too long accepted as is approved SGW

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 75,161

FREDERICK ALDINE BAIRD, JR.,

Respondent.

AMENDED JURISDICTIONAL BRIEF OF RESPONDENT

LAURA E. KEENE
Florida Bar No. 312835
Beroset & Keene
417 East Zaragoza Street
Pensacola, Florida 32501
Phone: (904) 438-3111
Attorney for Respondent

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

PAGE

CASES:

STATEMENT OF THE CASE AND FACTS

Petitioner, 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 Appellant below. MR. BAIRD will be referred to as Respondent, and the STATE shall be referred to as Petitioner. An appendix is attached to this jurisdictional brief, and reference to it will be by use of the letter "A" followed by the apropriate item number, in parenthesis.

This Jurisdictional Brief is filed by Respondent in response to Petitioner's Jurisdictional Brief which was filed on December 20, 1989.

In Baird v. State, 14 FLW 2339 (Fla. 1st DCA, October 3, 1989), the First District Court of Appeal noted that:

> "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 Section 895.03(4), Florida Statutes." (A:1).

The First District found error in the admission of hearsay testimony during the trial, and reversed the verdict of guilt, granting Respondent a new trial.

Respondent contended, and the First District agreed, that the Trial Court erred in admitting, over Respondent's timely objection and Motion for Mistrial,

testimony by an FDLE Officer that "I had received information that he (Respondent) was a major gambler and operating a major gambling operation in the Pensacola area...". (A:1).

The First District found that the testimony was "obviously hearsay and improperly admitted", citing Bauer v. State, 528 So.2d 6 (Fla. 2nd DCA 1988). (A:1). The Court explained that "the officer could testify to what he did as a result of 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)." (A:1). The First District found no basis for the admission of the hearsay testimony in this case. The First District further found that the State had failed to carry its burden of showing that the error complained of was harmless. The First District reversed Respondent's conviction and remanded the matter for new trial.

Thereafter, upon denial of rehearing, the State invoked this Court's jurisdiction in this matter.

SUMMARY OF ARGUMENT

The rule of law announced by the Florida Supreme Court in Collins v State clearly controls the case at hand. The First District Court of Appeal followed this Court's ruling in Collins in the instant case. Further, there is no conflict between the District Courts of Appeal since the Fourth District Court of Appeal has recently brought itself into line with this Court's precedent as set forth in Collins.

Additionally, the opinion of the First District Court of Appeal is not in conflict with the decisions of the Supreme Court regarding the application of the harmless error test, since the First District applied both DiGuilio and Ciccarelli in determining that the instant case was not a case of harmless error and that reversal and remand of this matter was necessary. Therefore, there is no reason for this Court to accept jurisdiction of this matter.

ARGUMENT

ISSUE I

THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS MATTER IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL, NOR IS THE FIRST DISTRICT COURT OF APPEAL IN CONFLICT WITH THIS COURT REGARDING THE DEFINITION OF HEARSAY.

In Baird v. State, 14 FLW 2339 (Fla. 1st DCA, October 3, 1989), the First District found error in the admission of certain hearsay testimony at the trial level, and reversed Respondent's conviction for a new trial. (A:1).

The First District ruled that :

> "The testimony was obviously hearsay and improperly admitted. See Bauer v. State, 528 So.2d 6 (Fla. 2nd DCA 1988). The officer could testify to what he did as a result of 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:1).

In Collins, this Court held that an officer testifying in a criminal case may say what he did pursuant to information received from others, but he may not relate the information itself, in that such testimony constitutes hearsay evidence. Collins at 67. In Collins, this Court could find no support for admitting testimony that a defendant on trial was said by some anonymous person to have

been engaged in the very criminal transaction for which he was being tried.

In its jurisdictional brief, Petitioner attempts to create a conflict between the District Courts by citing to Johnson v. State, 456 So.2d 529, 530 (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). In both Johnson and Freeman, the Fourth District held that testimony as to the contents of a police dispatch to which an officer responded was admissible to explain why the officer was at a particular place at a particular time. Petitioner attempts to create a conflict where none exists.

To begin, the factual difference between a police dispatch and an anonymous tip is apparent. A police dispatch directs an officer to handle what may well be an emergency situation. Any juror hearing the contents of the emergency dispatch would note that extraneous information included in the dispatch may or may not be true; there was no time to confirm or deny the information. Indeed, that is the officer's job upon receiving the dispatch.

Conversely, the information which the officer attempted to convey to the jury in Respondent's case was not the type of information that would typically be associated with an emergency situation. Instead, the jury heard testimony that some anonymous person passed along to a police

officer which accuses Respondent of the very criminal action for which he is being tried. As both the First District and the Florida Supreme Court recognized, such information is clearly hearsay, and cannot be passed along to the jurors to weigh along with the rest of the evidence.

Further, Petitioner fails to point out that this exact same issue has been settled by the highest Court in this state in Collins v. State, supra. In Collins, this Court stated that "an officer may say what he did pursuant to information but he may not relay the information itself for such is hearsay." (Citation omitted.) Collins at 67. This Court's holding in Collins has never been repudiated, nor has it ever been limited. As such, the rule of law announced in Collins is the rule which the First District Court of Appeals should, and did, abide by. The rule of law is well recognized by Florida courts, as is evidenced by the words of the Third District Court of Appeal, "Florida Courts have consistently condemned testimony which recounts the actual statement made by the out-of-court declarant implicating the accused. See, e.g., Collins v. State, supra; Kirby v. State, 44 Fla. 81, 32 So. 836 (1902). That condemnation necessarily reaches testimony where the actual statement, although unexpressed, is implicit in the testimony." Postell v. State, 398 So.2d 851, 854, n. 5 (Fla. 3rd DCA 1981).

Petitioner cites no reason to call into question the rationale which supported this Court's opinion in Collins.

Finally, Petitioner makes much of the alleged distinction between the rationale utilized in both Johnson and Freeman, and the First District Court of Appeal's reliance upon Collins in the case at hand. As noted above, it would appear that since the First District's opinion in Baird v. State, supra, is in line with the Supreme Court opinion in Collins, the onus would be upon the Fourth District to rule according to Supreme Court precedent as well.

Recently, the Fourth District has brought itself into line with Supreme Court precedent, as set forth in Collins, somewhat repudiating the rule of law announced in Freeman and Johnson. In Harris v. State, 14 FLW 1377 (Fla. 4th DCA, June 7, 1989), the Fourth District Court of Appeal found problems with the Freeman rationale:

> "The problem with the Freeman rationale is that the jury was permitted to hear incriminating evidence against the accused which is hearsay and which was not essential to establish a logical sequence of events. ... It was **not** permissible to relate the accusatory remarks of the informant. Such information is inadmissible hearsay. Collins v. State, 65 So.2d 61 (Fla. 1953). While the error in Freeman may have been harmless, as suggested by the special concurrence, we emphasize that it is not a sufficient justification for the introduction of incriminating hearsay that the statement explains or justifies an officer's presence at a particular location or some action taken as a result of the hearsay statement. There is a fine line that must be drawn between a statement merely justifying or

explaining such presence or activity and one that includes incriminating (and usually unessential) details. Our reasoning is further supported by the following from McCormick on Evidence (3d Edition 1984):

> '... In criminal cases, an arresting or investigating officer ... should be allowed some explanation of his presence and conduct. His testimony that he acted 'upon information received', or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relay historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.'" (A:2).

Thereafter, the Fourth District reversed and remanded Harris for a new trial specifically because inadmissible hearsay was admitted at the Trial Court level. Thus, it is apparent that the holding in Johnson and Freeman have been greatly limited and perhaps even repudiated by the Fourth District's opinion in Harris.

This Court need not accept jurisdiction of this matter since no conflict exists between the District Courts of Appeal, nor has the First District ruled contrary to any Florida precedent. Instead, both the First and Fourth District Courts have specifically cited to and followed this Courts opinion in Collins v. State in ruling on the issue of inadmissible hearsay, therefore leaving no conflict to be decided by this Court at this time.

ISSUE II

THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL IS NOT IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS OF THIS COURT REGARDING THE APPLICATION OF THE HARMLESS ERROR TEST.

In Baird v. State, supra, the First District held that OFFICER GRIFFITH's testimony was obviously hearsay and improperly admitted. (A:1). Moreover, the First District concluded that the State had failed to carry its burden of showing that the error was harmless. Therefore, the Court found it necessary to reverse Respondent's conviction and remand this matter for a new trial. The First District cited State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), in holding that the error was not harmless.

Petitioner now complains that the First District, in holding that the State must prove the error harmless, is in direct and express conflict with this Court's opinion in Ciccarelli v. State, 531 So.2d 129 (Fla. 1988). However, the First District applied both DiGuilio and Ciccarelli in determining that this was not a case of harmless error and that reversal and remand of this matter was necessary.

To begin, this Court's opinion in DiGuilio, often cited yet never overruled nor repudiated, holds that the harmless error test places the burden upon the State, as the beneficiary of the error, to prove beyond a reasonable doubt

that the error complained of did not contribute to the verdict. DiGuilio at 1135. (A:3).

Further, as Petitioner points out, this Court noted that oftentimes the analysis requires "more than a mere totalling of testimony, and, in most instances, more than a mere reading of a portion of the record in the abstract." Ciccarelli at 132. (A:4). Petitioner fails to add that this Court also noted:

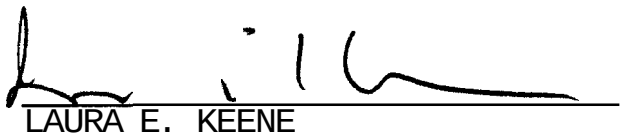
> "This is not to say that every case will require a reading of every word in a trial transcript. We can envision certain errors, such as improper leading questions or admission of totally irrelevant matters, that would not require such a demanding task. The decision of how much to read in order to apply the harmless error test 'vigorously' and appropriately must be left to the conscience of each individual judge." Ciccarelli at 132 (emphasis added). (A:4).

Although Petitioner would like to construe the First District's review and decision in this case to be the result of faulty analysis, it is clear that according to precedents set forth by this Court, the First District has fulfilled its duty in reviewing the evidence and making the decision that this error was not harmless error. There is no need for this Court to accept jurisdiction of this case, since the First District followed this Court's precedent in holding that the testimony offered by the State at the Trial Court level was inadmissible hearsay, wrongly admitted, and resulted in reversible error since it could not be said that such testimony was not harmless error.

CONCLUSION

Respondent prays that this Court will refuse jurisdiction of this cause.

Respectfully submitted,



LAURA E. KEENE
Florida Bar No. **312835**
Beroset & Keene
417 East Zaragoza Street
Pensacola, Florida **32501**
Phone: **(904) 438-3111**
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Richard E. Doran, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida **32399-1050**, this 17 day of January, **1990**.

LAURA E. KEENE
Florida Bar No. **312835**
Beroset & Keene
417 East Zaragoza Street
Pensacola, Florida **32501**
Phone: **(904) 438-3111**
Attorney for Respondent