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IN THE SUPREME COURT OF FLORIDA

HUGH MILLER CURTIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,891

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts presented by petitioner, but would clarify the statement, "The record fails to affirmatively demonstrate that the answer provided by the trial judge was done so with the knowledge or participation of petitioner or his counsel." (Brief of Petitioner, Page 2).

The record reflects:

1. The jury questions and answer was filed in open court (R 188).

2. Petitioner did not object to the instruction or otherwise record any claim or error in the lower court.

3. No hearing was had on the record regarding the questions or answer.

SUMMARY OF ARGUMENT

(1) Although there is no record of a hearing or technical compliance with Florida Rule of Criminal Procedure 3.410, the reocrd is adequate to demonstrate petitioner suffered no prejudice. Thus, any error which occurred is strictly procedural and may be deemed harmless.

(2) Technically speaking, Rule 3.410 does not specify that the required notice to counsel be had on the record. Failure to so inform counsel cannot be inferred from a silent record. Since no testimony was read, nor were additional instructions given, it was not necessary to conduct the jury into the courtroom to comply with the rule.

(3) Since the district court found no error in the trial court's answer as given, it was not necessary to determine whether or not there was, off the record, compliance with Rule 3.410. Should this court find error, the cause should be remanded with opportunity to supplement the record in the district court.

ARGUMENT

POINT I: WHETHER REVERSAL FOR NEW TRIAL IS NECESSARY WHERE THE RECORD DOES NOT REFLECT COMPLIANCE WITH RULE 3.410, BUT IS ADEQUATE TO DEMONSTRATE NO PREJUDICE TO THE DEFENDANT OCCURRED.

Assuming, arguendo, that the trial court answered the jury's questions without first consulting counsel, and that the procedure followed by the court contravenes the per se Rule of Ivory v. State,[1] respondent would respectfully urge this court to recede from or further clarify Ivory and hold that the failure to comply with Florida Rule of Criminal Procedure 3.410 can be harmless where

(1) the procedure actually followed by the court is adequate to preserve the record, and

(2) the record affirmatively demonstrates no prejudice to the defendant occurred.

In the instant case, the answer by the trial court in no way prejudice petitioner, nor is any prejudice claimed (other than procedural insufficiency). No procedural due process right has been infringed to an extent requiring a new trial. Rushen v. Spain, __U.S.__, 104 S.Ct. 453, 78L.Ed.2d267(1983); U.S. v. Betancourt, 734 F.2d 750 (11 Cir. 1984). Consequently, the issue rests squarely upon how strictly Florida wishes to enforce its procedural rules, where no actual prejudice has resulted.

The per se rule set forth in Ivory is no doubt concerned

[1] 351 So.2d 26 (Fla. 1977)

with avoiding possible prejudice to a defendant where it is unclear what has been told to the jury. In instances such as the facts of Ivory, where an actual error occurs, misinforming the jury, the danger is made most apparent. However, cases have also recognized a need to protect against even potential danger, such as where a question is answered by a bailiff and no certain record is available. See, Coley v. State, 431 So.2d 194 (Fla. 2d DCA 1983); Davis v. State, 408 So.2d 795 (Fla. 2d DCA 1982); Flowers v. State, 348 So.2d 602 (Fla. 4th DCA 1977); Slinsky v. State, 232 So.2d 451 (Fla. 4th DCA 1970); Holzapfel v. State, 120 So.2d 195 (Fla. 3d DCA 1960). In the instant case, both the questions and the court's response were in writing and preserved in the record. There is no uncertainty as to what the jury was told, and there is no claim that the response was incorrect or prejudicial. Under these circumstances, a per se rule serves little purpose,[2] and reversals on strictly procedural grounds have been avoided. U.S. v. Betancourt, supra; Rose v. State, 425 So.2d 521 (Fla. 1982); Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Nelson v. State, 148 Fla. 338, 4 So.2d 375 (1948); Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA 1984), rev. denied, 456 So.2d 1182 (Fla. 1984); State v. Hunter, 358 So.2d 50 (Fla. 4th DCA 1978). Respondent would respectfully urge this

[2] It might be argued that Ivory serves as a deterrent to trial court error in advising the jury without counsel's knowledge. However, a per se rule does not assure jury contact will not take place, but only assures reversal in the event such contact is discovered. Further, such a "purpose" imputes considerable bad faith to trial judges in assuming they intentionally err. Inadvertent mistake is not susceptible to deterrence.

court to allow any error here, if it occurred, to be deemed harmless. See, § 59.041, Fla. Stat. (1983); § 924.33, Fla. Stat. (1983).

POINT II: WHETHER THE RECORD DEMONSTRATES THE ERROR CLAIMED BY PETITIONER.

As discussed in the district court opinion,[3] the trial court's refusal to answer the jury's questions does not fall within the narrow technical terms of Florida Rule of Criminal Procedure 3.410, in that no additional instructions were given nor testimony read. Further, while it appears no conference regarding the jury questions was had on the record, the rule, technically speaking, does not require that such notice be on the record. An appellate court should not infer impropriety occurred off the record absent proof of impropiety. Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977). This record shows that the written questions and answers were filed in open court, without petitioner raising any objection to the procedure employed. While the court minutes and transcript contain no record of a conference, as in Occidental Chemical, a silent record does not create error where off-record impropriety is claimed. Accord, Lebowitz v. State, 313 So.2d 473 (Fla. 3d DCA 1975).

In the event this court determines reversible error has occurred if defense counsel did not have knowledge of the jury question and answer, respondent would request remand to the district court with opportunity to supplement the record. Although concerned about a possibly incomplete record, the district court had no need to impliment Rule 9.200(f), Florida

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[3] 455 So.2d 1090 (Fla. 5th DCA 1984)

Rule of Appellate Procedure, in reaching their decision. Respondent will seek to establish that pertinent contact with both the prosecutor and defense counsel did take place off the record, should this fact be necessary to reach a decision in this cause, and opportunity to supplement the record given. "No proceeding shall be determined because the record is incomplete until an opportunity to supplement the record is given." Fla. R. App. P. 9.200(f)(2).

CONCLUSION

The procedure employed by the trial court is answering the jury's questions ensured that the communication was made part of the record, without uncertainty as to possible prejudice. Since (1) the procedure adequately protected the record, and (2) the record affirmatively demonstrates no prejudice occurred, the per se rule of Ivory should be modified to allow the error to be deemed harmless.

Should this court determine that it is the state's obligation to submit record evidence of compliance with Rule 3.410, the state respectfully requests opportunity to do so.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to Larry B. Henderson, Assistant Public Defender, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 11TH day of March, 1985.

Ellen D Phillips

Of Counsel
Ellen D. Phillips