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IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,187

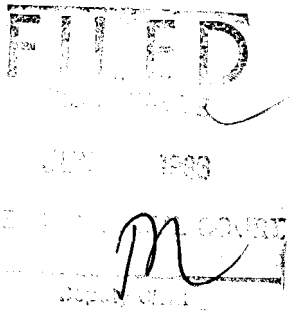
DENNIS WAYNE THOMPSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The Petitioner, Dennis Wayne Thompson, was the defendant in the lower court. The Respondent, the State of Florida, was the prosecution below. The parties will be referred to as they stood in the lower court. The symbol "R" will be used to designate the Record on Appeal. The symbol "Tr" will be used to designate the transcript of proceedings and the symbol "ST" will be used to designate the supplemental transcript of the proceedings. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE

The State accepts the Defendant's Statement of the Case.

STATEMENT OF THE FACTS

The State respectfully rejects Appellant's Facts and restates them as follows.

There was a burglary at the Big Fleet Bar in the City of Key West Florida between closing time on Decembert 24, 1982 and 6:00 a.m. on December 26, 1982. (Tr.4-9). Stolen in the burglary were the following items: Sears Radar Range Microwave oven (value $250); a Sony 19" color television (value

$619); approximately 30 bottles of hard liquor (value $320). (Tr. 52); a cup containing miscellaneous United States coins (Tr. 6).

At approximately 2:00 p.m. on December 27, 1982 Lieutenant Conrady of the Monroe County Sheriffs Office received information from a confidential informant regarding the location of stolen property (Tr. 13). The confidential informant stated stolen property was located at 322 Truman in the upstairs apartment. (Tr. 13) The person in possession of the property was named "Dennis" and lived in the apartment with two other persons occupying the apartment. The confidential informant stated the specific stolen property was a Sony television and bottles of liquor. (Tr. 4) Additionally the informant described "Dennis" as a white male, 30's, medium buit, dirty blonde hair and a pony tail. The other persons were described by the confidential informant as: Nathaniel, a black male approximately 50 years old and Anna, a white female 18-19, blonde hair. (Tr. 14-16)

Lieutenant Conrady reviewed the sheriffs office crime reports finding no reports matching the stolen goods. He then contacted Detective Brost of Key West and relayed the informant's information. (Tr. 14)

Detective Brost recieved the information from Lieutenant Conrady. (Tr. 20) The Detective had the Big Fleet burglary report assigned to him for investigation. (Tr. 21-22) The report included the Sears microwave oven. (Tr. 27)

The Detective and another investigator went to the Defendant's apartment building in order to collect information for a search warrant. (Tr. 23-24) While in the process of climbing the stairs a person with a ponytail who matched the description given by the Sheriff's Office, later identified as the Defendant, stuck his head out of the apartment door and called out "Ed." Detective Brost, whose name is "Ed" turned to the Defendant and asked if he was talking to him. The defendant said no he was talking to a third party in the hall. (Tr. 25) The Detective identified himself as a police officer and approached the Defendant to talk. From his vantage outside the Defendant's apartment, through the opened door, Detective Brost observed the microwave oven and the liquor. (Tr. 25-26) The microwave was unplugged on the floor. (Tr. 31)

He advised the Defendant of his Miranda rights and was invited inside. (Tr. 27)

The defendant was arrested, transported to the police department and re-read his rights which he waived. (Tr. 35) In questioning the Defendant regarding his possession of the

microwave, he responded to the Detective's question by stating he was out of work and needed money. He admitted the obtained the liquor and microwave from a friend who had dropped by the house and gave him the items. The Defendant made a deal with the friend that Defendant would sell the microwave for $200.00 and keep $50.00. The Defendant further stated he would not rat on his friend by identifying him. He also stated if the police had been a little later someone would have purchased the microwave. (Tr. 35-36)

Michael Cates the owner of the Big Fleet positively identified both the microwave oven (by the serial numbers) and the liquor bottles. (Tr. 54-57) He further testified that he never gave anyone permission to remove any of the stolen items from the bar. (Tr. 56)

Mr. Thompson testified on his own behalf. (Tr. 66-89)

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT PERMITTING THE DEFENDANT TO CONSULT WITH HIS ATTORNEY BETWEEN HIS DIRECT EXAMINATION AND CROSS EXAMINATION WHERE THERE WAS NO OBJECTION AND THE EFFECT WAS HARMLESS?

SUMMARY OF THE ARGUMENT

The Defendant on direct examination testified he had never been arrested before. When in fact he had been arrested previously. Prior to cross examination the State requested and received a brief recess to ascertain the proper impeachment method. Defendant's counsel requested permission to converse with the Defendant during the recess. The Court sustained the State's objection.

When cross examination began the Defendant volunteered he had been arrested on charges other than those pending before the Court. He further reasonably explained his reason for the previous erroneous testimony.

The State submits the Defendant's reasonable explanation and a reading of the record will establish that any error by the trial court was harmless under the Bova v. State, 410 So.2d 1343 (Fla. 1982) standard.

ARGUMENT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY NOT PERMITTING THE DEFENDANT TO CONSULT WITH HIS ATTORNEY BETWEEN HIS DIRECT EXAMINATION AND CROSS EXAMINATION WHERE THERE WAS NO OBJECTION AND THE EFFECT WAS HARMLESS.

The Defendant contends that the trial courts failure to permit him to consult with his attorney during the recess between his direct examination and his cross examination was error and that this error mandates a new trial. The State submits, that although error might have occurred, based on the totality of the circumstances the error was harmless.

In Bova v. State, 410 So.2d 1343 (Fla. 1982) this Court held that to deny a Defendant consultation with his attorney during any trial recess, even in the middle of this testimony, violates the Defendant's basic right to counsel. However, the Florida Supreme Court found the error to be subject to harmless error rule of Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). This Court held that since Bova did not show any actual prejudice, the brief restraint did not contribute to the jury's finding of guilt.

The Court in Recinos v. State, 420 So.2d 95 (Fla. 3d DCA 1982), in a en banc opinion applied Bova, in so doing, this Court found:

Bova affirmed the conviction because the error of the lower court in restricting consultation with counsel "over objection," 410 So.2d at 1344, did not result in any prejudice and was therefore "harmless." 410 So.2d at 1345. In so ruling, the court necessarily rejected the principle applied in Gideon and the other authorities in Judge Jorgenson's dissenting opinion, and contrarily held that the access to counsel rule is neither fundamental in the sense that it does not require preservation below, nor prophylactic in that reversal will necessarily follow its violation withoug reference to ordinary considerations of harmlessness. Compare also, e.g., Richardson v. State, 246 So.2d 771 (Fla. 1971) (failure, upon objection, to hold hearing on effect of state discovery violations requires "automatic" reversal); Ivory v. State, 351 So.2d 26 (Fla. 1977) (any communication between court and jury in absence of defendant requires reversal even if contents not erroneous); Land v. State, 293 So.2d 704 (Fla. 1974) (failure to make proper ruling as to voluntariness of confession requires new trial even if confession not in fact involuntary). The facts here qualify under both prongs of this determination.

First, the record shows that, unlike Bova, defense counsel acquiesced in and surely did not object to or challenge in any way the correctness of the trial judge's statement of the law. Since an articulated statement of the defendant's position in the trial court is an absolute prerequisite to the appellate consideration of a non-fundamental issue such as this one the conviciton may properly be affirmed because of this failure alone. Lucas v. State, 376 So.2d 1149 (Fla. 1979); see Clark v. State, 363 So.2d 331 (Fla. 1978).

[2] Second, the harmlessness holding of Bova applies in spades to the facts of this case. Indeed, we do not believe that what took place at the trial may be

> said to have ascended even to the dizzying heights of harmless error. As we understand it, harmless error occurs when a mistaken ruling, that is, a trial court decision which affects the conduct of the proceedings in some way, is shown not to have affected the final result of the litigation; in this case, the erroneous statement of the law was not shown to have constituted or led even to the sine qua non of any kind of error, harmless or otherwise: the existence of an allegedly adverse "ruling." This is because, as the writer's panel opinion points out, there is no indication that counsel or Recinos had any desire further to speak to the orther which was precluded by the court's announcement. Under these circumstances, the remark in question was no more than an academically incorrect observation about the law. We know of instance in which a statement, however textually erroneous, which has no causative impact on what actually happended or did not happen below, can justify a reversal . . .
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> 420 So.2d at 98.

Likewise, the case sub judice qualifies under both prongs of Bova's determination. When the trial court did not permit consultation between counsel and the defendant, defense counsel failed to object. (Tr.80). Therefore, this issue has not properly been preserved for review. Assuming that a proper objection was made, the error was harmless since no prejudice resulted. During the Defendant's direct examination he testified he never was charged with these types of offenses. (Tr.75). Before the State started its cross examination, it informed the Court of its intention to impeach the Defendant on subsequent charges. (Tr.77-80). The trial court

permitted a recess but denied the requested consultation. (Tr. 80). The prosecutor expressly desired to research this method of impeachment. (Tr. 79). When cross examination started the Defendant voluntered the fact that he was subsequently charged and gave a reasonable explanation for his failure to remember on direct. (Tr.81-83). The State submits no prejudice occurred since even if consultation was permitted what more could defense counsel have advised the Defendant to say in order to soften the result of the impeachment. Further, defense counsel could also have rehabilitated the Defendant on redirect and could have put the blame on himself for giving his client dubious advice.

Finally, the State submits an overall reading of the facts clearly establishes Defendant's culpalbility thus any error was harmless.

CONCLUSION

Based upon the foregoing discussion and authorities the State respectfully requests this Court affirm the Third District Court of Appeals decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **RICHARD J. PREIRA**, Special Public Defender, 1801 West Avenue, Miami Beach, Florida 33139 on this **9th** day of June, 1986.

RICHARD L. KAPLAN
Assistant Attorney General

RLK/dm