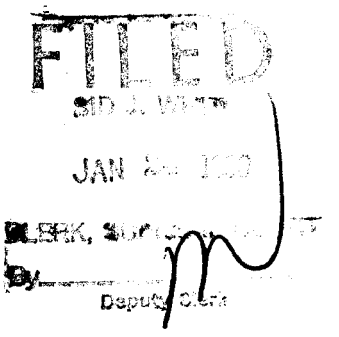
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

vs. Case No. 75,161

FREDERICK ALDINE BAIRD, JR.,

Respondent.

AMENDED JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and Appellee below. Frederick Aldine Baird, Jr., was the defendant in the trial court and the Appellant in the district court of appeal. The parties shall be referred to as "Petitioner" and "Respondent" respectively.

A copy of the decision of the District Court of Appeal is included in an appendix to this brief. Reference to factual matters will be by use of the symbol "A" followed by the appropriate page numbers in parentheses. The District Court's opinion is reported as Baird v. State, **14** F.L.W. **2339** (Fla. 1st DCA Oct. **3, 1989),** rehearing denied, **14** F.L.W. **2693** (Fla. 1st DCA, Nov. 21, 1989).

STATEMENT OF THE CASE AND FACTS

The District Court of Appeal found:

> As the result of a criminal investigation into football betting in the Pensacola area, Frederick Aldine Baird, Jr., was charged in numerous counts with racketeering and bookmaking. He was tried by jury and adjudged guilty on three counts of racketeering in violation of 895.03(4), Florida Statutes.

(A 1-2). As noted in footnote 1 of the opinion, one of those counts was for racketeering. Baird's codefendants, Douglas Vickery and Joseph Nunnari, pled *nolo contendere* to similar charges reserving the right to contest the constitutionality of the RICO statute. Their challenge was rejected below. Vickery v. State, 539 So.2d 499 (Fla. 1st DCA 1989). (A 3).

During trial, the Assistant State Attorney asked Officer Griffin whether Baird had been "targeted" for prosecution. The trial court overruled a hearsay objection and Griffin was allowed to testify that "I had received information that he was a major gambler and operating a major gambling operation in the Pensacola area. . . ." (A 2).

The District Court reversed Baird's conviction upon a finding that Officer Griffin's response was hearsay and that the error could not be considered harmless in the context of the

case. (A 2). The court also certified a question regarding the use of "pen register" devises by police agencies. On rehearing, the certified question was withdrawn in light of the intervening decision of this Court in **Shaktman** v. State, 14 F.L.W. 522 (Fla. Oct. 12, **1989).** Upon denial of rehearing, the State timely invoked this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

In this jurisdictional brief, the State of Florida contends that the First District Court of Appeal's decision regarding the admissibility of so-called hearsay evidence is in direct and express conflict with decision of other district courts of appeal. Furthermore, the State contends that the district court handled the harmless error analysis in a manner directly contrary to Ciccarelli v. State, 531 So.2d **129** (Fla. **1988).**

ARGUMENT

ISSUE I

WHETHER THE OPINION OF THE DISTRICT COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL AND THIS COURT REGARDING THE DEFINITION OF HEARSAY.

The First District Court of Appeal held that Officer Griffin's testimony constituted hearsay on authority of Bauer v. State, 528 So.2d 6 (Fla. 2d DCA 1988). The court ruled:

> The officer could testify to what he did as a result of the information received from others, but should not have been permitted to relate the information so received unless it otherwise met some recognized exception to the hearsay rule. See Collins v. State, 65 So.2d 61 (Fla. 1953). We find no basis for its admission in this case.

(A 2).

The trial court was improperly reversed.

It is apparent from the face of the opinion that Griffin's testimony was directed to "why" he acted not "what" Baird was alleged to be.

On this issue, in Johnson v. State, 456 So.2d 529, 520 (Fla. 4th DCA 1984), review ~~denied~~, 464 So.2d 555 (Fla. 1984), and Freeman v. State, 494 So.2d 270, 271 (Fla. 4th DCA 1986), the

Fourth District Court of Appeal held that an investigating officer's testimony as to the content of a dispatch to which he responded was admissible to explain why the officers were at a particular place at a particular time and what their purpose was. The Fourth District cited United States v. Walling, 486 F.2d 229, 234 (9th Cir. 1973), in support of its position.

The Fourth District's position is advanced by Professor Ehrhardt in his treatise on Florida Evidence. In Chapter 8, he concludes:

> An out-of-court statement which is not offered to prove the truth of the matters asserted, i.e. to prove that the facts contained in it are true, is not hearsay.

In support of this position, Ehrhardt cites Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982), and Brown v. State, 229 So.2d 37, 38 (Fla. 4th DCA 1974).

In Breedlove, this Court held that the introduction of statements made by members of Breedlove's family to a police officer were not inadmissible as hearsay because they were admitted to show their effect on Breedlove rather than for the truth behind those comments. Breedlove, supra, at 6-7. This Court further cautioned that "merely because a statement is not admissible for one purpose does not mean it is inadmissible for

another purpose." Citing, Hunt v. Seaboard Coastline Railroad Co., 327 So.2d 193 (Fla. 1976). Likewise in Brown v. State, supra, the Fourth District cited Wigmore on Evidence for the proposition that "if an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, the hearsay rules does not apply." Id. at 38.

Ignoring these cases, the First District relied on Bauer v. State, supra, to support its view. Bauer was a split decision in which Chief Judge Campbell vigorously dissented from the majority's reversal of a drug trafficking conviction. That court held a police officer could not testily to information he received from a confidential informant regarding defendant's alleged prior criminal activities in order to rebut a defense of entrapment because such testimony would be hearsay. (A).

In his dissent, Chief Judge Campbell forcefully points out:

> The very definition of "hearsay" is that it is a statement other than one by the declarant, offered to prove the truth of the matters asserted. Section 90.801(1)(c), Fla. Stat. (1985). The testimony of Agent Chouinard as to what the informant informed him that created Agent Chouinard's reasonable suspicion, was therefore, not hearsay. As the trial judge below held in allowing the testimony; the state has the right to show that Mr. Scaglione and Mr. Bauer were not randomly selected or exposed, and I will allow the state to ask Mr. Chouinard as to why he sought intro-

> duction to Mr. Scaglione and Mr. Bauer concerning the proffer, also, the other cases show that a confidential informant and hearsay may be utilized to show predisposition.

Bauer v. State, 528 So.2d at 12-13.

In the instant case, the First District commits the same error as the majority in Bauer.[1] Officer Griffin's testimony was not introduced to prove the truth of the matter asserted, i.e. that Baird was a major gambler. Rather, that testimony was introduced to show why Officer Griffin began his investigation of Baird and to rebut the defense argument that the police had targeted or selected Baird for prosecution.

[1] That conflict is based on an earlier decision which itself creates conflict is not detriment to this Court's acceptance of the instant case. Jolly v. State, 405 So.2d 418 (Fla. 1981).

ISSUE II

WHETHER THE OPINION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS OF THIS COURT REGARDING TO APPLICATION OF THE HARMLESS ERROR TEST.

In the instant case, the First District Court of Appeal summarily denied the State's harmless error in our argument with the following ruling "applying the rule in DiGuilio, 491 So.2d 1129 (Fla. 1986), to the circumstances, we conclude the state has failed to carry its burden of showing that this error was harmless." Ever since it certified the question of its obligations to review cases for harmless error in Lee v. State, 531 So.2d 133 (Fla. 1988), the First District Court of Appeal has repeatedly reversed cases citing to DiGuilio v. State, supra. Stallworth v. State, 538 So.2d 1296 (Fla. 1st DCA 1989); Fraser v. State, 530 So.2d 986 (Fla. 1st DCA 1988); Stockton v. State, 529 So.2d 739 (Fla. 1st DCA 1988); Cruse v. State, 522 So.2d 90 (Fla. 1st DCA 1988); Porterfield v. State, 522 So.2d 483 (Fla. 1st DCA 1988). That alone is unusual. However, when as here the court holds the State must prove the error harmless, their ruling is in direct and express conflict with this Court's opinion in Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

Pursuant to Ciccarelli:

. . . The function of an examination for this purpose is to

> take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

Kotteakos v. United States, 328 U.S. 750, 764, 66 S.Ct. 1239, 1247-1248, 90 L.Ed.2d 1557 (1946).

This requires more than a mere totaling of testimony, and, in most instances, more than a mere reading of a portion of the record in the abstract. It entails an evaluation of the impact of the erroneously admitted evidence in light of the overall strength of the case and the defense asserted. Unlike the initial decision of whether error occurred, which in many instances can be made from a fragment of the record of the examination of the law alone, the effect of error on the verdict is a different inquiry. It must, in most cases, be evaluated through the examination of the entire trial transcript. The court must determine *not* if there is overwhelming evidence of guilt, but if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error. (Emphasis added).

Id. at 132.

A classic example of how DiGuilio and Ciccarelli are to be applied is to be found in the Third District opinion Snowden v. State, **537** So.2d **1383, 1389** (Fla. 3d DCA **1989).** In that case, the court reviewed the entire transcript and outlined the reason for its decision.

We seek review in this case under this alternative theory because the First District Court of Appeal has not, from the face of its decision, engaged in an appropriate analysis under Ciccarelli. We are confident that if this Court accepted jurisdiction of this case and reviewed the record, it would reverse the decision in this regard.

CONCLUSION

Petitioner prays the Court will accept jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy *of* the foregoing has been furnished by U.S. Mail to LAURA E. KEENE, Esquire, Beroset & Keene, 701 South Palafox Street, Pensacola, Florida 32501, this 25th day of January, 1990.

RICHARD E. DORAN