IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
JAMES L. SMITH,
Respondent.

CASE NO. 67,039

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

(Continued)

STATUTES

PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

The following symbol will be used:

"R" Record on Apppeal

All emphasis has been supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Respondent was charged by information with kidnapping (Count I) and robbery of Winnie Mae Harrison (Count II) (R 215-216). On conclusion of Respondent's trial by jury, his motions for judgment of acquittal were denied (R 121-129). The jury returned its verdicts finding Respondent not guilty of Count I (R 234) and guilty of attempted robbery as included in Count II of the information (R 235). Respondent was adjudged not guilty of Count I (R 238) and guilty of attempted robbery, pursuant to the jury's verdicts (R 239). On September 10, 1984, Respondent was sentenced to serve five (5) years in prison on this charge (R 240).

Notice of appeal was timely filed on September 12, 1984 (R 241). On April 24, 1985, the Fourth District Court of Appeal issued its opinion reversing Respondent's conviction and remanding for a new trial. The District Court of Appeal certified the following question to this Honorable Court:

> May the harmless error rule be applied in a case involving an impermissible comment on the defendant's right to remain silent?
>
> (See Appendix)

Rehearing was denied on May 9, 1985. On May 10, 1985, the State of Florida filed its Notice to Invoke Discretionary Jurisdiction. This brief follows.

STATEMENT OF THE FACTS

On December 7, 1983, Winnie Mae Harrison went to the Glendale Savings and Loan bank to make a deposit for her daughter (R 45). As she was getting in her car to leave, a man she identified as Respondent approached her (R 47). He told her he had picked up an envelope he found in the bank parking lot (R 58), and asked her if she knew what it was (R 48). The envelope was addressed to a location in Cuba (R 48) and contained a $2 bill appearing on the outside of a stack of bills bound in a $100 wrapper (R 112).

As Ms. Harrison described what followed, a second man then came up and got inside her car (R 48). The two men then began "hounding" her about $500 she was supposed to give them (R 49, 73) so that she would get $7,000 back (R 57). Ms. Harrison gave the second man $20, thinking he would let her go (R 50). But the men asked for more money, so she drove them to her credit union in Margate (R 51). It was on the way there that Ms. Harrison changed her mind about giving the men any money: "What am I going to get my money out of the bank for?" (R 52). At the credit union, Ms. Harrison asked the cashier to call the police (R 55) and identified Respondent, who had asked about a bathroom and who remained in the area waiting for Ms. Harrison to finish her business at the credit union (R 56, 89).

Respondent was advised of his rights by the police (R 97-98). He was then taken back to Plantation (R 92, 102).

The $100 stack of "bills" was found to consist of paper (R 112). A Plantation police officer testified that she questioned him:

> I asked him what his name was. He didn't want to tell me. I asked him what his address was. He didn't want to tell me that either. So I didn't ask him anything else.
> (R 113-114)

Respondent's objection to this comment on his right to remain silent was overruled (R 114-115). Later, at the Plantation Police Station, Respondent told the officer that the second man and Harrison were trying to pass off the envelope to him as genuine (R 115).

POINTS INVOLVED

POINT I

WHETHER THE HARMLESS ERROR DOCTRINE SHOULD BE APPLIED TO CASES WHERE A WITNESS HAS DISCLOSED A DEFENDANT'S POST-ARREST SILENCE?

POINT II

WHETHER THE WITNESS COMMENTED ON RESPONDENT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT?

SUMMARY OF THE ARGUMENT

This Court's per se reversal rule in the Fifth Amendment context has been abrogated by the decisions in State v. Murray, 443 So.2d 955 (Fla. 1984) and United States v. Hasting, ___U.S. ___, 76 L.Ed.2d 96 (1983). A comment on an accused's post-arrest silence should be evaluated under the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), since Florida should decide this issue in harmony with federal decisions and the Legislature has codified the harmless error rule. In this case the evidence was overwhelming. Accordingly, Respondent's conviction should be affirmed.

In any event, there was no Fifth Amendment violation in the present case. Respondent was merely asked what his name and address were, and he refused to answer. He later made a statement regarding the incident. The District Court of Appeal erred in reversing Respondent's conviction.

ARGUMENT

POINT I

THE HARMLESS ERROR DOCTRINE SHOULD BE APPLIED TO CASES WHERE A WITNESS HAS DISCLOSED A DEFENDANT'S POST-ARREST SILENCE.

The harmless error doctrine is applicable in cases in which a witness reveals a defendant's post-arrest silence. The State relies on the United States Supreme Court's decision in United States v. Hasting, ___U.S. ___, 76 L.Ed.2d 96 (1983), and this Court's opinion in State v. Murray, 443 So.2d 955 (Fla. 1984) which approved its reasoning, to support this view.

In these two decisions, which dealt with the analogous area of prosecutorial comment on a defendant's failure to testify, the court in Murray stated:

> . . . Nevertheless, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the entire trial.' Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the 'harmless error' rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, ___U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). 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. Reversal of the conviction is a separate matter; it is the duty of

> appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations. The opinion here contains no indication that the district court applied the harmless error rule. The analysis is focused entirely on the prosecutor's conduct; there is no recitation of the factual evidence on which the state relied, or any conclusion as to whether this evidence was or was not dispositive.
>
> We have reviewed the record and find the error harmless. The evidence against the defendant was overwhelming . . .
>
> (Emphasis added)

In United States v. Hasting, supra (relied upon by this Court in Murray), the Supreme Court made it clear that notwithstanding the protections afforded by the Fifth Amendment of the federal Constitution a prosecutor's comment upon the failure of the defedant to testify (i.e., upon the exercise of his right to remain silent) is not per se reversible error, so a reviewing court must, before reversing upon this basis, review the appellate record to determine if the error was harmless beyond a reasonable doubt, i.e., if the evidence of guilt presented at trial was overwhelming. The Hasting court noted that it had previously rejected the per se reversal rule in Chapman v. California, 386 U.S. 18 (1967), and reiterated its holding therein that the harmless error rule governs even constitutional violations under certain circumstances. In reaching its conclusion, the court recalled the Chapman court's acknowledgment that certain constitutional errors involved "rights so basic to a fair trial that their infraction can never be treated as harmless error,"

but clearly determined that an improper comment on the exercise of a defendant's Fifth Amendment right to remain silent was not one of these "basic" rights triggering that extraordinary protection.

The Court's opinion in State v. Murray, supra, clearly adopts the Hasting and Chapman opinions and rationale and similarly determines that prosecutorial misconduct through improper comment does not involve any error "so basic to a fair trial" that it can never be treated as harmless. 443 So.2d at 956. Given this Court's acceptance of the Hasting decision and rationale in Murray, it has been made clear that an improper comment by a prosecutor - - including an improper comment on the exercise by a defendant of his Fifth Amendment right of silence--does not mandate, per se, reversal of a conviction by an appellate court in its supervisory power, but that rather the error must first be evaluated in light of the evidence presented to determine if the offensive conduct was in fact harmless.

Accordingly, in the Fifth Amendment area of an arrestee's silence after Miranda warnings, the harmless error concept is likewise applicable. In fact, prior to 1975, this Court did not regard as impermissible the admission into evidence of a defendant's post-arrest silence. See e.g., Albano v. State, 89 So.2d 342 (Fla. 1956). However, in Bennett v. State, 316 So.2d 41 (Fla. 1975), this Court quashed a district court's affirmance of a conviction on the basis that it conflicted with Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967). Jones

had held the admission into evidence of testimony that an accused, while in custody, remained silent in the face of an accusation of guilt, was per se harmful reversible error which was so fundamental it could be reached on appeal despite the lack of an objection. Jones reached this conclusion based solely upon the United States Supreme Court's statement in Miranda that the prosecution may not "use" at trial the fact that a defendant has stood mute or claimed his privilege in the face of accusation; the Third District noted that its decision changed the law in Florida, including that announced by this Court in Albano, supra. In Bennett, this Court basically adopted the reasoning of Jones, and after examining certain testimony at trial, found that reversible error had occurred. This Court's position on the applicability of harmless error was not beyond per-adventure, however. While first noting that the error complained of was of constitutional dimension and warranted reversal without consideration of harmless error, this Court then went on to state that "in any event," the error should not be regarded as harmless if there was a reasonable possibility that it might have contributed to the conviction. This Court then cited to certain federal precedents on harmless error, including Chapman v. California, supra, and stated that under no stretch of the imagination could it be said that the evidence against the Petitioner was overwhelming. In a concurring opinion, Justive Overton noted the error was prejudicial and not harmless.

As previously noted, the federal courts--most recently

in the Hasting decision[1] - have not accorded the Fifth Amendment the position granted by this Court in the Bennett dicta that became the per se reversal rule. The reason is clear: there is no basis for elevating the particular constitutional error at issue above any others. This Court has previously found the per se reversal rule inapplicable in certain respects. In Clark v. State, 363 So.2d 331 (Fla. 1978), it held an objection and motion for mistrial were necessary in order to preserve any point on appeal regarding an alleged improper comment on a defendant's silence. Similarly, in Jackson v. State, 359 So.2d 1190 (Fla. 1978) and Brown v. State, 367 So.2d 616 (Fla. 1979), this Court refused to reverse the convictions at issue where the defense, rather than the State, had brought to the jury's attention a defense silence. Whereas such result is no doubt partly explainable in this Court's refusal to "reward" invited error, see also, Clark, supra, Petitioner contends that it is also a recognition that evidence of a defendant's silence does not per se irretrievably taint a trial to the extent that no fair verdict can be reached.

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[1] See also, United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980); United States v. Staller, 616 F.2d 1284 (5th Cir. 1980); cert. denied, 449 U.S. 869; United States v. Whitaker, 592 F.2d 826 (5th Cir. 1979), cert. denied, 440 U.S. 950 (1979).

The State maintains it is time to hold that any claim of error in regard to an alleged comment upon a defendant's silence be eligible to be reviewed in terms of harmless error. Since the underlying basis for the rule is reliance on the Fifth Amendment to the United States Constitution, and the United States Supreme Court has made it clear in Hasting that the Fifth Amendment does not require this remedy, the law in Florida should be no different. There is no differing state law rationale to distinguish Florida's interpretation of the Fifth Amendment right to remain silent and due process protections from that of the United States Supreme Court. Indeed, the United States Supreme Court's interpretation of the provisions and protections of a provision of the United States Constitution is controlling, and it is the duty of this Court and other state courts to apply the rationale of the United States Supreme Court decisions interpreting the federal Constitution to the degree applicable in a particular case. See, Miami Herald Publishing Company v. Ane, 423 So.2d 376 (Fla. 1983); Chaney v. State, 267 So.2d 65 (Fla. 1972); State ex rel. Hawkins v. Board of Control, 83 So.2d 20 (Fla. 1955). In Jones, the district court created its per se reversal rule after giving "due consideration" to the views expressed by the Supreme Court with reference to Miranda; this Court should, as it apparently has done in Murray, give the same "due consideration" to the views expressed by the Supreme Court in Hasting and Chapman.

Moreover, the Florida Legislature has decreed that no judgment shall be reversed on appeal unless the error asserted

"injuriously affected the substantial rights of the appellant"; furthermore, there is no presumption that error injuriously affects said substantial rights. Section 924.33, Fla. Stat. (1983). In addition, the Legislature has specifically provided in a section to be liberally construed, that no judgment shall be set aside or reversed on the basis of the improper admission of evidence unless it shall appear that the error complained of has resulted in a miscarriage of justice, i.e., no judgment shall be reversed if the error alleged was merely "harmless." Section 59.041, Fla. Stat. (1983). These requirements as announced by the Legislature serve as clear restrictions on a criminal defendant's right to appeal which is also accorded [as provided by the state Constitution--Article V, §4(b); Article V, §5(b); Article V, §6(b)] by general law. Thus, the Legislature's accompanying proviso that appellate courts once vested with jurisdiction must consider the applicability of the harmless error doctrine before reversing a conviction must not be transgressed.

By certifying the harmless error question in the instant case, the Fourth District Court of Appeal acknowledged the overwhelming evidence in the instant case. The jury convicted Respondent on the strength of Miss Harrison's testimony, not because of the police officer's comment on the witness stand that Respondent would not tell her his name or address. Respondent's conviction should be affirmed.

POINT II

THE WITNESS DID NOT COMMENT ON RESPONDENT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

Should this Court conclude in Point I that a comment on silence can be harmless error and in this case it was, then resolution of Point II will be unnecessary. However, if the court does not so hold, the State nevertheless maintains the Defendant's conviction must be affirmed because there was no Fifth Amendment violation.

At trial, the following testimony was given by a police officer:

> I asked him what his name was. He didn't want to tell me. I asked him what his address was. He didn't want to tell me that either. So I didn't ask him anything else.
> (R 113-114)

After an objection by defense counsel that the statement was "a comment on the right to remain silent" (R 115), the trial court correctly responded: "She asked his name. He does not have the right to not give his name or his address. That is not part of the Miranda rights" (R 115). Miranda[2/] rights are rights which may be asserted in custodial interrogation. Where questioning by police officers is such that "the officers should have known that the respondent would suddenly be moved to make a self-incriminating response," then Miranda rights attach.

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2 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Rhode Island v. Innis, 446 U.S. 291, 303 100 S.Ct. 1682, 64 L.Ed.2d 297 (1981). This was not the circumstance here. Moreover, Respondent was not under arrest at the time Officer Corbett asked him his name and address (R 117). An officer is entitled to ask an individual his name. See e.g., §901.151, Fla. Stat. (1981); §856.021, Fla. Stat. (1983). Since Respondent was not the subject of custodial interrogation, his right to remain silent was not invoked, and it would be impossible to have a comment on that right.

Further, the next testimony that Officer Corbett gave indicated that Respondent gave her a statement at the police department:

> He stated to me that it was another black man and victim Harrison who tried to pass the envelope to him, not the other way around (R 115-116).

Thus, Respondent had not even invoked his right to remain silent; he gave a statement to police.

Therefore, the court of appeal erred in finding a Fifth Amendment violation and reversing the defendant's convictions. Regardless of the disposition of Point I, the defendant sub judice is not entitled to a new trial.

CONCLUSION

Petitioner respectfully requests that this Honorable Court quash the decision of the District Court of Appeal, and affirm Respondent's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief on the Merits has been furnished, by courier/mail, to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 7th day of June, 1985.

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