IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,807

THE STATE OF FLORIDA,

Petitioner,

vs.

MODEST0 HERNANDEZ,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The following symbols are used throughout this brief:

R - Record on Appeal

SR - Supplemental Record on Appeal, which Supplement Record was filed in the Third District Court of Appeal, pursuant to motion and order, by the State, and which consists of additional transcripts of trial court proceedings.

T - Transcript of trial court proceedings

As of the time of preparation of this brief, the Clerk of the Third District Court of Appeal has not completed its index to the record. Accordingly, some record citations are presently incomplete and will be corrected upon receipt of the completed index.

STATEMENT OF THE CASE AND FACTS

On January 13, 1987, the State of Florida filed an information, charging Modesto Hernandez with trafficking in cocaine. (R. 1).

Trial proceedings, in the Circuit Court for the Eleventh Judicial Circuit, in and for Dade County, Florida, commenced on October 7, 1987. The handwritten minutes of the deputy clerk reflect, that on that date, "Upon stipulation of respective counsel and with permission of the Court, the voir dire examination of prospective jurors was conducted in the absence of the Judge." (R. 5). The court reporter's transcripts do not contain the stipulation or the "permission of the Court."

In the proceedings in the Third District Court of Appeal, the State filed a motion to supplement the record on appeal, with two transcripts from October 7, 1987 attached. The motion to supplement was granted by the District Court of Appeal. Both transcripts are from the morning of October 7, 1987. The first of the two transcripts consists of five pages. In that transcript, before Judge Friedman, the prosecutor states, "My understanding is that at 10:00 we are going to need to pick a jury rather quickly and Judge Knight will try the case at 1:00." (SR., T. 3). As this time, nothing is said about the absence of the judge during voir dire. The second of the two transcripts attached to the State's motion to supplement is also dated

October 7, 1987, at 10:45 a.m., and consists of 82 pages. This is the voir dire transcript. The first line of that transcript commences with the deputy clerk of the court calling several venire members to the stand for questioning. (SR., T. 4). The prosecutor then addresses those venire members. Among his preliminary comments, the following is found:

> Obviously, the Judge is not here. Judge Knight will be hearing this case in another court room, but he is currently attending to other matters, so we will be selecting a jury outside the presence of the Judge. It is perfectly proper and permissible and done on a regular basis. It is done at this point as a matter of convenience.
>
> (SR., T. 4-5)

The prosecutor then examines the venire members. (SR., T. 5-64). During the prosecutor's questioning, defense counsel is silent; there are no objections to any of the prosecutor's questions. A brief recess is then taken, and defense counsel commences his questioning. (SR., T. 65). Defense counsel acknowledges the presence of his client. (SR., T. 65). Throughout defense counsel's questioning, the prosecutor remains silent, as there is no attempt to object to any questioning done by defense counsel. (SR., T. 65-80). At the conclusion of the questioning, the following ensues:

> PROSECUTOR: I'm going to ask you, ladies and gentlemen, hold on for one second while we go speak to Your Honor, Judge Knight, to see what time you ought

to come back from lunch. Just be patient with us for a second until we make a determination.

DEFENSE COUNSEL: Ladies and gentlemen, you are all excused for lunch. If you will report back, not to this court room, but court room **3-2.** There you will see George, the Bailiff, again. He will lead you in from there.

VOICE: What time?

PROSECUTOR: **1:30.**

[Thereupon, the proceedings were adjourned, to reconvene at **1:30** p.m. of the same day.]

(SR., T. **80-81).**

The next transcript, in sequence, has a cover sheet bearing the date of October 7, 1987, commencing at 1:30 p.m., before Judge Knight, and reflects that further proceedings commenced at **2:35** p.m., before Judge Friedman. (T. 1). The first line of the transcript has the judge telling the clerk to recall the jurors, and the clerk immediately proceeds to call the six jurors to the stand. (T. **3).**

The trial then proceeded. The jury returned a verdict of guilty of delivery or possession of cocaine, a lesser included offense. **(R. 58).** Hernandez was sentenced to a term of imprisonment of two-and-a-half years. (R. **59-64).**

On appeal to the Third District Court of Appeal, the Court reversed the judgment of the trial court, and remanded the cause for a new trial, pursuant to Singletary v. State, No. **86-**

2232 (Fla. 3d DCA Oct. **18, 1988),** and Carter **v.** State, 512 So.2d 284 (Fla. **3d** DCA **1987). (R.**). The following question was certified to this Court as being one of great importance to the administration of justice:

> 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 RIGHT?
>
> (R.).

The State has filed a Notice to Invoke Discretionary Jurisdiction of this Court.

QUESTION PRESENTED

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 RIGHT?

SUMMARY OF ARGUMENT

The waiver of the presence of the judge during voir dire, by stipulation of defense counsel, should constitute an adequate waiver of the judge's presence. A defendant is bound by the acts of his counsel, as a general rule. A presumption should exist that counsel consulted with his client regarding the matter.

Alternatively, the question is more appropriately presented in an evidentiary post-conviction hearing under Rule 3.850, Florida Rules of Criminal Procedure. At such a hearing, the circumstances of the waiver, including any discussions between defense counsel and the defendant, could be fully explored. If counsel and client discussed the matter and the defendant agreed with counsel, the waiver, in court, by counsel, should suffice. Such post-conviction hearings have been sanctioned by this Court and utilized to find valid waivers of a defendant's presence at certain stages of a trial.

Lastly, even if the waiver was inadequate, it should be deemed subject to harmless error analysis.

ARGUMENT

THE DEFENDANT'S RIGHT TO HAVE THE TRIAL JUDGE PRESENT DURING THE VOIR DIRE OF PROSPECTIVE JURORS BE VALIDLY WAIVED BY HIS ATTORNEY.

As a general rule, "a client is bound by the acts of his attorney within the scope of the latter's authority." State ex rel. Gutierrez v. Baker, 276 So.2d 470, 471 (Fla. 1973). That principle is applicable to the instant case, where the record reflects that defense counsel and the prosecutor stipulated, with the permission of the court, that voir dire would proceed in the absence of the judge. (R. 5). Indeed, when defense counsel represents to the court that he is agreeing to waive a right of his client, a presumption of regularity should attach to that representation, pursuant to which it is assumed that defense counsel consulted with his client regarding the matter. Cf., Dumas v. State, 439 So.2d 246 (Fla. 3d DCA 1983), rev. denied, 462 So.2d 1105 (Fla. 1985).

The Third District Court of Appeal, in the instant case and in other cases, has held that the defendant must personally, of record, knowingly and intelligently waive the presence of the judge during voir dire. Carter v. State, 512 So.2d 284 (Fla. 3d DCA 1987); Singletary v. State, 13 F.L.W. 2345 (Fla. 3d DCA Oct. 18, 1988) (on rehearing). Singleton is currently pending in this Court, pursuant to a certified question, and Singleton has been fully briefed and argued. Other jurisdictions addressing

the issue have concluded that a waiver by defense counsel alone will suffice. Haith v. United States, 342 F.2d 158 (3d Cir. 1965); Stirone v. United States, 341 So.2d 253 (3d Cir. 1965).

This Court has addressed the issue of the absence of the judge in different contexts. In Roberts v. State, 510 So.2d 885 (Fla. 1987), it was held that defense counsel's waiver of the presence of the judge during the jury's view of the site where a body was found constituted a sufficient waiver. In Brown v. State, 14 F.L.W. 53 (Fla. Feb. 2, 1989), during jury deliberations, while the judge was away from the courthouse, the jury requested transcripts of certain witnesses' testimony. After phone calls between the judge and attorneys in which defense counsel concurred that the judge need not return, it was further agreed that the jurors were told that they could not have the transcripts and that they would have to rely on their memories. The Court found that no valid waiver existed, based on Brown's claim that defense counsel never consulted with him and that Brown did not consent to the trial judge. The Court further found, in any event, that all communications from the jury must be received by the judge in person.

Brown is distinct from the instant case for several reasons. First, the waiver issue in Brown is essentially rendered irrelevant by the subsequent conclusion that the judge must personally receive all communications from the jury. Thus, this Court found that the judge's presence cannot be waived at

such stage of the trial. That requirement appears to be implicit in Rule 3.410, Florida Rules of Criminal Procedure, which requires that when a jury seeks further instructions or review of evidence, that the jurors be brought back into the courtroom to the judge. The situation in the instant case is not governed by any applicable rule of procedure. Moreover, in the instant case, neither the defendant nor the lower court have ever asserted that the presence of the judge cannot be waived. The defendant's sole claim has gone to the adequacy and requisites of the waiver. Additionally, Brown apparently had a sufficient record from which it could be ascertained that Brown never consulted with his attorney. In the instant case, it cannot be said, by review of the record, that the defendant and his attorney never consulted about the stipulated waiver of the presence of the judge.

In cases in which defense counsel agrees to the absence of the judge during voir dire, and the defendant never objects throughout the trial, but subsequently asserts that there was not a knowing and intelligent waiver, the better practice would be to permit the defendant to raise the claim in a motion for post-conviction relief under Rule 3.850, Florida Rules of Criminal Procedure. In such a proceeding, the court can conduct an evidentiary hearing and ascertain whether defense counsel consulted with the defendant, what was said, and whether the defendant advised his attorney that he agreed with the decision to waive the judge's presence. If the evidentiary hearing

conducted at that point reveals that defense counsel consulted with his client and that the defendant expressed his consent to the attorney, then the waiver should clearly be deemed sufficient. Brown, when discussing Roberts, supra, notes that the defendant and counsel consulted about the waiver. Typically, however, the fact that consultations between the defendant and counsel occurred will not appear in the transcripts, even if they did occur. For this reason, any issue which requires exploration of what occurred between counsel and client is more suitable for review in a post-conviction evidentiary hearing than in a direct appeal.

Such post-conviction evidentiary hearings have been utilized in similar situations. In Amazon v. State, **487** So.2d 8, 10-11 (Fla. 1986), the defendant challenged his absence from the jury view of the crime scene, During the direct appeal, this Court relinquished jurisdiction to the trial court, to determine the circumstances surrounding the waiver. The record had reflected a waiver by counsel. The evidentiary hearing, on relinquishment, established that Amazon knew of the waiver, that he had consulted with his attorneys, and that he authorized the attorneys to make the waiver. These facts permitted this Court to conclude that the waiver was knowing and intelligent. Such a post-conviction evidentiary hearing could obviously establish, or negate, the existence of such factors in the instant case.

In Blackwelder v. State, 489 So.2d 95 (Fla. 2d DCA 1986), the defendant had a direct appeal, but failed to raise the issue of the adequacy of the waiver of a 12 person jury. The issue was raised in a Rule 3.850 motion and an evidentiary hearing established that defense counsel had made a strategic decision, which he discussed with his client, who agreed. An adequate waiver was found, on the basis of these facts. Obviously, in the absence of a post-conviction evidentiary hearing in both Amazon and Blackwelder, the State would never have been able to establish, on the record, the facts which were ultimately used to establish the adequacy of the waiver.

As a further factor in evaluating whether counsel's stipulation alone should suffice, the Court should consider that the judge's absence in this case was at a stage preceding the swearing in of the jury. Although, for some purposes, a trial is deemed to start with jury selection, State v. Melendez, 244 So.2d 137, 139 (Fla. 1971), for double jeopardy purposes, the trial does not commence until the jurors who are to hear the case have actually been sworn in as jurors. Koenig v. State, 497 So.2d 875 (Fla. 3d DCA 1986). This has much practical significance. If voir dire results in some problem which the defendant eventually calls to the judge's attention, if the judge has any doubt as to how to rule, he can simply discharge the entire panel and start anew, without worrying about whether retrial will be precluded on double jeopardy grounds. However, when problems arise during the judge's absence after the jury

has been sworn, the judge does not have such a simple solution at hand (because a mistrial at such a later stage could conceivable result in a bar to further prosecution on double jeopardy grounds -- see, e.g., Spaziano v. State, 429 So.2d 1344 (Fla. 2d DCA 1983); Arizona v. Washington, 434 U.S. 497, 54 L.Ed.2d 717 (1978)).

The State further submits that even if the waiver is deemed inadequate as a matter of law, that any error must be deemed harmless. In Peri v. State, 426 So.2d 1021, 1027 (Fla. 3d DCA 1983), where the defendant, in the trial court, objected to the judge's announced intention of having voir dire proceed in her absence, the court refused to engage in harmless error analysis. The court applied a rule of automatic reversal, finding that harmless error analysis would be impractical and that it would not sufficiently deter judges from absenting themselves over defense objections.

The instant case clearly belies the Third District's concerns about the impracticability of engaging in harmless error analysis. Defense counsel never objected to any of the prosecutor's questions during voir dire, nor has the defendant ever asserted that any prosecutorial questions or comments were improper. The prosecutor did not, in any manner, object to or attempt to limit defense counsel's questioning of the venire. As to challenges, one challenge for cause was granted. (R. 5). There is no indication that the defendant ever sought, and had

denied, a challenge for cause. The record also reflects that the defendant did not use any of his peremptory challenges. (R. 5). With six unused peremptory challenges - see Rule 3.350(b), Florida Rules of Criminal Procedure - and no disputes over challenges for cause, and no prosecutorial interference with defense counsel's questioning of the venire members, what possible prejudice could have inured to the defendant? Indeed, if there were any problems, even though the judge was absent, defense counsel could have brought them to the judge's attention prior to the swearing in of a selected jury.

The availability of remaining peremptory challenges is a highly relevant factor in finding the absence of prejudice. Hill v. State, 477 So.2d 553, 556 (Fla. 1985), held that "it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." Just as the availability of further peremptories, under Hill, would render harmless any error as to a challenge for cause, so too, the remainder of six peremptories, enough to strike an entire panel, in the instant case, must render the unobjected-to-absence of the judge harmless, especially where the defendant has remained unable to even remotely articulate anything that occurred during voir dire which could have prejudiced him.

In summary, the State submits that:

1. Defense counsel's stipulation to the absence of the judge from voir dire is sufficient.

2. Claims regarding the adequacy of such waivers should be determined in post-conviction evidentiary hearings in which the State could conceivably adduce evidence pertaining to the waiver, such as consultations between defense counsel and defendant.

3. Any inadequacy in the waiver should be subject to harmless error analysis.

CONCLUSION

Based on the foregoing, the decision of the District Court of Appeal should be reversed and the judgment of conviction and sentence reinstated.

Respectfully submitted,

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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, Assistant Public Defender, Office of the Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 3rd day of April, 1989.

RICHARD L. POLIN
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