

DA 9-11-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,187

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SUPREME COURT  
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DENNIS WAYNE THOMPSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT  
COURT OF APPEAL OF FLORIDA, THIRD APPELLATE  
DISTRICT

INITIAL BRIEF OF PETITIONER

Respectfully submitted,

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## INTRODUCTION

The Petitioner, DENNIS WAYNE THOMPSON, was the defendant at trial and the appellant before the District Court of Appeal, Third District, in this case. The Respondent, the State of Florida, was the prosecution at trial and the appellee in the District Court of Appeal. In this brief, the parties will be referred to by their proper name or as they stood in the trial court.

The defendant's appendix contains the original and revised opinion of the District Court of Appeal and such portions of the trial transcript as are necessary to a complete understanding of the issue presented, consecutively paginated as "A. 1", etc. The Record on Appeal will be referred to as "R. 1", etc. Those portions of the trial transcript not contained in the appendix will be referred to as "Vol. I, Tr. 1", etc. and "Vol. II, Tr. 1", etc. Where employed, line references will be designated "L. 1", etc.

## STATEMENT OF THE CASE AND FACTS

- (a) Course of proceedings and disposition in the lower tribunals.

Dennis Wayne Thompson was charged by Information with Grand Theft (Count I) in violation of Florida Statute 812.014 and Dealing in Stolen Property (Count II) in violation of Florida Statute 812.019 (1)(R.10-13).

During the course of his jury trial, the defendant took the stand to testify in his own behalf (Vol. I, Tr. 65). At the conclusion of direct examination, the State Attorney requested a recess prior to beginning his cross examination of the defendant in order to research the proper method of impeaching him with an unrelated arrest for which he had not yet gone to trial <sup>1/</sup>(A. 15-18). The trial judge granted this request. When the recess was declared, the defendant's counsel

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1/ This method of impeachment had become available to the State when the defendant's counsel conducted the following direct examination of his client:

Q: Have you ever been charged with theft or accused of that before?

A: No.

Q: Have you ever been charged with burglary or accused of that before?

A: No.

Q: Have you ever been charged with dealing in stolen property or accused of that before?

A: No.

Q: Have you ever been in this situation before?

A: No.

(A. 14)(Emphasis supplied).

Defense counsel erroneously believed that despite those questions the defendant's arrest for theft and burglary of a conveyance while on bond in the instant case could not be the subject of impeachment on cross-examination since the defendant's arrest for those offenses occurred subsequent to (and therefore not "before") his arrest for the offenses charged in this case (A. 16-17).

requested that he and his client be permitted to speak. When they attempted to consult with each other the State objected (A. 18). The trial judge sustained the objection, precluded the requested consultation, and expressly barred the defendant from communicating with his attorney during the entire one-half (1/2) hour recess which ensued, solely because the defendant was "still on the stand" (A. 18).

When the trial resumed, the defendant offered an imprecise response to the prosecutor's first question thereby "opening the door" for the prosecutor to engage in further more specific impeachment regarding this unrelated arrest. In response to this further impeachment, the defendant volunteered a summary of facts underlying the unrelated arrest for which he had not yet been tried (A. 19-22).

Following his conviction and the imposition of a sentence of five years on Count I, to be served concurrently with a fifteen-year sentence imposed on Count II, the defendant timely perfected his direct appeal to the District Court of Appeal of Florida, Third District. This appeal raised, inter alia, the trial court's denial of the defendant's constitutional right to effective assistance of counsel by its order barring attorney/client communication during a critical

period in his criminal trial. The district court's original majority opinion rejected this argument and condoned the trial court's refusal to permit the defendant an opportunity to confer with his attorney during the trial recess because the restraint was "brief"<sup>2/</sup> (A. 1).

Judge Natalie Baskin dissented from the majority opinion, expressing her belief that: (1) the trial court's refusal to permit Thompson an opportunity to consult with his attorney during a recess in his trial was error; and, (2) the denial of access to counsel in this case was prejudicial because it damaged Thompson's credibility in the eyes of the jury in a case in which the State's evidence was far from overwhelming (A. 2).

The defendant timely filed a Motion for Rehearing En Banc and Motion for Rehearing on June 5, 1985. On December 17, 1985, the original majority opinion of the district court was withdrawn and a revised opinion was issued (A. 9). The defendant's Motion for Rehearing was considered as directed to the revised opinion and denied (A. 9). The revised majority opinion held that the trial court had committed error by barring attorney/client communication and acknowledged the prejudicial damage to credibility which the defendant suffered in

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<sup>2/</sup> The panel reversed the conviction for Grand Theft on other grounds (A. 6,7).

the eyes of the jury as a result of the State Attorney's cross examination regarding the unrelated arrest (A. 5,6). The revised majority opinion nonetheless affirmed the defendant's conviction on the basis that the defendant had failed to demonstrate "cognizable" prejudice (A. 6). Judge Natalie Baskin dissented from court's denial of the defendant's Motion for Rehearing.

On the same day, the entire District Court of Appeal of Florida, Third District, considered and denied (by a 5 to 4 majority) the defendant's Motion for Rehearing En Banc (A. 10<sup>3/</sup>). Chief Judge Schwartz's dissent from denial of rehearing en banc was based upon his determination that the majority had failed to "conclude that this constitutional error was -- as is, at a minimum, required -- harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see Crutchfield v. Wainwright, 772 F.2d 839 (11th Cir. 1985)." Judge Baskin agreed and opined that rehearing should have been granted both because "the case is of exceptional importance" and "for maintenance of uniformity in the court's decisions." Similarly, Judge Jorgenson expressed his view that the

<sup>3/</sup> Chief Justice Schwartz, together with Judges Baskin and Jorgenson, each issued separate dissenting opinions. Judge Daniel S. Pearson dissented without opinion. Judges Barkdull, Hendry, Hubbart, Nesbitt and Ferguson concurred.



majority had failed to apply the appropriate legal standard, which he felt required a determination that "the error in this case was not harmless beyond a reasonable doubt" (A. 11-13).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed on January 16, 1986. This Honorable Court entered its Order accepting discretionary jurisdiction to review the decision of the District Court of Appeal on April 24, 1986.

(b) Statement of Facts.

Sometime between December 24, 1982 and December 26, 1982 a bar in Key West, Florida, was burglarized (Vol. I TR.9). A subsequent inventory revealed that a microwave oven, a television, approximately 30 bottles of liquor and approximately ten cases of beer were missing (Vol. I TR.52).

On December 27, 1982, the Monroe County Sheriff's Office received information from a confidential informant that a stolen television set and liquor could be located at the defendant's apartment (Vol. I TR.14). The informant did not indicate that the defendant knew these items were stolen. This information was relayed to Detective Brost of the Key West Police Department (Vol. I TR.22).

Brost and another officer responded to the address where they saw the defendant standing outside his apartment with the door ajar (Vol. I TR.22). Brost identified himself and advised the defendant that he had received information that there was stolen property in the apartment (Vol. I TR.26, 48). The defendant invited Brost to search the one room apartment and denied that he was in possession of any stolen property (Vol. I TR.26-27). During this conversation Brost was able to see numerous boxes, bottles of liquor and a microwave oven inside the apartment (Vol. I TR.26). These items were neither covered nor otherwise concealed (Vol. I TR.26, 46). Brost advised the defendant of his Miranda rights and again received the defendant's consent to search the one room apartment (Vol. I TR.26, 48).

During the consensual search Brost decided that the microwave oven and bottles of liquor met the description of stolen property which he had received. He asked the defendant how those items had been obtained (Vol. I TR. 28). The defendant stated that he had purchased the microwave for \$150.00 and received the liquor in payment of a debt, from an acquaintance whose name he refused to reveal (Vol. I TR. 28, 72).

On cross-examination, Brost admitted that there

were absolutely no identifying or distinctive markings on the microwave or the liquor and no indication whatsoever that they were stolen (Vol. I TR.42). The owner of the property, Michael Cates, agreed with this assessment indicating that there was nothing about the mere appearance of those items which would lead one possessing them to believe that they were stolen (Vol. I pp. 42, 44, 58). Brost also admitted that his follow-up investigation revealed no evidence indicating complicity on the part of Mr. Thompson with the burglary at the Big Fleet Bar (Vol. I TR. 49).

Mr. Thompson had made his living for the past ten or twelve years by buying and selling goods at various flea markets (Vol. I TR.67, 75). He testified that he didn't realize the microwave and bottles of liquor were stolen (Vol. I TR.70); had purchased the microwave for \$150.00 from a fellow flea market dealer named Art; and, was going to sell it for \$200.00 (Vol. I TR.72). He had only known Art through past dealings at the flea market and as a result of those dealings Art owed him \$50.00, for which he had received the liquor. (Vol. I TR.72). Nothing he had ever purchased from Art turned out to be stolen and he had no reason to believe that the microwave or bottles of liquor were stolen (Vol. I TR. 74). Finally, he stated that he had originally

refused to give Art's name to Brost after Brost had told him the merchandise was stolen because he was scared (Vol. I TR.88).

SUMMARY OF ARGUMENT

The trial court committed reversible error by precluding Dennis Thompson from consulting with his attorney during a recess requested by the State of Florida immediately prior to his cross-examination. The defendant had a specific and significant need for legal guidance at this critical stage of his trial. Since the evidence in this case was circumstantial and far from overwhelming, the jury's perception of the credibility of the defendant's testimony that he did not know certain property in his possession was stolen became a matter of crucial importance. The trial court's decision to preclude the defendant from consulting with his attorney significantly damaged the defendant's credibility and requires that his conviction be reversed.

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE DEFENDANT'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY PRECLUDING HIM FROM CONSULTING WITH HIS ATTORNEY DURING A TRIAL RECESS

In Bova v. State, 410 So.2d 1343 (Fla. 1982), this Honorable Court declared that a defendant in a criminal proceeding must have access to his attorney during any trial recess:

"No matter how brief the recess, a defendant in a criminal proceeding must have access to his attorney ... . [w]e find that to deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, violates the defendant's basic right to counsel." Bova, supra, 410 So.2d at 1345.

Having unequivocally so stated, this Honorable Court went on to hold that such error constitutes federal constitutional error and requires application of the mandate of Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 711 (1967).

In Chapman, supra, the Supreme Court of the United States declared that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Accordingly, in Bova, this Honorable Court conducted "a complete review of the record" and

determined that the evidence of the defendant's guilt was both "direct and overwhelmingly satisfying beyond any reasonable doubt" that the trial court's error did not even "contribute to the jury's finding petitioner guilty." Bova, supra, at 1345. The record in this case simply does not permit the conclusion that the court's error was harmless beyond a reasonable doubt. Chapman, supra; see Crutchfield v. Wainright, 772 F.2d 839 (11th Cir. 1985). Rather, a complete review of this record reveals that the prejudicial effect of the trial court's error requires reversal.

To begin with, the recess in this case was granted as an accomodation to the State, not the defendant. Compare, Bova, supra, at 1344. The State was permitted this accomodation to prepare the most devastating conceivable impeachment of a testifying defendant - - - the creation of an impression in the minds of the jury that the defendant had deliberately misled them with respect to his arrest for other crimes. See, Michaelson v. U.S., 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1949). (Evidence of prior crimes is well recognized to be the most prejudicial type of evidence ).

While the State was utilizing the recess for that purpose, Dennis Thompson who, in his own words, was justifiably nervous and confused (Vol. I TR. 69, 76) ,

was forced to sit incommunicado and speculate idly about the proceedings. Likewise, his attorney was precluded by the trial court from performing his constitutional function, i.e., preparing his client to properly meet, respond to and mitigate the impending credibility attack.

If ever there was a time when Dennis Thompson needed guidance and counsel, this, as surely as any time, was it. As aptly noted by the Supreme Court of the United States in Geders v. United States, 425 U.S. 80, 88, 96 S.Ct. 1330, 1345, 47 L.Ed.2d 592 (1976):

"Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill equipped to understand and deal with the trial process without a lawyer's guidance"

In this time of distress Dennis Thompson needed counsel to inform him that, contrary to the prior advice he had received, the subsequent arrest for theft and burglary of a conveyance while on bond in the instant case could, and would, be the subject of cross-examination. He needed counsel's assistance to collect himself and to be prepared to credibly explain to the jury the error which had been made regarding the subsequent arrest, in response to cross examination questions about to be asked. He needed to discuss with counsel whether the facts underlying the extrinsic



offense for which he had been subsequently arrested could serve as a basis for redirect examination. He needed counsel to caution him that if he volunteered those underlying facts on cross-examination, the prosecutor would be afforded an opportunity for additional impeachment. He needed to be calmed and advised that it was more important now than ever that he listen closely to the questions asked, and barring an objection, respond only to the question that is asked; to be reminded that if he did not hear or understand the question asked, he had an absolute right to ask that it be repeated or explained. For all these reasons Dennis Thompson needed counsel and was prejudiced by its absence.

Instead, the court refused to permit him to consult with his attorney and required that this uncounseled co-defendant go one on one with a skilled adversary armed with information that, depending upon the subtleties of presentation, could fairly be construed as either the honest mistake which it was or a deliberate lie (see, A.19-23; A.24, L.1-7; A.25, L.1-7). Respectfully, the concept of "assistance of counsel" becomes hollow if the accused must remain sequestered from his counsel at the time counsel is most needed. Dennis Thompson was denied "the guiding

hand of counsel . . . [and] . . . [w]ithout it . . . did not know how to establish his innocence." Powell v. Alabama, 297 U.S. 45, 68, 53 S.Ct. 55, 64, 77 L.Ed 158, 170 (1932). In this case, the predictable result obtained.

The defendant was completely and totally unprepared to meet the impeachment which followed. His ignorance of the law of evidence and his inability to appreciate the legal distinction between theft and burglary resulted in a stammering, imprecise response to the prosecutor's first question thereby "opening the door" for the prosecutor to engage in further, more specific impeachment. The prejudice which the defendant endured from this additional impeachment, could have easily been foreclosed by carefully considered testimony and advice of counsel (A. 20). However, in response to this further impeachment, the defendant unnecessarily volunteered a weak, uncounseled and extemporaneous protestation of innocence which unwisely included a summary of facts underlying the offense for which he had been arrested but not yet tried (A. 19-22). The State Attorney then capitalized on the uncounseled defendant's inability to crisply and properly respond to his questions both in cross-examination and in summation (A.19-23; A.24, L.1-7; A.25, L.1-7).

The revised majority opinion of the Third District Court acknowledges the prejudicial damage to credibility

which the defendant suffered in the eyes of the jury as a result of the State Attorney's cross-examination and summation (A. 5, 6). However, it erroneously holds that because his need to consult with counsel during the recess arose as a result of counsel's "bad advice", the unnecessary prejudice which he suffered as a result of the trial court's denial of access to counsel was not "cognizable" on direct appeal (A. 6). Respectfully, that is simply not the law. The fact that the defendant may also be entitled to collateral relief as a result of his attorney's advice neither logically nor constitutionally justifies denying the relief to which he is entitled on direct appeal as a result of the trial court's prejudicial error. Dennis Thompson is unquestionably entitled to relief now for the prejudice which he suffered by virtue of the trial court's refusal to guard and vouchsafe his right to consult with counsel.

Just as the State required a recess to prepare to meet the unexpected turn of events; the defendant was entitled during the recess to confer with his counsel on how to avoid, minimize, and meet the previously unexpected cross-examination which now was sure to follow.

The magnitude of the error in this case is manifest. The trial court's erroneous decision to deprive the

defendant of an opportunity during the critical recess to discuss with his attorney the legal means available to preserve his credibility resulted in damage to his credibility in the eyes of the jury. The trial court's prohibition thus constitutes a substantial deviation from this Honorable Court's prior decisions which hold that under these circumstances Dennis Thompson deserved, and was entitled under the United States Constitution and the Florida Constitution to the advice, benefit and guidance of counsel. The denial of this right requires that his conviction be reversed.<sup>4/</sup>

4. The defendant respectfully submits that the error herein complained of is so fundamental that the prejudice is presumed and cannot be characterized as harmless. See, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed 2d 592 (1976). In any event, the totality of the circumstances and pervasively prejudicial effect of this error mandate reversal regardless of application of the fundamental error rule in the case at bar, as set forth above.

CONCLUSION

Wherefore, based upon the foregoing citations and authorities and a careful examination of the record on appeal, Dennis Wayne Thompson respectfully requests that this Honorable Court reject the "cognizable prejudice" test adopted by the Third District Court in the case under consideration, reverse the decision of that court in accordance with Bova v. State, 410 So.2d 1343 (Fla. 1982), and remand the instant case to the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida, for retrial.

Respectfully submitted,

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BY:

  
RICHARD J. PREIRA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Assistant Attorney General, Randi Lazarus Klayman, Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 16<sup>th</sup> day of May, 1986.

  
RICHARD J. PREIRA