IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.)
ALONZA ROWELL,)
Respondent.)
_____)

CASE NO. 65,417

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The Respondent was charged by Information on January 7, 1983 with two counts of burglary of a conveyance, one count of possession of burglary tools, and one count of petit theft (R 149-150).[1] He was tried by jury on March 17, 1983 and found guilty on all four counts as charged (R 126-127, 158-161).

The trial court adjudicated the Respondent guilty on all four counts and sentenced him to two years imprisonment, each on Counts I and III (concurrent), and to five years probation on Count II (consecutive), and to sixty (60) days in the county jail on Count IV (concurrent with Counts I and III) (R 173, 173-179). The Respondent's Motion for New Trial was denied on March 28, 1983, and he filed his Notice of Appeal to the District Court of Appeal, Fifth District, on March 31, 1983 (R 170-171, 180-182).

On May 24, 1984, the district court rendered its opinion in this cause, determining that an improper comment upon the Respondent's exercise of his right to remain silent had been made by a State witness, requiring reversal under the per se rule followed by this Court in previous decisions; however, the district court made it clear that absent this per se reversal rule they would not have reversed Rowell's convictions given the overwhelming proof of guilt adduced at trial which brought them to the factual conclusion:

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[1](R) refers to the record on appeal.

> . . . that it was clear beyond a reasonable doubt that the jury would have returned a vercict of guilty even in the absence of the improper comment . . .

The district court questioned the reasoning and logic for the per se reversal rule but nonetheless followed the judicial precedent from this Court. In doing so, however, the district court noted this Court's recent embracing of the reasoning and rationale in United States v. Hasting, ____ U.S. ____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (a decision in which the United States Supreme Court affirmatively rejected a per se reversal rule in the context of prosecutorial comment on a defendant's exercise of his right to remain silent in favor of a harmless error analysis) in its decision in State v. Murray, 443 So.2d 955 (Fla. 1984), and therefore certified the following question as one of great public importance:

> Has the Florida Supreme Court, by its agreement in State v. Murray, 443 So.2d 955 (Fla. 1984), with the analysis of the supervisory powers of appellate courts as related to the harmless error rule as set forth in United States v. Hasting, ____ U.S. ____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), receded by implication from the per se rule of reversal explicated in Donovan v. State, 417 So.2d 674 (Fla. 1982)?

Rowell v. State, 9 FLW 117,1178(Fla. 5th DCA May 24, 1984)

STATEMENT OF THE FACTS

On December 17, 1984, a police officer observed the Respondent and a second man standing outside of an automobile later determined to belong to one Karen Quinlin (R 4, 15). The two individuals aroused the officers' suspicions, and he watched as the Respondent entered the passenger side of the vehicle while the second man remained outside, constantly turning his head and looking around (R 4-6).

When the officer approached the subjects to seek identification, the second man attempted to conceal under the front of the car a brown paper bag containing an AM/FM cassette stereo and a cassette tape which ultimately was proven to have been stolen from another car in the parking lot (R 6-7, 11-14, 47-55). The knobs of that stereo had been removed and were in the bag separated from the cassette deck itself (R 12-13). It was later determined that the vent window on the automobile previously burglarized had also been tampered with (R 50-52, 55-60).

When accosted by the officer, the Respondent was caught sitting in the passenger side of Quinlin's automobile; near his feet on the floorboard of the car were a large screwdriver, a knob to the car stereo radio, and a bag containing, inter alia, a wire coat hanger (R 4-6, 16-23, 36-38). The car stereo radio had been moved so that its casing was partially out of the dashboard, and the vent window on the passenger side had been tampered with, and pry marks were obvious on it (R 16-17, 37-38, 41). Ms. Quinlin, the auto's owner, stated that she knew neither

the Respondent nor the second man discovered near the car; that the vehicle had been locked and its windows rolled up when she left it; and that the screwdriver and the bag found on the passenger side floorboard of the car were not hers and had not been in the auto when she left it (R 14-15, 35, 40-43). Similarly, Theresa Maher, the owner of the previously burglarized automobile, also testified that she had given no one permission to enter her car or remove the cassette player (R 51).

POINT I

THE FLORIDA SUPREME COURT BY ITS AGREEMENT IN STATE V. MURRAY, 443 SO.2D 955 (FLA. 1984), WITH THE ANALYSIS OF THE SUPERVISORY POWERS OF APPELLATE COURTS AS RELATED TO THE HARMLESS ERROR RULE AS SET FORTH IN UNITED STATES V. HASTING, ____ U.S. ____, 103 S.CT. 1974, 76 L.ED. 2D 96 (1983), HAS RECEDED FROM THE PER SE RULE OF REVERSAL EXPLICATED IN DONOVAN V. STATE, 417 SO.2D 674 (FLA. 1982).

ARGUMENT

In State v. Murray, 443 So.2d 955, 956 (Fla. 1984), this Court adopted the reasoning of the United States Supreme Court in United States v. Hasting, ____ U.S. ____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). In holding that improper prosecutorial argument could and did in that instance constitute mere harmless error:

> . . . Nevertheless, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, ____ U.S. ____, 103 S.Ct. 1974, 76 L. Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial

> misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations. The opinion here contains no indication that the district court applied the harmless error rule. The analysis is focused entirely on the prosecutor's conduct; there is no recitation of the factual evidence on which the state relied, or any conclusion as to whether this evidence was or was not dispositive.
>
> We have reviewed the record and find the error harmless. The evidence against the defendant was overwhelming. . .

(underscoring supplied)

In United States v. Hasting, supra, (relied upon by this Court in Murray), the Supreme Court made it clear that notwithstanding the protections afforded by the Fifth Amendment of the federal constitution a prosecutor's comment upon the failure of the defendant to testify (i.e., upon the exercise of his right to remain silent) is not per se reversible error such that a reviewing court must, before reversing upon this basis, review the appellate record to determine if the error was harmless beyond a reasonable doubt, i.e., if the evidence of guilt presented at trial was overwhelming. The Hasting Court noted that it had previously rejected the per se reversal rule in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and reiterated its holding therein that the harmless error rule governs even constitutional violations under certain circumstances. In reaching its conclusion, the Court recalled

the Chapman court's acknowledgment that certain constitutional errors involved "rights to basic to a fair trial that their infraction can never be treated as harmless error", but clearly determined that an improper comment on the exercise of a defendant's Fifth Amendment right to remain silent was not one of these "basic" rights triggering that extraordinary protection. 103 S.Ct. at 1980, n. 6.

This Court's opinion in State v. Murray, supra, clearly embraces the Hasting and Chapman opinions and rationale and similarly determines that prosecutorial misconduct through improper comment does not involve any error "so basic to a fair trial" that it can never be treated as harmless. 443 So.2d at 956. Given this Court's acceptance of the Hasting decision and rationale in Murray, it has been made clear that an improper comment by a prosecutor - including an improper comment on the exercise by a defendant of his Fifth Amendment right of silence - does not mandate, per se, reversal of a conviction by an appellate court in its supervisory power, but that rather the error must first be evaluated in light of the evidence presented to determine if the offensive conduct was in fact harmless. Accordingly, the per se reversal rule reiterated in Donovan v. State, 417 So.2d 674 (Fla. 1982), the decision in Bennett v. State, 316 So.2d 41 (Fla. 1975), upon which Donovan was based, and similar decisions[2] have lost their import due to this Court's embracing

[2] Clark v. State, 363 So.2d 331 (Fla. 1978); Willinsky v. State, 360 So.2d 760 (Fla. 1978); Shannon v. State, 335 So.2d 5 (Fla. 1976); see also, State v. Burwick, 442 So.2d 944 (Fla. 1983); Harris v. State, 438 So.2d 787 (Fla. 1983); David v. State, 369 So.2d 943 (Fla. 1979).

of the Supreme Court's clear pronouncement that the harmless error doctrine is applicable to appellate review in the context of Fifth Amendment rights and an alleged comment on a defendant's exercise of his right to remain silent.

Before the district court, the Respondent argued that, under the decision in Bennett v. State, supra, any comment on an accused's exercise of his right to remain silent constituted per se reversible error without regard to the harmless error doctrine. Rowell's emphasis on this Court's determination that the harmless error doctrine is inapplicable in such improper comment cases is understandable in the present context for if such error as alleged did occur at the trial below - which the State submits it did not (see, Point II herein) - this case would be an obvious one for applying the harmless error rule in light of the overwhelming evidence of Rowell's guilt. Indeed, the district court's opinion includes the same factual conclusion, and the evidence of record amply supports that finding.

Rowell was apprehended with an accomplice in a shopping mall parking lot just prior to Christmas (December 17, 1982). He was caught red-handed sitting in the passenger side of an automobile; near his feet on the floorboard of the automobile were a large screwdriver, a knob to the car's stereo radio, and a bag containing, inter alia, a wire coat hanger (R 4-6, 16-23, 36-38). The car's stereo radio had been moved so that its casing was partially out of the dashboard, and the vent window on the passanger side had been tampered with, and pry marks were obvious on it (R 16-17, 37-38, 41). The owner of the

automobile stated that she knew neither the Respondent nor a second man discovered near the automobile; that the car had been locked and its windows rolled up when she left it; and that the screwdriver and bag found on the passenger side floorboard were not hers and had not been in the car when she left it (R 14-15, 35, 40-43). The apprehending officer noted that he had observed the subject accompanying Rowell standing on the outside of the car constantly turning his head and that he had then seen Rowell enter the automobile (R 4-6). When he accosted the two (2) individuals, the other subject attempted to conceal under the front of the car a brown paper bag containing an AM/FM cassette stereo and a cassette tape which ultimately proved to have been stolen from another car in the parking lot (R 6-7, 11-14, 47-55). The knobs of the stereo had been removed and were in the bag separated from the stereo itself (R 12-13). The vent window on the automobile previously burglarized had also been tampered with (R 50-52, 55-60).

No evidence was presented even tending to contradict the testimony of the State's witnesses, and the obvious and certain implication of that testimony, i.e., that Rowell and his accomplice had burglarized both automobiles and removed or attempted to remove the stereos therefrom. Thus, notwithstanding the holding in Bennett, reannounced in Donovan, and the other decisions cited, the State asserts that the comment at issue here, even if it constituted error, clearly had no affect whatsoever on the jury's verdict given the overwhelming and uncontroverted evidence of Rowell's guilt.

As previously noted, the federal courts - most recently in the Hasting decision - have themselves failed to elevate the Fifth Amendment to the lofty heights afforded it by this Court in the Bennett dicta that became the per se reversal rule. The obvious question is WHY? Why should this particular type of constitutional error be raised above other constitutional protections which when transgressed in the trial setting can nevertheless be determined to constitute mere harmless error, i.e., error which did not infect the jury's verdict of guilt given the circumstances of the case and particularly the overwhelming nature of the evidence presented? Why should a mere, unintentional slip of the tongue by a state's witness, not specifically elicited by a prosecutor, doom an otherwise proper and lawful conviction to certain reversal despite ironclad testimony and physical and circumstantial evidence which provides unequivocal and uncontroverted proof of the accused's guilt.

The obvious answer is that there is no basis for elevating the particular constitutional error at issue above any others. The Hasting decision and its predecessor opinion - Chapman v. California, supra - clearly indicate the applicability of the harmless error concept even in those cases where the error alleged is an improper comment on an accused's exercise of his right to remain silent - a denial of his Fifth Amendment protections. Other federal courts have repeatedly applied the harmless error doctrine and upheld convictions despite a finding of improper comment or testimony regarding a defendant's invocation of his Fifth Amendment right of silence. United States v.

Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980); United States v. Staller, 616 F.2d 1284 (5th Cir. 1980), cert. denied 101 S.Ct. 207, 449 U.S. 869, 66 L.Ed.2d 89 (1980); United States v. Whitaker, 592 F.2d 826 (5th Cir. 1979), cert. denied 100 S.Ct. 422, 440 U.S. 950, 62 L.Ed.2d 320 (1979).

Why then does Florida have a per se reversal rule in light of the Hasting, Chapman, and other federal decisions? A review of the oft-cited Bennett decision and its per se reversal rule reveals that that particular holding is far from unequivocal and is in fact mere dicta in light of the Court's conclusion that even if the harmless error doctrine were applied it would not save the conviction in that case because: "Under no stretch of the imagination can it be said the evidence was overwhelming against the defendant." 316 So.2d at 44. In analyzing the decision, however, it is more important to note that the per se reversal rule and the rationale therefor sprang solely from the Fifth Amendment to the federal constitution and the then recent decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and more specifically from an opinion of the Third District Court of Appeal in Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), which the Bennett Court adopted as its own. The Jones decision and its apparent per se reversal rule likewise had as its sole legal rationale the Miranda decision's protection of the right to remain silent under the Fifth Amendment of the federal constitution. Indeed, it is worthy of note that the Jones court was of the opinion that a comment on a defendant's exercise of his right to remain silent constituted fundamental

error justifying reversal of a conviction even absent a timely objection. In reaching its conclusion, the district court in Jones noted that it must give "due consideration to the views expressed by the Supreme Court of the United States in Miranda relating to the matter involved here." 200 So.2d at 56.

Subsequent decisions by this Court applying and noting the per se reversal rule of Bennett have likewise limited the legal rationale for this extraordinary protection to the Fifth Amendment of the Constitution of the United States and the Miranda decision. See, Clark v. State, 363 So.2d 331, 333 (Fla. 1978); State v. Burwick, 442 So.2d 944, 947 (Fla. 1983). Yet, the United States Supreme Court in Hasting and Chapman has made it clear that neither the Fifth Amendment nor Miranda justifies this extraordinary remedy by an appellate court. The law in Florida should be no different for there is no differing state law rationale to distinguish Florida's interpretation of the Fifth Amendment right to remain silent and due process protections from that of the United States Supreme Court; indeed, the United States Supreme Court's interpretation of the provisions and protections of a provision of the United States Constitution is controlling, and it is the duty of this Court and other state courts to apply the rationale of the United States Supreme Court decisions interpreting the federal constitution to the degree applicable in a particular case. See, Miami Herald Publishing Company v. Ane, 423 So.2d 376 (Fla. 1983); Chaney v. State, 267 So.2d 65 (Fla. 1972); State ex rel. Hawkins v. Board of Control, 83 So.2d 20 (Fla. 1955). In Jones, the district court created

its per se reversal rule after giving "due consideration" to the views expressed by the Supreme Court with reference to Miranda; this Court should, as it apparently has done, give the same "due consideration" to the views expressed by the Supreme Court in Hasting and Chapman.

It is worthy of note that this Court has already retreated from a portion of the Jones fundamental error/per se reversal holding in Clark v. State, supra, where, noting that the United States Supreme Court had held that the federal constitution does not "mandate the adoption of an absolute rule requiring reversal in every case . . .", the Court held that an improper comment on a defendant's exercise of his right to remain silent was not fundamental error, i.e., an error which goes to the very foundation or merits of the case. Thus, upon finding that the federal constitution and the holdings of the United States Supreme Court in Chapman and Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), did not require reversal in every case the Clark Court held that a contemporaneous objection was necessary to preserve the issue for appellate review, thus rejecting one of the two prongs of the Jones decision which served as the basis for Bennett. Accord; Simpson v. State, 418 So.2d 984 (Fla. 1982); State v. Cumbie, 380 So.2d 1031 (Fla. 1980).

The State submits that it is time for this Court to specifically reject the second prong of the Jones decision, i.e., the per se reversal rule relied upon in Bennett and its progeny. The Hasting, Chapman and other federal decisions aside, the legal

and logical reasons for such a ruling are still obvious.

The Florida legislature has decreed that no judgment shall be reversed on appeal unless the error asserted "injuriously affected the substantial rights of the appellant"; furthermore, there is no presumption that error injuriously affects said substantial rights. § 924.33, Fla. Stat. (1983). In addition, the legislature has specifically provided in a section to be liberally construed, that no judgment shall be set aside or reversed on the basis of the improper admission of evidence unless it shall appear that the error complained of has resulted in a miscarriage of justice, i.e., no judgment shall be reversed if the error alleged was merely "harmless". § 59.041, Fla. Stat. (1983). These requirements as announced by the legislature serve as clear restrictions on a criminal defendant's right to appeal which is also accorded [as provided by the state constitution - Art. V, § 4(b); Art. V, § 5(b); Art. V, § 6(b)] by general law. Thus, the legislature's accompanying proviso that appellate courts once vested with jurisdiction must consider the applicability of the harmless error doctrine before reversing a conviction must not be transgressed.

Accordingly, the State respectfully submits that the harmless error doctrine is and should be applicable to situations such as that alleged sub judice, involving claims of improper comment or testimony on an accused's exercise of his right to remain silent. Indeed, is it not preposterous to reverse a defendant's conviction despite the testimony of perhaps twenty (20) reliable and credible eyewitnesses who present uncontroverted evidence

of a defendant's guilt merely because one witness inadvertently comments on the defendant's exercise of his constitutional right to remain silent - a right which if every citizen is presumed to know the law, the jury is obviously well aware of? Given the notoriety of the Miranda decision as propounded in the media and the constant "reading of Miranda rights" in everything from television police shows and soap operas to novels and magazine articles is it not safe to assume that the average juror is well aware of an individual's right to remain silent under the Fifth Amendment in exercise of that Fifth Amendment right when the defendant fails to take the stand or no evidence as to a statement to police after arrest is presented at trial? Where then is the great prejudice that justifies this extraordinary prophylactic rule that each year dooms many otherwise proper convictions based on overwhelming evidence of guilt to reversal and retrial, if possible, at great expense in time and money when the United States Supreme Court (the sole interpreter and protector of federal constitutional rights) specifically held that such protection is unnecessary, and the Florida legislature has likewise specifically decreed that no criminal conviction should be reversed if the error alleged is harmless?

The question certified by the district court should be answered in the affirmative, and the Respondent's convictions and sentences reinstated.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING ROWELL'S MISTRIAL MOTION WHERE THE TESTIMONY CONSIDERED IN THE ENTIRE CONTEXT IN WHICH IT WAS MADE DID NOT CONSTITUTE A COMMENT ON THE RESPONDENT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

ARGUMENT

It is well established that a motion for mistrial is addressed to the sound discretion of the trial judge and that the power to declare a mistrial and discharge a jury should be exercised with great care and caution and only in cases of absolute necessity, i.e., where the alleged error is so prejudicial as to vitiate the entire trial. State v. Murray, 443 So.2d 955 (Fla. 1984); Cobb v. State, 376 So.2d 230 (Fla. 1979); Salvatore v. State, 366 So.2d 745 (Fla. 1978).

In this case, the Respondent successfully argued to the district court that his mistrial motion should have been granted because of an allegedly improper comment by a witness as to the Respondent's exercise of his right to remain silent. The State respectfully disagrees with the district court's determination that the statement at issue was "fairly susceptible" of interpretation by the jury as a reference to Rowell's exercise of his right to remain silent and that the trial court should therefore have granted the mistrial motion. To the contrary, the State submits that the statement at issue when considered in the context in which it was made and in light of the other testimony adduced at trial was clearly not an improper

reference to Rowell's exercise of his Fifth Amendment rights.

The particular phrase which supports the Respondent's claim of reversible error occurred as the prosecutor elicited testimony from Officer Deal, the police officer who apprehended Rowell and his accomplice in the shopping center parking lot, as to the manner in which the Miranda[2] warnings were given to Rowell (R 7-8). As Deal read from his Miranda rights warning card he explained each question and the response he had obtained from the Respondent to it. Deal noted that he did not ask one particular question contained on the card, i.e., whether the Appellant was coerced into making a statement, and the objectionable statement resulted:

> I asked him, "Has anyone, at any time, threatened, coerced" -- excuse me.
> I don't believe I asked him that at the time.
> I did ask him, "Do you understand these rights," though, and he acknowledged that he did understand his rights.
>
> Q. Okay. Thank you.
> Did there come a time when you ever asked him if he was coerced into making a statement, or did you ever attempt to take a statement from him?
>
> A. Ah, I never asked him that. I never . . . I asked him, but he refused to give me any information as far as --
>
> MR. FIGGATT: Your Honor, may we approach the bench?
>
> (Whereupon, a discussion was had out of the hearing of the Jury.)

[2]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

MR. FIGGATT: Your Honor, I respectfully move the Court for a mistrial.
This witness has made a direct reference to my client's exercise of a right to remain silent. It's absolutely prohibited in the State's case in chief.

THE COURT: Let me hear what the answer of the witness was to that question, the last question that was asked.

(Whereupon, the foregoing answer was read back by the Court Reporter.)

THE COURT: Well, that's not a comment on his right to remain silent.

MR. FIGGATT: It's a comment . . . It's a comment on his pretrial exercise of a right to remain silent, which is not probative, but is prejudicial of his exercise of his right to remain silent.
It tends to indicate he had something to hide out there.

THE COURT: You'd have to show me some law on that. I don't see anything wrong with that.

MR. WALLACE: I think, Your Honor, that had it gone farther than it did, Mr. Figgatt may have had a valid objection, but I don't think, in this case, the answer that was given, in any way, reflects either prejudically (sic) or otherwise against the Defendant, and I don't think that it was a comment by the officer on his exercising his right to remain silent.

THE COURT: No. I don't think so either. So, I'll deny your motion for mistrial.

MR. FIGGATT: Your Honor, I ask that the Court instruct this witness not . . . In view of the Court's ruling, I'd ask that the Court instruct this witness, outside the Jury's presence, that he can't make any kind of remark about my client not talking unless it's elicited by the context of the situation.

THE COURT: Well, is there gonna be any more questions that would cause --

MR. WALLACE: No, sir, not in light of that answer.
Would you like a curative instruction?

MR. FIGGATT: No. I don't want a curative instruction.
I want your witness controlled, counselor.

MR. WALLACE: Okay.

THE COURT: All right. Motion denied.

(R 8-11) (Underscoring supplied)

During cross-examination of Officer Deal, defense counsel questioned him further as to his conversations with Rowell and as to the Miranda warnings given (R 25-30). At this point, Officer Deal noted before the jury that in his initial questioning of Rowell at the scene of the crime Rowell had not refused to answer at all but had instead agreed to talk with Officer Deal after his Miranda rights had been explained to him:

Q. But in response to the State Attorney's question with regard to whether or not you had asked him whether or not he had been coerced to make a statement when you said he refused, you never really asked that question out there on the street; did you?

A. I never asked for Mr. Rowell to make a statement regarding what had occurred.

Q. He certainly . . . You certainly asked him to make a series of brief reasons or justifications for him being there; didn't you?

A. Yes, sir; that's correct.

Q. Although that's not classified, in a formal sense, as a detailed statement, you certainly asked him a question in order to get an answer; did you not?

A. I advised Mr. Rowell of his rights, and I told him that he didn't have to say anything to me. He agreed to talk to me.

Q. Certainly.
Now, so, he agreed to talk to you. He didn't refuse to talk to you out there at all; did he?

A. That's correct.

Q. Okay. Now, sir, you indicate that when you asked Mr. Brown who he was, he told you; is that right?

A. That's correct.

(R 27-28) (Underscoring supplied)

It is clear from Deal's testimony on cross-examination, as elicited by defense counsel, that the Respondent did not in fact exercise his right to remain silent since after being specifically given his Miranda warnings by Officer Deal he agreed to talk with the officer and gave him information. Thus, Deal's testimony on cross-examination revealed that the accused had not exercised his right to remain silent but had freely talked to Officer Deal at the point in time at issue thereby waiving his Fifth Amendment right; accordingly, there was no comment on the exercise by the Appellant of his right to remain silent. Donovan v. State, 417 So.2d 674 (Fla. 1982). Instead, Deal's testimony when considered in the context in which it was adduced clearly reveals merely that the officer accosted the Respondent at the scene of the crime, read him his Miranda rights, and succeeded in obtaining statements from him at that point without coercion (the clear point that the prosecutor was attempting to bring out), which statements (including the Respondent's alleged identity) were later revealed to be untrue.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits has been furnished, by delivery, to James R. Wulchak, Assistant Public Defender for Respondent (1012 S. Ridgewood Ave., Daytona Beach, Florida 32014), this 26th day of June, 1984.

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