IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,223

THE STATE OF FLORIDA,

Petitioner,

vs.

JEROME SINGLETARY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

STEVEN T. SCOTT
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

Table of Contents

Table of Citations

Cases

INTRODUCTION

Petitioner was the prosecution and appellee below. Respondent was the defendant and appellant. The transcript will go by "Tr." and the record on appeal by "R." Enclosed is an appendix with the decision of the Third District Court of Appeal in the instant case.

STATEMENT OF THE CASE

Respondent was charged by information with burglary, grand theft, and unlawful possession of a firearm by a convicted felon on July 19, 1985. He went to trial on the first two of those counts in July of 1986. The jury found him guilty of burglary and petit theft. (R. 32, 33). Respondent was sentenced to nine years in jail (R. 36).

The Third District Court of Appeal reversed respondent's conviction (App. 1). It then certified a question of great public importance after consideration of petitioner's motion for rehearing (App. 2 et seq.), viz.,

> "MAY THE DEFENDANT'S RIGHT TO HAVE THE TRIAL JUDGE PRESENT DURING THE VOIR DIRE OF PROSPECTIVE JURORS BE VALIDLY WAIVED BY HIS ATTORNEY, OR MUST THE DEFENDANT PERSONALLY WAIVE SUCH A RIGHT?

STATEMENT OF THE FACTS

Voir dire began on July **30, 1986,** with respondent's counsel stating:

> "MR. WEBB: Your Honor, if I could, as to Mr. Singletary, just a couple of matters to cover with the Court. We are perfectly willing to waive the rights to the presence of the Court for purposes of voir dire . . ." (Transcript of July **30, 1986,** page 2).

The record does not indicate whether respondent himself was present at this juncture.[1]

There followed a discussion of the use of the word "caught" during voir dire (Tr. **2-6**). The court instructed the state not to use that word in front of the jury (Tr. **8**).

The prosecutor began voir dire in the morning (Transcript of July **30,** 11:00 a.m.) There is nothing in that transcript which is remarkable. No objections were made to any question. Nothing out of the ordinary happened.

The defense started its voir dire in the afternoon (Transcript of July **30,** 2:00 p.m.). Nothing out of the ordinary

---

[1] In respondent's brief in the Third District, respondent never claimed that he himself was absent from the courtroom. He only argued that the error below consisted of not being personally addressed by the trial court regarding the waiver of the court's presence.

there, either. The court did arrive 8 pages into that afternoon session and it remained until the end of voir dire. (Tr. 10). Nothing was called to the court's attention concerning any objection or any matter needing the court's intervention. The prosecution and defense agreed upon a panel in routine fashion (Tr. 44). This was an extremely non-eventful voir dire in all respects except for the fact that the judge missed the first half of it.

The evidence at trial consisted of the following:

Alicia Martinez testified that she saw a man breaking into the window of a next door neighbor (Tr. 199-200). She told her daughter to call the police (Tr. 201). She later saw the man exit the house. He came out of another window (Tr. 202), carrying clothes. She identified the respondent as that man (Tr. 206).

Mrs. Martinez' daughter testified consistent with her mother's testimony (Tr. 208 et seq.). She added that she watched respondent leave the house carrying clothes, that she yelled to the police to catch him, that respondent dropped the clothes and ran, and that he was apprehended by police (Tr. 214 et seq.).

Officer Gonzalez testified about how he arrested respondent at the scene (Tr. 225 et seq.). There was a short chase

and a quick arrest (Tr. 227, 228). The officer inspected the broken window and noticed that respondent's hands were bleeding (Tr. 230). Blood was on the window. Respondent did not appear to be under the influence of any drug. (Tr. 236).

The owner of the house took the stand and he testified as to the break-in and ransacking of the interior (Tr. 239 et seq.). He identified the stolen clothes.

Respondent then took the stand (Tr. 248 et seq.). He told of his eight prior criminal convictions (Tr. 249). He admitted to being a cocaine and heroin user (Tr. 251).

Respondent testified that he went to a crack house to smoke some crack. He then passed by the house he eventually was to burgle (Tr. 267), and he broke in, "because it seemed empty." His intent was "to camp out for a while" (Tr. 268). He took the clothes to use as a bed for himself. Respondent ended by stating that his head was "foggy, you know, foggy" on the day he entered the house. (Tr. 276).

The jury was out 30 minutes before it returned its verdict (Tr. 368).

ISSUE ON APPEAL

WHETHER RESPONDENT'S WAIVER OF THE COURT'S PRESENCE WAS VALID?

SUMMARY OF THE ARGUMENT

Respondent validly waived the presence of the trial court during voir dire even though he was not addressed personally by the Court. His attorney waived for him.

Even if not properly waived, said error is not of the type which calls for automatic reversal. The harmless error rule should be applied.

ARGUMENT

I

RESPONDENT'S WAIVER OF THE COURT'S PRESENCE WAS VALID.

This was a non-capital case. This Court has recently held that in such cases, a defendant does not have to personally waive rights in order for there to be a valid waiver of them. The defense attorney may validly waive rights on behalf of his client. Jones v. State, **484** So.2d 577 (Fla. **1986).**

Jones dealt with the waiver of a jury instruction. This Court found no need, in non-capital cases, for a defendant to personally address the court and communicate his desire to waive a particular right. A defendant can have a fair trial and be accorded due process without a personal waiver on his part. Jones controls this case, and it overrules the holding of Carter v. State, **512** So.2d **284** (Fla. 3d DCA **1987)** upon which respondent has relied. Carter's holding that the right to the judge's presence is fundamental and therefore waivable only if the defendant personally does *so* does not square with Jones, which held that such rights are only fundamental in capital cases.

Affirmance of the conviction is called for on this basis.

This Court should also look to the case of Roberts v. State, 510 So.2d 885 (Fla. 1987). In Roberts, this Court concluded that an accused's attorney may waive the presence of the trial judge during a jury view of the crime scene. This Court's analysis of the issue proceeded to characterize the defendant's argument regarding the need for a personal wavier to be an example of invited error.

> Roberts contends that even assuming his trial counsel waived the judge's presence, he did not acquiesce in or ratify this waiver. See Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, ___ U.S. ___, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986); Amazon v. State, 487 So.2d 8 (Fla.), cert. denied, ___ U.S. ___, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986). We find such acquiescence or ratification unnecessary under the circumstances present in this case and hold that defense counsel's express waiver of the trial court's presence at the jury view was adequate. To hold otherwise would allow Roberts to benefit from this clearly invited error.

Roberts, at 890

This Court then went on to hold the jury view to be of somewhat limited importance because no evidence was presented to the jury during the view.

> In a case such as this, where the view occurs during the deliberations, and no evidence or testimony is presented at the view, a defendant's absence can in no way thwart the fairness of the proceeding. Therefore, we conclude that

> the express waiver by defense counsel after consultation with the defendant serves as an adequate waiver of Robert's right to be present at the jury view. See Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987)

Roberts, at 890

In our case, no evidence of *any* type was presented to the jury panel during the short period of time that the judge was not present. Compare that to Roberts and one can state categorically that nothing even remotely related to guilt or innocence was brought up during this phase of the proceedings. One could easily argue that Roberts' fact pattern was fraught with more danger of prejudice than that of this case. If the absence of a trial judge in Roberts (and the attendant waiver issue) do not call for reversal, then the absence of a trial judge during part of voir dire does not call for reversal, either. Instead, the harmless error test of State v. Di Guilio, 491 So.2d 1129 (Fla. 1986) should be applied. Behold:

The Third District's Carter decision (relied upon below) is flawed because it ignores Di Guilio. Carter apparently relies upon the holding of Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983) for the proposition that a judge's absence during voir dire is per se reversible error. Peri, however, was decided before Di Guilio, and it relied upon another case of this Court, Ivory v. State, 351 So.2d 26 (Fla. 1977) for its justification of the use of the per se error rule. Ivory was later abandoned

by this Court. See also Rushin v. Spain, 464 U.S. 114 (1983), which found the Ivory type of error not to be reversible.

Rushin makes some very strong observations concerning per se reversal of convictions even where fundamental error has taken place:

> Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant. "At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests." United States v. Morrison, 449 US 361, 364, 66 L.Ed.2d 564, 101 S.Ct. 665 (1981), see also Rogers v. United States, 422 US 35, 38-40, 45 L.Ed.2d 1, 95 S.Ct. 2091 (1975). In this spirit, we have previously noted that the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Smith v. Phillips, 455 US 209, 217, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982).

Rushin, at 117, 118

It is clear that even fundamental errors are subject to the harmless error rule. This is as it should be, and Di Guilio

now controls the outcome of this case. It is therefore the State's position that even if there was an invalid waiver, reversal is not called for. Di Guilio held that United States Supreme Court precedent[2] should be followed in any situation where a court is contemplating reversing any conviction. This Court held that reversal should not automatically follow even where constitutional error is present.

> "[A]utomatic reversal of a conviction is only appropriate when the constitutional right which is violated vitiates the right to a fair trial" Di Guilio, at 1134.

Furthermore, this Court held that no court should label an error "per se reversible" when such an error is not always harmful. (See Di Guilio, at 1135).

> "Per se reversible errors are limited to those errors which are 'so basic to a fair trial that their infraction can never be treated as harmless error.'" Di Guilio, at 1135.

This Court has cited approvingly of a United States Supreme Court case, Rose v. Clark, ____U.S.____, 92 L.Ed.2d 460 (1986). See: Holland v. State, 503 So.2d 1250 (Fla. 1987). Rose is an excellent case on what constitutes per se reversible error. The following passage should be read in its entirety:

---

[2] Chapman v. California, 386 U.S. 18 (1976) and United States v. Hasting, 461 U.S. 499 (1983).

In Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 ALR 1065 (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. And since Chapman, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. ___, ___, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986). That principle has been applied to a wide variety of constitutional errors. E.g., id., at , 89 L.Ed.2d 674, 106 S.Ct. 1431 (failure to permit cross-examination concerning witness bias); Rushen v. Spain, 464 U.S. 114, 118, 78 L.Ed.2d 267, 104 S.Ct. 453 (1983) (per curiam) (denial of right to be present at trial); United States v. Hasting, 461 U.S. 499, 508-509, 76 L.Ed.2d 96, 103 S.Ct. 1974 (1983) (improper comment on defendant's failure to testify); Moore v. Illinois, 434 U.S. 220, 232, 54 L.Ed.2d 424, 98 S.Ct. 458 (1977) (admission of witness identification obtained in violation of right to counsel); Milton v. Wainwright, 407 U.S. 371, 33 L.Ed.2d 1, 92 S.Ct. 2174 (1972) (admission of confession obtained in violation of right to counsel); Chambers v. Maroney, 399 U.S. 42, 52-53, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970) (admission of evidence obtained in violation of the Fourth Amendment). See also Hopper v. Evans, 456 U.S. 605, 613-614, 72 L.Ed.2d 367, 102 S.Ct. 2049 (1982) (citing Chapman, and finding no prejudice from trial court's failure to give lesser-included offense instruction). Our application of harmless-error analysis is these cases has not reflected a denigration of the constitutional rights involved. Instead, as we emphasized earlier this Term:

"The harmless-error doctrine recognized the principle that the central purpose

of a criminal trial is to decide the factual question of the defendant's guilt or innocence, United States v. Nobles, 422 U.S. 225, 230 [45 L.Ed.2d 141, 95 S.Ct. 21601 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) (Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.')". Delaware v. Van Arsdall, supra, at ___, 89 L.Ed.2d 674, 106 S.Ct. 1431.

Despite the strong interests that support the harmless-error doctrine, the Court in Chapman recognized that some constitutional errors require reversal without regard to the evidence in the particular case. 386 U.S. at 23, n 8, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 ALR3d 1065, citing Payne v. Arkansas, 356 U.S. 560, 2 L.Ed.2d 975, 78 S.Ct. 844 (1958) (introduction of coerced confession); Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, 23 Ohio Ops2d 258, 93 ALR2d 733 (1963) (complete denial of right to counsel); Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437, 5 Ohio L. Abs 159, 5 Ohio L. Abs 185, 50 ALR 1243 (1927) (adjudication by biased judge). This limitation recognizes that some errors necessarily render a trial fundamentally unfair. The State of course must provide a trial before an impartial judge, Tumey v. Ohio, supra, with counsel to help the accused defend against the State's charge Gideon v. Wainwright, supra. Compare Holloway v. Arkansas, 435 U.S. 475, 488-490, 55 L.Ed.2d 426, 98 S.Ct. 1173 (1978) with Cuyler v. Sullivan, 446 U.S. 335, 348-350, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980). Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of quilt or innocence, see Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527 (1932), and no criminal punishment may

be regarded as fundamentally fair. Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury. See Delaware v. Van Arsdall, supra, at , 89 L.Ed.2d 674, 106 S.Ct. 1431 (constitutional errors may be harmless "in terms of their effect on the fact finding process at trial") (emphasis added); Chapman, supra, at 24, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 ALR3d 1065 (error is harmless if, beyond a reasonable doubt, it "did not contribute to the verdict obtained") (emphasis added).

Similarly, harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction. United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573, 51 L.Ed.2d 642, 97 S.Ct. 1349 (1977) (citations omitted). Accord, Carpenters v. United States, 330 U.S. 395, 408, 91 L.Ed. 973, 67 S.Ct. 775 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. See Duncan v. Louisiana, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444, 45 Ohio Ops 2d 198 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

We have emphasized, however, that while there are some errors to which Chapman does not apply, they are the exception and not the rule. United States v. Hasting, 461 U.S., at 509, 76 L.Ed.2d 96, 103 S.Ct. 1974. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other

> errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S., at ____, 89 L.Ed.2d 674, 106 S.Ct. 1431; United States v. Hasting, supra, at 508-509, 76 L.Ed.2d 96, 103 S.Ct. (1974).

Rose, 92 L.Ed.2d at 469-471.

Turning once again to Di Guilio, it must be reiterated that this Court has likewise expressed its view that per se error is not to be found unless one is dealing with a situation where no appellate court can say that the accused was denied a fair trial. Di Guilio mandates the use of the following test:

> "The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." Di Guilio, at 1139.

Application of this test to the facts reveals that reversal is not warranted. First of all, nothing happened dur-

ing the judge's absence which could be construed to be prejudicial. Nothing. Secondly, the proceedings were transcribed and the court could have reviewed the voir dire to rule on any objection. None was interposed. Thirdly, the parties expressed their satisfaction with the panel (Tr. 44). Number four, the defense could have had a reason for stipulating the absence of the court. Defense counsel could have felt that he could obtain more information without the court's presence. As such it was possibly a tactical decision. Number five, the evidence in this case was as overwhelming as it could hope to get. See "Statement of the Facts.'' It is hard to envision a different outcome than the one which we have.

Perhaps it there was something which took place in the court's absence --- anything unusual --- the state could concede that the harmless error test would not be met. That is not the case, however, and respondent has based his appeal in the Third District on a sterile and discredited argument, "It was wrong. I must have a new trial even though I cannot tell you how 1 was harmed."

Carter's holding is incorrect, as is that of Peri. The harmless error test must be employed in this case, and the conviction affirmed.

CONCLUSION

The certified question should be answered in the affirmative, and even if not, then the conviction should be affirmed because the error was harmless.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

STEVEN T. SCOTT
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to ROBERT KALTER, Office of the Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 18th day of November, 1988.

STEVEN T. SCOTT
Assistant Attorney General

/bf