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SUPREME COURT OF FLORIDA

CASE NO. 75,233

STATE OF FLORIDA,

Petitioner,

vs.

NANCY ELIZABETH GURICAN,

Respondent.

FILED
SID J. WHITE
FEB 12 1990
CLERK, SUPREME COURT
By ____________
Deputy Clerk

ON DISCRETIONARY JURISDICTION FROM
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The parties will be referred to herein as they stand before this Court. Nancy Elizabeth Gurican was the defendant in the trial court, the appellant in the First District Court of Appeal and is the Respondent in this Court. The State of Florida was the plaintiff in the trial court, the appellee in the First District Court of Appeal and is the Petitioner in this Court.

References to the transcript of the record on appeal will be designated "(TR___)" followed by the appropriate page number.

References to Petitioner's Brief on the Merits will be designated "(PB___)" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts and would add thereto that Respondent, as recognized in the First District Court of Appeals opinion, voluntarily surrendered herself to the jurisdiction of the Circuit Court after having absconded. Gurican v. State, 14 F.L.W. 2690 (Fla. 1st DCA, November 21, 1989).

SUMMARY OF THE ARGUMENT

ISSUE I

The "escape rule" applicable in the federal system has never been recognized in Florida and no good policy reasons exist to change that rule.

ISSUE II

The right to concluding argument by a defendant who offers no testimony or his own testimony has long been recognized as a substantive right under statute and then codified by this Court under Fla.R.Crim.P. 3.250. No good reason exist to change that rule and the harmless error principle should not apply.

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)

Petitioner's argument is bottomed on the false premise that a retrial now would present "...almost certain prejudice to the State..." (PB 13). Petitioner has overlooked the uncontradicted testimony of Deputy Sheriff Hurst (PB 4) who alone would suffice to convict respondent. In the event the testimony of a now missing witness is necessary, the rule since at least 1908 has been that the State can use the testimony from the first trial. Putnal vs. State, 47 So. 864 (Fla. 1908); accord, Richardson v. State, 247 So.2d 296 (Fla. 1971); see also, Ohio v. Roberts, 100 S.Ct. 2531 (1980). Where then would there be any prejudice to the State in the unlikely event that a retrial is necessary after an appeal? Unlikely when one considers the number of criminal convictions that are reversed for a new trial.

Similarly, the opinion of the First District Court of Appeal expressed concern that any change in the escape rule should be done by the Legislature since the right to an appeal is guaranteed by the Florida Constitution. As a matter of policy, if the Federal Escape Rule were invoked in the State of Florida, it would leave little incentive for a fugitive to return to the jurisdiction of the courts.

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)

Petitioner first claims that co-defendant Ramirez's entrapment defense "...was obviously intended to include Respondent." (PB 14). Curiously, the law is clear that entrapment will not lie in this type situation, i.e., where the defendant has had no contact with the informant but rather sells the drugs to a co-defendant who may have been entrapped by the informant: State v. Perez, 438 So.2d 436 (Fla. 3rd DCA 1983); State v. Garcia, 528 So.2d 76 (Fla. 2nd DCA 1988), rev. den., 536 So.2d 244 (Fla. 1988).

Whether or not any testimony presented by Ramirez was beneficial to Respondent - not conceding that it was - is a moot point:

> "We do not feel justified in engrafting upon this statute additional conditions which would preclude joint defendants from selecting joint counsel or which would enable one defendant, if he is so minded, to call a witness in his own behalf and thereby deprive a co-defendant of the right to open and close merely because the testimony of the witness called by the one is of benefit to the other." Faulk v. State, 104 So.2d 519, 523 (Fla. 1958)

The principle at issue here has been clear for at least 130 years when the enacting statute was considered by this Court in 1858 in the case of Heffron v. State, 8 Fla. 1873. That decision was thereafter reviewed by this Court again in Faulk, supra.

Recognizing that the law on this principle is clear and well founded in our jurisprudence, Petitioner then attempts to

denigrate it by claiming it is no longer a legislative enactment "...but only a rule of criminal procedure." (PB 18, emp. sup.)

Petitioner has overlooked the purpose of criminal court rules, which are to "...effectuate and implement constitutional and statutory rights and, to the extent possible, to insure against their violation." Dept. of HRS, Div. of Youth Services, vs. Golden, 350 So.2d 344, 346 (Fla. 1977). Clearly then, and contrary to Petitioner's assertion, this Court's reasoning in Birge v. State, 92 So.2d 819 (Fla. 1957), is still applicable and the right to concluding argument by the defendant, when offering no testimony or his own testimony, still provides "...for those accused of a crime an orderly judicial safeguard for the determination of their rights." Birge, p. 822.

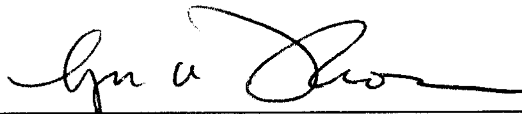
Finally, it would be foolhardy for one to attempt to gauge the impact of concluding argument under a harmless error examination and a plain and simple rule would be replaced with confusion and chaos.

CONCLUSION

Respondent respectfully requests this Court to answer both certified questions in the negative and to approve the decision of the First District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to John Koenig, Jr., Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 by regular U.S. Mail on this the 8th day of February, 1990.



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