OA 8-28-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,187

DENNIS WAYNE THOMPSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF OF PETITIONER ON THE MERITS

Respectfully submitted,

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Eleventh Judicial Circuit

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INTRODUCTION

The defendant, DENNIS WAYNE THOMPSON, brings forth herein the Introduction as set forth in his original brief.

STATEMENT OF THE CASE AND FACTS

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

The defendant brings forth herein the course of proceedings and disposition in the lower tribunals.

(b) Statement of the facts

The defendant brings forth herein the statement of the facts as set forth in his original brief.

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

Citing Recinos v. State, 420 So.2d 95 (Fla. 3d DCA 1982) (en banc), the State initially urges that the defendant failed to preserve this error for review. In so doing, it ignores the court's expressed indication to the contrary in Recinos. When "defense counsel proffer[s] or otherwise indicate[s] . . . " an unequivocal desire to communicate with his client during a recess and he is precluded from so doing, the error is preserved. Recinos, supra at 96, 98.[1/] (Emphasis added).

The record in this case reflects that counsel clearly, unequivocally and directly requested to speak with his client and expressed his desire to do so during the recess granted at the State's request (A. 5, 18; Vol. I TR-80). The trial court just as unequivocally denied that request simply because the defendant was

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1/ But cf., e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (no objection required); United States v. Alan, 542 F.2d 630, 634 (4th Cir. 1976), cert. denied, 430 U.S. 908, 97 S.Ct. 1179, 51 L.Ed.2d 584 (1977); United States v. Venuto, 182 F.2d 519 (3d Cir. 1950) (apparently no objection); Stripling v. State, 349 So.2d 187 (Fla. 3d DCA 1977) (apparently no objection); Mastracchio v. Houle, 416 A.2d 116 (R.I. 1980).

"still on the stand (A. 5, 18; Vol. I TR-80)." Counsel's consequent failure under such circumstances to invoke the phrase "I object" is of no moment - - - those words are not of talismanic effect. "[A] lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless." See, e.g., Brown v. State, 260 So.2d 377, 384 (Fla. 1968). This error has been properly preserved.

The State next summarily concludes that the error which the trial court committed in this case was harmless. Respectfully, the error herein complained of is so fundamental that it ought not 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 the trial court's error compels the conclusion that the error herein is not harmless and, most certainly, not harmless beyond a reasonable doubt. See, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, reh.denied, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967).

The State further misapprehends the source of the prejudice which serves as the basis for the defendant's appeal. Though the information regarding the defendant's subsequent arrest may have been prejudicial it was,

under the circumstances, properly before the jury (Petitioner's Initial Brief at page 2). However, that evidence was neither directed to nor in any way affected the defendant's testimonial credibility. On the other hand, the trial court's decision to preclude Dennis Thompson's attorney from performing his constitutional function during the recess which followed, i.e., preparing his client to properly meet, respond to and mitigate the impending credibility attack, resulted in overwhelming damage to Dennis Thompson's credibility. It permitted the State Attorney to create an impression in the minds of the jurors that the defendant had deliberately and knowingly intended to mislead them during his direct examination when, in fact, the record reveals this was not the case. It is this prejudice - - - and the defendant's consequent inability on cross-examination to credibly explain to the jury the error which his attorney had made regarding the subsequent arrest - - - which resulted in damage to his credibility.

Additionally, the explanation given by this panicked defendant --- that he had suffered a "failure to remember" --- was hardly a "reasonable" explanation for what occurred during his direct examination (Respondent's Brief page 10). Had the defendant been afforded the requested opportunity to consult with his counsel,

he could have learned that an explanation regarding how the error had occurred could properly be related to the jury on cross-examination, redirect and in summation. However, having been deprived of that opportunity, the defendant spontaneously assigned the error to a "failure to remember" and unnecessarily volunteered a weak, stammering and extemporaneous protestation of innocence which unwisely included a summary of facts underlying the offenses for which he had been arrested but not yet tried (Petitioner's Initial Brief at page 15). Clearly, his attorney was thereafter precluded from providing the jury with an explanation for what had occurred by "rehabilitating his client on redirect" or "putting the blame on himself" (Respondent's Brief page 10).

Even if defense counsel had not been precluded from employing the tactics mentioned by the State, the suggestion that he must do so for his client to have redress for the trial court's error is tantamount to the erroneous "congnizable" prejudice standard upon which the revised majority opinion of the District Court relied. That is, the State argues that because defense counsel chose not to engage in redirect to put the blame on himself (without first consulting with his client), the unnecessary prejudice which his client suffered as a result of the trial court's denial of access to counsel was not "cognizable" on direct

appeal. This argument conflicts with the established principle that the prosecution has the burden of showing that any intrusion upon a criminal defendant's right to consult with counsel during a trial recess was harmless beyond a reasonable doubt. It thus improperly shifts the burden to the defendant contrary to the dictates of Bova v. State, 410 So.2d 1343, 1345, citing Bova v. State, 392 So.2d 950, 954 at note 1 (Fla. 4th DCA 1980).

The evidence in this case was far from overwhelming. Indeed, the paucity of evidence against the defendant was affirmatively recognized by the trial court during argument on the defendant's Motion for Judgment of Acquital (Vol. I, Tr. 63). The entire case depended upon the jury's perception of the defendant's credibility. The trial court's interference with the defendant's right to communicate with his counsel occurred at a time when he needed, deserved and was unquestionably entitled to the full measure of effective assistance of a skilled advocate in order to preserve his credibility. On this record, the State of Florida cannot meet its burden of showing that the trial court's intrusion upon Dennis Thompson's right to consult with counsel during the trial recess was harmless beyond a reasonable doubt. Chapman v. California, supra; see, Crutchfield v. Wainright, 772 F.2d 839 (11th Cir. 1985). Accordingly the conviction should be reversed.

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Assistant Attorney General, Richard Kaplan, Esquire, 401 N.W. 2nd Avenue, Miami, Florida this 18TH day of June, 1986.


RICHARD J. PREIRA