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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,171

THE STATE OF FLORIDA,

Petitioner,

vs.

JERRY BROWN,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, the State of Florida, was the Petitioner in the District Court of Appeal of Florida, Third District and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit. The Respondent, Jerry Brown, was the Respondent in the Third District and the Defendant in the trial court. The parties will be referred to as they stand before this Court. The symbol "A" will be utilized to designate the Appendix to this brief. The symbol "EX" will designate a specific Exhibit in the Appendix. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent, Jerry Brown, is currently charged in information no. 83-872, with armed robbery, in violation of section 812.12, Florida Statutes (1979). The information alleges that on December 2, 1982, the Respondent unlawfully took by force, violence, assault or fear, property of a value in excess of one hundred dollars ($100.00) belonging to and in the person and custody of Julian Angelini and that in the course of committing said robbery carried a shot gun. (A., Ex. A).

On July 20, 1983, a jury trial commenced with Steven Taitz, Assistant State Attorney, Eleventh Judicial Circuit, as the prosecuting attorney. At the conclusion thereof, the jury retired to deliberate. However, the jury was unable to reach a unanimous verdict and on July 22, 1983, a mistrial was declared. (A., Ex. B).

In preparation for Respondent's second trial, Steven Taitz, the prosecuting Assistant State Attorney, filed, on July 27, 1983 an additional list of witnesses. Said list informed that Dennis Nowak, Assistant State Attorney Eleventh Judicial Circuit, was going to be a State's witness at Respondent's trial. (A., Ex. C).

Thereafter, on August 8, 1983, Respondent filed his Motion to Disqualify the Office of the State Attorney. The motion alleged that inasmuch as Florida Bar Code of Professional Responsibility, Disciplinary Rule 5-102,[1] prohibits a lawyer from litigating a case where another member of the firm ought to be called as a witness in that case, the entire office of the State Attorney was required to be disqualified since Dennis Nowak, a nonprosecuting, Assistant State Attorney, was going to testify at Respondent's trial. (A., Ex. D).

[1]Hereinafter, all further references to Ethical Considerations or Disciplinary Rules of the Florida Bar Code of Professional Responsibility will be done with the symbols "EC" and "DR", respectively.

The issue arose as a result of the Respondent's Motion for Lineup Pursuant to Florida Rule of Criminal Procedure 3.220(e), filed on May 23, 1983. (A., Ex. E). The motion alleged that Respondent, in order to aid the investigation of his defense, required Julian Angelini, the victim, who previously identified the Respondent, to appear at Respondent's lineup.

On May 25, 1983, Respondent's Motion for Lineup was Granted. (A., Ex. F). On June 3, 1983, the Lineup occurred. Present at the Lineup was Steven Taitz, the prosecuting Assistant State Attorney; Dennis Nowak, Assistant State Attorney, as a witness to the proceedings; Respondent; Respondent's counsel; Julian Angelini, the victim; and the Court Reporter. Assistant State Attorney Dennis Nowak, did not participate as a State Attorney during the lineup; he only observed the proceedintgs. (A., Ex. G).

On October 11, 1983, Respondent's Motion to Disqualify was heard by the trial court. (A., Ex. H). At said hearing, the Respondent's position was that when the opposing party seeks to call as a witness, a member of their law firm, that disqualifies the entire office from prosecuting the case (A., Ex. H at page 4), Respondent alleged that under the above described circumstances, the entire State Attorney's Office was required to be disqualified, pursuant to DR

5-102, since Assistant State Attorney, Nowak would or might testify on the State's behalf.

The State's position was that since the testifying Assistant State Attorney would be appearing only as a witness as to what he observed at Respondent's lineup, not in his capacity as an Assistant State Attorney, nor as a prosecuting attorney, disqualification of the entire State Attorney's Office was inappropriate. (A. Ex. H at page 5). Furthermore, the State submitted that disqualification of the entire office would not lessen any alleged prejudice of having an Assistant State Attorney testify, inasmuch as even with a Special Appointed State Attorney, the Assistant would still be called to testify. (A. Ex. H at page 13). At no time did Respondent challenge the competency of the testifying Assistant State Attorney. Finally, the State submitted that under the facts, sub judice, disqualification of the entire State Attorney's Office was not required. (A. Ex. H at page 13).

At the conclusion of the hearing, the trial court granted the motion. (A., Ex. H at page 22). On October 13, 1982, a written order was entered, which granted the motion and as grounds therefore found:

> 1. That the State intends to call as a witness, at trial an Assistant State Attorney who was present at a

> lineup wherein the Defendant was identified.
>
> 2. That the proffered testimony of said Assistant State Attorney is to the effect that the victim identified the Defendant, in a lineup, as the perpetrator.
>
> 3. That disqualification of the entire officer of the State Attorney is mandated by Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983).
>
> (A., Ex. I).

Petitioner then filed a Petiton for Writ of Common Law Certiorari in the Third District Court of Appeal. It was contended that the trial court departed from the essential requirements of law by finding that a multi-Assistant State Attorney's Office is a law firm pursuant to DR 5-102 and disqualifying the entire State Attorney's Officer without a showing of prejudice which could only be eliminated by disqualifying the entire office. (A., Ex. J).

Pursuant to an Order to Show Cause the Respondent contended that a multi-Assistant State Attorney's Office is a law firm as contemplated by DR 5-101B, DR 5-102 (A) and DR 5-105 (D) and therfore the State was not entitled to relief. In support thereof he relied upon Fitzpatrick v. Smith, 432 So.2d 89 (Fla. 5th DCA 1983) cert. pending, Case No. 63,752 and Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983) (A. Ex. K).

Thereafter, the Panel in Clausell v. State, 455 So.2d 1050 (Fla. 3d DCA 1984) decided, in a substantially identical case to the case sub judice, that a multi-Assistant State Attorney Office is not a law firm under the aforementioned Disciplinary Rules and that without a showing of prejudice a motion to disqualify an entire State's Attorney Office when a non-prosecuting assistant testifies should be denied. The Third District then heard Clausell en banc and also heard the case sub judice at the same en banc hearing. (A. Ex. L). The parties were permitted to file supplemental briefs. (A., Ex. M).

The en banc court in Clausell voted to disapprove of the panel decision and to approve of the Third District's previous decision of Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983). In Rodriguez, the Third District had previously held that the impropriety of the prosecuting attorney calling a member of his own office as a witness is per se reversible error without consideration of the amount, if any, of prejudice the defendant suffered. The en banc court certified the following questions:

> 1. Is it a breach of the Code of Professional Responsibility of the Florida Bar for a State Attorney or any Assistant State Attorney in the office to continue to act as the prosecutor in a criminal case when it is his or her intention to call another Assistant State Attorney in the same office to testify at

> the trial of the case as to a material matter?
>
> 2. If it is a breach of the Code of Professional Responsibility of the Florida Bar for a State Attorney or any Assistant State Attorney in the office to continue to act as the prosecutor in a criminal case when it is his or her intention to call another Assistant State Attorney in the same officer to testify at the trial of the case as to a material matter, is disqualification of the State Attorney and any Assistant State Attorney in the same office from prosecuting the case required whether or not prejudice to the defendant can be demonstrated?
>
> 445 So.2d at 1055-56.

Clausell is now pending before this Court in State v. Clausell, Case No. 65,945.

On the same day the Clausell en banc decision was announced, the panel in the case sub judice also announced its decision. State v. Brown, 456 So.2d 527 (Fla. 3d DCA 1984). The Brown panel denied the petition for writ of certiorari for the reasons set forth in Clausell v. State, supra.

In the case sub judice, Petitioner, after the denial of the writ of certiorari, moved for rehearing in order to have the questions certified in Clausell, certified in Brown. Petitioner also moved to stay the mandate. The motion for

rehearing was denied but the stay was granted. Petitioner's subsequent motion for clarification was denied.

A notice invoking the discretionary review jurisdiction of this Court was timely filed and jurisdiction was accepted on February 7, 1985.

QUESTION PRESENTED

WHETHER A SHOWING OF PREJUDICE IS REQUIRED BY A DEFENDANT WHEN HE MOVES TO DISQUALIFY THE ENTIRE OFFICE OF A STATE ATTORNEY ON THE GROUND THAT A NON-PROSECUTING ASSISTANT STATE ATTORNEY IS A WITNESS FOR THE STATE IN DEFENDANT'S TRIAL?

ARGUMENT

A SHOWING OF PREJUDICE IS REQUIRED BY A DEFENDANT WHEN HE MOVES TO DISQUALIFY THE ENTIRE OFFICER OF A STATE ATTORNEY ON THE GROUND THAT A NON-PROSECUTING ASSISTANT STATE ATTORNEY IS A WITNESS FOR THE STATE IN DEFENDANT'S TRIAL.

The State filed a Petition for Writ of Certiorari seeking to quash an order of the trial court which disqualified the Office of the State Attorney from further participation in Respondent's prosecution for armed robbery. Respondent successfully contended in the trial court because an Assistant State Attorney was to be a witness for the prosecution, all other members of the State Attorney's Office are disqualified from prosecuting him and a special prosecutor must be appointed.

The Third District denied the petition for writ of certiorari. State v. Brown, 456 So.2d 527 (Fla. 3d DCA 1984). The grounds therefor were for the reasons set forth in the substantially identical case of Clausell v. State, 455 So.2d 1050 (Fla. 3d DCA 1984).

In Clausell v. State, supra, Clausell sought to quash an order of the trial court which refused to disqualify the Office of the State Attorney from further participation in his prosecution for perjury. Clausell contended that

because two Assistant State Attorneys were going to be witnesses for the prosecution, all other members of the State Attorney's Office were disqualified from prosecuting him and a special prosecutor was required to be appointed. Clausell argued that it was unnecessary for him to show prejudice and that he was entitled to have the State Attorney's Office disqualified because its further participation in the prosecution constituted a breach of the Florida Bar Code of Professional Responsibility. His thesis was the Office of the State Attorney is a law firm, and every assistant within the office is a lawyer in the firm, so as to require the automatic disqualification of the firm when any of its members are to be witnesses in a case being prosecuted by the law firm.

The Panel, on the basis of State v. Murray, 443 So.2d 955 (Fla. 1984), rejected this contention. It held that without a showing that a prosecutor's violation of the Code of Professional Responsibility will or has prejudiced him, a defendant has no right to enforce the Code and is not intended to be an incidential beneficiary of any violation of its provisions. Further, the panel found that the State Attorney's Office is not a law firm within the meaning of the Code of Professional Responsibility. The panel then denied the petition for writ of certiorari.

The Third District, en banc, disapproved the panel decision. Instead, the court reaffirmed its previous holding that the impropriety of the prosecuting attorney calling a member of his own office as a witness is per se reversible error with no showing of prejudice required. Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983). The Rodriguez holding was based on the court's interpretation of DR 5-101(B)(14) and Dr 5-102 and found that since the challenged testimony did not fall within the exceptions of DR 5-101(B)(14) the violation thereof was per se reversible error.

The State submits that the foregoing rule of law directly conflicts with this court's standard of review announced in State v. Murray, 443 So.2d 955 (Fla. 1984). This court specifically held that prosecutorial misconduct in violation of the Code of Professional Responsibility is the proper subject of bar disciplinary action and will not warrant reversal of a conviction unless the misconduct can be said to have prejudiced the defendant's right to a fair trial. Therefore, in broader application without any showing that a prosecutor's violation of the Code of Professional Responsibility will or has prejudiced him, a defendant has no right to enforce the Code and is not intended to be an incidental beneficiary of any violation of its provisions.

In the case sub judice, the Third District based its holding of per se reversible error on an alleged violation of the Code of Professional Responsibility. Not only does this conflict with this court's decision in Murray, but it also ignores the fact that the revised Model Rules of Professional Conduct adopted by the American Bar Association on August 2, 1983 and which is being considered for adoption by this Court in In re: Revision of the Code of Professional Responsibility of the Florida Bar, explicitly requires a showing of prejudice before an attorney is disqualified from handling a case when a member of his firm testifies.

Florida's version of the ABA Model Rules of Professional Conduct, contains comments from the Special Committee on Model Rules of Professional Conduct, which comments contain the corresponding sections, if any, to the present code. Further said commentary provides analysis of both the revised and new provisions.

Rule 3.7, Lawyers as Witness, as modified by the Special Committee provides:

> Rule 3.7 Lawyer as Witness
>
> (a) A lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) The testimony relates to an uncontested issue;

(2) The testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) The testimony relates to the nature and value of legal services rendered in the case; or

(4) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

The committed found that Rule 3.7 addresses the dilemma of an advocate acting as a witness more concisely than Florida's DR 5-101(B) and DR 5-102. The committee notes that Rule 3.7(b) is a departure from DR 5-101(B) in permitting a member of a lawyer's firm to act as a witness in a trial in which the lawyer is an advocate. Since this change allows the lawyer witness to assist in trial preparation like any other witness the change was approved. In so approving the change it was recognized to remain as an advocate when a member of the firm is a witness is a tactical consideration rather than a ethical one.

The rule explicitly allows a lawyer to be an advocate even if a lawyer in his firm is a witness unless there is

either a conflict with a present client[2] or with a former clients.[3] Only when the lawyer, who is a member of a firm,

[2]Rule 1.7, Conflict of Interest: General Rules provides:

> Rule 1.7 Conflict of Interest: General Rule
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless;
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[3]Rule 1.9 Conflict of Interest: Former Client, provides:

> Rule 1.9 Conflict of Interest: Former Client
>
> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's

may not act as both advocate and witness by reason on conflict of interest, is the firm disqualified. See comment to Rule 3.7.

The new Rules further support the State's contention in its definition of the term "firm". The first clue is in the "Terminology" section. It provides:

> "Firm" or "Law Firm" denotes a lawyer or lawyers in a private firm, lawyer employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See comment Rule 1.10.

Comment to Rule 1.10 further expands the definition of law firm, by dealing with office space sharers and other less tangible associations. However, it excludes any reference to a State Attorney's Office as a law firm. It does include the Office of the Public Defender as a legal services organization.

> interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit the respect to a client or when the information has become generally known.

The new Rules also recognize the special role the prosecutor plays as an advocate. Once again, prosecutors are given special attention in the rules. Rule 3.8, Special Responsibilities of a Prosecutor provides:

> Rule 3.8 Special Responsibilities of a Prosecutor
>
> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
>
> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
>
> (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Finally, the scope of the Rules are to guide the lawyer through his conflicting responsibilities. The Rules state that a:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties are procedural weapons. The fact that a Rule is just a basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

If the foregoing rules are indeed adopted by this court, a showing of prejudice would be required to disqualify an attorney where a member of his office testifies. This trend of moving away from per se reversible error is further supported by recent developments disapproving of per se reversible error rules.

In Rules of Criminal Procedure-Amendment, 9 FLW 493 (Fla. Nov. 29, 1984), this Court amended Rule 3.390. This

amendment deleted the requirement that the trial court instruct the jury as to the maximum and minimum penalties. In so doing, this Court abolished the per se reversible error rule of Tascano v. State, 393 So.2d 540 (Fla. 1981).

In Tucker v. State, 459 So.2d 306 (Fla. 1984) this Court held that the failure to allege venue in an indictment or information is an error of form, not of substance and such a defect will not render the charging instrument void absnt a showing of prejudice to the defendant. In so doing, this Court receded from State v. Black, 385 So.2d 1372 (Fla. 1980), which held that venue was an essential element of the crime charged, thus an indictment which failed to allege venue was per se prejudicial.

This Court in Ivory v. State, 351 So.2d 26 (Fla. 1977) held that it is per se reversible error when there is communication with the jury outside the presence of the prosecutor, defense counsel and the defendant. However, this Court has seemingly receded from the absolute holding in Ivory. In Hitchcock v. State, 413 So.2d 741 (Fla. 1982) this Court held that the trial court's response to a question regarding penalties without notifying any of the parties constituted harmless error. Harmless error was also found in Rose v. State, 425 So.2d 521 (Fla. 1982) where the trial court, without notifying defense counsel, gave an

"Allen charge". Furthermore, this implicit rejection of Ivory has been applied with this Court's approval, by the District Courts. See Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA 1984), pet. for rev. denied, 456 So.2d 1182 (Fla. 1984).

Furthermore, in Fitzpatrick v. Smith, 432 So.2d 89 (Fla. 5th DCA 1983), rev. pending, the Fifth District only disqualified the entire State Attorney's Office from prosecuting the defendant after it found a conflict of interest which was prejudicial to the defense. See also Brown v. State, 455 So.2d 583 (Fla. 5th DCA 1984)(State Attorneys Office is not disqualified from prosecuting a criminal case merely because one prosecuting attorney in the office is a state's witness in the case).

Therefore, it is clear that this Court is receding from per se reversible error rules. As such, the instant case deserves the same treatment since the disqualification of the entire State Attorney's Office will not alleviate the prejudice, if any, of the non-prosecuting assistants testimony. The prejudice complained of does not lie in the fact of who is prosecuting the case, but who is testifying. The proper challenge should be made against the witness and if the testimony is relevant, it should be permitted regardless of who is prosecuting the case. The proper remedy when the

testimony is deemed relevant, would be for a defendant to file a Motion in Limine to preclude the non-prosecuting witness from testifying as to his official position. In the instant case, such procedure would eliminate any suggestion of prejudice since the non-prosecuting assistant will only be able to testify as to what he observed.

CONCLUSION

Based upon the points and authorities contained herein, the State respectfully requests that this Court reverse the Third District in the instant case and find that a showing of prejudice must be made in order to disqualify an entire State Attorneys Office when a non-prosecuting assistant state attorney testifies for the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF ON THE MERITS was furnished by mail to ROBIN GREENE, Attorney for Respondent, 1351 N. W. 12th Street, Miami, Florida 33125, on this 27th day of February, 1985.

MICHAEL J. NEIMAND
Assistant Attorney General

ss/