IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 65,417

PETITIONER'S REPLY BRIEF ON THE MERITS

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AUTHORITIES CITED

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POINT I

IN REPLY TO THE RESPONDENT AND IN SUPPORT OF THE ARGUMENT THAT 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, 75 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

The Respondent, relying upon timeworn law review articles as well as various concurring and dissenting opinions, argues that the per se reversal rule of Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), which served as the basis for the decisions in Bennett v. State, 316 So.2d 41 (Fla. 1975), and its progeny [including Donovan v. State, 417 So.2d 674 (Fla. 1982)], remains a viable precept of appellate review in this state despite this Court's obvious acceptance of the holding in United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), and State v. Murray, 443 So.2d 955 (Fla. 1984). This assertion is clearly without any rational legal basis and must be rejected.

Rowell casts about in his argument searching for an adequate legal foundation for a now defunct rule of law which required reversal in all cases, no matter how staggeringly

overwhelming and uncontradicted the evidence of a defendant's guilt and despite the pronouncement of this nation's highest court that the type of constitutional error at issue does not mandate per se reversal if the error can be deemed harmless by an appellate tribunal.

Initially, Rowell futilely attempts to distinguish the issue in this case from that in Hasting, calling the prosecutor's comment in that case a "somewhat nebulous argument about certain uncontradicted allegations and evidence" (RB 7)[1] in an apparent argument that no true comment on the defendant's exercise of his right to remain silent was at issue there. This argument is totally without merit, as even a cursory examination of the Hasting opinion reveals that the focal point of that case was the proper and necessary standard of appellate review required by the dictates of the United States Constitution in considering an alleged comment on a defendant's exercise of his Fifth Amendment right.

Next Rowell, ignoring this Court's embrace of Hasting and Murray and in Jones v. State, 449 So.2d 253 (Fla. 1984)[2] apparently claims that a violation of Fifth Amendment rights through improper comment may still require, under some unexplained legal rationale, reversal in every case no matter how ludicrous

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[1](RB) refers to the Respondent's answer brief on the merits.

[2]The Jones decision involved, inter alia, an alleged comment by a state witness on the defendant's refusal to take a polygraph examination and this Court determined that the alleged comment was insufficient to justify reversal due to the harmless nature of the error in light of the overwhelming evidence supporting conviction.

the result (e.g., despite the fact that the evidence against a particular defendant at trial may have included the testimony of twenty (20) impartial eyewitnesses implicating him as well as overhwelming physical evidence (fingerprints on the weapon, etc.) and perhaps even a signed confession by the defendant himself with no contradictory defense testimony or physical evidence). This argument clearly overlooks Florida's own binding statutory limitation on appellate reversals provided by §§ 59.041 and 924.33, Fla. Stat. (1983). These statutes provide clear legislative restrictions on an appellate court's authority to reverse convictions where the errors asserted are "harmless" and have been applied by this Court in upholding convictions in even capital cases. See, Perri v. State, 441 So.2d 606, 607 (Fla. 1983). Similarly, this contention fails to take into consideration this Court's utilization of the same harmless error standard applied by the United States Supreme Court in Hasting and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Jones v. State, 449 So.2d 253, 263 (Fla. 1984).

Rowell's grasping at straws through citation of dissenting opinions, outdated law review articles, and time-worn federal court decisions questioning the alleged potential for abuse in the "harmless error doctrine" is a worthless indulgement in a scholastic smoke screen in an attempt to have this Court restore a per se rule, rejected in Murray, that is without rational or legal basis.

The case is simple. Florida's per se reversal rule

was an obvious reaction to Miranda[4] and stood as the relief mechanism fashioned by the state courts, who were without other guidance, in order to conform to with what they thought were the necessary dictates of the Fifth Amendment of the United States Constitution. Since that time, the United States Supreme Court has made it clear that the Fifth Amendment does not require per se reversal in such cases, and this Court as it did in Clark v. State, 363 So.2d 331 (Fla. 1978),[3] should now make it clear that its decision in Murray is a realization of the effort to complete the realignment of our state courts with the pronouncements of the United States Supreme Court as to the proper appellate standard of review sufficient to protect a defendant from alleged transgressions of his federal constitutional Fifth Amendment right. That is, the Murray decision should be recognized for what it is - a final rejection of the Jones Court's over-reaction to Miranda in its 1967 per se / fundamental error holding.

Certainly, this Court's adoption and application of

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[3] In Clark, this Court determined after review of the decisions in Miranda, Chapman, and Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), that an improper comment on the exercise of Fifth Amendment rights was not a fundamental error such that the State's contemporaneous objection rule should apply. This decision repealed by implication one of the two prongs of the decision in Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), which served as the basis for Bennett, i.e., that such a comment constituted fundamental error for which no objection was necessary. Thus, it can be said that the comment-type error at issue does not equate to a denial of due process or an error which goes to the "foundation" of the case since it is not fundamental. Ray v. State, 403 So.2d 956, 960 (Fla. 1981).

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

the federal harmless error standard in conjunction with this State's own "harmless error" statutes justifies the return to square one and this Court's prior application of the harmless error test in Fifth Amendment comment cases. See, State v. Galasso, 217 So.2d 326 (Fla. 1968); Bennett v. State, 316 So.2d 41, 44 (Fla. 1975) (England, J., dissenting). The "potential for abuse" of this harmless error rule urged by the Respondent is no more present here than in all other cases involving a myriad of alleged errors, constitutional and otherwise, where the harmless error doctrine is now applied by this Court and the other courts throughout the state and nation and, in light of the pronouncement in Hasting accepted by this Court in Murray, it is now clear that the type of Fifth Amendment comment question raised in this case is subject to the application of the harmless error doctrine on appellate review.

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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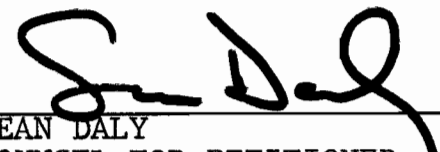
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Reply Brief on the Merits has been furnished, by delivery, to James R. Wulchak, Assistant Public Defender for Respondent (1012 S. Ridgewood Ave., Daytona Beach, FL 32014-6183), this 30th day of July, 1984.



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