SUPREME COURT OF FLORIDA

FILED
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OCT 3 1985
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VINCENT FRANCIS GALLO, Petitioner,	)	
v.	)	CASE NO. 67,254
STATE OF FLORIDA, Respondent.	)	

RESPONDENT'S BRIEF

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POINT I

CERTIFIED QUESTION

IS THE STATE ENTITLED TO HAVE JURY INSTRUCTIONS GIVEN ON NECESSARILY INCLUDED LESSER OFFENSES IN A CASE WHERE THE DEFENDANT REQUESTS THAT NO SUCH INSTRUCTIONS BE GIVEN AND KNOWINGLY AND INTELLIGENTLY WAIVES HIS RIGHT TO SUCH INSTRUCTION?

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PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner 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 of Appeal except that Respondent may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal.
"AB"	Petitioner's Initial Brief

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida, does not accept the Statement of the Case and Facts as found in Petitioner's Initial Brief. Respondent will present the facts necessary to resolve the issues herein. Petitioner was charged by a four count information with kidnapping, two counts of sexual battery, and possession of a firearm during the commission of a felony. On June 6, 1984, the cause came before the Honorable Leroy H. Moe, Circuit Judge, for a jury trial. The first witness called by the State was Christine Currid, Petitioner's victim. Miss Currid testified that on November 6, 1982, Petitioner stopped, and offered her a ride to a Burger King Restaurant. Miss Currid willingly got in the car, but Petitioner then started going away from the Burger King and Miss Currid became suspicious. Petitioner then pulled a gun out from under his seat and aimed it at Miss Currid. (R 71). Petitioner drove to an area where there were storage lockers, stopped the car and tied Miss Currid's hands together with shoe laces. (R 72). Petitioner also, at that time, put a pillowcase over her head. He then resumed driving. During this time, Petitioner ordered the victim to perform oral sex upon him. (R 73). Petitioner proceeded to drive the victim to a house and took her to the front door and then into the house. (R 76). The victim testified that Petitioner raped her inside the house. (R 80). She testified that she was not a willing participant and that given the opportunity she would have escaped. (R 81).

Miss Currid was aware of her surroundings as she remembered that there were mirrors in the living room (R 85), and that Petitoner took several pictures of her with a camera during the period of time she was in the house. (R 98). She was also able to remember several of the digits of Petitioner's license plate. (R 90). When Miss Currid reported the incident to the police, they were able to trace the license number to Petitioner. About one hour after the crime was committed the victim was taken to an out-of-court "show-up" at Petitoner's home. (R 4). Miss Currid identified Petitioner's Volkswagon Rabbit automobile, and she identified Petitioner as the perpertrator of the crime.

The State also presented the testimony of Chester Blythe, a specialist in hair and fiber analysis with the United States Federal Bureau of Investigation. Agent Blythe was provided several fiber samples associated with Petitioner and with the victim. He testified that fibers identical to those from Petitioner's carpet were found on the victim's slacks. Further, fibers similar to the bindings used to tie the victim were found in Petitioner's car. (R 161).

Detective Donald Fitch testified that he searched the Volkswagon Rabbit automobile belonging to Petitioner and discovered items belonging to the victim, Christine Currid, in the vehicle. (R 185, 186).

At the conclusion of the evidence, after the jury was excused, defense counsel, the State Attorney, and the trial judge, participated in a charge conference. (R 411). The State Attorney asked what "lessers" the Petitioner would request. Defense counsel

stated, "We don't want any lessers." To which the State Attorney replied, "You want just the as charged?" The defense counsel nodded his head affirmatively. The State Attorney then said, "That's fine with me, Judge." However, the Court stated that it was reluctant to do that as there were lesser included offenses as a matter of law and the Court thought that these had to be given no matter how much he might "specifically get an absolute, total waiver from you (meaning defense counsel) and the defendant." (R 411-412). Defense counsel made a brief statement of the reasons why he had advised his client to seek no instructions upon lesser included offenses. (R 412). Immediately after that, with no inquiry being made of the Petitioner, himself, the State Attorney changed his mind. The State Attorney said, "Judge, then, I'm going to request some in the abundnace of caution. I don't want this coming back" (R 412). The trial court then stated, "I'm going to give the ones that are lesser as a matter of law under catagory one."

The charge conference continued, with no specific objections upon any proposed instructions being made by Mr. Kay, defense counsel. However, he again stated, "The defendant does not want any lessers. The defendant doesn't know whether the State or the Court is requesting the lessers, but whoever is requesting them, we don't want them." To which, the State Attorney replied, "The State is requesting them." The trial court then stated, "Well, I think they are lessers and there is evidence in there of them." (R 415).

There then followed a discussion upon the kidnapping charge. The Court initiated the discussion by stating, "O.k., on the kidnapping- -." The State Attorney indicated that the State would not request any lesser included offenses on that and indicated that he believed defense counsel's position was the same. The trial court then stated to defense counsel, "Do you want any lessers on the kidnapping?" Defense counsel replied, "No, sir." The Court then stated, "Alright. I am going to give false imprisonment." The State Attorney asked, "Is that category one?" The Court stated, "Category one. There is testimony in there that she got in there voluntarily and that could be enough to support the lessers. (R 416). The Court asked defense counsel whether he had discussed the waiver of lesser included offenses with regard to the possession of a firearm, stating, "Did you discuss it with your client?" Mr. Kay, the defense counsel, stated, "Yes, I did." Then, to his client, he asked, "You understand that we did request no lessers? Do you understand that, Mr. Gallo?" The Petitioner replied, "I don't understand that part." (R 416).

Defense counsel then explained the situation to his client. (R 417). After this, the trial court stated, "Alright. In the abundance of caution, I detect some ambivalence, not as to what his answers were, but as to...He really understands the seriousness of the matter and the import of lesser included offenses. Based on that, I am going to give the ones I gave on the sexual battery and kidnapping and let's see. Under count four, improper exhibition

of a dangerous weapon." (R 418). No specific objections were made by defense counsel to any of the instructions presented to the jury. (R 499-521).

Specifically, with regard to the instruction on kidnapping and false imprisonment, the trial court asked defense counsel whether he had any problem with this instruction and the defense counsel replied, "I'd like to admit I'm wrong. I think this is a pretty good instruction, so I am not going to object to it." (R 426-427). The sexual battery and its lesser included offenses were discussed and no objection was lodged by defense counsel. (R 421).

The jury returned verdicts of guilty of kidnapping without the use of a firearm, guilty of two counts of sexual battery with force not likely to cause serious injury, and not guilty of possession of a firearm during the commission of a felony.

POINTS ON APPEAL

POINT I

CERTIFIED QUESTION

IS THE STATE ENTITLED TO HAVE JURY INSTRUCTIONS GIVEN ON NECESSARILY INCLUDED LESSER OFFENSES IN A CASE WHERE THE DEFENDANT REQUESTS THAT NO SUCH INSTRUCTIONS BE GIVEN AND KNOWINGLY AND INTELLIGENTLY WAIVES HIS RIGHT TO SUCH INSTRUCTION?

POINT II

WHETHER THE STATE DID NOT CONSENT TO THE PETITIONER'S WAIVER OF INSTRUCTIONS OF LESSER INCLUDED OFFENSES? (RESTATED).

POINT III

WHETHER THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY INSTRUCTING THE JURY ON LESSER OFFENSES NOT CHARGED IN THE INFORMATION AS PETITIONER FAILED TO PROPERLY OBJECT TO THE INSTRUCTIONS AS GIVEN?

POINT IV

WHETHER THE TRIAL COURT COMMITTED NO ERROR BY NOT INSTRUCTING THE JURY UPON ATTEMPTED KIDNAPPING, A CATEGORY 2 LESSER INCLUDED OFFENSE, WHEN SUCH INSTRUCTION WAS NOT REQUESTED AND NO OBJECTION WAS MADE TO THE TRIAL COURT OF THE FAILURE TO GIVE THE INSTRUCTION?

SUMMARY OF THE ARGUMENTS

POINT I

CERTIFIED QUESTION

Just as is the case with waivers of jury trials, the consent of the State is required before instructions upon lesser included offenses can be waived by a defendant. The State is entitled to have the jury consider the defendant's liability for necessarily lesser included offenses as well as the main offense because charging a defendant with the highest appropriate offense does not mean that the State must necessarily risk giving up the right to prove lesser charges against the defendant.

The following points were raised in and rejected by the District Court and this Court should not review them again.

POINT II

Petitioner made no express waiver of the instructions upon lesser included offenses before the State Attorney requested the court to instruct the jury upon said offenses. The State must consent to a defendant's waiver of the instructions. As the State requested instructions upon lesser included offenses, it is clear that the State did not consent to the waiver and the trial court could not thereafter properly dispense with instructing the jury upon the lesser included offenses.

POINT III

As petitioner made no appropriate objections to any specific instructions, but only a general objection to the giving of instructions upon lesser included offenses, Florida Rule of Criminal Procedure Rule 3.390 provides that petitioner may not assign as error grounds of appeal the giving of any instruction in this case.

POINT IV

Petitioner's counsel thought the kidnapping instruction was "pretty good" and did not object to it. As petitioner failed to object to the instruction, and failed to object to the trial court's failure to instruct, Rule 3.390 precludes assignment of this issue as error.

ARGUMENT

POINT I

CERTIFIED QUESTION

IS THE STATE ENTITLED TO HAVE JURY INSTRUCTIONS GIVEN ON NECESSARILY INCLUDED LESSER OFFENSES IN A CASE WHERE THE DEFENDANT REQUESTS THAT NO SUCH INSTRUCTIONS BE GIVEN AND KNOWINGLY AND INTELLIGENTLY WAIVES HIS RIGHT TO SUCH INSTRUCTION?

The issue stated above, which has been certified as a question of great public importance, has been analogized, by Petitioner Gallo, to a defendant's right to a jury trial. Respondent concurs. Rule 3.260, Florida Rules of Criminal Procedure, states: "A defendant may in writing waive a jury trial with the consent of the State." Thus a defendant may attempt to give up his right to a jury trial, but his unilateral action has absolutely no effect upon the State, which must consent to a waiver of a jury trial sought by a defendant. When the State fails to consent to a defendant's motion to waive trial by jury, it is not error for the trial court to deny the motion. State ex rel. Gerstein v. Baker, 339 So.2d 271 (Fla. 3rd DCA 1976); Thomas v. State, 328 So.2d 545 (Fla. 3rd DCA 1976). Further, there is no constitutional right to have one's case tried before a judge without a jury. Thomas.

In Harris v. State, 438 So.2d 787 (Fla. 1983), cert. denied, ___U.S.___, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984), this Court held that the defendant's waiver precluded

him from complaining on appeal of the trial court's failure to give instructions on lesser included offenses. In that case there was an agreement and stipulation by the defense, which logically was made in concert with the State (although the opinion does not specify the State was a party to the agreement and stipulation). Id. at 796. Therefore it would appear, in the absence of any contrary indications, that the State gave its consent to the waiver of instructions in Harris. This is not the situation presented in the instant issue on appeal. The Fourth District Court of Appeal held below that there was a "belated but timely request of the state" for the jury instructions on lesser included offenses. 10 F.L.W. 1443 (Fla. 4th DCA 12 June 1985). In light of this holding it is clear that the State did not consent to the Petitioner's request, contrary to Petitioner's contention in his Brief at page six.

Respondent suggests this Court should adopt the language of the Fourth District's opinion below.

> ...[S]ince the charging document, as a matter of law, includes all necessarily lesser included offenses that the state may have charged, we believe the state was entitled to have the jury consider the appellant's liability for such offenses as well as the main offense charged. State v. Bruns, 429 So.2d 307 (Fla. 1983); Brown v. State, 206 So.2d 377 (Fla. 1968). While a defendant may be charged with the highest offense that a prosecutor or grand jury believes appropriate considering the available evidence, that does not mean that the

> state must necessarily risk giving up the right to prove a lesser charge against the defendant. For instance, in a case where aggravated battery is charged, we believe the state would be entitled to have the jury charged on the offense of simple battery.

Id.

This Court should answer the certified question in the affirmative based upon the foregoing argument and authorities and approve the decision of the Fourth District Court of Appeal affirming the judgment and sentence of the trial court.

POINT II

THE STATE DID NOT CONSENT TO THE PETITIONER'S WAIVER OF INSTRUCTIONS OF LESSER INCLUDED OFFENSES. (RESTATED).

Initially, the State would submit that this Court should not exercise its discretion to consider this issue on appeal, where it was raised and rejected by the Fourth District. As this Court stated in State v. Hegstrom, 407 So.2d 1343, 1344 (Fla. 1981), this Court will not accept a case for review on one basis and then reweigh the evidence once reviewed by the district court, in order to provide a second record review of cases already resolved by the district courts of appeal. See also Sobel v. State, 437 So.2d 144, 148 (Fla. 1983). This Court should thus accept the holding of the Fourth District that the prosecutor had made a timely request for instructions, and did not consent to the proposed waiver of instructions.

If this Court should decide to exercise its discretion to review this issue, then the State submits that it is without merit.

Respondent has repeated his argument made upon the certified question in Point I but now *sua sponte* assumes the holding of the Fourth District Court of Appeal has been reversed insofar as the State having made a timely request for the instructions on lesser included offenses. Respondent offers no argument and no authority for this assumption. The

record is quite clear that no express waiver was made by Petitioner which would meet the Harris, supra, at 797, criteria before the state attorney requested the lesser included offenses be instructed upon (in effect, withdrawing his somewhat flippant statement of "That's fine with me, Judge."). (R. 411). Petitioner is merely making an unsupported assumption that the trial court must take the prosecutor's first comment as a complete waiver of the State of Florida's right to have the jury instructed upon lesser included offenses. Common sense alone dictates that such an assumption is false, notwithstanding the holding of the District Court below which held the prosecutor did not consent to waive the subject instructions. 10 F.L.W. 1443, supra.

There being no consent to the waiver by the State, the trial court could not properly dispense with instructing the jury upon the lesser included offenses after the state attorney requested they be given. (R. 412). Harris, supra, at 796; Brown, supra, at 382; Reddick v. State, 394 So.2d 417 (Fla. 1981); State v. Abreau, 363 So.2d 1063 (Fla. 1978); State v. Thomas, 362 So.2d 1348 (Fla. 1978); Lomax v. State, 345 So.2d 719 (Fla. 1977).

POINT III

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY INSTRUCTING THE JURY ON LESSER OFFENSES NOT CHARGED IN THE INFORMATION AS PETITIONER FAILED TO PROPERLY OBJECT TO THE INSTRUCTIONS AS GIVEN.

Initially, the state would submit that this Court should not exercise its discretion to consider this issue on appeal, where it was raised and rejected by the Fourth District. As this Court stated in State v. Hegstrom, 407 So.2d 1343, 1344 (Fla. 1981), this Court will not accept a case for review on one basis and then re-weigh the evidence once reviewed by the district court, in order to provide a second record review of cases already resolved by the district courts of appeal. See also Sobel v. State, 437 So.2d 144, 148 (Fla. 1983).

If this Court should decide to exercise its discretion to review this issue, then the State submits that it is without merit.

Petitioner did not make any appropriate objections in the trial court to the instructions which he, on appeal, complains were error. Instead, Petitioner objected below to giving instructions upon *any* lesser included offenses. (See record page 411 et seq.)

Petitioner attempts to claim these general objections are sufficient to permit him to assign as error the instructions as given by the trial court. He is in error. Fla.R.Crim.P. Rule 3.390 provides:

> (d) No party may assign as error grounds of appeal the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection.

> Opportunity shall be given to make
> the objection out of the presence
> of the jury.

Petitioner obviously did not clearly state his objections to the specific instructions he now claims as error, despite his representation in his brief at page 11.

Appellant's contention that this was fundamental error, and that the case of Smith v. State, 365 So.2d 405 (Fla. 3rd DCA 1978) supports this contention is clearly erroneous. Smith concerned Florida Statutes §794.011(3) and §794.011(4)(b), not §795.011(5), as here. Petitioner has made no offer of authority to support his patently incorrect position that §794.011(5) is not a lesser included offense of §794.011(3). Respondent submits to this Court that Petitioner is absolutely wrong! See Florida Standard Jury Instructions in Criminal Cases, 262, 263. In Hicks v. State, 362 So.2d 730 (Fla. 3rd DCA 1978) cited as controlling by Smith, which Petitioner relies upon, the Appellant had properly objected to the giving of the instruction, which was found to be in error. There was no fundamental error found.

POINT IV

THE TRIAL COURT COMMITTED NO ERROR BY NOT INSTRUCTING THE JURY UPON ATTEMPTED KIDNAPPING, A CATEGORY 2 LESSER INCLUDED OFFENSE, WHEN SUCH INSTRUCTION WAS NOT REQUESTED AND NO OBJECTION WAS MADE TO THE TRIAL COURT OF THE FAILURE TO GIVE THE INSTRUCTION.

Initially, the State would submit that this Court should not exercise its discretion to consider this issue on appeal, where it was raised and rejected by the Fourth District. As this Court stated in State v. Hegstrom, 407 So.2d 1343, 1344 (Fla. 1981), this Court will not accept a case for review on one basis and then reweigh the evidence once reviewed by the district court, in order to provide a second record review of cases already resolved by the district courts of appeal. See also Sobel v. State, 437 So.2d 144, 148 (Fla. 1983).

If this Court should decide to exercise its discretion to review this issue, then the State submits that it is without merit.

Again, Petitioner fails to recognize that the instruction must be requested, or, at least, the failure to instruct must be objected to before the jury retires, by stating distinctly the matter to which he objects. Fla.R.Crim.P. Rule 3.390. See Argument, Point III, supra.

Petitioner cites Cabe v. State, 408 So.2d 694 (Fla. 1st DCA 1982) where the District Court reversed and

remanded for a new trial because the trial court refused to instruct upon an offense which was one step removed from the crime for which the defendant was convicted after the defendant requested an instruction upon that offense. As Petitioner failed to request any instructions *sub judice*, and made no objection to the trial court's failure to instruct the jury upon *any* offense, he may not maintain this assignment of error on appeal. *Fla.R.Crim.P.* Rule 3.390.

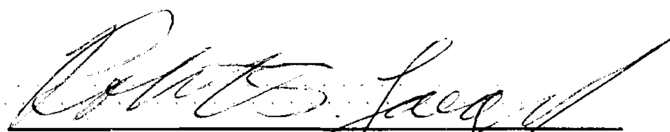
This fourth issue was, to undersigned counsel, not apparently raised in the Petitioner's Appellate Briefs in the District Court. Only after a closer review of the argument presented in "ISSUE II" of Appellant's Initial Brief did counsel for Respondent become aware that the Appellant had injected, without a heading, an argument, that error might exist for *failure* to instruct upon certain lesser included offenses, into the midst of his argument that error might exist for the *giving* of instructions upon any offenses except those contained on the face of the indictment. For this misunderstanding undersigned counsel must apologize.

CONCLUSION

For the reasons stated above, as supported by the authorities cited herein, the opinion of the Fourth District Court of Appeals, cited at 10 F.L.W. 1443, should be approved.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 30th day of September, 1985, by United States Mail, to: JOHN C. RAYSON, ESQUIRE, Sherman & Rayson, 2400 E. Oakland Park Blvd., Ft. Lauderdale, Florida 33306.

Of Counsel