DIG 6-9-86

IN THE SUPREME COURT OF FLORIDA

DANIEL R. BUTLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO: 68,021

PETITIONER'S REPLY BRIEF

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ARGUMENT

In rebuttal to petitioner's arguments the state asserted, in essence, that (1) the erroneous instruction was harmless because the jury's guilty verdict was a rejection of Butler's testimony, (2) the instruction was not error at all because it merely correctly told the jury about the victim's right to be armed, (3) the instruction was not a comment on the evidence by the judge because rational jurors would not infer that if the victim had the gun Butler was guilty.

All these assertions miss the mark. First, no factual basis supports the state's claim that the jury did not believe Butler when he said Jones was armed. The state's circular argument simply begs the question. Butler's point is that the faulty instruction made it impossible to know whether the guilty verdict meant that the jury rejected Butler's version of the event or that the jury accepted his version

but, because of the instruction, could not accept his defense. In a telling passage of its brief the state argued that "if this instruction had not been given, the jury could have inferred that the victim, Mr. Jones, unlawfully provoked Petitioner into shooting Jones." (Emphasis added) (State's Brief at 4). Butler's point precisely! Without the challenged instruction the jury could have fairly decided whether Butler was entitled to shoot in self defense. But with the instruction the jury was handcuffed into finding that according to either version of the facts Jones, by necessary implication, was right and Butler was wrong. The jury was left with no rational way to express a belief that Butler fired to protect himself from the provocation by Jones. As the state so cogently noted, the instruction pertermitted consideration by the jury that Jones "unlawfully" armed himself. Butler's entire defense was that an armed Jones had threatened him with the gun. The instruction preempted that defense by stating that Jones had a lawful right to arm himself and stand his ground in self defense. In that event, it is only logical to conclude that Butler could not have been acting lawfully when he shot a man who was already acting lawfully by being armed. At the very least, the defense of home instruction had the undeniable potential to cloud the rights of the parties and to distort the balance of the self defense instruction.

Second, the state's argument confuses the theory of defense instruction with the abstract principle of law

pertaining to persons attacked in their homes. The theory of defense instruction is for the benefit of the person on trial, in this instance Butler. The homeowner, Jones, was not on trial and his "rights" were not germane to an explanation of Butler's right to defend himself. In this line of argument the state says it is "ludicrous" to suggest that a correct statement of law could ever result in prejudicial error. Apparently the state did not read Wilson v. State, 171 So.2d 903 (Fla. 2nd DCA 1965) in which the court gave a theoretically correct instruction, that it was a crime to carry a pistol without a license, but in doing so committed reversible error. No evidence had been presented to establish that defendant did or did not have a license. The defendant claimed self defense and the appellate court reversed because the jury might have rejected that theory by inferring that if the pistol were wrongfully possessed there was no entitlement to self defense. Wilson's rationale overlays Butler's case perfectly and nullifies the state's argument that correct propositions of law can never be harmful error. If the law does not apply to the facts, it is indeed irrelevant and, if confusing on a material point, reversible error as well. See, Finch v. State, 116 Fla. 437, 156 So. 489 (1934); Driver v. State, 46 So.2d 718 (Fla. 1950); Fla.R.Cr.P. 3.390(a).

Third, the state overlooked also the principle that "appellate counsel must be bound by the acts of trial counsel."[1]

[1] Castor v. State, 365 So.2d 701, 703 (Fla. 1978).

In this Court the state said the instruction did no more than explain for the jury the victim's right to have a gun. Contrary to what was argued here, the prosecutor at trial repeatedly told the jury that even if Butler's testimony were true, he should still be convicted because Jones had a right to be armed and consequently Butler had no right to claim self defense. (R-407-410, 421).

The theory advanced by the state in its closing shows also how the instruction was capable of supporting the inference that because Jones was the homeowner and had the right to be armed Butler was guilty. In its brief the state abandons the position it took in the trial court by labeling the same argument made by the prosecutor "simplistic" and one that rational jurors would not accept. The prosecutor urged that exact position to convict Butler and the state cannot disavow it now to preserve the conviction.

The prosecutor's argument just highlights the damage done to Butler's defense by the instruction itself which, construed as the prosecutor did, was a prohibited comment on the evidence by the trial judge.

Finally, the state maintains that even if the instruction was irrelevant, it was not "fundamental error." (State's Brief at 5). Butler does not have to show the error to be fundamental, because timely objection was made. See Castor v. State, supra, note 1. The state should have to show that the error was not prejudicial. It did not and the district court did not either. Butler, on the other hand, has

conclusively shown that the challenged instruction met the test of reversible error, by demonstrating its potential for misleading jurors on a material issue. See, Fla. Power & Light v. McCollum, 140 So.2d 569 (Fla. 1962).

The decision of the district court on harmless error should therefore be quashed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief has been furnished to Ms. Andrea Hillyer, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Daniel Butler, #094028, Post Office Box 628, Lake Butler, Florida 32054, this 16th day of May, 1986.

MICHAEL J. MINERVA