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IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,676

RONALD TUCKER,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

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AN APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA
CRIMINAL DIVISION

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Ronald Tucker was the defendant below and shall be referred to as "petitioner," in this brief. The State of Florida shall be referred to as "respondent."

STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's statement of the case and facts with the following additions, corrections, or clarifications:

When the prosecutor brought up the subject of waiver, defense counsel indicated she had discussed the matter with petitioner (R 2). The judge informed petitioner that he had a right to have his case heard by a jury of six people from the community (R 3). The judge told petitioner that his attorney could pick the jury (R 3). Petitioner assured the judge that he would not attack the verdict on the basis that the case was heard non-jury (R 4).

SUMMARY OF THE ARGUMENT

Rule 3.260 states only that a defendant may, in writing, waive his right to a jury trial. It does not say that an oral record waiver cannot be valid. It does not require anything more than a simple statement that the defendant waives his right to jury trial. In this case, petitioner made a detailed oral waiver in front of the trial judge (R 2-5, copy attached). Petitioner's attorney discussed the waiver with him before petitioner requested it (R 2). Any technical non-compliance with Rule 3.260 was harmless error given petitioner's oral waiver.

ARGUMENT

ISSUE

WAS THE ORAL WAIVER OF JURY TRIAL
IN THIS CASE VALID?

Initially, it should be noted that this issue was not preserved for review. At no point at the trial level did petitioner object and complain that the waiver must be in writing. Florida Rule of Criminal Procedure 3.260 states that, "[a] defendant may in writing waive a jury trial with the consent of the State." Florida has never required by statute, rule, or case law that the court itself inform the defendant of this right or make direct inquiry as to the voluntariness of his waiver. Sessums v. State, 404 So.2d 1074, 1075-76 (Fla. 3d DCA 1981) and Williams v. State, 440 So.2d 1290, 1291 (Fla. 4th DCA 1983), rev. denied, 450 So.2d 489 (Fla. 1984).

In Sessums, the defendant pre-trial signed an information stamped, "waived trial by jury." Id. at 1075. Defense counsel informed the judge that the defendant had waived his right to jury trial. The Third District held that this constituted a valid waiver. In the present case, petitioner was informed by the trial judge, in detail, of his right to a jury trial (R 2-5). Petitioner's attorney indicated that she had discussed the matter with her client (R 2). Petitioner stated that he wished to waive his right to a jury trial (R 4-5). It cannot be seriously argued that the failure of the defendant to sign a piece of paper simply stating that he waives jury trial, amounts to fundamental

error. Actually, the detailed record waiver given by the trial judge afforded the defendant much more protection than a simple written waiver. See Hoffman v. State, 397 So.2d 288, 290 (Fla. 1981)(''the violation of a rule of procedure prescribed by this Court does not call for a reversal of a conviction unless the record discloses that noncompliance with the rule resulted in prejudice or harm'

. . . The rules are not intended to furnish a procedural device to escape justice.")

Accordingly, petitioner's failure to object below precludes this Court from addressing the merits of his argument. See Pope v. Wainwright, 496 So.2d 798, 801 (Fla. 1986), cert. denied, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987)(all errors, unless fundamental, are waived if not timely raised in the trial court).

Assuming that this Court finds that this issue was preserved for review, no error was committed. In Tosta v. State, 352 So.2d 526, 527 (Fla. 4th DCA 1977), cert. denied, 366 So.2d 885 (Fla. 1978), the Fourth District held:

[W]e do not say that there may never be a valid oral waiver of jury trial by a defendant. We do hold, however, under the circumstances of this case, where there was no written waiver by the defendant and nothing in the record to show the defendant's concurrence in his counsel's waiver, or that he understood what was meant by waiver of a jury trial, that there was no valid waiver.

Florida Rule of Criminal Procedure 3.260 has not changed since the decision in Tosta. In Jones v. State, 452 So.2d 643 (Fla. 4th DCA 1984), rev. denied, 461 So.2d 116 (Fla.

1985), the defendant was convicted of first degree felony murder, kidnapping and attempted robbery. There was no record testimony that the defendant personally, in writing or orally, waived his right to a jury of twelve persons. In reversing, the court stated:

It is clear that in Florida the waiver of trial by jury must be written and must be signed by the defendant. Fla.R.Crim.P. 3.260 and Sessums v. State, 404 So.2d 1074 (Fla. 3d DCA 1981).

Id. at 643. Tosta was not mentioned as being overruled in Jones.

Rule 3.260 simply states that, "[a] defendant may in writing waive a jury trial with the consent of the State." The rule does not indicate that an oral, informed detail waiver is void and the rule has not been so interpreted by the courts.

In Blackwelder v. State, 489 So.2d 95, 97 (Fla. 2d DCA), rev. denied, 494 So.2d 1149 (Fla. 1986), the court distinguished Jones:

Even if we were to accept the rationale of Jones, we would find it distinguishable from the instant case. In the first place, Jones was decided on a direct appeal; whereas, here, the point was not raised on appeal but first appeared in a motion for post conviction relief.

* * *

Moreover, unlike the circumstances in Jones, our record demonstrates that appellant affirmatively agreed with his counsel's trial tactic not to select alternates and to proceed with less than a twelve-person jury should one of the jurors be excused. See United States v. Ricks, 475 F.2d 1326 (D.C. Cir. 1973), in which the defendant's oral stipulation to proceed with the eleven jurors was deemed valid despite a federal rule which required waivers of trial by jury of less than twelve to be

in writing.

In determining that there must be a written waiver, even in cases where the parties agree to proceed with only one less than the required number of jurors, Jones relied substantially upon the decision in Nova v. State, 439 So.2d 255 (Fla. 3d DCA 1983). However, the issue in Nova, was simply whether the defendant had received the full benefits of his plea bargain under which he agreed to be tried for first-degree murder by a jury composed of six persons rather than twelve. If there were any doubt that Nova does not hold that the stipulation has to be in writing, this was dispelled in a subsequent appeal of that case in which the court held that since the defendant had not made his bargain in reliance upon the benefit which he now claims that he did not receive, his oral waiver of the requisite number of jurors was valid. State v. Nova, 462 So.2d 511 (Fla. 3d DCA), petition for review denied, 472 So.2d 1181 (Fla. 1985).

It would be a travesty of justice to permit appellant to now repudiate his lawyer's trial tactic with which he fully concurred and thereby set aside his five-year old conviction for reasons totally unrelated to whether he received a fair trial (emphasis added).

The Fourth District recognized this distinction in Ringemann v. State, 546 So.2d 52, 53 (Fla. 4th DCA 1989). ~~See also~~ Shuler v. State, 463 So.2d 464, 464-65 (Fla. 2d DCA 1985)(where there was no written waiver of jury trial **and** there was no inquiry in open court as to whether appellant waived his right to jury trial, court would reverse, citing Tosta); Winchell v. State, 456 So.2d 1277 (Fla. 2d DCA 1984) (Absent a written waiver, where the court does not inquire of the defendant personally concerning his right to waiver, defendant is entitled to reversal); Pino v. State, 492 So.2d 811, 812 (Fla. 3d DCA 1986)(Where defendant did not waive his rights in writing or personally orally waive his rights,

relief would be granted).

Assuming arguendo that this Court interprets Rule 3.260 to require a written waiver, reversal is not necessary. The oral waiver entered into by petitioner was much more detailed than the simple written waiver suggested by the Rule. Accordingly, any error was harmless. See Hoffman, 397 So.2d at 290, and Ringeman, 546 So.2d at 53-54.

Petitioner next complains that his waiver was not valid because he was not told by the trial judge that he could participate in the selection of the jury and that the verdict must be unanimous for a conviction. This Court need not address this issue. The question to be answered is whether a defendant can orally waive a jury trial. Rule 3.230 has never required that the trial judge inform a defendant that he has a right to participate in the jury selection. See Sessums, 404 So.2d at 1075-76 and Tucker v. State, 547 So.2d 270, 271 (Fla. 4th DCA 1989).

Moreover, the cases relied on by petitioner do not support his argument. In Williams v. State, 521 So.2d 268 (Fla. 2d DCA 1988), there was no written or oral waiver entered into by the defendant. The only mention of a jury trial was the defense counsel's statement that he wished to try the case non-jury. Since there was no indication that the defendant had personally waived his right to jury trial, orally or in writing, the court reversed. In doing so, the court cited to Rule 3.260, which does not require that the defendant be told of his right to select a jury or told that

the verdict must be unanimous for a conviction.

Shuler v. State, 463 So.2d 464 (Fla. 2d DCA 1985), simply held that a defendant must, in writing or orally, waive his right to a jury trial. The court reversed because neither a written or oral waiver appeared in the record. It did not require that the judge inform a defendant of his right to participate in jury selection or that the verdict must be unanimous for a conviction.

In Enrique v. State, 408 So.2d 635 (Fla. 3d DCA 1981), rev. denied, 418 So.2d 1280 (Fla. 1982), the defendant was without counsel. There was no indication that he had any idea of the meaning of a jury trial. The defendant executed a written waiver of jury trial. The third district held that under those circumstances, the defendant should have been told that he had the right to participate in the selection of the jury and that any jury verdict must be unanimous.

Enrique is distinguishable in that it involved a counseless defendant. This distinction was explained by the third district in Dumas v. State, 439 So.2d 246, 249 (Fla. 3d DCA 1983), rev. denied, 462 So.2d 1105 (Fla. 1985), and by the Fourth District in Tucker, 547 So.2d at 271.

One of the principal purposes of the right to counsel is to ensure that a defendant has someone knowledgeable to inform him of the legal consequences of his actions. In the present case, petitioner was represented by counsel. Petitioner and his attorney discussed what the waiver involved, before petitioner requested it (R 2). There was no