and intelligent waiver of jury trial must affirmatively appear in the record. Hurd v. State, 440 So.2d 691 (Fla. 1st DCA 1983); Cirio v. State, 440 So.2d 650 (Fla. 2d DCA 1983); Johnson v. State, 411 So.2d 1023 (Fla. 2d DCA 1982). This Court has not directly addressed the issue of whether the record must affirmatively show that a defendant's waiver of his right to trial by jury was in fact knowing, voluntary and intelligent. However, this Court's recent decision in Harris v. State, 438 So.2d 787 (Fla. 1983), supports such a requirement.

In Harris, this Court faced the issue of whether a defendant could waive his right to have the jury instructed on necessarily included lesser offenses. In deciding that a defendant could waive this right, this Court analogized the right to have the jury instructed on necessarily included lesser offenses to the defendant's right to a jury trial:

> This procedural right to have instructions on necessarily included lesser offenses given to the jury does not mean, however, that a defendant may not waive his right, just as he may expressly waive his right to a jury trial. Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930); Davis v. State, 159 Fla. 838, 32 So.2d 827 (1947); Fla.R.Crim.P. 3.260.

438 So.2d at 797. Having determined that the right to such jury

instructions could be waived, this Court then announced the following requirements for an effective waiver of the right:

> We conclude that there must be an express waiver of the right to these instructions by the defendant [emphasis in original], and the record must reflect that it was knowingly and intelligently made.

Id. Surely, if a waiver of a procedural right such as the right to have the jury instructed on lesser included offenses requires an affirmative showing on the record that the waiver was knowingly and intelligently made, then a waiver of a fundamental constitutional right such as the right to a jury trial also must require such an affirmative showing on the record that the waiver was knowingly and intelligently made.

A number of courts from other jurisdictions have held that the record must affirmatively show that a defendant's waiver of his right to trial by jury was knowing, voluntary and intelligent. Several courts have imposed this requirement in the absence of a controlling rule or statute. See e.g. Rice v. People, 193 Colo. 270, 565 P.2d 940 (1977)(en banc); State v. Irving, 216 Kan. 588, 533 P.2d 1225 (1975); Ciummei v. Commonwealth, 378 Mass. 504, 392 NE 2d 1186 (1979). Other courts have imposed such a requirement even though the applicable rule, like Fla.R.Crim.P. 3.260, does not include such a requirement. United States v. Scott, 583 F.2d 362 (7th Cir. 1978); United States v. Delgado, 635 F.2d 889 (7th Cir. 1981); Walker v. State, 578 P.2d 1388 (Alaska 1978); see United States v. David, 511 F.2d 355 (D.C. Cir. 1975); People v. Losacano, 29 Ill.App.3d 103, 329 N.E. 2d 835 (1975); see also Countess v. State, 286 Md. 444, 408

A.2d 1302 (1979); People v. Corbin, 109 Mich.App. 120, 310 NW 2d 917 (1981); Hawkins v. United States, 385 A.2d 744 (D.C. App. 1978); State v. Kehoe, 59 Ohio App.2d 315, 394 N.E. 2d 1022 (1978). Furthermore, ABA Standards for Criminal Justice, Waiver of Trial by Jury 15-1.2(b)(2d Ed. 1980), adopted by the decisions in Rice v. People, supra, and State v. Irving, supra, 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 decision of the District Court of Appeal, Third District, in the case at bar stands in direct opposition to the decision of the First District Court of Appeal in Hurd v. State, supra; the decisions of the Second District Court of Appeal in Cirio v. State, supra, and Johnson v. State, supra; the decision of this Court in Harris v. State, supra; the ABA Standards; and all the previously cited decisions from other jurisdictions. Indeed, not only does the decision in the instant case flatly reject any requirement that the record affirmatively demonstrate a knowing, voluntary and intelligent waiver of the right to trial by jury, but the decision goes so far as to eliminate the following minimal requirements previously imposed by the Third District:

> [T]he defendant's signature accomplished in open court and incorporated either in the transcript of the proceedings or otherwise made part of the record.

Viggiani v. State, 390 So.2d 147 (Fla. 3d DCA 1980), rev. denied, 402 So.2d 613 (Fla. 1981). In holding the signed stamp on the face of the information in the instant case sufficient to support

a finding of an effective waiver of the right to trial by jury, the district court of appeal expressly recedes from its prior decision in Viggiani.

In reaching its decision, the district court of appeal pays brief lip service to the basic constitutional principles at stake:

> Defendant contends here that trial by jury is a fundamental constitutional right, guaranteed an accused, which is forfeited only by a waiver which is voluntary and intelligent, citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930); and Floyd v. State, 90 So.2d 105 (Fla. 1956). There is no disagreement on that point.

Dumas v. State, supra, 439 So.2d at 250. Yet, despite recognizing these basic tenets, the Court refuses to require that the record affirmatively show that a defendant's waiver of his right to jury trial was in fact knowing and intelligent. This seeming incongruity is explained by the Court through the use of the following legal fiction:

> Where a record shows a waiver, although there is no further evidence that the waiver was executed in open court, there is a presumption that in the regular course of the proceedings the defendant, through his attorney, learned of, and waived his constitutional right to jury trial. The presumption which springs from defendant's signature on the formal charging document denoting waiver of jury trial, is, more precisely, that the defendant was advised by his attorney of his right to trial by jury, the consequences of relinquishing that right, and any advantages to be expected therefrom, all of which makes for the knowing and intelligent waiver required by Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930).

Id., 439 So.2d at 249-250 (footnotes omitted).

Thus, the Third District relies entirely on a presumption of law to find that the defendant knowingly, voluntarily and intelligently waived a constitutional right characterized by the United States Supreme Court as "fundamental to the American scheme of justice," Duncan v. Louisiana, supra, and characterized by this Court as "one of the most fundamental rights guaranteed by our system of government." Floyd v. State, supra. Such reasoning is totally unprecedented. Indeed the Court cites no authority for such a far-reaching presumption of law. As pointed out in the dissenting opinion in this case, the Court's reliance on such a presumption "put[s]. . .on their heads" the well-established rules that every presumption is indulged against the existence of a waiver of a significant constitutional right, Johnson v. Zerbst, supra, and that such a waiver cannot be presumed from a silent record, Boykin v. Alabama, supra.

The recent decision of the United States Supreme Court in Marshall v. Lonberger, ___U.S.___, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) does not establish the constitutional validity of the all-encompassing presumption of law relied on by the district court of appeal in the instant case. Lonberger challenged the admission into evidence of a prior conviction based on his contention that his plea of guilty underlying that conviction had not been knowing, voluntary, and intelligent. Specifically, Lonberger claimed that he had not been aware of the specific charges to which he had pleaded guilty. The United States Supreme Court upheld the admission into evidence of the prior conviction, concluding that the record established that the

guilty plea was knowing and voluntary. This holding was based in part on a presumption of law:

> Under Henderson [v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)], respondent must be presumed to have been informed, either by his lawyers or at one of the pre-sentencing proceedings, of the charges on which he was indicted. Given this knowledge of the indictment and the fact that the indictment contained no other attempt charges, respondent could only have understood the judge's reference to "attempt on [victim], with a knife" as a reference to the indictment's charge of attempt to kill.

___U.S. at ___, 103 S.Ct. at 852-53, 74 L.Ed.2d at 661.

The Supreme Court's utilization of the presumption of law in Marshall v. Lonberger cannot serve to justify the presumption of law utilized in the instant case for two reasons. First, there is obviously a vast difference between presuming that defense counsel informed his client of the charges against him (the presumption in Lonberger) and presuming that defense counsel fully advised his client of his right to jury trial, the consequences of relinquishing that right, and any advantages to be expected therefrom (the presumption in the instant case). Advising a defendant of the charges against him is probably the first and most basic information routinely given to a defendant by defense counsel. The same certainly cannot be said about advice to a defendant concerning his right to a jury trial and the consequences of relinquishing that right.

The second distinction between the presumption in Lonberger and the presumption in this case concerns the effect given to each presumption. The presumption in Lonberger was utilized only to establish one particular element of a knowing and voluntary

guilty plea--the defendant's awareness of the charges against him. The other elements of a knowing and voluntary waiver were affirmatively demonstrated by the record in the case. That record included a "conviction statement" indicating that the consequences of the plea had been fully explained to the defendant, as well as a transcript of the plea colloquy wherein the defendant stated that he understood the rights he was waiving, that the plea was not the result of any threats or promises, and that he was pleading guilty to get a reduced sentence.

In the case at bar, on the other hand, there is absolutely nothing in the record which indicates that the defendant knowingly, intelligently and voluntarily waived his right to a jury trial. The presumption relied on by the Court is utilized to single-handedly establish each and every element of a knowing, intelligent and voluntary waiver. Lonberger simply does not authorize such a far-ranging application of a presumption to establish a valid waiver of a fundamental constitutional right.

In addition to the fundamental constitutional principles at stake in this case, there are, as pointed out by the dissent, compelling practical reasons for requiring that the record affirmatively demonstrate that a waiver of the right to jury trial was made knowingly, voluntarily, and intelligently. The problems inherent in relegating to post-trial proceedings the determination of whether a defendant's waiver was in fact knowing, voluntary and intelligent are vividly set forth in the dissenting opinion:

> Thus the court has encouraged, indeed necessitated, just what was so aptly characterized in Boykin as the "spin-off of collateral proceedings that seek to probe murky memories," 395 U.S. at 244, 89 S.Ct. at 1713, and which, for that reason, should instead be forestalled or obviated altogether. In this present instance, the disadvantages of that technique are exacerbated by the fact that the issue later to be determined will likely involve the resolution of obviously undesirable disputes between the defendant and his lawyer about who said what to whom in the hallway or the holding cell or in whispered conversations at counsel table months or years before. See e.g. Krueger v. State, 84 Wis.2d 272, 267 N.W. 2d 602 (1978). Moreover, the professional self interest of the (now-previous) attorney will be in unseemly direct conflict with that of his former client, who must, in turn, establish that his lawyer did not act with competence. Since all this can be avoided in almost every case by the simple expedient of a brief colloquy between the court and the defendant spread upon the record, the most elementary principles of sound judicial administration dictate the adoption of that requirement.

Dumas v. State, supra, 439 So.2d at 254.

In a decision issued only two weeks after the date of the decision in the case at bar, the Fourth District Court of Appeal encountered the very problems anticipated by the dissent. In Williams v. State, 440 So.2d 1290 (Fla. 4th DCA 1983), the defendant contended that the record before the appellate court was insufficient to establish a valid waiver of his right to jury trial. The appellate court initially entered an order relinquishing jurisdiction to the trial court for an evidentiary hearing to determine whether the defendant's waiver was in fact knowing, voluntary and intelligent. The appellate court subsequently rethought its position:

> As it turns out, the call for an evidentiary hearing in this case has turned into a thicket. Once the hearing commenced, it was impaled upon the thorn of the attorney-client privilege, which has convinced us that it was error to initiate the hearing. On reflection, we now agree with appellant's position that it was incumbent upon the trial court and all counsel involved to see that the record reflected compliance with the rule. If it does not, a post-trial hearing should not be held to resurrect or reconstruct what should have been done initially.

Id., at 1291.

When the practical problems inherent in post-trial proceedings are considered in conjunction with the fundamental constitutional principles involved, the conclusion is inescapable that a valid and effective waiver of the right to jury trial requires an affirmative showing in the record that the waiver was in fact knowing, intelligent and voluntary. Accordingly, this Court should approve the decisions in Hurd, Cirio, and Johnson, and quash the decision of the district court of appeal in the instant case, which finds a valid and effective waiver of a fundamental constitutional right based solely on a signed stamp buried amidst the clutter of the first page of the information.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that Court to reverse the petitioner's judgment of conviction.

Respectfully submitted,

BENNETT H. BRUMMER
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Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125

By: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida, this 14th day of March, 1984.

By: _____
HOWARD K. BLUMBERG
Assistant Public Defender