IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALVIN TYRONE THORNTON,

Respondent.

CASE NO. 64,899

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the criminal division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

Respondent was the Appellant in the Fourth District Court of Appeal and the defendant in the trial court.

In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal.

"A" Appendix to Petitioner's Brief on Jurisdiction.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On February 19, 1982 the State charged Respondent with second degree murder with a firearm in the Seventeenth Judicial Circuit in Florida. On May 7, 1982, a jury found him guilty as charged and the court adjudicated him to be guilty that day. The court sentenced him to fifty years imprisonment and retained jurisdiction over the first third of the sentence.

On appeal to the Fourth District Court of Appeal, Respondent assigned as error comment made by the arresting officer during direct examination. On April 13, 1983, the Fourth District Court of Appeal affirmed the decision of the lower court in a per curiam opinion with one dissenting opinion (A. 1). The lower court then issued an opinion on rehearing which superceded the original opinion and which reversed the decision of the lower court and remanded for a new trial (A. 2).

At trial the prosecutor attempted to show that Respondent was warned of his constitutional rights, that he waived those rights and voluntarily made a statement in which he admitted killing the victim but only in self defense. The prosecutor asked Officer Ciani about the first time he read Respondent his Miranda rights at the time of his arrest.

> Q Did Mr. Thornton, the first time you read him his rights, give you an indication that he did not understand what you were saying?

Officer Ciani's answer was not confined to the question asked:

> A No, sir. He replied, "Yes," that he understood, and that he did not answer any questions at the initial time of arrest.

Counsel for Respondent timely objected and moved for a mistrial on the grounds that the witness commented on Respondent's right to remain silent. The trial judge denied the motion. The Fourth District Court of Appeal found in an opinion on rehearing error in the denial of the motion for mistrial.

The discretionary jurisdiction of this Court was sought to review the decision of the district court of appeal. The order accepting jurisdiction and dispensing with oral argument was entered on May 21, 1984.

POINT INVOLVED ON APPEAL

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT OFFICER CIANI IMPERMISSIBLY COMMENTED ON RESPONDENT'S RIGHT TO REMAIN SILENT?

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT OFFICER CIANI IMPERMISSIBLY COMMENTED ON RESPONDENT'S RIGHT TO REMAIN SILENT.

The Fourth District Court of Appeal found that in the instant case "[T]he comment volunteered by the police officer witness violated Appellant's right to remain silent (or, more correctly, the correlative and derivative right not to have the state employ the exercise of the right to remain silent as probative of guilt)." 442 So. 2d 1105. The comment in controversy is excerpted in pertinent part below:

> Q Did Mr. Thornton, the first time you read him his rights, give you an indication that he did not understand what you were saying?

Officer Ciani's answer was not confined to the question asked:

> A No, sir. He replied, "Yes," that he understood, and he did not answer any questions at the initial time of arrest.

Petitioner sought to invoke the discretionary jurisdiction of this Court on three basises. First, that the lower court opinion sub judice directly and expressly conflicts with Donovan v. State, 417 So. 2d 674 (Fla. 1982) wherein this Court determined that it was not error for the State to mention that the defendant remained initially silent in the face of questioning.

The second basis for asking this Court to take jurisdiction over this cause is that the standard used by the lower court in determining that Officer Ciani's statement impermissibly impinged

upon Respondent's right to remain silent was that expressed in Kinchen v. State, 432 So. 2d 586 (Fla. 4th DCA 1983).

The opinion in Kinchen is in direct conflict with those in Gains v. State, 417 So. 2d 719 (Fla. 1st DCA 1982) and State v. Bolton, 383 So. 2d 924 (Fla. 2d DCA 1980). This Court accepted jurisdiction over Kinchen to resolve the conflict. Because the Fourth District in the instant case expressly stated it reviewed the comment under the Kinchen standard, if a different standard were applicable, it would in all likelihood affect the outcome of this cause.

The third basis for this Court's discretionary jurisdiction over this cause is the apparent recognition by this Court that the harmless error doctrine should be at least considered even when dealing with a comment arguably referring to a defendant's right to remain silent. See State v. Murray, 443 So. 2d 955 (Fla. 1984) (we agree with the recent analysis of the Court in United States v. Hastings, 76 L. Ed. 2d 96 (1983).

Each of these three basises upon which Petitioner sought discretionary review of the instant cause will be addressed sequentially.

A

In context, it is readily discernible that Officer Ciani's statement was elicited only as part of the process of examining the circumstances under which the inculpatory statement was made. The testimony of the police officer did not constitute an impermissible reference to Respondent's right to remain silent, as the record demonstrates a waiver of that right.

In Donovan v. State, 400 So. 2d 1306 (Fla. 1st DCA 1981) the court rejected the defendant's assertion that the state reversibly erred in mentioning that the defendant remained silent initially in the face of questioning. In affirming the First District decision this Court held:

> The second objection came after Deputy Smith was asked if Donovan had indicated that he understood the Miranda warnings. Standing alone, Smith's answer, "No, Sir, Tim didn't say anything," could be interpreted as an exercise of his right, but when read in context it becomes clear that the answer is not objectionable. The state sought to introduce Donovan's statements through Deputy Smith, and, therefore, it was proper to elicit testimony from him that Miranda warnings were given. Such testimony is relevant to prove that the subsequent statement was made voluntarily.

Donovan v. State, 417 So. 2d 674, 671 (Fla. 1982).

From the foregoing law, Petitioner maintains that when read in context, Officer Ciani's statement was not objectionable because the record shows that Respondent waived his right to remain silent.

As authority for its opinion the Fourth District relied on the case of Marshall v. State, 393 So. 2d 584 (Fla. 1st DCA

1981). The facts in Marshall are quite different from those of the instant case. In Marshall, it is clear the defendant did exercise his right to remain silent and the officer's comment was an impermissible comment on that right. It was not until 20 hours later that Marshall decided to make a statement. The instant case, is more easily analogized to Donovan, id.

Herein, the Respondent made his incriminatory statements within an hour and a half of being taken to the station and was made directly after the officer reviewed his rights with him (R. 9-24). Consequently, Petitioner maintains on the authority of Donovan that there was no impermissible comment because the record reveals that Respondent did not rely upon his right to remain silent. See also, Williams v. State, 353 So. 2d 588 (Fla. 3d DCA 1977), cert. dismissed, 372 So. 2d 674 (Fla. 1979); State v. Prieto, 439 So. 2d 288 (Fla. 3d DCA 1983); United States v. Martinez, 577 F. 2d 960 (5th Cir.), cert. denied, 439 U.S. 914 (1978).

In sum, the utility of the challenged testimony was not to indicate guilt by virtue of the defendant's silence but was elicited only as part of the process of examining the circumstances under which the inculpatory statement was made. Consequently, the lower court erred in holding that a mistrial was required.

B

In its opinion sub judice, the Fourth District Court of Appeal stated that the standard to be applied in measuring whether a comment impinges upon the constitutionally guaranteed right to remain silent is expressed in their recent opinion of Kinchen v. State, 432 So. 2d 586 (Fla. 4th DCA 1983). In the Kinchen case, on rehearing, that court acknowledged that the First and Second District Courts have, on at least two occasions, invoked a different standard on review than was followed in the Kinchen case. See Gains v. State, 417 So. 2d 719 (Fla. 1st DCA 1982) and State v. Bolton, 383 So. 2d 924 (Fla. 2d DCA 1980). This Court accepted jurisdiction over the Kinchen case and heard oral argument on April 4, 1984.

Petitioner recognizes that this Court has held, "[A]ny comment which is 'fairly susceptible' of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error. . . ." David v. State, 369 So. 2d 943, 944 (Fla. 1979). However, Petitioner would urge this Court to reconsider the matter and to adopt the standard used by the federal courts in determining whether an individual's federal constitutional right to remain silent has been violated, i.e. whether the manifest intention of the comment was directed to silence or the remark was such that the jury would naturally and necessarily take it to be such a comment, Samuels v. United States, 398 F. 2d 964, 967 (5th Cir. 1968), United States v. Garcia, 655 F. 2d 59, 64 (5th Cir. 1981), United States v. Vera, 701 F.

2d 1349, 1362 (5th Cir. 1983).

In the Gains, id. and Bolton, id. cases, the First and Second Districts employed the federal standard in reviewing allegedly impermissible comments. Petitioner respectfully submits that these holdings, being consistent with the federal holdings, should be given statewide validity by this Honorable Court, since they apply to a federal constitutional right. Petitioner recognizes the authority of this Honorable Court to give continued validity to the more stringent "fairly susceptible" standard but submits there is no reason to do so in light of the contrary federal authority.

Should this Honorable Court adopt the "manifest intention"/"naturally and necessarily" standard advocated by Petitioner here, Petitioner would further submit that the decision of the Fourth District Court of Appeal in the case sub judice, finding an impermissible comment on Respondent's failure to testify, i.e. the exercise of his right to remain silent, must be reversed.

C

In the recent case of State v. Murray, 443 So. 2d 955 (Fla. 1984) this Court specifically agreed with the recent analysis of the United States Supreme Court in United States v. Hastings, 76 L. Ed. 2d 96 (1983). On appeal, Hastings claimed that the prosecutor violated his Fifth Amendment rights. In reversing the Court of Appeals decision, the Supreme Court held:

> Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations (citations omitted).

76 L. Ed. 2d 106. In the instant case, the Fourth District failed to review the record to determine if the harmless error doctrine was applicable. In its Motion for Rehearing, Petitioner apprised the District Court of the Hastings decision and its pronouncement that improper comment on the failure of an accused to testify does not require automatic reversal if the court concludes that, on the whole record, the error was harmless beyond a reasonable doubt.

In consequence of the Murray and Hastings decisions, Petitioner maintains that the harmless error analysis is applicable to the instant case. While Petitioner maintains that there was no error, Petitioner would submit in the alternative that any error was harmless.

CONCLUSION

Based on the foregoing presentation, supported by the authorities and circumstances cited herein, Petitioner maintains that the decision of the Fourth District Court of Appeal is in direct and express conflict with decisions of this Court and other district courts of appeal.

WHEREFORE, Petitioner respectfully requests this Court enter an order reversing the decision of the lower court and find that in accord with this Court's Donovan decision there was no impermissible comment on the defendant's silence because the defendant did not exercise his right to remain silent.

Petitioner would also ask this Court to adopt the Federal standard in reviewing an alleged comment on the right to remain silent as was done in the Gains and Bolton cases.

Further, Petitioner respectfully requests that this Court reiterate its approval of the Hastings harmless error analysis as it did in State v. Murray, id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to GARY CALDWELL, ESQUIRE, Assistant Public Defender, Attorney For Appellant, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier this 11th day of June, 1984.

Marilyn J. Altman
OF COUNSEL