IN THE SUPREME COURT OF FLORIDA

DANNY MICHAEL TAYLOR,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 68,213

FILED
SID J. WHITE
MAR 20 1986
CLERK, SUPREME COURT
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RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

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SUMMARY OF ARGUMENT

The decision below should be approved, and the certified question of great public importance answered in the negative; it is not reversible error *per se* for the jury in a non-capital felony proceeding to be allowed to separate during deliberation, following the giving of adequate admonition. The holding of this court in *Livingston v. State*, 458 So.2d 235 (Fla. 1984), applies only to capital cases, and no reason exists to extend it to all other felony prosecutions.

Further, while stating a general desire that the jury continue to deliberate, defense counsel herein made no particular showing as to why sequestration was required in this case or what prejudice ensued from the lack thereof; in contrast to the counsel in *Livingston*, no mistrial was requested and denied. Respondent contends that separation during deliberation should be a matter for the court's discretion, and that a *per se* reversal rule is unnecessary and unwarranted.

ARGUMENT

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND APPROVE THE DECISION BELOW; AFTER SUBMISSION OF THE CAUSE TO THE JURY FOR DELIBERATIONS IN THE TRIAL OF A NON-CAPITAL CASE, IT IS NOT REVERSIBLE ERROR PER SE FOR A TRIAL COURT TO AUTHORIZE THE JURY TO SEPARATE OVERNIGHT, OR FOR SOME OTHER DEFINITE TIME FIXED BY THE COURT, AND THEN REASSEMBLE AND CONTINUE ITS CONSIDERATION OF A VERDICT

In its decision, Taylor v. State, 481 So.2d 970 (Fla. 5th DCA 1986), the Fifth District Court of Appeal, relying on this court's prior decision of Engle v. State, 438 So.2d 803 (Fla. 1983), as well as the recent decision of the First District Court of Appeal, Franklin v. State, 472 So.2d 1303 (Fla. 1st DCA 1985), held that it was not reversible error as a matter of law for a trial judge to permit a jury to separate overnight during its deliberation in a non-captial case. (See Appendix). The court, however, noting this court's decisions of Livingston v. State, 458 So.2d 235 (Fla. 1984) and Raines v. State, 65 So.2d 558 (Fla. 1953), certified the following question to this court, as one of great public importance, pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(v):

> After submission of the cause to the jury for deliberations in the trial of a non-capital case, is it reversible error per se for a trial court to authorize the jury to separate overnight, or for some other definite time fixed by the court, and then reassemble and continue its consideration of a verdict?

Respondent urges this court to answer the above question in the negative, and approve the decision below.

In his brief on the merits, petitioner argues primarily against the affirmance of his own conviction, and does not offer any view as to whether separation of the jury during deliberation constitutes *per se* reversible error, as the above question posits. Petitioner's arguments are primarily based upon his reading of Florida precedents, and he acknowledges that "[t]he rule of criminal procedure dealing with separation of jurors (Florida Rule of Criminal Procedure 3.370) does not provide much guidance on the issue." (Brief of Petitioner at 4). Respondent suggests that the disposition of petitioner Taylor's case was correct and that a *per se* rule of reversal in these circumstances would be inappropriate.

As petitioner notes, his trial was for a non-capital felony, and, further, was "not one likely to attract the notice of the media." (Brief of Petitioner at 5). The case was not submitted to the jury until 4:34 p.m. in the afternoon, and no verdict had been reached by 6:10 p.m. (R 164-6)(See Appendix). When the judge, in view of the lateness of the hour, stated his intention to send the jury home, defense counsel objected (R 167-8). Defense counsel's objection, however, was based solely on his reading of Rule 3.370, and he never moved for a mistrial, contending only that the jury had to remain either until they reached a verdict or a hung jury was declared (R 168). Prior to their departure, the judge specifically instructed the jury not to discuss the case with anyone (R 171). The jury returned at 8:50 a.m. the next morning, deliberated two hours, and returned a verdict (R 172-3; 198). Although defense counsel polled the jury as to their agreement with the verdict, he sought no *voir dire* as to the affects of the separation (R 172-6). No further objection or motion for mistrial was made in reference

to the separation, and the argument was not included in petitioner's motion for new trial (R 204)(See Appendix).

Respondent contends that no precedent of this court mandates reversal under the circumstances set out above, and further maintains that this case does not dictate the creation of any new rule of law. This court held in Livingston v. State, supra, that in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so. This court stated that a separation of jurors after commencement of deliberations will, except in emergency or special circumstances, generally be grounds for a mistrial. It must be emphasized that in Livingston, the jury was allowed to disperse for an entire weekend, in excess of forty-eight hours, and defense counsel not only objected prior to sequestration, but renewed such objection and moved for a mistrial upon the jury's return. The Raines case, cited in Livingston, and owing much to a since-repealed statute, involved a similar separation, but one without any preliminary or cautionary instruction by the judge.

The Livingston holding owes much to its setting, a capital case, with its unavoidable attendant publicity. It is by no means unprecedented for this court to require certain safeguards in death penalty cases which are not the norm in other criminal prosecutions. Thus, in Jones v. State, 11 F.L.W. 60 (Fla. February 13, 1986), this court recently approved the decision of the Fifth District Court of Appeal, Jones v. State, 459 So.2d 475 (Fla. 5th DCA 1984), and in so doing held that only in a capital case is the defendant's personal waiver of instruction on lesser included offenses necessary.

It is additionally worth noting that in Livingston, this court did not expressly overrule its prior precedent of Engle v. State, in which a similar, although shorter separation of the jury during deliberation, was found not to be grounds for reversal. In Engle, this court noted that defense counsel had agreed to the separation.

In this case, while it cannot be said that defense counsel agreed per se to the separation, it also cannot be said, in contrast to the situation in Livingston, that he maintained an objection and moved for a mistrial. In Franklin v. State, the First District recently rejected a claim of error relating to jury separation in a non-capital case, where the jury had been given a cautionary instruction prior to separation and where defense counsel had merely stated that he would "prefer" to have the jury continue to deliberate, but would leave the matter to the court's pleasure. To respondent, the statements of defense counsel sub judice seem closer to that of his peer in Franklin, than in Livingston. While counsel stated his preference that the jury either keep deliberating or be declared a hung jury, he never presented the court below with a motion for mistrial. Neither, it must be noted, did he specifically point out why sequestration would be required in this case or, the morning after, seek to demonstrate any prejudice on the record resulting from the separation. It is the state's position that defense counsel's failure to move for a mistrial, interview or poll the jurors after separation so as to create a record as to prejudice or include this point in his motion for new trial constitutes the virtual abandonment of objection. The fact that this point relates to jury deliberation should not excuse counsel's duty to preserve his record in this regard and petitioner has failed to come forward

with any convincing precedent or argument as to why prejudice should be presumed in this context.

It is respondent's position that this court's holding in Livingston is limited to prosecutions for capital felonies, and it is worth noting that in fashioning such holding, this court looked to the state of the law in other jurisdictions. See Annot, Separation of Jury in Criminal Cases after Submission of Cause, 72 A.L.R.3d 248 (1976 & Supp 1983). This annotation, to which this court cites in Livingston, states that a considerable number of jurisdictions have taken the position that in non-capital felony cases "the trial court has authority, in the exercise of sound discretion (subject to review by an appellate court) to permit the jurors to disperse after a proper admonition, so that error may not be predicated upon such dispersal without proof by the complaining party that such separation resulted in prejudice or harm." Annot, 72A.L.R.3d at 253-4. It would seem that the practice of allowing the jury to separate during deliberation is most often condemned in jurisdictions where such practice expressly conflicts with precedent or a rule of criminal procedure, although it must be noted that even therein, the prosecution can prevent reversal by demonstrating that no injury has in fact occurred. Annot, 72 A.L.R.3d at 254. Although this court stated in Livingston that Florida Rule of Criminal Procedure 3.370 does not specifically contemplate a separation of the jury during deliberation, it must be noted, that in contrast to its equivalent in other jurisdictions, it does not expressly prohibit such either. Certainly the repeal of section 919.01(1) Florida Statutes (1953), and its replacement with the above rule which lacks express prohibition of this matter,

hardly bespeaks an intention to create a _per se_ reversible error rule on this subject.

Respondent urges this court to reject any _per se_ rule of reversal regarding separation of jurors during deliberation in non-capital context, and maintains that the prevailing trend in law would seem to be against such approach. _See Commonwealth v. Jones_, 490 A.2d 863 (Pa Super. 1985) and cases cited therein. Many jurisdictions have always left the matter to the discretion of the trial court, with the burden of demonstrating any prejudice on the defense. _See e.g._, _People v. Maestras_, 187 Colo. 107, 528 P.2d 916 (Colo. 1974); _State v. Jones_, 218 Kan. 720, 545 P.2d 323 (Kan. 1976); Annot, 72 A.L.R3d 248. Respondent suggests that recent rulings by two other state supreme courts, those of Minnesota and North Dakota, may be illustrative of the current thinking on this issue. In both cases, the factual situation was the same as that before this court-an overnight separation of jurors in a non-capital case without the consent of the defense, but with cautionary instructions by the presiding judge. Significantly, in each case, the state supreme court was faced with either precedent or criminal rules which seemed to forbid the practice, yet, in both _State v. Bergeron_, 340 N.W.2d 51 (N.D. 1983) and _State v. Sanders_, 376 N.W.2d 196 (Minn. 1985), the court refused to find reversal mandated.

Thus, in _Bergeron_, the jurors were allowed to disperse overnight, over defense requests for separation. An earlier precedent of the North Dakota Supreme Court held that such separation during deliberation was an irregularity, but that reversal would not be required if the state demonstrated a lack of prejudice; the dissent in such case, however, had expressed the view that the

defense should have to show prejudice. The court in Bergeron chose to adopt the view of the dissent, and reverse its prior holding, observing that while jury sequestration under certain circumstances may be advantageous to the defense, its effect could also be "a double-edged sword". The court went on to note,

> ...in some instances sequestration may also induce a jury to reach a premature verdict in order to end lengthy deliberations in uncomfortable situations. In some instances the interests of justice will be served to permit a jury to separate and return refreshed the next day, particularly when, as here, the jurors were not forewarned that they might be sequestered. Id at 58.

The North Dakota Supreme Court also carefully considered upon whom the burden of persuasion should lie in any claim of error, "[f]or separation to constitute reversible error there must be an objection supported by an affirmative showing that the defendant was prejudiced because of the separation." Id at 59. The court said that mere reliance upon the applicable North Dakota statute, which, like ours, fails to expressly proscribe such separation, without a showing of actual prejudice, was insufficient, and found that the defense could have obtained the requisite evidence of prejudice through affidavits from the jurors or a showing that the jurors had been exposed to actual prejudicial publicity during separation. The state would maintain that the North Dakota court was correct in its recognition that sequestration is something of a mixed blessing, and that the court was further entirely on point as to its allocation of burden of proof.

In State v. Sanders, th Minnesota Supreme Court considered a situation in which the jurors in a non-capital case had been allowed to go to their own homes during an overnight recess in

deliberations; although the defendant had given his consent to such separation, he argued on appeal that such had been "coerced". Minnesota rules of procedure provide that there can be no separation of jurors during deliberation without the consent of the defense, and the lower appellate court had vacated the conviction. The Minnesota Supreme Court reversed this ruling, and in so doing, reversed one of its own prior cases. The court carefully considered the contention that separation during deliberation was "presumptively prejudicial", and simply found that it could not agree with it. The court noted that its own prior decision, which had resulted from an application of such contention, was predicated upon the need to "secure the rights of the litigants against the possibility of jury tampering." Id at 206. The court then stated,

> It seems to us that there is a significant difference between the recognition that any private communication, contact, or tampering, directly or indirectly, with a juror during a criminal trial about the matter pending before the jury bespeaks such a probability of interference with the jury's functions that it raises a rebuttable presumption of prejudice, (citation omitted), and the declaration that any separation of the jury after submission of the cause without the consent of the parties raises a presumption of prejudice and requires a new trial. Id at 206.

The Minnesota Supreme Court went on to note that there was no evidence or "even an allegation" that during the separation any juror had been exposed to outside influences. The court similarly noted that although the case had involved a serious felony, there had apparently been no media coverage. Further, the court looked to the short duration of the separation and the admonition given the jury prior to their departure. Given the above, the court found that the facts simply did not justify any inference of preju-

dice. The state maintains that all such facts can be found from the record sub judice, and that the Minnesota approach to the instant issue would be the correct one.

The results in Minnesota and North Dakota, as well as other similarly-minded jurisdictions, must be based on a recognition that a per se rule of reversal as to jury separation in every non-capital felony would be unworkable, as well as unwarranted. Obviously a separation of jurors can take place for an hour, a night, a weekend or longer. It can occur for the court's convenience, the jurors' convenience or, as in Bergeron, because no one thought to reserve hotel rooms. It can occur in the most publicized and heinous of crimes or, as here, in a rather run-of-the-mill purse snatching. The requirement that the jury be sequestered during their deliberation in a capital case obviously only affects a small percentage of those felonies tried in any given state. To grossly expand such rule, and to couple it with a per se reversible error provision, would turn jury service into involuntary servitude and overburden the entire criminal justice system for the protection of undisturbed constitutional rights.

Sequestration of jurors during deliberation in non-capital felonies should be left to the sound discretion of the trial court, whose ruling should be disturbed only in a showing of a palpable abuse of such discretion. A party aggrieved by the trial court's failure to sequester should be required not only to make a contemporaneous and specific objection, but also to make a record showing of prejudice, which the state would then have the opportunity to rebut. Obviously, the longer the separation, and the greater the media coverage, the easier it would be for the defense to meet its

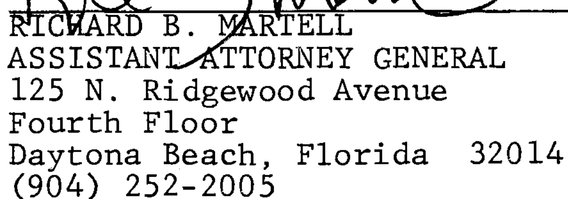
burden. To hold, however, that every defense counsel would, in essence, be entitled to sequestration simply upon demand would be unnecessary, as well as unwise. The district court correctly resolved this issue, and the decision below should be approved. For the reasons stated herein, the certified question should be answered in the negative.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the decision below should be approved, and the question of great public importance certified to this court answered in the negative.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

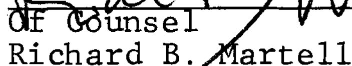


RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to Kenneth Witts, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 18 day of March, 1986.



Of Counsel
Richard B. Martell