IN THE SUPREME COURT OF FLORIDA

RALPH CORTEZ WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,217
First District Court of Appeal
Case No. AX-88

****

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

AND

CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE

INITIAL BRIEF OF PETITIONER

RHONDA S. MARTINEC
DANIEL, KOMAREK & MARTINEC,
Chartered
P. O. Box 2522
Panama City, FL 32402
(904)763-6565
ATTORNEY FOR PETITIONER

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PRELIMINARY STATEMENT

RALPH CORTEZ WILLIAMS was the defendant in the lower court and will be referred to Appellant or the Defendant. The State of Florida was the prosecution in the court below and will be referred to as Appellee or the State.

The following symbols will be used in this brief followed by the appropriate page number(s) in parentheses:

"R" - Record on Appeal

STATEMENT OF THE CASE AND FACTS

Defendant was charged by Information with attempted first degree murder with a firearm. (R-1;8). Defendant proceeded to trial relying upon the defense of temporary insanity. (R-61). Subsequent to Defendant's Notice of Intent to rely upon the defense of temporary insanity, the trial court appointed Doctors Paul Bittick and Daniel Palmer to examine Defendant and file a report relative to Defendant's insanity at the time of the offense. (R-67-68).

At trial, there was conflicting testimony regarding Defendant's mental state at the time of the offense. Dr. Clell C. Warriner, a clinical psychologist, testified that he had examined Defendant and was of the opinion that Defendant was not consciously aware of his actions and thus could not control his actions at the time of the commission of the offense. (R-323-327).

Dr. Paul Bittick testified that he had examined Defendant to determine his mental condition at the time of the offense, as ordered by the lower court. (R-284). Dr. Bittick testified that it was his opinion that Defendant was suffering from a mental defect on the dates that Defendant committed the offense and classified the mental defect as psychogenic amnesia. (R-295). Dr. Bittick further testified that psychogenic amnesia was in the class of a disassociative disorder. (R-296). Dr. Bittick explained that it was his opinion that Defendant

perhaps had some knowledge of what he was doing but had no awareness of the significance or the consequences of his actions. (R-297).

On the other hand, the State's rebuttal witness, Dr. Daniel Palmer, testified that he too had examined Defendant as ordered by the lower court. (R-361). Dr. Palmer testified that as a result of his examination of Defendant, he concluded that it was unlikely that Defendant experienced psychogenic amnesia on the date of the offense. (R-364). Further, Dr. Palmer testified that he found no evidence during his examination of Defendant to suggest that Defendant was suffering from a mental defect, infirmity, or disease at the time of the commission of the offense. (R-364).

Defendant testified that he had no recollection of going to the Waffle Iron on the date of the commission of the offense and did not recall shooting Mrs. Williams or himself. (R-342-359).

After closing arguments, the lower court gave instructions to the jury and the jury retired for deliberations. Thereafter, the jury requested a copy of all the jury instructions. (R-421). The trial judge refused to honor the jury's request and instructed the bailiff to advise the jury that the instructions could not be sent to them, but could be read to them again. (R-421-441). Defense counsel was not notified of the jury's request until after the verdict was rendered. (R-441). Moreover, the jury never received a copy of the

instructions nor were the instructions read to the jury after the jury's request. (R-441).

Although Defendant was adjudicated guilty of attempted first degree murder with a firearm (R-117-118), the jury included the words "with mercy." (R-95). The verdict form provided to the jury by the trial court was altered to include the words "with mercy." (R-95). Defendant objected to the form of the verdict. (R-409).

Furthermore, after learning of the jury's request for the instructions, defense counsel timely filed a Motion for New Trial and hearing was held thereon. (R-98-99). Thereafter, Defendant appealed his conviction to the District Court of Appeal, First District. The lower appellate court affirmed Defendant's conviction and certified the following questions of great public importance under Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v):

> 1. Is a trial judge's denial of a jury request for a copy of instructions within the express notice requirements of Fla.R.Crim.P. 3.410?
>
> 2. Does Ivory v. State, 351 So.2d 26 (Fla. 1977), preclude application of a harmless error rule to a trial judge's denial of a jury request for copy of instructions during deliberations, without notice to counsel?

Thereafter, Defendant timely filed his Notice to Invoke this Court's jurisdiction.

ISSUES PRESENTED

I. A TRIAL JUDGE'S DENIAL OF A JURY REQUEST FOR A COPY OF INSTRUCTIONS IS WITHIN THE EXPRESS NOTICE REQUIREMENTS OF FLA.R.CRIM.P. 3.410.

A. APPLICATION OF A HARMLESS ERROR RULE TO A TRIAL JUDGE'S DENIAL OF A JURY REQUEST FOR COPY OF INSTRUCTIONS DURING DELIBERATIONS WITHOUT NOTICE TO COUNSEL IS PRECLUDED BY THE RULE OF IVORY V. STATE, 351 SO.2D 26 (FLA. 1977).

B. IF NOT SO PRECLUDED, THE ERROR CANNOT BE HELD HARMLESS WHERE THE JURY ALTERS THE VERDICT FORM PROVIDED BY THE COURT AND RETURNS AN AMBIGUOUS VERDICT.

ARGUMENT

I. A TRIAL JUDGE'S DENIAL OF A JURY REQUEST FOR A COPY OF INSTRUCTIONS IS WITHIN THE EXPRESS NOTICE REQUIREMENTS OF FLA.R.CRIM.P. 3.410.

A. APPLICATION OF A HARMLESS ERROR RULE TO A TRIAL JUDGE'S DENIAL OF A JURY REQUEST FOR COPY OF INSTRUCTIONS DURING DELIBERATIONS WITHOUT NOTICE TO COUNSEL IS PRECLUDED BY THE RULE OF IVORY V. STATE, 351 SO.2D 26 (FLA. 1977).

B. IF NOT SO PRECLUDED, THE ERROR CANNOT BE HELD HARMLESS WHERE THE JURY ALTERS THE VERDICT FORM PROVIDED BY THE COURT AND RETURNS AN AMBIGUOUS VERDICT.

Florida Rules of Criminal Procedure 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to 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 supplied).

In Ivory v. State, 351 So.2d 26,27 (Fla. 1977), the Court found that the provisions of Fla.R.Crim.P. 3.410 were applicable where, during deliberations, the jury requested "the following additional information: the instructions to the jury, the defendant's

statement, the medical examiner's report, and 'the brief definitions of third degree murder and the various types of manslaughter.'" (Emphasis added.) The Ivory court reasoned that where the jury made such requests, counsel were entitled to notice and the opportunity to participate in the discussion of the action to be taken on the jury's request. The Court in Ivory, id. at 28, stated: "The right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored."

In the case at bar, defense counsel was denied an opportunity to make argument as to the actions to be taken in response to the jury's request because the trial court denied the jury's request without even notifying counsel. Obviously, the trial court could have granted the jury's request for a copy of the instructions. See Fla.R.Crim.P. 3.400. Defense counsel, however, was not given an opportunity to request that the trial court honor the jury's request or to suggest how such request could most feasibly be honored. The facts of the instant case not only demonstrate that defense counsel was entitled to notice because the jury's request was within the proper scope of Fla.R.Crim.P. 3.410, but also emphasize the reason for such requirement.

Additionally, the opinion of the court in Isley v. State, 354 So.2d 457 (Fla. 1st DCA 1978) resolves the first question certified to

this court in the affirmative. In Isley, the jury made a request identical to the request of the jury in the instant case and the court held that defense counsel was entitled to notice. The facts of the case at bar are clearly distinguishable from the cases previously relied upon by the State in urging that the notice requirements of Fla.R.Crim.P. 3.410 are not applicable in the instant case.

The court in Villavicencio v. State, 449 So.2d 966, 969 (Fla. 5th DCA 1984) found no error where the trial judge merely informed jurors that a certain exhibit had not been admitted into evidence in response to the jury's request therefor because such request was ". . . neither an express request for testimony to be read to them nor a request for additional instructions regarding the law in the case and thus was not per se within the scope of Rule 3.410." Additionally, the court in Hitchcock v. State, 413 So.2d 741, 744 (Fla. 1982) found a communication to be outside the purview of Fla.R. Crim.P. 3.410 where, during the deliberations on guilt or innocence in a first degree murder case, the jury asked whether they were required to recommend death penalty or life at that time and the court responded, "You should not consider any penalty at this time -- only guilt or innocence."

A review of the facts of the case at bar leads to the inescapable conclusion that the jury's request for a copy of the jury

instructions and the judge's denial was a communication within the scope of Rule 3.410. Thus, defense counsel was entitled to notice and the first certified question should be answered in the affirmative. It should further be noted that the facts of the instant case differ from Villavicencio, supra, in that the trial judge feasibly could have honored the jury's request in the instant case, but could not in Villavicencio, supra. Furthermore, the facts of the instant case differ from Hitchcock, supra, in that the jury in Hitchcock did not request additional instructions as did the jury in the instant case. A negative response to the first certified question would render Fla.R.Crim.P. 3.410 meaningless.

In Ivory, supra at 28, the Court stated:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.

The Ivory Court continued:

> We now hold 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. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Id.

Based on a review of authority following the Ivory decision, it appears that the courts have not applied the per se reversible error rule to "any communication" but have construed the Ivory holding as being applicable where a jury request is made within the scope of Fla.R. Crim.P. 3.410 and without notice to counsel, and a response is made by the trial judge. In Coley v. State, 431 So.2d 194 (Fla. 2d DCA 1983) the jury requested testimony read back during deliberations. The court in Coley, supra, held that the conduct of the trial judge in advising jurors to rely on their own recollection was a communication within the scope of Fla.R.Crim.P. 3.410 and inasmuch as such additional instruction was given without notice to defendant or counsel, amounted to prejudicial error.

Conversely, in Curtis v. State, 455 So.2d 1090 (Fla. 5th DCA 1984), the court held that a jury's question as to whether a certain statement was evidence was not a request within the scope of Rule 3.410 and, thus, the trial judge's response without notice to counsel was not error. The court in Curtis recognized that Rule 3.410 proscribes the giving of additional instructions without first giving notice, but found that the trial judge's actions did not warrant reversible error due to the failure to demonstrate prejudice. It should be noted that a dissenting opinion was delivered in Curtis wherein Judge Sharp questioned whether the opinions of Rose v. State,

425 So.2d 521 (Fla. 1982), cert. den. _____ U.S. _____, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983) or Hitchcock v. State, 413 So.2d 741 (Fla. 1982), cert.den. 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982), altered the application of Ivory v. State, 351 So.2d 26 (Fla. 1977) to the facts in Curtis.

In Rose, the jury did not make a request but the trial court gave the "Allen charge" without first giving notice to counsel. Although the Rose Court agreed that counsel should have been given notice prior to the "Allen charge", the Court found the error harmless and found that counsel was present when such charge was given and that in light of the seven hours of deliberations, the charge was proper. Supra at 524.

Moreover, reversal of Defendant's conviction is mandated in the case at bar if this Court should find that Ivory does not preclude application of a harmless error rule inasmuch as it is obvious the error complained of was not harmless. Firstly, it must be observed that the trial judge wholly ignored the mandates of Fla.R.Crim.P. 3.410. Although the jury made an express request for additional instructions, the jury was not conducted into the courtroom, nor was Defendant or defense counsel notified of the trial judge's denial of the jury's request until after the verdict was returned.

The jury, by its verdict, obviously intended to render a verdict to something less than the crime with which Defendant was charged as is demonstrated by inclusion of "with mercy". In this context, it

must be recalled that the defense of temporary insanity was supported by the testimony of two psychologists, although contradicted by one psychologist. Under such circumstances, it cannot reasonably be held that there is no "reasonable possibility that the [practice] complained of might have contributed to the conviction." United States v. Hastings, _____ U.S. _____, 103 S.Ct. 1974, 1979, _____ L.Ed.2d _____ (1983), citing with approval Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 238, 11 L.Ed.2d 171 (1963). In other words, it is not clear beyond a reasonable doubt that the jury would have returned a verdict of guilty if the trial judge had complied with the mandate of Fla.R.Crim.P. 3.410, brought the jury into the courtroom and allowed counsel to make argument to honor the jury's request by providing a copy of the instructions. In fact, the jury did not simply return a guilty verdict although Defendant was adjudicated guilty as charged. At the very least, the panel would have been much more comfortable in advising the trial judge that they wished for him to read the instructions again. Such procedure would have at least prevented the jury's reluctance to disturb the other case the trial judge presided over during their deliberations.

Obviously, the jury intended "with mercy" to have some significance. Thus, it cannot reasonably be said that the actions of the trial judge in failing to follow the mandate of Fla.R.Crim.P. 3.410

was harmless. Chapman v. California, 386 U.S. 125, 87 S.Ct. 824, _____ L.Ed.2d _____ (1967).

CONCLUSION

WHEREFORE, based on the foregoing argument, reasoning and citations of authority, Petitioner respectfully requests that the decision of the First District Court of Appeal be quashed and the Defendant's conviction be reversed, and the case remanded to the lower court for new trial.

Respectfully submitted,

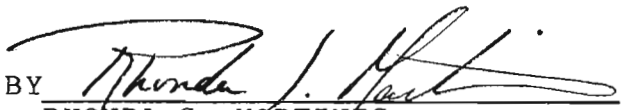
DANIEL, KOMAREK & MARTINEC
Chartered

BY 
RHONDA S. MARTINEC
P. O. Box 2522
Panama City, FL 32402
(904)763-6565
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been delivered by mail to GREGORY G. COSTAS, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, on this 15th day of July, 1985.

DANIEL, KOMAREK & MARTINEC
Chartered

BY 
RHONDA S. MARTINEC
P. O. Box 2522
Panama City, FL 32402
(904)763-6565
ATTORNEYS FOR PETITIONER