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IN THE SUPREME COURT OF FLORIDA

HUGH MILLER CURTIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,891

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE

HUGH MILLER CURTIS (hereafter Petitioner) was charged by Information with the offense of Aggravated Assault With A Deadly Weapon [violation of §784.021(1)(a), Florida Statutes (1981)](R169).[1/] The Office of the Public Defender was appointed to represent Petitioner (R176) and the matter proceeded to a jury trial in the Circuit Court of Orange County, the Honorable Michael F. Cycmanick presiding (R1-163).

The State's case consisted of seven photographs and the testimony of three persons (R1-70). At the conclusion of the State's case, defense counsel moved for a directed verdict of acquittal, which Motion was based upon insufficiency of evidence to establish that a deadly weapon had been involved (R109-110). The Motion was denied (R110).

1/ (R) refers to the Record on Appeal, Fifth District Court of Appeal Case. No. 82-1704

Petitioner testified in his own behalf and presentented the testimony of an eye-witness to the alleged assault (R70-105). The defense then rested and renewed the Motion for Judgment of Acquittal, which motion was denied (R105). The jury was instructed without objection as to the law of the case (R143-154), but in so doing the trial judge failed to define the term "deadly weapon" for the jury. After the jury retired for deliberation, two written questions were propounded to the trial court (R188). These questions were answered in writing by the court without reconvening court and 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 (R154, 186,188).

Following deliberation, the jury returned a verdict of guilty of "Aggravated Assault as charged in the Information" (R187).

Petitioner was adjudicated guilty of violation of Section 784.021(1)(a), Florida Statutes, and sentenced to a five (5) year term of imprisonment, with credit to be allowed for 111 days time served (R190-193). The Office of the Public Defender was appointed to represent Petitioner (R194,216) and a Notice of Appeal was filed December 3, 1982 (R198,210). The conviction of Petitioner was affirmed on direct appeal by the Fifth District Court of Appeal in Curtis v. State, 455 So.2d 1090 (Fla. 5th DCA 1984). On February 6, 1985 this

Court accepted jurisdiction to review the aforesaid decision based upon express and direct conflict with a decision of the Supreme Court of Florida, to wit: Ivory v. State, 351 So.2d 26 (Fla. 1977). This brief follows.

STATEMENT OF THE FACTS

Appellant, paying for a week in advance, rented a motel room at the Relms Motel, and had stayed there without incident for four days (R50), when he discovered that something was missing from his room (R72,90-91). He sent his companion to the manager's office to determine whether the maid knew anything about the missing property, but the maid had gone home for the day (R44,72).

When Appellant heard that the maid was unavailable, he went to the manager's office to see for himself (R90-91). An altercation ensued. Two witnesses testified that Appellant assaulted Edna McCoy with a knife as she attempted to telephone the police to investigate the theft (R18-23,45-47). Appellant and another witness testified that Appellant did not have a knife and did nothing more than seize the telephone from the grasp of Ms. McCoy (R72-76,90-94).

POINT

THE TRIAL COURT ERRED IN FAILING TO COMPLY WITH FLA.R.CRIM.P.3.410 WHEN RESPONDING TO AN INQUIRY FROM THE JURY CONCERNING THE EVIDENCE PRESENTED AT TRIAL.

Fla.R.Crim.P. 3.410 provides that "[a]fter the jurors have retired to consider their verdict, if they request additional instructions or the have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant." (emphasis added).

Compliance with the above emphasized language of Rule 3.410 serves two purposes; 1) compliance affords the parties due process and an opportunity to be heard, and; 2) compliance provides a full and complete record to provide meaningful appellate review. The rule contains no provision whatsoever for the trial judge to summarily answer in writing an inquiry from the jury, and for good reason.

The Fourth District Court of Appeal addressed the practice of summarily answering a jury inquiry in Slinsky v. State, 232 So.2d 451 (Fla. 4th DCA 1970). The court stated the following:

> [W]e feel that the practice here employed, innocently intended as undoubtedly it was, violated the defendant's rights in a harmful way and entitles him to a new trial...[T]he trial court, faced with such request, should have ad-

> vised counsel of it and reconvened court with defendant in attendance... This would afford counsel an opportunity to perform their respective function. They could advise the court, object, request the giving of additional instructions or the reading of additional testimony, and otherwise fully participate in this facet of the proceeding...

Id. at 453.

Quoting the foregoing language, this Court in Ivory v. State, 351 So.2d 26 (Fla. 1977) held that "it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request." Id at 28. This holding comports with the requirement of Fla.R.Crim.P. 3.410.

It is interesting to note that Fla.R.Crim.P. 3.180 (a)(5) requires that the defendant be present "[a]t all proceedings before the court when the jury is present." If a jury's inquiry is answered in writing by the court without reconvening the jury in the courtroom as required by Rule 3.410, the procedure may technically comply with Rule 3.180, but it nonetheless technically violates Rule 3.410. Technicalities aside, the fundamental concepts of due process and a public trial require that the court reconvene to provide the jury answers to its inquiries or additional instructions. To file a written memorandum does not explain to public audience the action taken by the court, albeit that the writing is filed "in open court."

Further, the danger of providing a single written instruction signed by the judge is that the jury might attach more significance to that one written instruction as opposed to the oral charge to the jury at the conclusion of the case.

It is respectfully submitted that the non-compliance with Fla.R.Crim.P. 3.410, affirmatively demonstrated by the record, requires reversal of the instant conviction.

CONCLUSION

Based upon the argument and authorities set forth in this brief, this Court is respectfully asked to reverse the conviction and remand the matter for retrial.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith at 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 and mailed to Mr. Hugh Miller Curtis, Inmate No. 086938 3876 Evans Rd. Box 50, Polk City, Florida 33868 on this 19th day of February 1985.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER