O/a 6-29-87

IN THE SUPREME COURT OF FLORIDA

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By

STEPHEN WILLIAM BRADLEY,

Petitioner,

v.

CASE NO. 69,657

STATE OF FLORIDA,

Respondent.

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioner's statement of the case and facts to the extent given but supplements that statement by noting that in oral argument before the district court of appeal counsel for the petitioner conceded that defense counsel at trial was in fact present during discussion and consideration by the trial judge of the communication from the jury at issue. Appellate counsel for petitioner also indicated that the petitioner himself claimed that he was not present at the time of the jury communication at issue.

SUMMARY OF ARGUMENT

The district court properly distinguished this case legally and factually from the per se reversal rule first announced in Ivory v. State, 351 So.2d 26 (Fla. 1977) since the jury inquiry at issue did not request "additional instructions" or to have "testimony" read to the jury. Inasmuch as Florida Rule of Criminal Procedure 3.410 specifically imposes notice requirements upon the judge only in those particular situations and given the obvious harshness of a per se reversal rule, the district court's finding that the trial court's simple refusal to allow the jury to consider an exhibit not introduced into evidence did not justify reversal is clearly appropriate under the circumstances and is in line with numerous decisions which distinguish between requests for instructions and the largely ministerial task of determining which exhibits have in fact been admitted into evidence and may therefore be considered by the jury.

Alternatively, should this Court determine that the jury communication at issue was subject to the requirements of Rule 3.410 the state respectfully requests this honorable court to revisit the improvident and unjustified per se reversal rule announced in Ivory in favor of the well-established and statutorily mandated harmless error rule of Section 924.33, Florida Statutes (1985). It can hardly be said that in every case of juror communication harmful/prejudicial error will result and given the clear legislative pronouncement that criminal judgments should be reversed only if the substantial rights of the defendant had been adversly effected, i.e., if the defendant

has in fact been prejudiced, no basis for reversal is presented where the state can, as in this case, demonstrate beyond a reasonable doubt that the error alleged was not prejudicial in that it did not affect the verdict. Accordingly, the state urges this Court to reject the Ivory per se reversal rule and adopt the well-reasoned concurrence of Justices Shaw and McDonald in Williams v. State, 488 So.2d 62, 64 (Fla. 1986) applying the mandated harmless error rule.

Finally, and again alternatively, if the foregoing arguments are rejected the state would nevertheless respectfully submit that reversal is inappropriate in this case given the petitioner's previous concession at oral argument before the district court of appeal that his trial counsel was in fact present during the jury communication at issue. In carving out exceptions to the harsh per se reversal rule of Ivory this Court has determined that Rule 3.410 does not necessarily require the defendant's presence if defendant's counsel is present for communications under the rule and afforded the opportunity to voice objections. As noted by the district court below, the record in this case makes unclear just who was present during the jury communication at issue, and remand, as suggested by petitioner's appellate counsel at oral argument before the district court, may well be appropriate to determine if any error in fact occurred prior to reversal for a new trial in this case.

ARGUMENT

THE DISTRICT COURT PROPERLY DETERMINED THAT THE JURY COMMUNICATION AT ISSUE WAS NOT SUBJECT TO THE REQUIREMENTS OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.410 BECAUSE THE JURY DID NOT REQUEST ADDITIONAL INSTRUCTIONS OR TO HAVE ANY TESTIMONY READ TO THEM; ALTERNATIVELY, EVEN IF THE COMMUNICATION WERE SUBJECT TO THE CONSTRAINTS OF RULE 3.410 THE OBVIOUSLY HARMLESS NATURE OF ANY PURPORTED ERROR IN THIS CASE AND THE CLEAR CONSTRAINTS OF SECTION 924.33, FLORIDA STATUTES REQUIRES REVISITATION AND REJECTION OF THE PER SE REVERSAL RULE OF IVORY V. STATE, 351 SO.2D 26 (FLA. 1977); FURTHERMORE AN EVIDENTIARY REMAND SHOULD BE ORDERED TO DETERMINE IF ERROR IN FACT OCCURRED PRIOR TO REVERSAL.

Initially, the respondent reasserts the arguments contained within the jurisdictional brief submitted in opposition to this Court's exercise of its discretionary jurisdiction. Given the clear constitutional requirements of express and direct conflict and the legally and factually distinguishable nature of the district court decision in this case and this court's holding in Curtis v. State, 480 So.2d 1277 (Fla. 1985), discretionary jurisdiction should be withdrawn as improvidently granted.

The distinction between this case and Curtis is made evident by the majority opinion below which distinguishes Curtis and Ivory v. State, 351 So.2d 26 (Fla. 1977) and other decisions applying the proscriptions of Florida Rule of Criminal Procedures 3.410 from factual situations like those presented sub judice where the jury communication does not involve a request for

additional instructions or to have any additional testimony read to the jurors.

As noted by the state in its answer brief at the district court level the jury inquiry at issue was in effect nothing more than a question as to whether all evidentiary exhibits had been presented to them and as such was a matter governed not by Florida Rule of Criminal Procedure 3.410 but by Rule 3.400 which controls situations in which the jury is to be provided with items previously introduced into evidence, which rule does not require the presence of either counsel or the defendant. Morgan v. State, 471 So.2d 1336 (Fla. 3d DCA 1985); Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA), rev. denied, 456 So.2d 1182 (Fla. 1984); Turner v. State, 431 So.2d 328 (Fla. 3d DCA), rev. denied, 438 So.2d 834 (Fla. 1983). The underlying bases for the majority opinion, aside from the factual distinctions drawn, clearly involve the district court majority's distain for the application of a per se reversal rule under the facts of this case where the appellant before the district court made "no contention...that he was in any way harmed" by the purported error. Bradley v. State, 497 So.2d 281, 283 (Fla. 5th DCA 1986). Indeed, although the petitioner for the first time before this Court attempts to create some perceived prejudice from the jury communication at issue a review of his only brief submitted before the district court reveals his position that prejudice is of no import and that as long as he was able to present a trial record which did not reflect "open-court treatment of an inquiry from the jury" he was entitled to automatic reversal even if

trial counsel was in fact present and even if he sustained no even arguable prejudice from the purported error. Certainly, the district court majority found such a per se reversal requirement, under the peculiar facts of this case, a bitter pill to swallow and properly refused to do so nothing this Court's apparent vacillation on the harmless error/per se reversal analysis of Rule 3.410 and this Court's specific refusal to accept jurisdiction on a previous decision from the same district court on this same issue, implicitly rejecting the defendant's claim that a jury's request for an evidentiary exhibit fell under the requirements of Rule 3.410. See, Villavicencio v. State, supra.

In this case, the jury's written request was, as correctly determined by the district court, not a request for "additional instructions" or to have "testimony read to them" such that the trial court judge could not be faulted for failing to adhere to the requirements of Rule 3.410 (if in fact he did fail to meet those requirements - a determination which the record presented makes impossible). The jury's written communication was in effect nothing more than a jury request to review what they thought was documentary evidence in the case (the original police report) and the judge's denial of that request in writing on that same piece of paper noting that the police report had not in fact been admitted into evidence was well within the court's authority specifically granted by Florida Rule of Criminal Procedure 3.400(d). Furthermore, the written request and judicial response was filed in the court record and was also noted in the court minutes, clearly exposing the judge's decision to further

appellate review upon challenge by the petitioner if he deemed it necessary. (SR 31, 46)[1] Although the petitioner now for the first time attempts to create an actual prejudice claim his arguments are weak and insubstantial at best since the police report at issue was not in fact introduced into evidence and was properly kept from the jury's consideration; indeed, had the arrest report actually been presented to the jury for their consideration it is a virtual certainty that Bradley would have complained of the judge's action on appeal (as in Ivory) in and given the absence of any objection on the record, despite the apparent presence of defense counsel, it can only be assumed that the defense did not in fact wish the report to be presented to the jurors. As the petitioner candidly and correctly states the per se reversal rule has been "much maligned" and the district court's rejection of the applicability of that judicial invention under the circumstances of this case should be commended as a rejection of the easy appellate "out" that such rules afford reviewing courts, in favor of proper individualized review of the trial judge's actions and the right of the people of the State of Florida codified in Section 924.33, Florida Statutes (1983) to expect that no judgment will be reversed without individualized appellate review to determine whether in fact the "substantial rights of the appellant" have been "injuriously affected."

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[1] (SR) refers to the supplemental record on appeal. (SSR) refers to the second supplemental record.

HARMLESS ERROR

Even if it were assumed that the jury communication at issue was subject to the requirements of Florida Rule of Criminal Procedure 3.410 the state respectfully submits that the *per se* reversible error rule judicially created by this tribunal is inappropriate and should be rejected. The petitioner's initial brief rehashes at length various arguments in support of the *per se* rule in obvious and justified concern that this Court could well revisit the issue and reconsider the propriety of *judicially* creating and imposing such an extraordinary and elevated standard for alleged violations of Rule 3.410 especially since there will certainly be cases, like the factual circumstances presented here, where the lack of prejudice to the defendant is clear, yet the appellate court because of the strictures of the judicial *per se* reversal pronouncement is powerless to do anything but "throw the baby out with the bathwater" and reverse despite the fair trial and disposition afforded the defendant in that particular case. Here, the jurors simply asked if they could see an arrest report which had not in fact been introduced into evidence and were properly informed by the trial court that they could not have it because the document itself had not been admitted into evidence and they could consider only evidence actually admitted. (SR 31) That this response was legally correct should be self-evident and the total lack of prejudice actually suffered by Bradley becomes even more clear when it is considered that the jury was repeatedly informed in the presence of defense counsel and Bradley without objection that the case must be decided

solely upon the evidence actually introduced at trial. (SSR 5, 83, 85)

Even assuming that defense counsel was not given notice and opportunity to object to the jury communication in this case the propriety of the judge's ruling had such an objection been made is clear and the communication from the jury and to the jury is made obvious by the record, so at to allow full and complete analysis of the propriety of this ruling. What goal is to then be served by automatic reversal of an otherwise fair and proper trial and disposition of this case? Is harmless error actually some sort of exclusionary rule to be enforced against judges at the expense of the people of the State of Florida for certainly there is no allegation that the state erred in this case and the petitioner will receive no fairer trial on remand since under the same circumstances the jurors will still not be authorized to view the police report. Why should the people of this state be made to bear the costs and delay of justice in this case resulting from a new trial simply to teach an object lesson to judges around the state (as apparently urged by petitioner) when no actual prejudice has befallen this particular defendant? In any event, this court would certainly be free to issue an opinion in any such case if it determined that the judge's actions were substantively deficient but to otherwise uphold the conviction on a harmless error analysis as has been previously done in innumerable appellate decisions, thus educating wayward jurists.

The state submits that the per se reversal rule announced in Ivory v. State, 351 So.2d 26 (Fla. 1977), is unnecessary and ill-

advised overkill which necessarily fails to contemplate the myriad factual situations which could be presented amply demonstrating the lack of prejudice to the accused from the communication at issue. Certainly, the "prophylactic effect" of the rule makes an appellate judge's life easier as noted by Justice England in his concurring opinion in Ivory; however, the Florida Legislature, apparently unconcerned with the ease of which appellate courts determined cases, has mandated that judgment shall not be reversed until the harmless error rule is applied and this Court has in fact noted the limitation of Section 924.33, Florida Statutes (1983), in revisiting and rejecting other state per sereversal rules. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); State v. Marshall, 476 So.2d 150 (Fla. 1985); see also, State v. Murray, 443 So.2d 955 (Fla. 1984). Applying the principles of Marshall and DiGuilio to this case the appropriateness of applying a harmless error rule is clearly demonstrated especially given the "preferred method of promoting the administration of justice" exemplified by the harmless error rule. 476 So.2d at 153. As in those cases applying the harmless error rule the state seeks nothing more than the opportunity of carrying its burden of showing the purported error harmless beyond a reasonable doubt; a showing easily made in this case. As in DiGuilio the per se error rule should be determined inappropriate under this context because the error at issue is not "always harmful, i.e., prejudicial." 491 So.2d at 1195. Furthermore, the fact that the notice requirements at issue have been codified by this Court in

mandatory rule form cannot overcome the mandate of Section 924.33 which limits all appeals and is no less mandatory in nature than the proscription of Florida Rule of Criminal Procedure 3.250 which precludes prosecutorial comment upon a defendant's failure to testify in his own behalf - a mandatory proscription which has nevertheless been determined subject to the harmless error rule. Similarly, as in Marshall and DiGuilio it is clear that there is no federal constitutional bar to applying a harmless error analysis in cases like those at bar. See, Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983).

The apparent phylosophical and practical problems in imposing a per se reversal rule in the context of Rule 3.410 violations is amply evinced by this Court's vacillations on the subject already noted by virtually every district court of appeal and by this Court itself in Williams v. State, 488 So.2d 62, 64 (Fla. 1986). The obvious problem with creating a per se reversal rule at least in this context is that there will be cases and circumstances, like those presented herein, where it becomes clear that a defendant has suffered no actual prejudice from the error asserted but nevertheless demands reversal. In such cases decisions like Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), and Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982), result and exceptions are made. Thus, the per se reversal rule is in effect rejected and the harmless error rule applied despite the court's assertion on paper of a prophylactic rule. The better rule, and the one in

keeping with the express requirements of Section 924.33, Florida Statutes, is to apply the harmless error standard and evaluate each case on the circumstances presented where the state in fact attempts to carry its burden of showing the error harmless under the factual circumstances. To do otherwise is clearly to exalt form over substance and unnecessarily burden an overextended judicial system by ordering a new trial that will afford the defendant no greater protection of any real and substantive right.

The state respectfully urges this court to reconsider the per se reversal rule created in Ivory and restated in Curtis and Williams in favor of the well-reasoned analysis of Justice Shaw, concurring in result only in the Williams decision, that the time for specifically accepting and applying the harmless rule in the context of Rule 3.410 violations has arrived. Here, the jury communication and response thereto are evident of record and the parties have been afforded the opportunity to "make full argument" as to the reasons the jury's request should or should not have been honored. If, as here, it is clear that the defendant's argument is baseless and the trial judge's decision correct there is no reason to remand for a trial and the justification for the Ivory prophylactic rule is clearly undermined. 351 So.2d at 28. See, Meek v. State, 497 So.2d 1058, 1060 (Fla. 1986); Hitchcock v. State, supra.

PRESENCE OF PETITIONER'S TRIAL COUNSEL PRECLUDES RELIEF

The harshness of the Ivory per se reversal rule has resulted

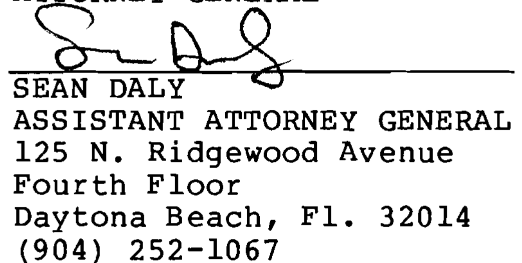
in various attempts and decisions to avoid its impact and the resulting necessity for a new trial especially in the context of death cases. See, Rose v. State, supra; Hitchcock v. State, supra. In Meek v. State, supra, this Court determined that no new trial was necessary despite an alleged Rule 3.410 violation because defense counsel, but not the defendant himself, was in fact present and afforded the opportunity to be heard. At oral argument before the district court of appeal Bradley's appellate counsel indicated that he had been informed that the petitioner's trial counsel was in fact present for the jury communication at issue although the petitioner himself claimed to have been absent. Accordingly, reversal of this cause is unjustified. Meek v. State, supra; Thomas v. State, 65 So.2d 866 (Fla. 1953). In any event, as suggested by defense counsel at oral argument remand might be appropriate to reconstruct the record for determination as to just who was and who was not present during the jury communication at issue. Should this court reject previous arguments submitted by the respondent, the state would in the alternative suggest that remand for record reconstruction or evidentiary hearing would in fact be appropriate to determine if any error actually occurred in this case. Certainly, it would be an exercise in futility to order an entirely new trial if defense counsel and / or the defendant were in fact present for consideration of the jury inquiry but the matter for some reason simply failed to appear of record.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this Honorable Court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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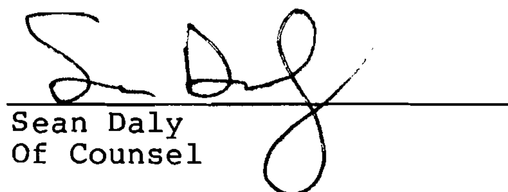
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished, by delivery, to Larry Henderson, Assistant Public Defender for petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, this 4th day of May, 1987.



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