IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 69,038

PAUL CLAIR LENTZ,

Respondent.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399
(904) 488-0290

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. BH-170

PAUL CLAIR LENTZ,

Respondent.
_____/

PRELIMINARY STATEMENT

Paul Clair Lentz was the defendant below and will be referred to herein as Respondent. The State of Florida was the prosecution below and will be referred to herein as Petitioner.

The Record on Appeal consists of seven volumes. Volume I contains the docketing instruments. (R 1-182) Volume II contains the trial transcript of the testimony of state witnesses Charles Kelly and James Kelly. (R 183-279) Volume III contains the trial transcript of state rebuttal witness Robert Berland and the close of the trial. (R 280-458) Volume IV contains the transcript of the sentencing hearing (R 463-512) and trial transcript of swearing of the jury and six state witnesses. (R 513-638) Volume V contains the testimony of defense witness Dr. Sidney Merin. (R 639-705) Volume VI contains trial transcript of testimony of defense witnesses. (R 706-914) Volume VII contains the trial transcript of Respondent's testimony. (R 915-992)

STATEMENT OF THE CASE

Respondent was charged by an amended information with the attempted first degree murder with firearm of Charles B. Kelly on September 7, 1983. (R 1) The initial trial resulted in a mistrial following a hung-jury. Petitioner relied on the defense of insanity at the time of the offense in both trials. (R 116-118) (R 536-553) The District Court opinion is cited as Lentz v. State, 11 F.L.W. 2545 (Fla. 1st DCA Dec. 5, 1986).

The jury was instructed on the standard jury instruction relating to insanity. (R 429-430) Respondent did not request alternative instructions on the defense of insanity or object to the standard instruction given. After deliberation, the jury requested reinstruction on the Florida sanity law and on Verdicts 1 and 2. (R 446) The jury was reinstructed, once again without objection, on the standard insanity instruction and on first and second degree murder. (R 446-452) The jury deliberated for approximately three hours and then returned a verdict finding Respondent guilty of attempted first degree murder with a firearm. (R 452-454) (R 138-139) Respondent filed a timely motion for new trial which did not challenge or object to the standard jury instruction on insanity. (R 465-491)

At the sentencing hearing, the State successfully argued that the offense of attempted first degree murder with a firearm should be reclassified from a felony of the first degree

punishable by maximum penalty of thirty years imprisonment, with a minimum mandatory of three years for use of a firearm to life felony punishable by life with a minimum thirty year term of imprisonment. (R 492-506) Respondent was adjudicated guilty and sentenced to thirty years in state prison with a mandatory minimum three year applicable. (R 509) (R 153-165) Respondent then filed a timely notice of appeal. (R 174) The Public Defender was appointed to handle the appeal. (R 179)

On appeal, Respondent argued for the first time that the standard jury instruction on the burden of proof in the defense of insanity was improper on authority of this Court's holding in Yohn v. State, 476 So.2d 128 (Fla. 1985). Respondent argued that the instructions as given constituted fundamental error which excused Respondent's failure to object to the instructions given at trial and his failure to request alternative instruction in writing as required by Florida Rule of Criminal Procedure 3.390(c) and (d). The District Court below found that the element of Respondent's sanity was a critical and disputed issue and under the circumstance, the omission to instruct on that element was fundamental error and ordered a new trial for Respondent.

The district court went on to note that this decision was in express and direct conflict with the Third District Court of Appeals opinion in Snook v. State, 478 So.2d 403 (Fla. 3rd DCA

1985) which had held that it was not fundamental error for the trial court to give the standard jury instruction on insanity. The District Court, pursuant to Rule 9.030(a)(2)(A)(iv), certified that this decision expressly and directly conflicted with the decision of another District Court of Appeal on the same question of law. Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court on December 31, 1986.

STATEMENT OF THE FACTS

The evidence below reviewed in light most favorable to the verdict on appeal reflects the following facts.

Respondent was a successful home builder and Charles Kelly sold homes built by Respondent. (R 188-189) This buisness relationship had a social demension. (R 189) Charles Kelly worked with Respondent's wife and eventually had a love affair with her. (R 196)

On September 6, 1983, Frank Kraeft, a salesman at the Outdoor Shop in Tallahassee, Florida sold a model 38 Smith and Wesson Revolver to Respondent. (R 556-557) Respondent appeared to be a ordinary customer who stated he was purchasing the gun for his wife's protection. (R 561) Respondent was clean shaven, well dressed and hair was neat. (R 563)

On September 7, 1983 around 3:00 p.m., Charles Jacobsen, a neighbor of Charles Kelly observed Respondent's white Chevy Luv pick-up parked on Sharon Road with a man sitting in it. (R 576) Jacobsen next observed this truck in Charles Kelly's driveway. (R 577) Charles Kelly and Respondent walked down the street in a casual manner. (R 578)

Jacobsen next saw Respondent chasing Kelly and shooting at him with a firearm. (R 579)

Respondent parked his truck behind Charles Kelly's car to block his exit. (R 199) Respondent was dressed normal except for his shirt-tail was out. (R 200) Respondent approached Kelly and said "I'd like to talk to you." (R 200) Respondent asked Kelly to walk down the street and told Kelly that he had ruined a lot of lives. (R 201) Respondent blamed Kelly for ruining his business. (R 201) Respondent told Kelly that he thought he was a strong enough individual to resist his wife's propositions. (R 201) Respondent and Kelly walked backed towards Kelly's home. (R 202) Kelly noticed that Respondent was nervous when Kelly was on his right side. (R 203) Respondent spoke in direct complete statements. (R 204) Respondent took a deep breath, turned his back to Kelly and Kelly heard a click before Respondent wheeled and fired directly at Kelly's chest. (R 204) The bullet struck Kelly in the chest and passed through his body. (R 205) Respondent and Kelly briefly struggled and a second shot was fired. (R 205) Kelly ran across the road and Respondent gave chase and fired again. Kelly was hit in the back. (R 205-206) Respondent emptied the gun, but missed Kelly who climbed a fence. (R 206) Respondent returned to his truck and drove away.

David Lightsey testified that around 6:30 or 7:00 p.m. he came home from work and observed Respondent's truck parked along the road about a quarter of a mile from Sharon Road. (R 607-609) Lightsey spoke with Respondent who told him he was waiting

for a friend in a truck to pass by and described the truck. (R 610) Respondent was relaxed. (R 611)

Officer James Kelly testified that Respondent told him that he was angry at Charles Kelly, a man who was supposely his friend would do this by going with his wife. He was pissed off. (R 260) Respondent said he had planned it. (R 262)

Respondent also made written notes after the shooting-"why didn't Charlie die when I shot him", (R 895) and "I am only two blocks away from the scene of the crime." (R 898)

Respondent offered testimony from two experts that he was legally insane on September 7, 1983. Dr. Merin, a Diplomate, Board certified in clinical psychology in neuropsycholgy, who treated Respondent from October 25, 1983 until September 24, 1984 testified that Respondent was not legally sane at the time of the crime. (R 646-660, 733-788) Dr. Merin testified Respondent suffered from a major depressive episode with depersonalization features, which is a recognized mental defect or illness. (R 662-668, 746, 789, 742-743) Dr. Merin indicated this shooting was inconsistent with Respondent's tested personality and that he was incapable of entertaining specific criminal intent. (R 793) Dr. David Moore, a psychiatrist testified that he had examined Respondent on August 8, 1983 prior to the incident and that he appeared depressed. (R 867) Dr. Moore admitted on cross-examination that the extent of the depression was not so severe

as to label it a major depressive episode with all of the sequelae that can come from the episode. (R 868) Dr. Moore prescribed sleeping pills. (R 869)

The State's rebuttal expert, Dr. Berland, did not think Respondent's mental disturbances were severe enough to impair his ability to reason. (R 296-327) Dr. Berland also thought that Respondent knew what he was doing and knew it was wrong and was sane at the time of the offense. (R 309, 314) Dr. Berland based his finding on the fact that Respondent was able to describe all of the action on the day of the offense in great detail to the arresting officer. Plus he (Respondent) described to Dr. Berland "walking down the street and getting the gun out, shooting the victim, driving away, driving around the corner and waiting for the police, the use of the credit cards in the hotel, he new what newspapers to go look for when he was in Jacksonville to see whether the crime was described in the newspaper". (R 309-310) Dr. Berland testified that he saw no evidence that Respondent had a major mental illness before during or after the shooting. (R 313)

SUMMARY OF ARGUMENT

This Court has held that it is the duty of the trial judge to accurately charge the jury on the State's burden of proof when the defendant raises the question of insanity, where the defendant objects to the standard jury instruction and makes a written request for alternative instruction based on the facts and circumstances of the case. This Court has also held in a capital case that charging the jury with the standard jury instructions involving the defense of insanity does not constitute reversible error where the defendant does not object and request alternative instruction in writing.

The District Court below erred in holding that the instructions as given constituted fundamental error. This Court should reaffirm this holding that defendants must object to the instruction as given and request alternative instructions in writing before they may assert the claimed error on appeal.

ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD JURY INSTRUCTION ON INSANITY WHERE RESPONDENT DID NOT OBJECT TO THE INSTRUCTION GIVEN AND MADE NO REQUEST ORALLY OR IN WRITING FOR AN ALTERNATIVE INSTRUCTION.

Respondent successfully argued before the District Court below that Yohn v. State, 476 So.2d 123 (Fla. 1985) mandated a new trial with different jury instructions on insanity due to the fundamental error in the instructions as given. Yohn was not decided at the time of the trial. However, Yohn v. State, 450 So.2d 898 (Fla. 1st DCA) was available and the question certified therein put veteran defense counsel Philip Padovano on notice that the requested jury instructions in Yohn were pending appeal. Judge Shivers had quoted the entire requested jury instructions in footnote 1 of the First Districts opinion in Yohn supra, which of course was released prior to trial date.

In Yohn v. State, supra the defense counsel had complied with Fla.R.Crim.P. 3.390(c) and made a written request. Here counsel could have argued along the line of Judge Anstead's dissent in Reese v. State, 452 So.2d 1079, 1080 (Fla. 4th DCA 1984) knowing that the question would be answered in Yohn and preserved his appellate claim.

This Court and other District Courts of Appeal have already held that the failure of defense counsel to interpose a timely

objection and request alternative instruction in writing as required by the criminal rules procedurally bars appellate and other post conviction review of this claim that the jury was incorrectly charged. Roman v. State, 475 So.2d 1228 (Fla. 1985); Snook v. State, 478 So.2d 403 (Fla. 3rd DCA 1985); Lancia v. State, 11 F.L.W. 2536 (Fla. 5th DCA Dec. 4, 1986).

The District Court below held that the use of Florida Standards Jury Instruction 3.04(b) constituted fundamental error which required a new trial for Respondent. The District Court's ruling states that the Respondent's "sanity was a critical and disputed issue since it was his only defense" and as such the need for objection was obviated by this "fundamental error". Lentz v. State, 11 F.L.W. 2545, 2546 (Fla. 1st DCA Dec. 5, 1986).

In Roman v. State, supra this Court held:

> As Appellant's last point relating to the guilt phase, he contends that the trial court erred in failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that Appellant was legally sane at the time of the commission of the offense. Appellant did not preserve this point, as he did not request the trial court give this instruction. We find no error. Id. at 1234.

The decision in Yohn was released by a sharply divided four three Court on July 11, 1985 and rehearing was denied October 7, 1985. The opinion in Roman, supra was decided August 30, 1985 and became final October 25, 1985. The defendant in Roman argued

that the trial court committed fundamental error in giving the Standard Jury Instruction and relied on Holmes v. State, 374 So.2d 944 (Fla. 1979) cert.denied, 446 U.S 913 (1980); Parkin v. State, 238 So.2d 817 (Fla. 1970) cert.denied, 401 U.S. 974 (1971) and United States v. Jackson, 587 F.2d 852 (6th Cir. 1978).[1] See Issue V Initial Brief of Appellant page 46 in Roman v. State, Case No. 63,766. The Appellant in Roman also supplied this Court with a notice of supplemental authority on September 7, 1985 citing to Reese v. State, 452 So.2d 1079 (Fla. 4th DCA 1984). This Court rejected Roman's argument via an oblique reference to the failure to preserve the question by requesting an alternative instruction. This comports with prior decisions of this Court. See Castor v. State, 365 So.2d 701 (Fla. 1978); Lucas v. State, 376 So.2d 1149, 1151-1152 (Fla. 1979).

Petitioner below argued to the District Court that the failure of defense counsel to interpose a timely objection and request alternative instruction in writing as required by the rules procedurally barred appellate relief. The District Court below correctly held that fundamental error is that which can be considered on appeal absent objection in the trial court. However, Petitioner maintains this Court has rejected the argument that the Standard Jury Instructions constitute

---

[1] This Court has inherent power to review its own files. Petitioner asks the Court to take judicial notice of the Initial Brief filed in Roman v. State and included as Appendix.

fundamental error and the United States Supreme Court has rejected the argument that it is constitutional error. See Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The above decisions hold that due process requires the State to prove each and every element of the offense beyond a reasonable doubt, but it is not a denial of due process to place the burden of proving the affirmative defense of insanity on the defendant. Moreover, this Court in Yohn labeled the issue "crucial" not "fundamental". Id. at 128. The Yohn decision was also silent as to retroactive or prospective application. A reading of Yohn and Roman in conjunction leads to the conclusion that this court rejects the view that the above error is fundamental and relegates it to an error which must be properly raised at trial.

This view comports with the United States Supreme Court decision in Rose v. Clark, 478 U.S. _____, 92 L.Ed.2d 460, 106 S.Ct. 3101 (1986), wherein the Court applied harmless-error anaylsis to a defendant's claim that the jury instructions had impermissibly shifted the burden of proof to the defendant as to malice, an element of second degree murder. The application of harmless-error anaylsis precludes a finding of fundamental error. This Court in Yohn, supra exclusively stated that the decision was grounded in policy, not constitutional requirements.

Also in State v. Lancia, supra, the Fifth District has rejected consideration of the above claim via Fla.R.Crim.P. 3.850 motion where the defendant made no objection to the instructions at trial. The Court relied on Roman v. State, supra.

The situation below presents the classic sandbag. If acquitted, defendant wins and if convicted, defendant wins on appeal. Respondent was represented by able counsel who was very zealous in protecting the rights of the defendant. This Court should quash the decision of the District Court below as just another example of "the use of loopholes, technicalities and delays in the law which frequently benefit rogues at the expense of decent members of society". State v. Jones, 204 So.2d 515, 519 (Fla. 1967).

CONCLUSION

Petitioner respectfully asks that this Court quash the decision of the District Court below and reinstate the judgment and sentence of Respondent.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Gary L. Printy
GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 30th day of February, 1987.

Gary L. Printy
GARY L. PRINTY
Assistant Attorney General