IN THE SUPREME COURT OF FLORIDA

JOSEPH ANTHONY CICCARELLI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,811

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This cause is pending in this Court pursuant to a certified question of law by the District Court of Appeal, Fourth District.

The brief of petitioner on the merits will refer to the record by the symbol "R" followed by the appropriate page number in parentheses. A supplemental record was filed in the district court, and said supplemental record will be referred to as "SR" followed by the appropriate page number in parentheses.

The petitioner will be referred to by name in this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner, JOSEPH ANTHONY CICCARELLI, was charged by information with possession of cocaine (R-1-2). This offense was alleged to have occurred on February 20, 1985.

Mr. Ciccarelli was convicted at a jury trial of possession of a controlled substance, to wit: cocaine (R-36). He was adjudicated guilty and sentenced to thirty months incarceration (R-43). Timely appeal was taken to the District Court of Appeal, Fourth District, which affirmed in an opinion certifying to this Court the following question:

> We certify the following question a one of great public importance:
>
> IS IT NECESSARY, IN EVALUATING AN ASSERTION OF HARMLESS ERROR IN A CRIMINAL APPEAL, THAT EACH APPELLATE JUDGE INDEPENDENTLY READ THE COMPLETE TRIAL RECORD?

A timely notice of review was filed invoking the jurisdiction of the Supreme Court. This brief on the merits asserts that the District Court of Appeal did not review the error in the instant case as required by Holland v. State, 503 So.2d 1250 (Fla. 1987), and as otherwise required to review trial errors involving constitutional rights where the harmless error doctrine has been asserted.

The trial court granted Mr. Ciccarelli's pretrial motion to preclude testimony as to a statement elicited from Mr. Ciccarelli after he had invoked his right to remain silent. (Supplemental Record-7).

> MR. TORRES [Defense Counsel]: And again any statements -- the court to preclude any statements made by Mr. Ciccarelli regarding --after he received Miranda but -- and indicated that he wished that he did not make --

> want to make any statement, Your Honor. In other words, they read his Miranda, they questioned him and he didn't want to read -- or make any statements. That of course goes to the -- I don't think the state is gonna make that error as that goes to --
>
> THE COURT: Granted.

(Supplemental Record-7).

On July 25, 1985, this cause proceeded to trial by jury, the Honorable Rupert J. Smith, presiding (SR-15).

Officer Kirk was one of several Ft. Pierce police officers executing a search warrant for the residence of James and Barbara Willis (SR-93) located at 211 South 25th Street (SR-39). As they approached, Officer Kirk saw Mr. Ciccarelli leaving through the front door (SR-44). Kirk testified that:

> I [Kirk] saw him [Mr. Ciccarelli] head toward the Mercedes at which time I pursued him and he stopped and stuck -- well, he was sticking his hand in his pocket as he was coming to the stop and then pulled it out and that's when the dollar bill, the quarter and the white powdery substance fell out.

(Supplemental Record-75). Kirk admitted that no one else saw the above-cited events. (SR-45). Mr. Ciccarelli was arrested and advised the charge against him was for possession of cocaine. (SR-60).

Prior to being given the Miranda advisory, Kirk offered Mr. Ciccarelli the dollar bill and the quarter (SR-64). Kirk testified over Mr. Ciccarelli's objection that he "really didn't see any need to keep the dollar bill and the quarter so I was gunna give that back to Mr. Ciccarelli, and of course he said, 'Nope, that isn't mine." (SR-64).

> MR. TORRES [defense counsel]: I'm gunna object, this goes against the man's Fifth Amendment rights to remain silent, he had arrested him already, he hadn't advised him of any rights and I make a motion for mistrial at this point.
>
> THE COURT: Motions denied.
>
> (end of bench conference) (SR-65).

Detective Kevin Burban of the Ft. Pierce Police Department instructed Officer Kirk to stop Mr. Ciccarelli (SR-95). Burban then proceeded into the Willis house to execute the search warrant (SR-95). Burban admitted that he did not know if Mr. Ciccarelli came out of the door (SR-100), that he did not see Mr. Ciccarelli drop anything (SR-95-96), and that he didn't see Mr. Ciccarelli with any drugs, "Cocaine or anything else." (SR-101). Burban described the lighting as "medium." (SR-96). "There wasn't street light all overlighting it up either." (SR-96); "There's not any street lights that I know of exactly right there to set up that particular area, but I'm sure there's some street lights in the area, whether they're on Boston or 25th, I just don't know." (SR-100).

Babu Thomas, a forensic chemist at the Regional Crime Laboratory in Ft. Pierce (SR-102), testified that the substance was cocaine (SR-108) and weighed less than one gram (SR-112).

The state rested (SR-112). Mr. Ciccarelli moved for a judgment of acquittal due to the state's failure to prove its case beyond and to the exclusion of every reasonable doubt as to Mr. Ciccarelli's possession of the cocaine (R-113). In addition, Mr. Ciccarelli argued that the state had failed to prove jurisdiction (SR-113), however, the court took judicial notice that it

was St. Lucie County, Florida. (SR-114). The court denied the motion. (SR-113).

Mr. Ciccarelli testified on his own behalf (SR-116-125). He had been doing some repair work for the Willises that evening (SR-116).

> As I [Mr. Ciccarelli] was coming out this door on my second approach, I came past the Mercedes approaching my car and these officers then did come out of this car and proceed to the store and one officer did state to apprehend that suspect and that the officer I thought to be the last officer in that group pursued me at my car, but upon coming around the building in the car he stumbled and I stepped back a few feet and he apprehended me, handcuffed me over the back side of this Mercedes, brought me back to the door, sat me on the ground and observed the area and then we went back inside the garage there and sat on a barrel I sat on inside here and he -- I asked him what was going on and he told me I was under arrest for possession of cocaine.

(SR-118).

Mr. Ciccarelli denied having any cocaine in his possession at that time (SR-123), in fact, Mr. Ciccarelli "never seen the cocaine until the officer stated that it was mine and I did not throw such cocaine on the ground and I didn't have no cocaine, I did not possess no cocaine. I was there for the purpose of my repair work ..." (SR-125).

The defense rested (SR-125), and renewed his motion for judgment of acquittal which was again denied (SR-126).

The jury returned its verdict finding Mr. Ciccarelli guilty as charged (SR-174). The state filed a notice of intent to seek enhanced penalty (R-29) and a presentence investigation was ordered (R-175).

On August 30, 1985, a hearing was held on Mr. Ciccarelli's motion for a new trial (R-42-53) at which time Mr. Ciccarelli argued that the trial court erred in denying Mr. Ciccarelli's motion for mistrial stating:

> MR. TORRES: And this is the right to remain silent. When Officer Kirk was on the stand he -- there was testimony elicited wherein he showed the defendant money. If I recall it was a dollar and a quarter and he asked the defendant, "Is this yours?" and the defendant denied it. This was done before any rights were read to him. And the inference of that is that this evidence was picked up from the ground and he already allegedly, before this introduction of his testimony, he said, "I saw him drop it." He came up and if he saw him drop it the first thing he should have done was arrested the man and read him his rights if he was going to interrogate him. This is in --this clearly an interrogation. The rights were not read. The question was asked, the inference that it's his in addition to this cocaine and therefore, Miranda has been violated. And his constitutional right to remain silent has been violated.
>
> (R-43-44).

In response, the state argued that the actions of Officer Kirk were not an interrogation.

> THE STATE: He offered the money, held the money out to the defendant to give it back to him, he had no use for it. The defendant refused to take it so he entered it into evidence. Even if Your Honor should find this was an interrogation, the state would argue that certainly in view of all the other evidence in this case the error is harmless and just because an alleged error has a constitutional foundation does not automatically warrant reversal. It needs to be fundamental error. And the state is unable to see how the -- that act of offering him the money and the defendant refusing it would be fundamental error or even prejudice the defendant.
>
> (R-49).

Mr. Ciccarelli argued in rebuttal that

> Officer Kirk picked up this cocaine and his money, why didn't he ask him whether the cocaine was his? The inference, of course, is whether the money is his and then he says of course, -- inferring guilt as to the cocaine. Then Mr. Massey [State's Attorney] says he didn't have no use for it anyway. Well, why was it in evidence. Of course, it's in evidence because allegedly he dropped it with the cocaine. And that's the inference. It was an interrogation, clearly interrogation to make this man say, "This money was mine, therefore, that cocaine was mine too." That was the inference. The inference of guilt. Because if the officer would have asked, "Is the cocaine yours?" then there would be no problem in saying like Mr. Massey is arguing that it was an interrogation, all of it, but he separated it to infer guilt, to catch him in a net. And that's where the Miranda comes into play. If he had already seen the cocaine drop or threw down, he didn't remember which one and the Court -- Your Honor recalls, then the minute he sees any contraband drop or thrown by a defendant, "You're under arrest." Read Miranda. And then the question, "Is this yours?" All of it, not pieces of it. And that was the inference.

(R50-51).

The trial court denied Mr. Ciccarelli's motion for a new trial. (R-53).

Pursuant to Mr. Ciccarelli's petition for review by writ of habeas corpus, the district court granted Mr. Ciccarelli's belated direct appeal (R-54-55).

SUMMARY OF THE ARGUMENT

An exculpatory statement admitted into evidence over objection was the product of a police tactic calculated to elicit a response in violation of Mr. Ciccarelli's Fifth Amendment privilege against compulsory self incrimination. After Mr. Ciccarelli was arrested and handcuffed and before given the Miranda advisory, Officer Kirk attempted to give him a dollar bill and quarter found near the cocaine that had been thrown to the ground. (SR-64). In response to Kirk's offer, Mr. Ciccarelli denied that they were his (SR-64). Through such action, the police failed to scrupulously honor the right to remain silent and the admission of this statement over objection constituted prejudicial error.

The decision below was premised upon harmless error, yet the court indicated that it did not actually review the appellate record to independently scrutinize whether the error could have affected the verdict. In view of the circumstantial nature of the evidence such full review of the record by the deciding judges of the reviewing court on plenary review is mandated by Holland v. State, supra, and United States v. Hasting, 461 U.S. 499 (1983).

ISSUE BEFORE THE COURT

> WHETHER THE TRIAL COURT ERRED PREJUDICIALLY IN DENYING MR. CICCARELLI'S MOTION FOR MISTRIAL BY ADMITTING MR. CICCARELLI'S STATEMENT WHICH WAS OBTAINED AFTER THE POLICE FAILED TO SCRUPULOUSLY HONOR DEFENDANT'S FIFTH AMENDMENT RIGHTS?
>
> And
>
> WHETHER THE DISTRICT COURT ERRED IN NOT REVIEWING THE ENTIRE RECORD WHEN FINDING THE ERROR TO BE HARMLESS?

Officer Kirk's attempt to give Mr. Ciccarelli the dollar bill and quarter, thus inferring his ownership of the cocaine as well, although not express interrogation, was its functional equivalent. It is well settled that a defendant must be advised of his rights under Miranda v. Arizona, 483 U.S. 443 (1966), before police may question (or its functional equivalent) a person in custody or otherwise deprived of his freedom of action in any significant way. The Fifth Amendment privilege against self incrimination is so fundamental that the fact that Mr. Ciccarelli's statement was intended to be exculpatory is irrelevant for purposes of Miranda, id. at 477:

> If a statement made were in fact truly exculpatory, it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warning and effective waiver required for any other statement.

"Interrogation" under Miranda includes not only express questioning but also its "functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300 (1980). Thus, any words or actions by the police "other than those normally attendant to arrest and custody" that they know or should know would be reasonably likely to elicit an incriminating response constitute interrogation and as such must cease upon the individual exercise of his right to remain silent. Innis at 301. Although Mr. Ciccarelli was not advised of his Miranda rights prior to making the statement, he nevertheless indicated his desire to remain silent.

The District Court of Appeal below found a "serious question" as to the admissibility of the statement denying ownership of the money found next to the contraband. The court found that under the test of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), that the error was harmless. The concurring opinion of Judge Stone would have held there to have been no Miranda violation, but if there had been a violation that the error was harmful.

The issue before this Court is whether the District Court of Appeal properly reviewed the case pursuant to the dictates of Holland v. State, supra and United States v. Hasting, supra. The court expressly noted that Holland "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." Nevertheless, the district court expressly stated that each judge on the panel "has not independently read the record in its entirety." The district court 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."

A description of the evidence does not suffice for review of the record because determinations of harmless error, particularly where violations of the Fifth Amendment privilege is involved, cannot adequately be made based upon a summary prepared by the court's staff or by review of the briefs. The briefs are designed to present to the reviewing court a statement of the case and of the facts "which shall include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal." See Florida Rule of Appellate Procedure 9.210(b)(3). We submit that this does not suffice for judicial review of the record. In Holland v. State, supra this Court held that is the duty of the appellate court to review the entire trial court record in determining harmless error. The Supreme Court in United States v. Hasting, was quoted by this Court in State v. Marshall, 476 So.2d 150 (Fla. 1985), at 152, as mandating the following:

> In Hasting the Court stated: 'Since Chapman, the Court has consistently made it clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.'

Quoting United States v. Hasting, 461 U.S. at 509.

These references in State v. Marshall, United States v. Hasting and Holland v. State, that the reviewing court must consider the trial record as a whole coincides with this Court's decision in State v. DiGuilio, supra where this Court expounded

the difficulty of harmless error determinations and emphasized the duty of a reviewing court to evaluate the nature of the error in light of the entire proceedings. It is not sufficient for a reviewing court to simply refer to the strength of the evidence. It is the reasonable and possible effect of the error upon the jury's resolution of competing facts and issues that the District Court of Appeal must determine in reviewing a criminal conviction where error in violation of the Fifth Amendment privilege is involved. In its review of this case, the court below should have independently reviewed the entire record for the following reasons, in addition to the dictates of the decisions referred to above.

The substantial reasons supporting the rule announced in the cases set forth above include the fact that the judges themselves on the reviewing court are qualified by experience while both counsel for the parties and the judicial aids, who are employed to assist the court, lack such experience and qualifications. Only those who have been duly selected and sworn as judges are empowered to actually decide cases. For the actual substance of the decision, which involves the evaluation of error in light of the entire trial record, to be subsumed into a statement of case and facts in the briefs of the parties or a judicial summary presented by the aids to the court is inconsistent with this Court's determination in State v. DiGuilio of the method by which these kinds of errors must be reviewed.

The entire trial court record gives a deciding panel a basis for exercising reasoned judgment. The possible effect upon a

jury of a Fifth Amendment privilege violation cannot be learned from a mere summary of the evidence. It is a decision requiring evaluation and judgment which springs from first hand knowledge of the actual presentation of the evidence including equivocations of witnesses, the kinds of inferences made necessary by the specific testimony for relevant and material facts to be found, and in applying the reasonable doubt standard to harmless error. The reviewing court must be assured that the error may not have infected the jury's determination of either the question of guilt or the degree of guilt.

Judicial review of the entire record is not as difficult as the district court may have indicated in its opinion below. Trial transcripts, where the parties have adequately briefed the facts, may be read by the reviewing judges with an eye to the evidence that is contained in the testimony. The reviewing court does not approach the appellate record cold. The purpose of the briefs is to present the court with an understanding of the evidence, but does no suffice for judicial review of the evidence in determination of the judicial decision. In Anders v. California, 386 U.S. 738 (1967), it was emphasized that it is the court and not counsel for either of the parties that makes the determination of the case on appeal. For the court to rely upon the briefs of the parties, instead of its own determination, in making the sensitive determination of harmless error beyond a reasonable doubt in Fifth Amendment privilege violations is questionable in view of the decision in Anders that in no merit cases the reviewing court must independently review the entire

record. It would be an anomaly for the court to be required to do less in cases where reversible error is urged upon the appellate court.

The summary of the case in the briefs of the parties, or in the summary prepared by the judicial aids to the judges, may contain inaccuracies or omissions, and no amount of labor by judicial aids can suffice for the experienced judgment of those qualified to serve as appellate judges. Moreover, since the judicial summary upon which the decision of reviewing courts, under the decision below, may be made is not made available to the public or to counsel for the parties. Therefore, in cases where less than a full opinion is rendered any inaccuracies or omissions in those summaries would go completely unnoticed because neither the judges nor counsel for the parties would be able to determine whether the decision may be based upon error in the presentation of the record in summary form to the appellate judges.

Florida Rule of Appellate Procedure 9.200 concerns the necessity of the trial court record, including pertinent portions of transcripts of proceedings, to be transmitted to the clerk of the appellate court. Moreover, Rule 9.200(f) necessitates the correction of any error or omission before the court reaches a decision, and provides that no proceeding shall be determined because the record is incomplete unless an opportunity to supplement the record has been given. It is also an axiom of appellate practice that the statement of the facts in a brief of appellant, or petitioner, be stated most favorably to the ruling

below. This requirement makes difficult the presentation of weaknesses in the evidence as to which error in violation of the Fifth Amendment privilege may have affected the jury's determination of the facts. If an appellant is precluded from presenting the facts in a manner favorable to his assertion of harmful error, then it is absolutely necessary that the appellate court itself review the record in order to determine how the violation may have influenced the jury's adverse determination of the facts as applied to the law. Query, how do weaknesses in the evidence or how do particular facets of the evidence as to the which the trier of fact may have been influenced by the Fifth Amendment privilege violation get presented to the appellate judges if not by the court reading the testimony?

An analogous situation was presented in Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983). In that case a trial judge was absent during part of the voir dire process over the objection of the accused. The District Court of Appeal extensively considered the duty of the court to be personally present at all of the trial proceedings in a case. The court noted that it is not a formality that the court be personally present in order to preside over the proceedings. It was noted that in numerous cases it did not matter the stage of the proceeding nor the length or reason for the departure, nor the judge's proximity to the proceedings as in any way mitigating the harm created by the court's absence.

In appellate proceedings the actual work of the appellate court is two-fold. It is in reviewing the record of the proceedings below in order to determine the exact nature of those proceedings. Secondly, it is to review the law as may be applied to judicial errors allegedly occurring during those proceedings. The court may not, of course, rely extensively on the work of others in determining appellate decisions which may be controlling of the legal issues. It is assumed that the appellate judges personally review judicial decisions which may be controlling in appellate cases. It should also be required, as well as assumed, that appellate judges also personally review the records to which they are applying that law. If the appellate court relies upon second-hand information concerning the actual proceedings below, it is performing only one-half of its required appellate function and is effectively absent during a required portion of the appellate review process. The petitioner submits that an appellate court may not absent itself from reviewing the trial court proceedings anymore than it may do so by relying upon a summary of controlling decisions on questions of law. The court may of course utilize summaries in order to identify the most pertinent portions of appellate decisions as well as portions of records in cases pending before it. But it is the responsibility, we submit, for appellate judges to personally review the record of the proceedings in all material respects as well as to independently review controlling court decisions to determine first-hand the basis upon which they apply both law and facts in appellate decisions.

Florida Rule of Appellate Procedure 9.220, concerning an appendix to an appellate brief, specifically provides in the committee notes that the appendix is optional except where required under specific rules. Although an appendix may be encouraged to identify and present pertinent portions of the record deemed necessary to an understanding of the issues presented, no where in the rule does it state that an appendix is required for the court to adequately review the nature of the error in light of the harmless error rule announced in DiGuilio. If it is necessary for counsel for appellants in criminal proceedings to attach an extensive appendix containing all possible relevant portions of the trial proceedings which may have been affected by the error, then the rule should so state. Until an amendment to the rule, if such is to be done, is effectuated this Court should protect the rights of those seeking a review of constitutional errors during their trials by adhering to its pronouncement in Holland which is consistent with its ruling in State v. DiGuilio, State v. Marshall and United States v. Hasting, that the appellate court must review the record as a whole in considering the harmless error rule. Anything less than that, without specifically alerting the public and the bar to the necessity to present the entire record as an appendix to the brief where necessary, is inadequate to protect the Fifth Amendment right involved.

CONCLUSION

Wherefore, it is respectfully requested that this Court quash the portion of the decision below approving of the summary review process of the record in this case and that this Court either reverse and remand with instructions that petitioner be afforded a new trial or that the District Court of Appeal provide a complete review process in this case.

Respectfully submitted,

RICHARD L. JORANDBY
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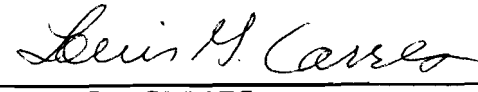

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROLYN V. McCANN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 26th day of August, 1987.

LOUIS G. CARRES
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