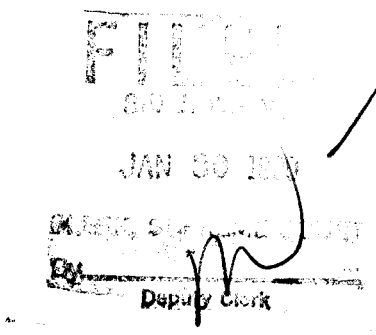
SUPREME COURT OF FLORIDA



CASE NO. 75,233

STATE OF FLORIDA,

Petitioner,

vs.

NANCY ELIZABETH GURICAN,

Respondent.

****

ON DISCRETIONARY JURISDICTION FROM
THE FIRST DISTRICT COURT OF APPEAL

****

PETITIONER'S BRIEF ON THE MERITS

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Florida Statutes:

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the First Judicial Circuit, in and for Escambia County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

"T" Transcripts

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

By information filed December 8, 1983, Respondent was charged with trafficking in excess of 28 grams of cocaine but less than 200 grams in violation of section 893.135(b)1, Florida Statutes (R 398). The case proceeded to a jury trial on June 5, 1984 with codefendant Jenny Ramirez.

Prior to the commencement of trial, there was a lengthy discussion out of the presence of the jury regarding the admissibility of three taped conversations between the codefendants and the undercover police officer. Defense counsel had filed a pretrial motion to consolidate the two cases for trial. Said motion was granted (T 6). The prosecutor was then concerned that the three tapes might present a Bruton[1]-type problem in that Respondent was not a party to these tapes, but was only referred to therein as "she."(T 8-13). The State argued that, through the taped conversations, Ms. Ramirez was testifying against Respondent and, therefore, defense counsel was representing two defendants with adverse interests, and if so, severance was required (T 9).

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[1] Bruton v. United States, 391 U.S. 123, 20 L.Ed 2d 476, 88 St. Ct. 1620 (1968).

The trial judge decided to listen to these tapes in order to make a proper determination as to admissibility (T 15-17). After hearing the tapes, defense counsel objected on the grounds that one of the tapes contained references to a crime not charged; that the tapes contain incriminating statements by codefendant Ramirez referring to Respondent; and that the tapes are illegible (T 21-22). The trial court ruled that two of the tapes contained no competent evidence and were therefore inadmissible (T 26). He deferred ruling on the third tape which contained statements made on the day of the drug transaction (T 28).

After opening statements, the State called as its first witness Michelle Hurst, the undercover officer in this case (T 37). She testified that in October of 1983 she had received some information regarding codefendant Jenny Ramirez (T 41). She called Ms. Ramirez on the phone and discussed a narcotics transaction, specifically cocaine (T 42). Ramirez told Ms. Hurst to meet her at Richey's Bar (T 42). At said meeting, codefendant Ramirez gave the officer a sample of cocaine in a dollar bill (T 47-48). Officer Hurst had requested six ounces of cocaine, however, the deal could not be completed at that time as she did not have the money even though Ramirez had the cocaine (T 48-49). Hurst then took the sample to the Sheriff's Department and informed her supervisor of the transaction (T 50). She was then wired with an audio monitoring device and went to the Torch Bar

with her partner Wayne Ladieu to meet Ramirez (T 51). There were other Sheriff's Officers acting as surveillance (T 52). Ms. Ramirez then arrived and sat at a table with Hurst (T 52). Hurst showed Ramirez the money and was told that the cocaine was coming with some other people (T 53). After several phone calls by Ms. Ramirez, two people showed up with the cocaine and sat down at the table (T 54). They discussed several ways of conducting the transaction and decided to meet at the Corral Lounge (T 55-56). Ms. Ramirez never showed up (T 57). A few days later, Officer Hurst, while working a sting operation, saw Ms. Ramirez at the Royal Package Store (T 58). Ramirez told Hurst that she got scared and called the deal off because she recognized the officers' cars in the parking lot (T 58-59). Two days later, Ramirez returned Officer Hurst's phone call and a time and place was agreed upon to meet that evening (T 60-61). They met at the Royal Package Store and again Hurst was told that another girl was bringing the cocaine (T 62, 64). The "other girl" was Nancy Gurican, the respondent in this case (T 65). When Respondent arrived with the cocaine, the three of them went into the ladies room and entered separate adjoining stalls (T 67).

The cocaine and money was then exchanged underneath the partition separating the stalls (T 68). Ramirez handed two ounces of cocaine to Hurst and Hurst gave Respondent $3900 (T 67-68). The take-down team was then called in and placed both defendants under arrest (T 69-71).

The trial court then ordered a short recess at which time it was determined that the parties had agreed on what portions of the tape would be played (T 72-73). With the jury present, the tape was played in open court (T 76). The conversation on the tape takes place in the ladies' room of the Royal Package Store (T 76). Further examination revealed that Ms. Ramirez told Officer Hurst she had been dealing drugs since she was fourteen years old and that she knew what she was doing (T 118).

Deputy Wayne Ladieu was then called as a witness. His testimony corroborated that of Officer Hurst.

Investigator Thedodore Roundy testified that he participated in the arrest of the two defendants (T 132). He was stationed in the woods outside the Royal Package Store when he was informed that the drug transaction had taken place in the ladies' room (T 133). He entered the room and observed Respondent and Ms. Ramirez in a stall huddled in a corner (T 133). Respondent had the roll of money in her hand (T 133).

Corporal Glen Gowitzke testified that he received the packages of cocaine delivered by Respondent and Ms. Ramirez (T 141). He gave the cocaine to the crime lab for weighing and testing (T 142). It was determined by an expert witness that the packages delivered by Respondent contained 42 grams of cocaine (T 157).

The State then rested its case and the defense immediately called Jenny Ramirez to the stand (T 160). Her lengthy testimony revealed that the theory of her defense was entrapment: the confidential informant in the case knew of her poor financial status and knew that she was susceptible to dealing in drugs to obtain money for her sick daughter's operation (T 161-173). Ms. Ramirez further testified that she talked to Respondent in an attempt to locate some drugs to sell to the confidential informant (T 197). Respondent knew Ms. Ramirez's daughter, Tonya, and knew about her medical problems (T 198). Ramirez confided in Respondent; they were best friends (T 199). Respondent told Ramirez to stay away from Bill Lister, the confidential informant (T 199). However, Ramirez said she really needed the money for her daughter's surgery (T 199). Respondent then became involved in the drug transaction because Ramirez trusted her (T 204). When Ramirez called Respondent to bring the cocaine, she refused at first but then decided to help Ramirez (T 204).

In rebuttal, the State called Billy Lister, the confidential informant (T 300). His testimony pertained solely to the codefendant Ramirez (T 299-328). In response thereto, the defense presented the testimony of several family friends as well as that of Ramirez's daughter (T 328-340).

Defense counsel sought and was denied the final argument to the jury on Respondent's behalf (T 349-353). Respondent was found guilty as charged (T 393), however, a mistrial was declared as to Ramirez (T 394).

Sentencing was scheduled for August 1, 1984 (T 396), while Respondent remained free on bond. She was not actually sentenced in this case until December 12, 1988 (R 407-408). As recognized in the lower court's opinion, the delay in sentencing is attributed to Respondent's absconding from the jurisdiction of the circuit court to avoid sentencing. Gurican v. State, 14 FLW 2690 (Fla. 1st DCA November 21, 1989).

A timely notice of appeal was filed and, after receipt of the record on appeal, the undersigned moved to dismiss the appeal on the grounds of the escape rule and that the long delay would be extremely prejudicial to the State in the event a new trial is ordered. After the filing of briefs in the cause, the First District issued 2-1 decision in the cause refusing to initiate a new rule in Florida with respect to the federal "escape rule," and denied the State's motion to dismiss. 14 FLW at 2691. The Court, however, certified the following questions to this Court as questions of great public importance:

> Should Florida's appellate courts apply the federal escape rule in which the court, upon proper motion, will dismiss an appeal of an accused who has

> fled the jurisdiction before sentencing, and hence before filing a notice of appeal, even though the accused is back within the court's jurisdiction when the motion to dismiss is filed?
>
> Should Florida's appellate courts apply a harmless error analysis where a defendant has been wrongfully denied the right to the last argument before the jury?.
>
> 14 FLW at 2692.

This Court's jurisdiction was invoked on December 19, 1989 and this brief follows.

SUMMARY OF ARGUMENT

The direct appeal herein, filed almost five years after Respondent was convicted of trafficking in cocaine, should have been dismissed on the basis of the well-recognized "escape rule." Respondent absconded from the jurisdiction of the trial court prior to sentencing on August 1, 1984 and returned for sentencing on December 12, 1988. Although Florida has only applied the escape rule in situations where a defendant absconds from the jurisdiction of the appellate court after filing a notice of appeal, Petitioner requests this Court to apply the same reasoning in the instant context in light of the federal courts' decision's which have seen fit to apply the rule in identical situations.

Alternatively, this Court is requested to reject the lower court's finding that Respondent offered no testimony in her defense and consequently conclude that no violation of Rule 3.250 existed. If the Court determines otherwise, the rule should be read in conjunction with the harmless error statutes enacted in Florida.

ARGUMENT

ISSUE I

WHETHER FLORIDA'S APPELLATE COURTS SHOULD APPLY THE FEDERAL ESCAPE RULE IN WHICH THE COURT, UPON PROPER MOTION, WILL DISMISS AN APPEAL OF AN ACCUSED WHO HAS FLED THE JURISDICTION BEFORE SENTENCING, AND HENCE BEFORE FILING A NOTICE OF APPEAL. (certified question).

As in the lower tribunal, Petitioner submits that the appeal in this cause should be dismissed on the basis of the "escape rule" as Respondent waived her right to appeal by admittedly absconding from the jurisdiction of the circuit court for almost five years in order to avoid being sentenced for her cocaine trafficking conviction. The record establishes that Respondent was originally scheduled to be sentenced on August 1, 1984, however, she was actually sentenced on December 12, 1988 (T 396, R 407-408).

This so-called "escape rule" has been applied in Florida in situations where a defendant absconds from the jurisdiction of the appellate court after filing a notice of appeal. In that context, this Court has held that the defendant's appeal may be dismissed upon motion of the State and that reinstatement may properly be denied. Bretti v. Wainwright, 225 So.2d 516 (Fla. 1969); Woodson v. State, 19 Fla. 549 (Fla. 1882). See also Mitchell v. State, 294 So.2d 395 (Fla. 1st DCA 1974); Decree v.

State, 180 So.2d 667 (Fla. 1st DCA 1965). Those Courts found that the defendant was deemed to have abandoned his appeal as he was unable to confer with his attorney.

In the federal system, the Courts have consistently applied the escape rule in a context identical to the present case. In United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982), cert. denied, 460 U.S. 1015, 75 L.Ed 2d 486, 103 S.Ct. 1259 (1983), the defendant failed to appear for sentencing and his bond was subsequently forfeited. He was apprehended 2 years later and sentenced to seventeen years incarceration. Thereafter, Holmes appealed and the prosecution moved to dismiss the appeal on the basis that he had abandoned such a right by absconding from the court's jurisdiction. The Eleventh Circuit observed that most instances of application of the escape rule involve one who becomes a fugitive after the filing of a notice of appeal. However, it was held that reasoning supportive of the escape rule is equally applicable whether the defendant absconds before or after sentencing. The Court based that reasoning primarily on the decision in Molinaro v. New Jersey, 396 U.S. 365, 24 L.Ed.2d 586, 90 S.Ct. 498 (1970), where it was specifically held:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints upon him pursuant to the conviction. While such an escape does not strip the case of its character, as an adjudicable case

> or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.
>
> 24 L.Ed. 2d at 587-588.

The decision in Holmes has been followed in recent federal cases. United States v. Persico, 853 F.2d 134 (2d Cir. 1988); United States v. Puzzanghera, 820 F.2d 25, 27 (1st Cir.), cert. denied, ___U.S.___, 98 L.Ed. 2d 195, 108 S.Ct. 237 (1987); United States v. London, 723 F.2d 1538 (11th Cir.), cert. denied, 467 U.S. 1228, 81 L.Ed. 2d 878, 104 S.Ct. 2684 (1984). See also State v. Kearns, 730 S.W. 2d 553 (Mo. App. 1987). The First District's opinion expressed concern that such a rule should only be enacted through legislation as the right to an appeal is guaranteed by the Florida Constitution. However, appellate courts in Florida have the jurisdiction and inherent discretion to dismiss appeals and refuse their reinstatement. Bretti v. Wainwright, supra. This Court is urged to adopt the reasoning set forth in Holmes and apply the traditional escape rule to the circumstances at bar where Respondent admittedly absconded from the trial court's jurisdiction for almost five years for the sole purpose of avoiding sentencing. It should make no difference that Respondent has voluntarily resubmitted herself to the court's jurisdiction. Her absconding after conviction but prior to sentencing not only shows contempt for the very process she now seeks to utilize, but the long hiatus preceding the case

reaching this Court presents administrative problems and almost certain prejudice to the State in the event of a remand for a new trial. This Court should take the initiative and prohibit "criminal defendants who flee prior to sentencing [from being] permitted upon apprehension to seek relief from the very legal system that they previously had seen fit only to defy." Holmes, supra, 680 F.2d at 1374.

There is no sound reason for entertaining a case such as this on appeal and, as set forth above, ample policy considerations support a dismissal. The lower court's ruling does nothing but "encourage short vacations from prison." Brown v. State, 388 So.2d 586 (Fla. 5th DCA 1980). The certified question herein should be answered in the affirmative.

ISSUE II

WHETHER FLORIDA'S APPELLATE COURTS SHOULD APPLY A HARMLESS ERROR ANALYSIS WHERE A DEFENDANT HAS BEEN WRONGFULLY DENIED THE RIGHT TO THE LAST ARGUMENT (certified question).

In this case, Respondent was jointly tried with her codefendant Jenny Ramirez. Prior to closing arguments, defense counsel argued that he should be entitled to concluding argument with respect to Respondent as she offered no testimony in her behalf (T 349-353). The trial court denied Respondent final argument. The propriety of said denial was the sole issue raised on direct appeal. In its summation of the facts, the First District concluded that "Gurican put on no defense," 14 FLW at 2690, and, therefore, was wrongfully denied the right to concluding argument. Fla.R.Cr.P. 3.250. The State emphatically disagrees with the foregoing conclusion and initially submits that testimony was in fact offered in Respondent's behalf.

This testimony was elicited through codefendant Ramirez who presented an entrapment defense which was obviously intended to include Respondent. Ramirez testified that she contacted Respondent in an attempt to locate some cocaine to sell to the confidential informant (T 197). The two defendants were very close friends and knew they could confide in each other (T 199). Ramirez stated that Respondent did not want to become involved

initially. "She told me not to -- to stay away from [the confidential informant]." (T 199). However, Respondent was persuaded to help find some cocaine only after Ramirez "continued asking her and told her that I really needed the money for my daughter's surgery." (T 199). The foregoing testimony was clearly offered in Respondent's defense and such was expressly argued to the jury during defense counsel's closing argument:

> As to Nancy Gurican, you heard Jenny testify about their close relationship, about Nancy's feelings about Tonya, about Nancy knowing about Lister, about Nancy finally saying, "Don't do this." And she went along and did it with her. Why? To help Jenny who was in this dire straits that she was in because of her daughter.
>
> (T 374).

The testimony of Ramirez that was favorable to Respondent was offered on behalf of Respondent within the meaning of the rule, thus disentitling her to concluding argument before the jury. See Larias v. State, 528 So.2d 944 (Fla. 3rd DCA 1988); McAvoy v. State, 501 So.2d 642 (Fla. 5th DCA 1987).

Not unlike the First District Court of Appeal, the State is fully cognizant of the settled state of the body of law in this area, 14 FLW at 2691, and should this Court conclude that Respondent's denial of final argument was error, the State submits that the circumstances present a scenario susceptible to application of a harmless error analysis.

Although the alleged error has been recognized by the courts of this State as a "substantial procedural right," it is Petitioner's position that such does not rise to the level of error which would require reversal. Compare Terwilliger v. State, 535 So.2d 346, 348 (Fla. 1st DCA 1988).

Seldom quoted is section 59.041, Florida Statutes (1987), the chapter entitled "Appellate Proceedings" which states:

> **59.041 Harmless error; effect.** - No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

Also to be considered is section 924.33, Florida Statutes (1987), the Chapter entitled "Appeals." This latter section is much like the former and states:

> **924.33 When judgment not to be reversed or modified.** - No judgement shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial

> rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

The above legislation was discussed at length in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). It can be deduced from DiGuilio that if application of the harmless error test results in a finding that the type of error is not always harmful, then it is improper to categorize the error as per se reversible as the lower court has in this case.

The State is not unmindful of the 1957 decision in which this Court specifically refused to apply harmless error analysis where the trial court erroneously denied the defendant, offering no testimony on his own behalf except his own, the right to have closing argument before the jury, even though the evidence was adequate to sustain the jury's verdict of guilt. Birge v. State, 92 So.2d 819, 822 (Fla. 1957). Justice Thornal, writing for the majority, reasoned that it was not within the Court's judicial province to disregard completely this legislative enactment "which undoubtedly was passed to provide for those accused of crime an orderly judicial safeguard for the determination of their rights." Id. at 822. The Court was referring to section 918.09, Florida Statutes (1957) which states:

> **918.09 Accused may make himself a witness.** - In all criminal prosecutions the accused may at his option be sworn

> as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.

However, effective January 1, 1971, the foregoing section was repealed by §180, Chapter 70-339, Laws of Florida, thus no longer making it a legislative enactment but only a rule of criminal procedure which was originally adopted as Rule 1.250, F.R.Cr.P. (1967) and revised as Rule 3.250 in 1972. Accordingly, this Court's holding in Birge v. State is no longer viable and the rule of criminal procedure now being alleged to have been violated should be considered by appellate courts in conjunction with the above-mentioned harmless error statutes. See Howard v. State, 239 So.2d 83 (Fla. 1st DCA 1970). A violation of a rule of criminal procedure does not call for reversal of conviction unless the record discloses that noncompliance with the rule resulted in prejudice or harm to the defendant. Clair v. State, 406 So.2d 109 (Fla. 5th DCA 1981).

Applying said standard sub judice, the record demonstrates that Respondent actively participated in the delivery of the cocaine to undercover officers (T 65-68, 197-204). This evidence

was undisputed and was never denied as is obvious from the entrapment defense offered at trial. Thus, there is no reasonable possibility that the alleged rule violation contributed to the verdict. DiGuilio, supra. The undersigned urges this Court to find that no violation of Rule 3.250 is present in this case or, in the alternative, apply the harmless error analysis to the instant facts and rule that any alleged error in the arrangement of arguments must be considered harmless.

CONCLUSION

WHEREFORE, in light of the foregoing arguments and cogent citations of authority, Petitioner respectfully requests this Honorable Court answer the certified questions in the affirmative and quash the decision below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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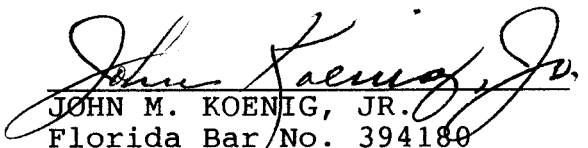
Tallahassee, Florida



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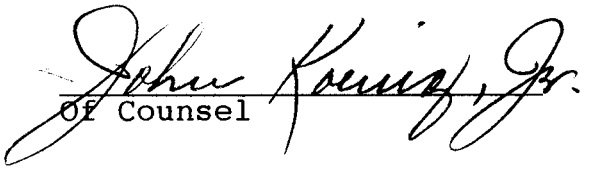
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by United States to: LEO A. THOMAS, ESQUIRE, 226 South Palafox Street, Pensacola, Florida 32501, this 26th day of January, 1990.



Of Counsel

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