047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,828

THE STATE OF FLORIDA,

Petitioner

vs.

ERNEST GRISSOM,

Respondent.

* * * * * * * * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * * * * * * * *

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and Facts recited in the Brief of Petitioner on the Merits with the following additions and clarifications:

The Defendant was tried by a jury before the Honorable Edward N. Moore, Circuit Judge (R. 6-13).

After the Defendant's initial Motion for a Mistrial based upon the Court's comment on the Defendant's exercise of his right to remain silent, the Court offered to give (and in fact did give a "curative" instruction. (T. 209). The Defendant objected and stated:

MR. LANDAU: But I think at this juncture it goes a little too far and error is clear. I would be moving for mistrial. I don't think a curative would help the situation.

THE COURT: The Motion is denied.

MR. LANDAU: I'll tell you why. Because the particular curative you would be giving regarding the jury instruction I'm not too sure we'll be asking for.

THE COURT: You already asked me to give that jury insturction when I spoke to them originally. So they already have that instruction. You requested it, that I give it to them.

MR. LANDAU: The instruction also goes at the end of the case.

THE COURT: Yes, but if you want to - if you don't want, I won't give it. I do intend to give a curative instruction.

MR.LANDAU: I object to giving a curative instruction. (T. 210-211).

The Third District Court of Appeal did not view the Murray decision as an indication that the Supreme Court had receded from the per se rule of reversal in this area. The Court noted that the Murray case did not concern a comment on a defendant's failure to testify, and in fact the Defendant in Murray did testify. Therefore, the Third District Court of Appeal found that Murray was not necessarily a retreat from the per se rule of Harris, David and Trafficante. Grissom v. State, So. 2d 10 F.L.W. 851 (Fla., 3d DCA, March 26, 1985).

The Third District Court of Appeal reversed the Defendant's conviction, for a new trial, but directed the State's question to this Court for consideration.

ARGUMENT

I.

THE DECISION OF STATE v. MURRAY 443, So. 2d 955 (Fla. 1984) and UNITED STATES v. HASTING, 461, U. S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), HAVE NO EFFECT ON THE PER SE RULE OF REVERSAL EXPLICATED IN HARRIS v. STATE, 438 So. 2d 787 (Fla., 1983), DAVID v. STATE, 369 So. 2d 943 (Fla. 1979), and TRAFFICANTE v. STATE, 92 So. 2d 811 (Fla. 1957).

The right not to be compelled in any criminal matter to be a witness against oneself is a right expressly guaranteed in Florida Criminal cases by Article I, Section 9, of the Florida Constitution. In order to safeguard an accused's right against self-incrimination, the Legislature in 1951 passed Florida Statute 918.09 which provided in part:

> ***nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf***

Section 918.09 was repealed in 1970. However, the concept of not penalizing an accused for exercising his privilege against self-incrimination was then embodied in F.R. CR. P. 3.250 adopted by this Court.

In a decision involving a comment by a prosecuting attorney who stated...

> ***all right. The testimony here is uncontradicted, uncontradicted, by these two Trafficantes, this was said in the

> car. They were both there, is there anyone, is ther any statement here in evidenec that either one of them contradicted, regardless of who said it? They have their right***

This Court affirmed that "our law prohibits any comment to be made, directly or indirectly, upon the failure of the Defendant to testify..." Trafficante vs. State 92 So. 2d 811 (Fla., 1957) en Banc reh. den. 1957. In subsequent years this Court has maintained an unbroken record regarding comment on an accused's exercise of his right to remain silent, and has repeatedly refused to apply the harmless error doctrine in such cases. Donovan v. State, 417 S. 2d 674 (Fla., 1982); Bennett v. State 316 S. 2d 41 (Fla., 1975); Shannon v. State, 335 So. 2d 5 (Fla., 1976); Strasser v. State, 445 So. 2d 322 (Fla., 1983) on Rehearing, 1984; Way v. State, 67 So. 2d 321 (Fla., 1953) en Bunc, Rehearing denied, 1953; Simmons v. State, 139 Fla. 645, 190 So. 756 (Fla.) Diecidue v. State, 131 So. 2d 7 (Fla., 1961) reh. den. 1961.

The reason for the rule historically was that this Court recognized the harm done by such a comment, and the impression left with the jury as suggesting the defendant's guilt. In Trafficante at page 813, this Court noted:

> When such impression has been made on the minds of the jurors it cannot by this court be said 'that the error complained of has (not) resulted in a miscarriage of justice.'

This Court went further citing Rowe v. State 87 Fla. 17, 98 So. 613 and spoke of cautionary instructions and the uselessness of same:

> Even if the trial judge had stopped the State Attorney and told the jury not to consider the failure of the defendant to testify, it would not have cured the error. Trafficante at page 813.

Indeed, this Court has expressly gone beyond federal standards in United States v. Hasting 461 U. S. 499, 103 S. Ct. 1974, 76 L. Ed 2d 96, (1983) last year when on rehearing (after the Murray decision) this Court ordered a new trial due to a prosecutor's eliciting from a state witness evidence that a Defendant exercised his right to remain silent. The Defendant was given a new trial without regard to the harmless error doctrine. State v. Strasser, 445 So. 2d 322 (Fla., 1983) on rehearing, 1984

This Court is free under Florida's Constitution to require higher standards of justice than the federal system requires. Oregon v. Hass, 420 U. S. 714, 719 (1975); Cooper v. California, 386 U. S. 58 (1967).

In fact, this Court has on numerous occasions gone beyond federal standards affording citizens of Florida greater rights than the federal system.

In State v. Neil, 457 So. 2d 481 (Fla., 1984) this Court in construing Article I, Section 16 of the Florida Constitution rejected the federal standards of Swain v. Alabama, 380 U. S. 202 (1965) in determining whether peremptory challenges were discriminatorily used.

In State v. Glosson, 462 So. 2d 1082 (Fla., 1985) reh. den. 1985, this Court rejected the narrow application of the due process defense by federal Courts holding that under Article I, Section 9 of the Florida Constitution, misconduct by the State (in the form of a contingent fee paid an informant) violates the due process rights of a defendant regardless of the Defendant's predispostion and requires dismissal of the charges.

Article I, Section 9, of the Florida Constitution has also been construed as being more restrictive on the use of post-arrest silence than the United States Constitution when interpreting the Fifth Amendment. Lee v. State, 411 So. 2d 928, 930 (Fla. 3d DCA, 1982) reh. den. 1982; Pet. for rev. den. 431 So. 2d 989 (Fla., 1983).

It should be remembered that our government is a "federalism of separate states." Gibson v. Florida Legislative Investigation Committee 108 So. 2d 729 (Fla., 1958) reh. den. 1958 cert. den. 79 S. Ct. 1433. This Court has always been acutely aware of Florida constitutional requirements and the

United States Constitutional directives:

> Consistent with the above mentioned tendencies in some quarters, we deem it appropriate to recall that American federalism is a co-ordinate union of divided sovereignties. E. Pluribus Unum. If it be true, as our own State Constitution reminds us, that 'all political power is inherent in the people,' Section 2, Declaration of Rights, F.S.A., it is equally fundamental that the powers enjoyed by the Federal government are those only which are specifically defined in the Constitution of the United States supplemented by those powers essentially implicit in the areas specified. In equal measure powers not so delegated to the federal government nor prohibited to the states were, by the Tenth Amendment to the Constitution of the United States, expressly reserved to the respective states or to the people thereof. It might be well to recall that the Federal Contitution was ratified by conventions of the individual states as separate sovereignties representing the people of each individual state. Gibson at page 733.

Under Florida Article I, Section 9, the privilege against self-incrimination and the corresponding prohibition against penalizing one who exercises this vital right should remain without regard to the harmless error doctrine, as it has been for so many decades.

The case at bar, the Murray, Hasting, Harris, David and Trafficante cases are not necessarily in conflict, due to

the differences in factual situations. Murray and Hasting do not mandate the adoption of the harmless error doctrine in Article I, Section 9 cases.

Hasting was a case in which the Defendant did not testify at trial. Prosecutorial misconduct by comment on the Defendant's failure to testify was the error claimed.

The United States Supreme Court held that the supervisory powers of appellate courts will not be used to reverse convictions where the errors alleged are harmless. The United States Supreme Court further noted in its decision that the particular remark in the Hasting case was at most an "attenuated" violation of Griffin v. California, 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965). Hasting, 76 L. Ed. 2d at page 102. In the Hasting case the comment by the prosecutor was that the defendant did not challenge any of the crimes charged. Hasting, 76 L. Ed. 2d at page 101-102. The Hasting decision was based primarily upon Chapman v. California, 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).

The case of State v. Murray, 443 So. 2d 995 (Fla., 1984) likewise differs from Hasting, other Florida cases and cases at bar. Murray testified at trial. There was no Fifth Amendment nor Article I, Section 9 right to remain silent asserted. Murray at page 956. There was no Trafficante, Harris,

or David question involved in the Murray case. The assistant state attorney who prosecuted the Murray case at trial stated that Murray is a man who thinks he knows the law and can twist it and lie to his own advantage. Murray, at page 956. This was an improper comment on Murray's testimony at trial after he had taken the stand and testified.

In deciding the case, this Court expressly agreed with the analysis of the Court in the Hasting case that:

> 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. Murray at page 956.

The statement made by this Court in Murray does not stand in a vacuum. Murray had nothing factually to do with the Privilege Against Self-Incrimination, and certainly nothing to do with the failure of the defendant to testify and the application of the harmless error rule thereon.

The cases of Trafficante, David and Harris are all comment on silence cases where the prosecutor made comments on the Defendant's silence during the trial. Trafficante dealt with a statement that the Defendant has not contradicted the testimony. David was also a direct comment by the prosecutor asking why if he, had a business failure, the Defendant did not say anything. Finally, the Harris case held that a comment on

Defendant's demeanor was not a comment on his right to remain silent but that had it been interpreted as such the harmless error rule would apply.

All of the cases, Trafficante, David and Harris were decided on the basis of Fla. R. Crim. P. 3.250 (Formerly Section 918.09, Fla. Stat. 169), which prohibits comment by a prosecutor on a Defendant's failure to testify.

Both former Florida Statute 918.09 and Fla. R. Crim. P. 3.250 have been extended to prohibit a trial judge from going beyond the dictates of the Rule. Diecidue v. State 131 So. 2d 7, 9 (Fla., 1961) reh. den. 1961; McClain v. State, 353 So. 2d 1215 (Fla. 3d DCA, 1978) reh. den. 1978; Young v. State, 330 So. 2d 235 (Fla., 2d DCA, 1976) reh. den. 1976.

Article I, Section 11 of the Florida Constitution guarantees a fair and impartial trial to the citizens of Florida. Under Section II the trial Judge has a duty not to comment on an accused's failure to testify. Diecidue, at page 9. Under former Florida Statute 918.09 this Court held:

> We are not unmindful of the postulate that our Statute, F. S. Section 918.09, F.S.A. makes specific reference only to the fact that the prosecuting officer may not make reference directly, indirectly or covertly to the fact that an accused in a criminal case did not take the stand in his own defense. Nevertheless, when a trial judge steps beyond the admonition contained in F.S. Section 918.10, F.S.A., wherein it is declared that 'the presiding judge shall

> charge the jury only upon the law of the case (upon) the conclusion of argument of counsel***' (emphasis supplied) it cannot be said 'that the error complained of has (not) resulted in a miscarriage of justice.' Way et. al v. State, Fla. 67 So. 2d 321, 323.
>
> Diecidue at page 9.

The remarks made by a trial judge to a jury are even more weighty than those remarks made by a prosecutor. It has been noted:

> There can be little question that the remarks made by the judge in a jury trial are given great weight by the jury---greater than the remarks of other participants in the trial.
>
> Young v. State 330 S. 2d 235 (Fla., 2d DCA, 1976) reh. den. 1976.

Neither Hasting nor Murray construe Fla. R. Crim. P. 3250 nor Article I, Section 9 or 11 of the Florida Constitution. There is no reason to interpret Murray as a retreat from the case arising under Rule 3.250 or Article I, Section 9.

The rationale behind Trafficante and its progeny was that a comment on an accused's failure to testify made an impression on the minds of jurors regarding a Defendant's silence which could not be erased nor said to have not resulted in a miscarriage of justice. Trafficante at page 813.

This Court has noted that such comments are so

serious that:

> Even if the trial judge had stopped the state attorney and told the jury not to consider the failure of the defendants to testify, it would not have cured the error.
>
> Rowe v. State, 87 Fla. 17, 98 So. 6B, 617 (Fla.).

This rationale behind Trafficante, David, Harris and other cases on point was the gravity of the harm to the Defendant. Not one of these cases discusses the Appellate Court's "supervisory powers". That is because this Court never viewed such comments as harmless.

As a practical matter, should this Court determine that the harmless error rule should be applied to cases such as the case at bar, no trial judge could grant a mistrial before determining whether the evidence was overwhelming. When does evidence become overwhelming? This would be the subject of numerous appeals on the issue. There would be no guidelines for the trial courts to follow to determine when a comment on a Defendant's failure to testify is harmlful or harmless, so that the District Courts of Appeal and ultimately this Court would have to determine how much evidence is enough.

As the rule presently stands, no one is to comment on the failure of an accused to testify at trial. It is an easy to follow, simple rule. In balancing the benefits of this

rule against the dangers, the scales are weighted heavily in favor of benefit to the citizens of Florida. The potential dangers of having an unclear rule that no one shall comment - but if they do it doesn't matter - will tend to increase the number of comemnts made at trial. Soon an accused will be placed in the position of having to prove his innocence by testifying, which is contra to our entire judicial system.

The State has the burden of proof in a criminal case. It is a heavy burden but was designed to protect all of our citizens accused of crime both innocent and guilty. Permitting comments on an accused's silence during trial lessens the State's burden as most jurors want to hear from the Defendant. Even wihtout impermissible comments from the State, a Co-Defendant, or the Court, one who does not testify in his own behalf has a heavy burden. Calling attention to his failure to defend himself, failure to speak out at trial, failure to speak to the police and failure to contradict State's witnesses makes an indelible mark in the minds of the jurors against one accused of crime. Should the harmless error doctrine be applied to such cases, that mark will be showing up increasingly, over the line designated for the foreperson on guilty verdicts. Such comments are so devastating due to their very nature that there will be no way for one accused of crime to decline to testify, and still walk out of our

courtrooms via the front door.

The certified question should be answered in the negative and the Defendant should be given a new trial.

II.

AS FOUND BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, THE TRIAL COURT'S COMMENT CONSTITUTED A COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY AT TRIAL.

If a comment is "fairly susceptible" to interpretation by the jury as a reference to the Defendant's failure to testify it is an improper comment on the Defendant's exercise of his right to remain silent. Trafficante v. State, 92 So. 2d 811 (Fla., 1957); Bain v. State _____So. 2d_____, 8 F.L.W. 2655 (Fla., 4th DCA, Case no. 82-1522, 11/2/83) Harris v. State, 438 So. 2d 787 (Fla., 1983); David v. State, 369 So. 2d 943 (Fla., 1979); Roberts v. State, 443 So. 2d 192 (Fla., 3d DCA, 1983) review denied, 450 So. 2d 489 (Fla., 1984); Samonsky v. State, 448 So. 2d 509 (Fla., 3d DCA, 1983) review denied, 449 So. 2d 265 (Fla., 1984); Burns v. State, _____So. 2d_____ 10 F.L.W. 904 (Fla., 3d DCA, April 9, 1985) (pending in this Court, Case no. 66, 888).

In the instant case, during defense counsel's cross-examination of the State's first witness, Linda Bannister Grissom, the trial court sustained the prosecutor's objection to a question regarding whether the witness had discussed her testimony with the prosecutor. (T. 208). The trial judge, without a request by the prosecutor, then gratuitously instructed

both defense counsel and the jury that:

> It is perfectly proper for the witness to discuss her testimony with the State Attorney as well as it is for your client to discuss his testimony with you, and you may proceed.

(T. 298, 209). Defense counsel immediately requested a side bar and moved for a mistrial, based on the court's prejudicial comment. (T. 209).

The Court's comment that it was perfectly proper for the defendant to discuss his testimony with defense counsel, clearly directed the jury's attention to the defendant's impending failure to testify.* As such the comment was "fairly susceptible" to being interpreted as a reference to the defendant's silence at trial. David v. State at 944. In fact, the contrast between the status of the two at trial, namely, Linda Grissom who discussed her testimony with the prosecutor and elected to testify, and the defendant, who discussed his testimony with defense counsel and subsequently elected not to testify, would likely have cemented the implications inherent in the comment.

Several cases illustrate the impropriety of the

*The defendant's privilege against self-incrimination is violated as much by a comment on his impending failure to take the stand as be a reference to his completed election not to become a witness. State v. Turner, 433 A. 2d 397, 401 (Me. 1981); Roberts v. State, supra.

Judge's comment.

In Manofsky v. State, 354 So. 2d 1249 (Fla., 4th DCA 1978) the court reversed the defendant's conviction for aggravated assault after concluding that the prosecutor had improperly commented on the defendant's failure to testify, when the prosecutor commented:

> Now the testimony may be different if the (appellant) testifies.

In Fussell v. State, 436, So. 2d 434 (Fla. 3d DCA 1983) the Court reversed the defendant's conviction for attempted sexual battery after concluding that the prosecutor's question during voir dire examination -- "Does it bother you that a 14 year old girl is going to be the victim in this case, it is going to be her word against his word?" -- was an impermissible comment on the defendant's failure to testify.

Similarly, in Smith v. State, 358 So. 2d 1137 (Fla., 3d DCA 1978), the court reversed Smith's conviction upon finding that the prosecutor's comment in opening statement -- "Do you believe Mrs. Santz (State's witness) or are you going to believe the defendant." -- was an improper comment on the defendant's right to silence.

Also, in Ramos v. State, 413 So. 2d 1302 (Fla., 3d DCA, 1982) the court found that the prosecutor's comments during voir dire examination, that a defendant need not testify

if testifying would incriminate him and that the decision as to whether the defendant would testify was the defendant's, were improper.

This Court reversed a conviction where the trial judge instructed the jury and mentioned the Defendant's failure to give contrary or exculpatory evidence, indirectly. Diecidue v. State, supra.

Likewise, asking the Defendant who was representing himself, whether he wanted to "get under oath" and "tell the jury anything" was held to be an impermissible comment by the Court on the Defendant's failure to testify. Young, supra.

Under the circumstances in the instant case, the trial judge's comment, that it was appropriate for the defendant to discuss his testimony with his counsel, improperly focused the jury's attention on the Defendant's decision to not take the stand. The court's comment constitutes reversible error. David v. State, supra. The certified question should be answered in the negative. The Defendant should receive a new trial.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the Respondent requests that this Honorable Court answer the Certified Question in the negative, affirm the decision of the District Court of Appeal, Third District, and remand the cause for a new trial.

Respectfully submitted,

BENNETT H. BRUMMER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, Att: Richard L. Polin, Esquire, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida 33128 this 10th day of June, 1985.

MAY L. CAIN
SPECIAL ASSISTANT PUBLIC DEFENDER