IN THE SUPREME COURT OF FLORIDA

CASE NOS. 67,772 & 67,773

FILED
DEC [illegible] 1985
CLERK, SUPREME COURT
By
Chief Deputy Clerk

EDWARD SMITH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

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ARGUMENT

I

THE RULE THAT THE FAILURE OF A TRIAL COURT TO CONDUCT AN INQUIRY INTO A VIOLATION OF THE PROVISIONS OF RULE 3.220 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE IS PER SE REVERSIBLE ERROR APPLIES IN THIS CASE, REQUIRING THAT DEFENDANT BE AFFORDED A NEW TRIAL WHERE THE STATE FAILED TO DISCLOSE A STATEMENT ATTRIBUTED TO DEFENDANT, IN VIOLATION OF RULE 3.220(a)(1)(iii) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE, AND THE TRIAL COURT PERMITTED THE STATEMENT TO BE INTRODUCED INTO EVIDENCE WITHOUT CONDUCTING AN INQUIRY INTO THE CIRCUMSTANCES OF THE VIOLATION, POTENTIAL PREJUDICE TO DEFENDANT, AND WHETHER SANCTIONS SHOULD BE IMPOSED AS A CONSEQUENCE OF THE DISCOVERY VIOLATION.

The state's primary argument is that there recently has been "a clear trend away from per se rules of reversal in favor of a harmless error test", and that the rule of Cumbie v. State, 345

So.2d 1061 (Fla. 1977), Wilcox v. State, 367 So.2d 1020 (Fla. 1979), Smith v. State, 372 So.2d 86 (Fla. 1979), Kilpatrick v. State, 376 So.2d 386 (Fla. 1979), and Cooper v. State, 377 So.2d 1153 (Fla. 1979), should fall in the face of this "trend". Brief of Respondent at 20-23. The most fundamental flaw in this argument is that no such "trend" exists.

Rather, the harmless-error doctrine has been part of the warp and woof of American criminal jurisprudence since the early part of this century. See generally Kotteakos v. United States, 328 U.S. 750, 758-61 (1946). Section 59.041, Florida Statutes (1983), providing that "no judgment shall be set aside or reversed . . . in any cause, civil or criminal . . . unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice", was first enacted in 1911 by the Florida legislature. Ch. 6223, § 1, Laws of Fla. (1911). Indeed, even prior to the adoption of this statute, this Court had applied the harmless-error doctrine, as a matter of common law, in criminal cases. E.g., Wallace v. State, 41 Fla. 547, 26 So. 713 (1899); Ellis v. State, 25 Fla. 702, 6 So. 768 (1890); Smoot v. State, 21 Fla. 611 (1885); Metger v. State, 18 Fla. 481 (1881). Section 924.33, Florida Statutes (1983), the criminal harmless-error statute, was first enacted in 1939. Ch. 19554, § 309, Laws of Fla. (1939).[1]

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Section 924.33 provides that "[n]o judgment shall be reversed unless the appellate court is of the opinion . . . that error was (Cont.)

Thus, any harmless-error "trend" began long ago -- at the very least, some 60 years prior to the advent of Richardson v. State, 246 So.2d 771 (Fla. 1971), and the subsequent per se rule of Cumbie -- and obviously provides no basis for now departing from those decisions. The recent decisions of this Court upon which the state relies have simply applied the harmless-error doctrine in several specific trial contexts. E.g., State v. Marshall, 476 So.2d 150 (Fla. 1985)(constitutional harmless-error doctrine applied to prosecutorial comments on the silence of an accused at trial); State v. Murray, 443 So.2d 955 (Fla. 1984)(re-affirmance of harmless-error doctrine's applicability to prosecutorial misconduct); Bova v. State, 410 So.2d 1343 (Fla. 1982)(refusing to permit counsel to confer with defendant during 10-minute recess while defendant was testifying held harmless error).[2]

On the other hand, where the error is such that an accurate ascertainment of the extent of the prejudice to an accused is

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committed that injuriously affected the substantial rights of the appellant." § 924.33, Fla. Stat. (1983). This standard or review has been construed as being no different from the "miscarriage of justice" standard of Section 59.041. Libertucci v. State, 395 So.2d 1223, 1226 n.7 (Fla. 3d DCA 1981).

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The decision in Tucker v. State, 459 So.2d 306 (Fla. 1984), in which this Court held that the absence of a venue allegation in a charging document is not fundamental error, addressed a very different issue. This Court noted that "[n]o argument has been raised that Tucker was in any way embarrassed in the preparation of his defense" by the omission of a venue allegation, id. at 308, and held that "failure to allege venue . . . is an error of form, not substance and such a defect will not render the charging instrument void absent a showing of prejudice to the defendant." Id. at 309. The basis for this holding was the specific provisions of Rule 3.140(o) of the Florida Rules of Criminal Procedure, and not the harmless-error doctrine.

impossible on the face of a cold appellate record, this Court has not hesitated to fashion _per se_ rules. For example, in _Ivory v. State_, 351 So.2d 26 (Fla. 1977), this Court held that a violation of Rule 3.410 of the Florida Rules of Criminal Procedure (requiring that notice be given to counsel for defendant prior to reinstruction of a deliberating jury), is _per se_ reversible error, concluding that "[a]ny 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." _Id._ at 28. This Court recently has reaffirmed _Ivory_ in _Curtis v. State_, 10 F.L.W. 533 (Fla. Sept. 26, 1985), rejecting a harmless-error approach, and upholding the _per se_ rule because "it is impossible to determine whether prejudice has occurred during one of the most sensitive stages of the trial" if Rule 3.410 is not followed. _Ibid._ _Curtis_ concludes with endorsement of Justice England's concurring opinion in _Ivory_:

> The rule of law now adopted by this Court is obviously one designed to have a prophylactic effect. It is precisely for that reason that I join the majority. A "prejudice" rule would, I believe, unnecessarily embroil trial counsel, trial judges, and appellate courts in a search for evanescent "harm," real or fancied.

10 F.L.W. at 533, _quoting_ _Ivory v. State_, 351 So.2d at 28 (England, J. concurring).

The rule of _Cumbie_ is of the same tenor and effect, and serves the same interests:

> No appellate court can be certain that errors of this type are harmless. A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all

> aspects of the state's breach of the rules, as Richardson indicates.

Cumbie v. State, 345 So.2d at 1062; accord, Wilcox v. State, 367 So.2d at 1023 ("trial court's investigation into the question of prejudice should be on the record so as to facilitate meaningful appellate review").

Cumbie is thus neither an aberration nor a departure from any real or imaginery "trend" in the law. Rather, it is a simple and workable prophylactic formulation to protect the substantial discovery rights of defendants (and of the prosecution) under Rule 3.220 of the Florida Rules of Criminal Procedure. The interests of stare decisis command that prior precedent be followed "unless for some compelling reason it becomes appropriate to recede therefrom." Forman v. Florida Land Holding Corporation, 102 So.2d 596, 598 (Fla. 1958). The state has utterly failed to identify any such compelling reasons, and its specious "trend" being utterly insufficient to justify a departure from this Court's consistent rulings on the issue, adherence to the controlling precedent is both necessary and highly appropriate.[3]

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On the assumption that this Court will recede from Cumbie and its progeny, the state offers, as the heart of its argument that defendant was not prejudiced by the discovery violation, the suggestion that defendant brought any prejudice on himself "by needlessly interjecting an irrelevant statement into his own testimony", i.e., the statement that he had been in the backyard of the burglarized residence several days prior to the offense (Tr. 152-55). Brief of Respondent at 16-19. This argument is the height of arrogance. It was the prosecution which initially sought to introduce the undisclosed statement during its case-in-chief, and which succeeded in placing the statement before the jury before the court "struck" it on substantive grounds (Tr. (Cont.)

The state's alternative arguments are that there was no discovery violation in the first instance and that the inquiry by the court was sufficient to satisfy the Richardson mandate. Brief of Respondent at 23-26. These arguments are improperly raised in the context of this case, which is before this Court on a certified question by the District Court of Appeal, the court finding that there was a discovery violation and that the trial court had failed to comply with Richardson, reversing defendant's conviction, and certifying to this Court the question whether a trial court's failure to inquire fully into a discovery violation can be harmless error (A. 1-2). This Court has expressly held that reconsideration of the factual basis for a decision of a district court of appeal on discretionary review is improper when

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115, 134). If the statement "add[ed] nothing to the substantive ability of the jury to reach a finding of guilt or innocence", as the state now argues, Brief of Respondent at 17, one has to wonder why the state sought to introduce it, in the first instance, before defendant had testified.

Moreover, the discovery violation was complete once the state elicited the undisclosed statement, regardless of the court's subsequent instruction. Wilcox v. State, 367 So.2d at 1023. Having "'released the spring'" by using the undisclosed statement in the first instance, the state should not be permitted to seek any benefit from defendant's subsequent testimony. Harrison v. United States, 392 U.S. 219, 224 (1968). Finally, the state has misinterpreted the significance of the undisclosed statement: the fingerprint technician testified that the fingerprint found on the jalousie window was "fresh", i.e., that it had been placed on the window within weeks or "[p]ossibly" a month prior to its discovery (Tr. 143), defendant's testimony that he had been in the backyard of the residence "a couple of days" before the incident (Tr. 155) was thus a critical component of the defense at trial, and the state's rebuttal of that testimony with the undisclosed statement was accordingly of serious impact on defendant's credibility. Again, it is incongruous for the state now to assert that its rebuttal testimony was essentially meaningless at trial.

such would obviate a decision on the issue presented on review:

> We categorically decline to accept [a] case for review on one basis and then reweigh the evidence, once reviewed by the district court, in order to avoid a ruling on the legal issue which provoked our jurisdiction. As the 1980 constitutional amendment to our jurisdiction made clear, we will not provide a second record review of cases already resolved by the district courts of appeal. . . .

State v. Hegstrom, 401 So.2d 1343, 1344 (Fla. 1981)(footnote omitted).

And, should this Court reach the state's alternative arguments, the record and controlling precedent would compel the conclusion that the court below properly held both that the state had violated Rule 3.220(a)(1)(iii) of the Florida Rules of Criminal Procedure and that the trial court failed to conduct the requisite inquiry. The response to defendant's discovery demand is a form pleading, on which the prosecutor checked a box next to the following statement: "All [s]tatements or summaries of statements made by the defendant are available for copying by contacting the undersigned Assistant State Attorney." (S.R. 4). This is not "disclosure" within the meaning of the discovery rule. Donahue v. State, 464 So.2d 609, 610-11 (Fla. 4th DCA 1985); Clair v. State, 406 So.2d 109, 111 (Fla. 5th DCA 1981). That counsel for defendant did not rely on this precedent, but instead sought to learn of oral statements from the police report and on deposition of the interrogating officer (Tr. 121, 127-30, 160-61), is much to his credit and, since the officer failed to disclose the statement at issue in the report or during deposition, serves only further to establish the violation of the

rule.[4]

The state further claims that the court abided by the Richardson rule in that "[d]efense counsel was permitted to argue that his client was prejudiced . . . and defense counsel was clearly permitted to present any argument he desired." Brief of Respondent at 25. This is true -- but all it means is that counsel for defendant was permitted to make an objection on discovery-violation grounds. When a discovery violation is brought to the attention of a trial court, it is the state which has "the burden of showing to the trial court that there was no prejudice to the defendant", Cumbie v. State, 345 So.2d at 1062, and the prosecutor in this case did not say a word on this subject, nor was he ever asked to by the trial court (Tr. 116-30). Furthermore, an "adequate inquiry" under Richardson "should ascertain at the least whether state's violation was inadvertent or willful, whether the violation was trivial or substantial, and

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The state chooses to ignore the initial violation stemming from its inadequate discovery response, and asserts that "the substance of the oral statement was disclosed". Brief of Respondent at 25. This is clearly not so. Moreover, the state does not -- and cannot -- dispute that the specific statement attributed to defendant that he had not been on the burglarized premises "in the last month or so" (Tr. 158) was never revealed in any way. The police report reflected only that defendant had denied involvement in the burglary, and the detective related only these statements on deposition (Tr. 121, 127-30, 160-61). She testified at trial that she had not made any written notes of the undisclosed statement, but had simply kept it in her memory until the time of trial (Tr. 160-61). At the hearing on the motion for new trial, the prosecutor stated that he "didn't have any statements in [his] possession" (Tr. 257). Thus, the state's discovery response was not only inadequate, it was affirmatively misleading: there were no statements which were "available for copying" (S.R. 4).

most importantly, effect, if any, it had upon the defendant's ability to prepare for trial." Wilcox v. State, 367 So.2d at 1022 (citation omitted). Thereafter, a court must consider the appropriate sanctions to be imposed. Id. at 1023. The trial court in this case made no inquiry whatsoever into these questions; indeed, the record before this Court is wholly silent as to the most fundamental aspect of a Richardson inquiry, i.e., why the statement was never disclosed. The opportunity to make discovery objections and present argument thereon is thus not "tantamount to a Richardson hearing", as the state claims, Brief of Respondent at 25, and nothing more appears on the record in this case.

II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT TO BE PRESENT DURING THE EXERCISE OF PEREMPTORY CHALLENGES AT SIDEBAR, IN VIOLATION OF DEFENDANT'S RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS TRIAL, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND RULE 3.180 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

The state does not defend the holding of the district court of appeal that defendant's exclusion from the bench conference at issue was a "security measure" (A. 1). Its primary argument is that the "key" aspect of an accused's right to be present at critical stages of a criminal trial "is the ready ability or nonability of counsel to consult with his client during the exercise of peremptory challenges", and that the trial court could therefore exclude defendant from the bench conference

without violating the rule of Francis v. State, 413 So.2d 1175 (Fla. 1982), if it permitted counsel to walk back and forth during the conference and consult with defendant.[5] This argument misconstrues the essential nature of the right of presence at a criminal trial.

As Francis holds, the right to be present is, at heart, the right to be where critical stages of a trial are taking place; stated otherwise, it is the right not to be somewhere other than that. In the present case, defendant's exclusion from the bench conference was as effective a denial of his right to be present as occurred in Francis when peremptory challenges were exercised in another room; in neither situation is a defendant in earshot

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5 The state also suggests that "non-presence during the exercise of [peremptory] challenges could not constitute constitutional error" because "[t]here is no constitutional right to peremptory challenges." Brief of Respondent at 27 (citations omitted). This Court held to the contrary in Francis:

> Francis has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Florida Rules of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.

413 So.2d at 1177. And this Court's ultimate conclusion in Francis was as follows:

> Finding that [Francis] was denied due process of law by the selection of the jury outside his presence and that this resulted in prejudicial error, we reverse his conviction and remand for a new trial.

Id. at 1176; see Peede v. State, 474 So.2d 808, 812-14 (Fla. 1985); Smith v. State, 453 So.2d 505, 506 (Fla. 4th DCA 1984); Shaw v. State, 422 So.2d 20 (Fla. 2d DCA 1982).

of the critical-stage proceedings.[6] What the state's argument does, however, appear to be driving at is the suggestion that defendant's exclusion was nonprejudicial, for such is the only relevance of an excluded defendant's opportunity to consult with counsel. See Shriner v. State, 452 So.2d 929, 930 (Fla. 1984)(rejecting claim that exclusion of defendant from unspecified bench conferences required a new trial, not because defendant had been "present" but because no allegations of prejudice were forwarded).

Francis held that the defendant in that case was entitled to a new trial because this Court was "unable to assess the extent of prejudice, if any, Francis sustained by not being able to consult with his counsel during the time his peremptory challenges were exercised." Francis v. State, 413 So.2d at 1179. In the present case, as in Francis, id. at 1176, defendant was present during the voir dire questioning (Tr. 3-77), but was forbidden to approach the bench with counsel for the parties for the exercise of peremptory challenges, the court ruling that "the client cannot come side-bar and stand with the lawyers and the clerk to decide on the jury selection." (Tr. 69-70). Thereafter, the parties proceeded to exercise peremptory challenges, and the court twice permitted counsel to confer with

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Taken to its logical extent, the state's position would authorize locking an accused in a soundless glass booth during a criminal trial, from which he could see but not hear the proceedings, if counsel was permitted periodically to step inside and tell the accused what was transpiring. Such a procedure would surely be the antithesis of "presence" in any meaningful sense.

defendant, once after a tentative panel had been selected with counsel having exercised two peremptory challenges, and again prior to the selection of the alternate juror (Tr. 71-75).[7] The possibility of prejudice to defendant is virtually identical to that which compelled reversal in Francis: one brief opportunity to consult with defendant prior to the selection of the six regular jurors is not the equivalent of the opportunity for consultation which is afforded when an accused is present and able to consult with counsel at any time during the course of the proceedings.[8] Denying defendant his right to be present at this

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The state's characterization of the court's rulings at the conference, i.e., that "the judge made it clear that defense counsel could walk back and forth between the judge's bench and the defendant's table to consult with his client", Brief of Respondent at 29, is misleading. As set forth in the text, the court afforded counsel two such opportunities; it was only at the hearing on the motion for new trial that the court stated that it had "indicated to [counsel] that you had the privilege at any time, every time if you still wished to walk back and forth to your client to discuss a particular juror with him" (Tr. 253-54).

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Nor do the decisions relied upon by the state warrant a different conclusion. In both United States v. Alessandrello, 637 F.2d 131 (3d Cir. 1980), and United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983), the defendants were excluded from small portions of voir dire involving potentially-sensitive questioning of individual jurors, and not, as here, from the critical peremptory-challenge process. Washington, 705 F.2d at 496-98; Alessandrello, 637 F.2d at 134-35, 144. In United States v. Chrisco, 493 F.2d 232 (8th Cir. 1974), the defendants were absent during a luncheon recess, during the course of which their counsel and the prosecution informally agreed upon their peremptory challenges, but were present in court when those challenges were given effect by the actual striking of the jurors, and had an opportunity to voice any objections to the challenges to their counsel. Id. at 235-36. And in United States v. Barasco, 742 F.2d 1335 (11th Cir. 1984), the defendants were not present at out-of-court conferences among their lawyers regarding the exercise of pooled peremptory challenges, but were present in court when the challenges were exercised. Id. at (Cont.)

critical stage of the trial proceedings is therefore reversible error.

CONCLUSION

Based upon the foregoing, and the reasons and authorities set forth in the brief of respondent, defendant requests this Court to answer the certified question in the negative and to approve that portion of the decision of the court below which reverses the conviction in this cause, and/or to quash that portion of the decision holding that proceeding with a critical stage of the trial in defendant's absence was not error, and to remand to the District Court of Appeal with directions to order that defendant be afforded a new trial.

Respectfully submitted,

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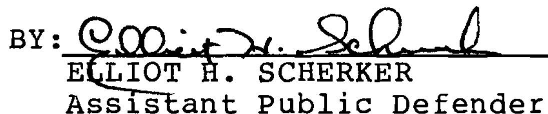
BY: 
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1349-50. None of these decisions addressed the effect of a complete exclusion from the peremptory challenge process, ameliorated only, as here, by two opportunities to consult.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to RICHARD L. POLIN, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128 this 16th day of December, 1985.

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