

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

JOSEPH ANTHONY CICCARELLI, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

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CLERK, DISTRICT COURT  
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CASE NO. 70,811

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii-iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2 - 4
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6 - 14
IS IT NECESSARY, IN EVALUATING AN ASSERTION OF HARMLESS ERROR IN A CRIMINAL APPEAL, THAT EACH APPEL- LATE JUDGE INDEPENDENTLY READ THE COMPLETE TRIAL RECORD?	
CONCLUSION	15
CERTIFICATE OF SERVICE	15

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Applegate v. Barnett Bank of Tallahassee</u> , 337 So.2d 1150 (Fla. 1979)	9
<u>Basset v. State</u> , 449 So.2d 803 (Fla. 1984)	13
<u>Ciccarelli v. State</u> , 508 So.2d 52 (Fla. 4th DCA 1987)	7
<u>Donovan v. State</u> , 417 So.2d 674 (Fla. 1982)	14
<u>Edwards v. Arizona</u> , 451 U.S. 477 (1980)	13
<u>Harris v. Rivera</u> , 454 U.S. 339 (1981)	10
<u>Holland v. State</u> , 503 So.2d 1250 (Fla. 1987)	7
<u>In re Estate of Max Lieber</u> , 103 So.2d 192 (Fla. 1958)	9
<u>Kinchen v. State</u> , 508 So.2d 51 (Fla. 4th DCA 1987)	7
<u>Lee v. State</u> , 501 So.2d 591 (Fla. 1987), n.1	11
<u>Miranda v. Arizona</u> , 483 U.S. 443 (1966)	11, 12
<u>Overfelt v. State</u> , 434 So.2d 945 (Fla. 4th DCA 1983)	9, 11
<u>Polyglycoat Corporation v. Hirsh Distributors, Inc.</u> , 442 So.2d 958 (Fla. 4th DCA 1984)	9
<u>Porter v. State</u> , 160 So.2d 104 (Fla. 1964)	10
<u>Rhode Island v. Innis</u> , 446 U.S. 291 (1980)	12

	<u>PAGE</u>
<u>State v. DiGuilio</u> , 491 So.2d 1129 (Fla. 1986) . . . .	14
<u>State v. Gonzalez</u> , 467 So.2d 723 (Fla. 3d DCA 1985) . . . .	12
<u>State v. Overfelt</u> , 457 So.2d 1385 (Fla. 1984) . . . .	10
<u>Tierney v. State</u> , 404 So.2d 206 (Fla. 2d DCA 1981) . . . .	13
<u>Trushin v. State</u> , 425 So.2d 1126 (Fla. 1983) . . . .	11
<u>Warren v. State</u> , 384 So.2d 1313 (Fla. 3d DCA 1980) . . . .	14

PRELIMINARY STATEMENT

This cause is pending before this Court pursuant to a question certified by the Fourth District Court of Appeal

Respondent was the prosecution and appellee below and Petitioner, the defendant and appellant.

In the brief, the parties will be referred to as they appear before this Honorable Court of appeal except the Respondent may also be referred to as the state.

The following symbols will be used:

"R"                                Record on Appeal

"SR"                               Supplemental Record on Appeal

"AB"                               Petitioner's Brief

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found on pages two (2) through seven (7) of Petitioner's Brief on the Merits with the following additions and clarifications:

Gregory Kirk of the Fort Pierce Police Department testified that on the evening of February 20, 1985, he along with several other officers, went to the residence of James and Barbara Willis to execute a search warrant. (SR 39). As they approached the house, Petitioner was seen exiting the house through the front door. (SR 44). Kirk testified that Petitioner appeared to be "shocked" and started half-running half-walking toward a Mercedes Benz parked in front of the house. (R 44). Kirk testified that Detective Burban told him to apprehend Petitioner. (R 44). Kirk followed Petitioner until Petitioner stopped. (SR 44). Kirk testified that Petitioner put his hand in his pocket then pulled it out along with a cellophane packet which was later found to contain cocaine, and one dollar bill and a quarter. (SR 44-45). Not knowing what else Petitioner would be pulling out of his pocket, Kirk testified that he pushed Petitioner on the hood of the car, searched him and handcuffed him. (SR 45). Petitioner was then arrested. (SR 46). Petitioner asked Kirk why he was under arrest and Kirk told him for possession of cocaine. (SR 60). Kirk testified that he retrieved the items that came from Petitioner's pocket from the ground, and put them in his own pocket. (SR 45, 61, 64). Kirk then took Petitioner

inside the Willis house where the other officers were executing the search warrant. (SR 45). Kirk testified that once he was inside of the house he didn't really see any need to keep the dollar bill and the quarter so he decided he was "gonna give that back to Mr. Ciccarelli, and of course he said, 'Nope, that isnt' mine.'" (SR 64).

Detective Burban of the Fort Pierce Police Department testified that as he, along with Officer Kirk and several other officers, approached the Willis house in order to execute the search warrant, he saw Petitioner exit the house. (SR 94). Burban testified that he told Kirk to stop Petitioner. (SR 95). Burban testified that he had no first-hand knowledge about what transpired between Kirk and Petitioner after Kirk stopped him. (SR 95).

Babu Thomas, a forensic chemist at the Regional Crime Laboratory in Fort Pierce testified that the cocaine contained in the cellophane packet weighed less than one gram. (SR 108-112).

Petitioner testified in his own defense that as he was coming out the door of the Willis house, he saw several police officers approach the house. (SR 118). Petitioner testified that he heard one officer say to another to apprehend Petitioner and that he was then apprehended, and handcuffed by Officer Kirk. (SR 116-118). Petitioner testified that he asked what was going on and that Kirk told him he was under arrest for possession of cocaine. (SR 118-119). Petitioner was then brought inside the house where the warrant was being executed. (SR 119). Once

inside the house, Petitioner testified that Kirk showed him the cellophane packet, dollar bill and quarter and told another officer that he had seen Petitioner throw the items on the ground. (SR 119). Petitioner denied having any cocaine in his possession at that time (SR 123) and testified that he was at the house doing repair work. (SR 116). Petitioner admitted that he had twice before been convicted of a felony. (SR 124).



SUMMARY OF THE ARGUMENT

The Fourth District correctly decided the instant case and affirmed Petitioner's conviction and sentence. Further, the Fourth District sufficiently and adequately reviewed the record for purposes of determining whether any error committed below was harmless.

## ARGUMENT

IS IT NECESSARY, IN EVALUATING AN ASSERTION OF HARMLESS ERROR IN A CRIMINAL APPEAL, THAT EACH APPELLATE JUDGE INDEPENDENTLY READ THE COMPLETE TRIAL RECORD?

This case is before this Court pursuant to the Fourth District certifying the above question as being one of great public importance. In certifying this question the Fourth District in its opinion below held that any error in admitting Petitioner's statements at trial were harmless. The court also stated:

In determining that the error involved herein was harmless we have relied extensively upon the review of the evidence set out in the parties' briefs and our own internal review process by which the court's legal staff directly examines the trial court record to be certain that the court is presented with an accurate description of the evidence. Each judge on the panel has not independently read the record in its entirety. While we are confident that this review has been both complete and accurate, we are concerned as to whether our review is in accord with the holding in Holland v. State, 12 F.L.W. 94 (Fla. Feb. 5, 1987), which appears to hold that it is the duty of each appellate judge to read the entire trial court record before determining whether trial error may be harmless.

Our primary concern is that we comply with the supreme court's directions in resolving a harmless error claim by the state. At the same time, however, we must acknowledge some concern for the sheer amount of judicial time that will be required if, indeed, each judge must read the entire record before harmless error is raised in the vast majority of criminal appeals and our ability to manage an already staggering case load will certainly be affected by a requirement that each

judge read the entire record. Notwithstanding our concerns we will, of course, regorously apply the standard of review mandated by the supreme court.

Ciccarelli v. State, 508 So.2d 52 (Fla. 4th DCA 1987). The identical question was certified by the Fourth District in Kinchen v. State, 508 So.2d 51 (Fla. 4th DCA 1987).

Respondent submits that the concerns expressed by the Fourth District in its opinion below, as evidenced by the question certified, relate solely to the internal operating procedures of the courts of appeal in this state. Namely, does each appellate judge have to independently read the complete trial record in evaluating an assertion of harmless error? Although Respondent would not presume to tell this Court or any other court how to operate internally, Respondent would point out that the Fourth District, like this Court, has its own manual of Internal Operating Procedures (appended hereto as Exhibit "B"). Further, the Fourth District, like all of the other district courts of appeal, and this Court, has a legal staff which assists the court in handling their staggering case load. It was out of concern for this tremendous case load as-well-as this Court's obvious concern that appeals proceed on a timely basis as evidenced by the recent amendments to the Florida Rules of Appellate Procedure, that the instant question was certified. Ciccarelli, supra.

Recently this Court in Holland v. State, 503 So.2d 1250 (Fla. 1987), addressed the procedure by which a court may examine a case for harmless error:

Lastly, we are once again compelled to caution appellate courts that the burden upon the state to prove harmless error whenever the doctrine is applicable is most severe. See State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). It is the duty of the panel of appellate judges to read the record in its entirety and review the issues with careful scrutiny in order to apply the test.

Holland makes clear that in determining whether an error is harmless, the panel of appellate judges must read the entire record. However, Holland does not state whether every member of that Panel must read the entire record. To suggest that every member of an appellate panel must read the entire record on appeal to determine if an error is harmless would place an exorbitant burden on the appellate judges and courts of this state, including this Court and its seven (7) members, with the result undoubtedly being that the appellate process in this state would proceed at a snail's pace. Justice would certainly not be "swift." Respondent thus submits that the question certified deserves an answer based on concern for a criminal appellant's right to an appeal as-well-as pragmatic sensibilities necessary for the disposition of that appeal. Respondent submits that the review afforded for the district court of appeal was accurate and complete for purposes of determining harmless error and that the following considerations will lead to a proper answer to the question certified.

First, although the state's burden to prove an error

is harmless where the doctrine is applicable is most severe, it is an appellant's burden to demonstrate that error occurred at all. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). That error must appear from the face of the record. In re Estate of Max Lieber, 103 So.2d 192 (Fla. 1958). Florida Rule of Appellate Procedure 9.210 sets forth the form and content of briefs filed in appellate proceedings in this state. An initial brief filed by an appellant must contain a statement of the case and facts which shall include the nature of the case, the course of the proceedings, and the disposition below. When the appellant states the facts, it is the responsibility of the appellee to point out the specific areas of disagreement in the appellee's statement of the facts. Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983). Further, it is the duty of counsel to prepare an appellate brief so as to acquaint the court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. Polyglycoat Corporation v. Hirsh Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA 1984). Thus, the parties' briefs should, and must, accurately set forth the facts of the case as-well-as the principles of law germane to its resolution by the appellate court.

Further, the court of appeals below, as-well-as this Court, has its own internal review procedures for deciding cases. The Fourth District stated in its opinion that in determining whether an error is harmless, its legal staff directly examines

the trial record to be certain that the court is presented with an accurate description of the evidence. In addition, the district court suggested that some members of the panel, if not all, had read the record in its entirety for purposes of determining harmless error. It should be noted that the district court did not state that the entire panel had not read the record.

Thus, it is apparent that the district court relied on the parties' briefs as-well-as on its own internal review process, in determining whether the error in the instant case was harmless. To suggest that this process of review is not sufficient for purposes of determining harmless error, and that all members of a panel must read the entire record, is to presume that the court's legal staff selectively edits the record to reach desirable results or that one judge hoodwinks the other into believing the record says something it doesn't. Of course, this Court cannot abide this presumption. Rather, as this Court reiterated in Porter v. State, 160 So.2d 104 (Fla. 1964):

The presumption is that those charged with administering the laws have properly discharged their duty, and against any misconduct on their part, until the contrary is made to appear.

Thus, it is assumed that courts, including the district court below, do what is necessary to discharge their duties. See Harris v. Rivera, 454 U.S. 339 (1981).

Additionally, Respondent would also remind this Court that in State v. Overfelt, 457 So.2d 1385 (Fla. 1984), this Court affirmed the Fourth District's opinion stating that the court

would not make an independent inspection of the transcript.  
Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983).

Respondent submits that these considerations should and must be viewed in context with the burgeoning case loads experienced by all of the appellate courts of this state and will thus lead to an appropriate answer to the question certified.

Regarding Petitioner's attempt to persuade this Court to examine the merits of the instant case, Respondent would point out that this case is before this Court pursuant to a certified question regarding appellate review and harmless error, and not the individual merits of Petitioner's case. This Court must refrain from exercising its authority to entertain issues ancillary to the issue vesting jurisdiction as said jurisdiction is reserved solely for the instance where the ancillary issues affect the outcome of the petition. Lee v. State, 501 So.2d 591, 592 (Fla. 1987), n.1; Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983). Clearly, these non-meritorious, ancillary issues cannot affect the outcome of the petition.

Even if this Court was to entertain the individual merits of Petitioner's case, Respondent would maintain that the Fourth District correctly affirmed Petitioner's conviction and sentence.

Petitioner alleges that Officer Kirk's testimony that he offered Petitioner the dollar bill and quarter, which occurred after Petitioner had been arrested but before he had been read his rights under Miranda v. Arizona, 483 U.S. 443 (1966), and

Petitioner's response "Nope, that isn't mine," constituted a comment on Petitioner's Fifth Amendment right to remain silent. (AB 9-10). In support of his argument, Petitioner alleges that although he "was not advised of his Miranda rights prior to making the statement, he nevertheless indicated his desire to remain silent." (AB 10). He complains that the trial court erred in overruling his objection to Officer Kirk's testimony and in denying his motion for mistrial. Respondent maintains however, that the trial court correctly admitted the testimony and correctly denied the motion for mistrial.

In the case sub judice, the record reveals that although Petitioner was not read his Miranda rights immediately after his arrest in front of the Willis house, there was no need to read him his rights at that moment since he was not being subjected to interrogation, custodial or otherwise. Nor was Petitioner being subjected to the "functional equivalent" of interrogation. Rhode Island v. Innis, 446 U.S. 291 (1980). Indeed, Officer Kirk told the court that he did not ask the Petitioner any questions at all. (SR 47). Because the Petitioner was not subjected to custodial interrogation or its functional equivalent, no Miranda warnings were therefore required. Miranda, supra; State v. Gonzalez, 467 So.2d 723 (Fla. 3d DCA 1985). Respondent would further point out that at no time did Petitioner ever indicate a "desire to remain silent" as Petitioner suggests. (AB 10). The record indicates that after Petitioner was arrested by Kirk, out in front of the house, Petitioner on his own asked



Kirk why he was under arrest. Both Kirk and Petitioner testified to this fact at trial. (SR 60, 118-119). Both Kirk and Petitioner testified that Kirk told Petitioner he was under arrest for possession of cocaine. (SR 60, 118-119). Kirk testified that Petitioner then said that it wasn't his. (SR 60). Respondent submits that beyond any doubt, Petitioner initiated the exchange with Kirk and in doing so, did not indicate a desire to remain silent. Edwards v. Arizona, 451 U.S. 477 (1980); Basset v. State, 449 So.2d 803 (Fla. 1984). Petitioner's statement that "it wasn't his" was not the product of interrogation but rather the product of his own willingness to talk. Likewise, Petitioner's statement made inside of the house, after he had been offered back the dollar bill and quarter by Kirk, was not the product of custodial interrogation or its functional equivalent. Officer Kirk's offer of the dollar bill and quarter was not calculated to elicit an incriminating statement from the Petitioner. Compare, Tierney v. State, 404 So.2d 206 (Fla. 2d DCA 1981). Officer Kirk had no intent to draw a statement from Petitioner and was instead trying to give him back the money because he thought, perhaps incorrectly so, that since he had the packet of cocaine, he didn't have any need for the dollar bill and quarter. (SR 64). Respondent submits Officer Kirk was only guilty of being unsophisticated, not of being cunning or calculating. In any event, Petitioner told Kirk that the money wasn't his, which was an exculpatory statement.

Respondent would further submit that Petitioner's two statements that the cocaine wasn't his and that the money wasn't

his, did not amount to an invocation of the right to remain silent. Donovan v. State, 417 So.2d 674 (Fla. 1982). Petitioner's denials cannot be taken as an unspoken election to exercise the right to remain silent. Warren v. State, 384 So.2d 1313 (Fla. 3d DCA 1980). Thus, there could be no "comment" on silence. Lest it be said that Petitioner was unaware of his constitutional right to remain silent because he had not been given his Miranda warnings, Respondent would point out that Petitioner on cross-examination admitted that he had twice before been convicted of a felony. (SR 124). Clearly, Petitioner was not a neophyte, ignorant of the criminal justice system and the rights offered defendants.

Finally, Respondent would argue that even if it could be construed that Officer Kirk did comment on the Petitioner's right to remain silent, such error would have to be deemed harmless under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), since any error would not have affected the verdict where there was overwhelming evidence of Petitioner's guilt. Respondent thus maintains that the trial court correctly denied Petitioner's motion for mistrial and that Petitioner's conviction and sentence were properly affirmed by the Fourth District Court of Appeal. Further, the Fourth District sufficiently and adequately reviewed the record for purposes of determining that any error was harmless.

CONCLUSION

WHEREFORE, Respondent respectfully requests that the decision of the Fourth District be affirmed and that this Court answer the question certified in an appropriate manner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits has been furnished, by courier, to LOUIS G. CARRES, ESQUIRE, Assistant Public Defender, The Government Center, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401, this 2nd day of November, 1987.

*Carolyn V. McCann*  
\_\_\_\_\_  
Of Counsel