O/a 6-29-87

IN THE SUPREME COURT OF FLORIDA

STEPHEN WILLIAM BRADLEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 69,657

PETITIONER'S INITIAL BRIEF ON THE MERITS

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SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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STATEMENT OF THE CASE AND FACTS

STEPHEN BRADLEY was charged by amended information with violations of §810.02(2)(a), Fla.Stat. (1983)[burglary of a dwelling with a battery], §812.014(1)(a)(b), Fla.Stat. (1983)[petit theft] and §784.03 Fla.Stat. (1983)[battery] (SR24) 1/. A special public defender [Mr. Leon Cheek, Esq.] was appointed to represent Bradley (SR22), and the matter proceeded to a jury trial in the Circuit Court for Seminole County, the Honorable Vernon C. Mize presiding.

The state presented the testimony of two persons at trial (R3-44,SR15-22). Viewed in a light most favorable to the verdicts, that testimony established that on November 29, 1984 Thomas Jackson (a Longwood Police Officer) and his wife returned

1/ (SR) refers to the supplemental record in the instant case, whereas (R) refers to the initial record on appeal.

home after Christmas shopping (R4-5). Some packages and the wife's purse were left near the sliding glass door, and the couple went back to the master bedroom (R6). Jackson heard the glass door open, and he observed the defendant grab his wife's purse and run (R6-8). The officer gave chase, yelling "stop, I'm a cop." (R11). After being chased about 60 feet, the defendant abandoned the purse (R12). Jackson caught up with the defendant (R13), and during the ensuing struggle Jackson was struck in the face (R13-15).

At the conclusion of the state's case, defense counsel moved for a judgment of acquittal, arguing that the state had failed to prove that the battery was intentional and that this type conduct did not fall within the intended perimeters of the burglary statute (R44-47,51-53). The motion was denied (R53). Bradley exercised his right to remain silent and, following objection free closing arguments, the jury was instructed on the law of the case (SR53-75,75-93). The jury propounded two inquiries to the court during deliberation (SR31-32,46). The first question asked, "Can we read the original police report?" (SR31). Judge Mize wrote, "NO. The police report is not in evidence. You have to consider only the matters that are in evidence." (SR31). The second question requested another reading of the law as it relates to battery (SR32,46). The court returned the jury to the courtroom and reinstructed the jury on the law of battery in the presence of the defendant and counsel (SR46,93-95).

The jury found Bradley guilty of burglary of a dwelling with a battery, petit theft and battery (SR33-35). He was adjudicated guilty of all three offenses on May 14, 1985 (SR39-40). The matter came on for sentencing on July 19, 1985 (SR66-69). The sentencing hearing was continued due to the short notice of the state's intent to prosecute the defendant as a habitual offender (SR70). A guideline scoresheet totaling 121 points was prepared and accepted by the Court (SR193). The recommended sanction was 5½ to 7 years imprisonment.

Judge Mize did not find the evidence sufficient to sentence the defendant as an habitual offender in reference to the standards set forth in Section 775.084, Florida Statutes (SR180). The court departed from the recommended guideline sentence, however, and on October 28, 1985 sentenced Bradley to a 15 year term of imprisonment, to be served concurrently with a 60 day and 1 year term of incarceration for the misdemeanor offenses (SR170,195-199). Credit is to be received for 333 days time served (SR195). The written reason for departure provides: "Due to the previous record of the defendant and the nature of those offenses." (SR193).

On direct appeal, the Fifth District Court of Appeal reversed the departure sentence, finding it to be unsupported by clear and convincing reasons. Bradley v. State, 497 So.2d 281 (Fla. 5th DCA 1987)(Sharp, J., dissenting). In rejecting the issue contending that the trial court erred in failing to respond to the first jury inquiry in open court with notice to the parties as required by Fla.R.Crim.P. 3.410, the court held that

the jury inquiry did not implicate Rule 3.410 because it did not ask for additional instructions or to have testimony read. Bradley at 283. A technical correction in the opinion was made following rehearing.

Discretionary review on the basis of express and direct conflict was timely sought by Bradley and granted by this Court on March 20, 1987. This brief follows.

SUMMARY OF ARGUMENT

After retiring to deliberate the jury wrote a note requesting that they be allowed to read a police report that, though never introduced into evidence, was used by defense counsel to impeach the key state witness. The report had been marked for identification purposes, and it contained the sworn statement of the witness; further it had been used by the witness to refresh his recollection of the event prior to trial. The request was answered in the negative by the trial judge without bringing the jury into the courtroom, and apparently without notice to the attorneys for either party.

Fla.R.Crim.P. 3.410 imposes a mandatory duty for the trial judge to address on the record in open court a request from the jury requesting additional instructions and/or a reading of the testimony. The request in this case sought further instruction and/or reading of evidence presented in open court during the trial. Thus, the trial court erred in failing to comply with requirements of Fla.R.Crim.P. 3.410.

The per se reversible error rule remains viable and it is appropriate as the only mechanism whereby trial judges will be acutely aware of the need to strictly comply with the requirements of Rule 3.410. Even if a "harmless error" rule could effectively be administered, and Petitioner respectfully submits that it cannot, trial courts would as a result soon become less concerned with the need to strictly comply with Rule 3.410.

The failure to comply with Rule 3.410 most harms the State of Florida, because a harmless error analysis is unavail-

able to the state where a violation of Rule 3.410 results in the acquittal of a defendant or conviction on a lesser offense than perhaps otherwise could have been obtained had the state been able to address a question that concerned the jury in its deliberations.

As a basic tenet of fairness, both sides should have the opportunity to address a question that is germane to the case and that is affecting the jury in its fact finding function. Substitution of appellate review and application of a harmless error analysis for a full and fair jury trial in the first instance is inconsistent to a constitutionally guaranteed right to a jury trial. The per se reversal rule is appropriate following a violation of Rule 3.410. The decision of the Fifth District Court of Appeal should be reversed and the case remanded for retrial on all charges.

ISSUE

WHETHER FLA.R.CRIM.P. 3.410 REQUIRES THAT THE JURY BE CONDUCTED INTO THE COURTROOM AND THAT COUNSEL FOR THE PARTIES BE GIVEN NOTICE PRIOR TO THE JUDGE RESPONDING TO A REQUEST FROM THE JURY FOR ADDITIONAL INSTRUCTIONS OR FOR TESTIMONY TO BE READ?

Florida Rule of Criminal Procedure 3.410 expressly provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such notice read only after notice to the prosecuting attorney and to counsel for the defendant.

In the instant case the Fifth District Court of Appeal ruled that the communication from the jury was outside the requirement of Rule 3.410, because, ". . . the jury (1) did not request additional instructions, and (2) did not request to have any testimony read to them." Bradley at 283 (emphasis added).

That ruling expressly conflicts with both the spirit and holdings of this Court in Williams v. State, 488 So.2d 62 (Fla. 1986), Curtis v. State, 480 So.2d 1277 (Fla. 1985), and Ivory v. State, 351 So.2d 26 (Fla. 1977). This Court in Ivory recognized that a per se reversible error rule is warranted where a trial court, in the absence of the defendant and without notice to attorneys for the parties, communicates with a jury about matters affecting their deliberations. The procedure so violates

established principles of fairness and due process of law that violation of the basic fundamental rights involved cannot avoid redress under the guise of "harmless error." Fundamental constitutional rights require an intentional, knowing and voluntary waiver; they cannot be lightly discarded if the Constitution is to retain viability. By far the most critical period during a trial is the jury deliberation process, and by far the importance of the free exercise of fundamental constitutional rights is at its peak during that critical period of trial when the jury performs its function of determining the credibility of the witnesses and the appropriate weight to be given the testimony and evidence. After presentation of the evidence and instruction on the law, the jury retires as a body to the sanctity of the jury room. No longer proscribed from discussing the case with other jurors or from forming opinions, the jurors are instead encouraged by the court to fully and fairly discuss what they have perceived in order that a just verdict be returned.

How is an appellate court to know what prompted the jury, in the performance of its fact finding function, to ask for guidance or for other information that quite clearly concerns the jurors as they consider credibility and determine what evidence is believable? The limitations on an appellate court in determining credibility of witnesses from a cold record go without gainsay. Appellate review of credibility of witnesses is simply not an acceptable substitute for the jury trial to which both parties are constitutionally entitled.

Fla.R.Crim.P. 3.410 affords both parties the full panoply of constitutional rights when, during deliberations, the jury asks for additional instructions or to have testimony read them. The requirement of notice, open court/public treatment of the inquiry, presence of the accused, and an opportunity to be heard and to object are implicated when the jury asks a question that concerns the deliberation process. The parties may, by stipulation, introduce an exhibit about which the jury is concerned but which, through oversight or inadvertance, was not formally introduced.

In this case the jury asked, "Can we read the original police report?" At issue is whether this question falls within the purview of a request for additional instructions or a request to have testimony read to them. It is initially submitted that, as a practical matter, it is if no consequence that the jurors requested to read the report rather than to have the report read to them ... but for the fortuitous phrasing, the question could have read "can we be read the police report again". The effect of the communication is the same; the jury is concerned about what is contained in the police report and, if possible, they want it again published to them.

This particular police report contained the sworn statement of the police officer/victim of the burglary and battery. It had been used extensively by defense counsel to impeach the officer following his direct examination (R26-30,35), and though it was marked as defense exhibit "A" for identification, it had not been introduced into evidence. It

properly was subject to introduction because the witness used the report to refresh his recollection (R29)(See Section 90.613 Fla.Stat.). The report was also admissible pursuant to Section 90.803(5) Fla.Stat., that is, as the recorded recollection of the witness made under oath contemporaneously to the incident. In any event, at least those portions of the police report that were referred to during cross-examination of the police officer were actually in evidence, if only for impeachment purposes. Pursuant to Fla.R.Crim.P. 3.410, the defendant and the state were entitled to notice of the jury inquiry concerning the police report and an opportunity to respond prior to the jury being instructed that the report was not in evidence and that they would have to rely on their own recollection of the evidence.

The request for additional instructions contemplated by Rule 3.410 should not be viewed strictly as applying to requests for substantive instructions. Rather, the terms of the rule should be liberally viewed to affect its purpose. Stated simply, if the jury asks for guidance concerning a matter that is germane to their deliberations, it is seeking further instruction from the court, and the parties should have notice of that question as a matter of basic fairness.

Though much maligned, the per se reversible error rule is the only viable means to insure strict compliance with such an important rule of procedure. Ethically, judges should not be answering questions from jurors in the absence of notice to and participation of parties if the question, liberally viewed, is germane to the jury's fact finding function. This tenet need not

be expounded on. The harm accrues to both parties, and it is only by red-flagging the ex parte procedure by a judge as wholly unacceptable that trial judges automatically will immediately go on the record in the presence of counsel for the parties to resolve a jury communication. Application of a harmless error analysis will eventually remove the alarm bells that should sound in the trial judge's head as soon as the bailiff hands him any inquiry from the jury.

Further, as aptly phrased by Justice England, "A 'prejudice' rule would, I believe, unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent 'harm', real or fancied." Ivory v. State, 351 So.2d 26, 28 (Fla. 1977)(England, J., concurring specially). An example of how elusive prejudice or the lack of it can be to determine is found in this very case. The defendant was charged with petit theft, battery, and burglary with a battery. He admitted committing the theft (SR18), he contested, however, being guilty of the more severe offense of burglary with an assault (SR59-60). The testimony in that regard was at best inconclusive, and the credibility of the witnesses was crucial.

Specifically, Officer Jackson testified that he chased Bradley for over 100 feet; he struck Bradley "at least" twice in the back (R26). Jackson claimed to have been struck once by Bradley as they went into a ditch (R13), and again when he got Bradley turned around (R14). He disclaimed being angry (R23); he conceded that he might have been yelling obscenities (R22), and claimed to have had a red mark on his face for two hours after

the incident (R30). He wanted to have Bradley charged with the highest offense possible (R32). Jackson's wife, on the other hand, testified that her husband was angry (RSR21), screaming obscenities (SR20-21), and that he did not display any injuries when he returned (SR22).

Section 810.02(2), Florida Statutes (1983) provides: "Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in §775.082, §775.083, or §775.084, if, in the course of committing the offense, the offender [m]akes an assault or battery upon any person."

> An act is committed "in the course of committing" if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

Section 810.011(4), Fla.Stat. (1983). If Bradley committed a battery on Jackson while fleeing after commission of the burglary, the state is entitled to a guilty verdict. If Bradley did not commit a battery on Jackson, he is entitled to an acquittal on the battery charge and a conviction only for the lesser burglary offense. Clearly in this case there is insufficient evidence for an appellate court to resolve the issue that is controlled by credibility of the witnesses. But if a reversal is then appropriate, what charges are to be reversed? The theft charge appears not to be implicated, but in fact all charges are affected. If the theft conviction remains intact, the jury trying the case following remand will not be aware that Bradley has suffered one conviction from this incident. If they are so informed, that bolsters the state's case against Bradley for the

remaining charges, in that the new jury will be aware that six other jurors have found Bradley guilty of an offense stemming from the incident they are now trying. The more astute jurors may even glean that a prior conviction has been reversed on appeal, requiring the new trial.

This entire dilemma is circumvented by requiring strict compliance with Rule 3.410. The rule requires that, when a request from the jury occurs during deliberation, the jury "shall be conducted into the courtroom by the officer in charge." Thus, the defendant and counsel for both sides will receive notice of the communication and the record will concretely evidence that fact. The procedure benefits both parties, but perhaps it benefits the state more than it does the defendant. If the prosecutor is denied his right to participate in formulating a response to a jury inquiry and the defendant is acquitted or found guilty of a lesser offense, the state cannot then appeal. The state has lost its right to notice, and that cannot be corrected on appeal under a harmless error rubric. It is only through strict adherence to the dictates of Rule 3.410 that the parties can be assured that their constitutional rights have been preserved, at a time that is the culmination of all that has previously transpired in the trial. The per se rule is warranted in recognition of the fact that this crucial period constitutes the very essence of both party's right to a jury trial. See Rose v. Clark, __U.S.__, 106 S.Ct. __, 92 L.Ed.2d 460,470 (1986).

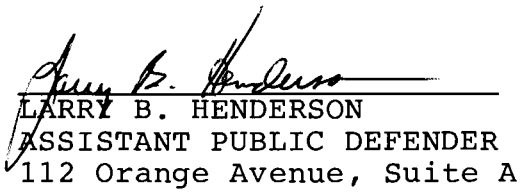
The decision of the Fifth District Court of Appeal in this case should be reversed and the viability of the per se

CONCLUSION

Because the trial court failed to comply with Fla.R.Crim.P. 3.410, the convictions in this case must be reversed and the matter remanded for retrial on all charges.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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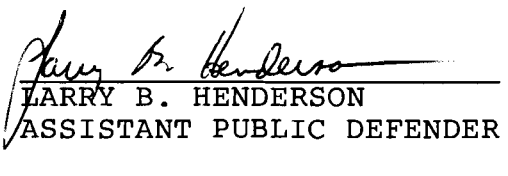
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Stephen W. Bradley, #044890, 500 Orange Circle Avenue, Belle Glades, Fla. 33430 on this 14th day of April 1987.



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reversible error rule set forth in Ivory, supra, ratified. Further, to disperse any confusion, this Court should expressly disapprove Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA), rev. denied, 456 So.2d 1182 (Fla. 1984). A workable definition should be clearly stated that, if a judge receives a communication from the jury and that communication is germane to the deliberations of the jury, the jury is seeking additional instruction and, accordingly, the notice and open court requirement mandated by Rule 3.410 apply.

CONCLUSION

Because the trial court failed to comply with Fla.R.Crim.P. 3.410, the convictions in this case must be reversed and the matter remanded for retrial on all charges.

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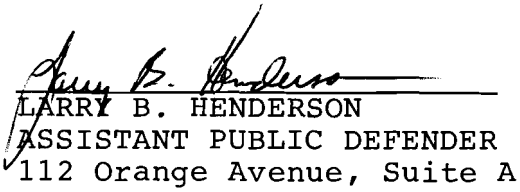

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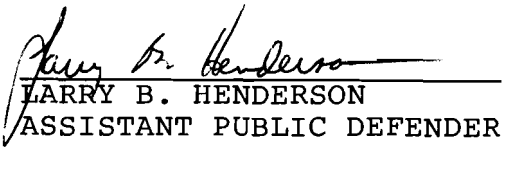

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