Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 75,717

THEWELL EUGENE HAMILTON,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR HOLMES COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellee accepts the Appellant's preliminary statement and will also give references to the record on appeal as "R" with page numbers in parentheses.

STATEMENT OF THE CASE

The Appellee accepts the Statement of the Case as set forth by the Appellant with the addition of the fact that the advisory verdict of the jury was by a vote of seven (7) to five (5). (R-2)

STATEMENT OF THE FACTS

The Defendant objected and moved for a mistrial when it was discovered that unauthorized material was in the jury room during penalty phase jury deliberations (R-15). It is also noted that initial objection to the unauthorized materials was made prior to the verdict being published (R-14). The trial Court took the matter under advisement and requested written authority within ten (10) days by each party (R-17) *so* that the trial Court did not simply, three months later, grant a Motion for Mistrial.

The trial Court denied a Motion for New Trial after taking testimony on February 20th, 1990 (R-38) but set aside the advisory verdict ordering the empaneling of a new jury for the penalty phase (R-30 R-38). The trial Court, after hearing the State indicate they were going to appeal and attempt to get a stay, reiterated it's feelings

regarding the granting of a new penalty phase hearing, further directing that hearing (R-35 R-36).

The Appellant in addition to filing a Notice of Appeal on the granting of the new penalty phase hearing requested a stay in this Honorable Court with the Appellee filing a response and objection to that stay. This Honorable Court granted the stay per order dated March 16th, 1990 which contained a scrivener's error indicating it was the Appellee's Motion for Stay.

SUMMARY OF ARGUMENT

The trial Judge in his discretion granted a new penalty phase hearing in an abundance of caution and certainly in consideration of this Court's Decision in Hamilton v. State, 547 So.2d 630 (Fla. 1989).

Clearly unauthorized materials were in the jury room during deliberations in violation of Fla. R. Crim. P. 3.400. A trial Court must be armed with discretion because of it's familiarity with the circumstances, conditions, and tensions existing at the time of the granting of the motion.

That judgement call by the trial Judge should not be disturbed.

ARGUMENT

ISSUE

SHOULD THE TRIAL JUDGE'S GRANTING OF A NEW PENALTY PHASE HEARING BE REVERSED.

There was a clear violation of Rule 3.400 Fla. R. Crim. P. which clearly deliniates what items may be taken into a jury room, said rule of Criminal Procedure sets forth:

> "The Court may permit the jury, upon retiring for deliberation, to take to the jury room:
>
> a. A copy of the charges against the defendant;
> b. forms of verdict approved by the Court, after first being submitted to counsel;
> c. any instructions given; but if any instruction is taken all the instructions shall be taken;
> d. all things received in evidence other than depositions. If the thing recieved in evidence is a public record or a private document which, in opinion of the Court, ought not to be taken from the person having it in custody, a copy shall be taken or sent instead of the original."

The Appellee (Defendant) timely requested a mistrial (R-14 R-15).

The issue is whether the trial Judge in exercising his discretion in granting a new penalty phase hearing overstepped his authority for the violation of the Rule. Certainly, a trial

Court must be armed with discretion because it is familiar with the circumstances, conditions, and tensions existing at the time. State ex rel. Pryor, v. Smith, 239 So.2d 85 (Fla. 1st DCA 1970). It should be noted on page 86 of the Smith case that the Court concluded

> "The entry into the jury room of the unadmitted evidence amounted to an impermissable intrusion of the jury's deliberative process in violation of the rule announced by the Supreme Court in State ex rel. Larkins v. Lewis, 54 So.2d 129 (Fla. 1951)"

It is clear that the Granting of a mistrial is in the trial Court's discretion, Palmer v. State, 486 So.2d 22 (Fla. 1st DCA 1986)

Federal Decisions follow the same principles in that the granting of mistrials are in the trial Judge's discretion. U.S. v. Pridgen 462 F 2d 1094. Most cases on the subject of mistrials are where the trial Court has denied a mistrial on behalf of the Appellant (Defendant) and reiterating the principle of the trial Court's discretion unless there was a clear abuse.

How can we say what affect the magazines had on the jury during their deliberation? The Supreme Court of Florida clearly indicated in Bennett v. State, 316 So.2d 41 (1975), that error is not harmless if there is a reasonalble possibility

that it might have contributed to the conviction.

The Court stated on page 44:

> "The first error of which defendant complains was of constitutional dimension and warrants reversal without consideration of the doctrine of harmless error. Jones v. State, supra. In any event the error should not be held harmless, as contended by the State, if there is a reasonable possibility that it might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85, 84 S. Ct. 229, 11 L.Ed.2d 171 (1963); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)."
> (Emphasis added)

We also know that the Florida Courts have been consistent in their rulings with regard to unauthorized material in jury rooms, as shown in their reversal reflected in Smith v. State, 95 So.2d 525 (1957 Fla.), when a dictionary was allowed in the jury room without informing defense counsel. Federal authorities follow the same proposition and new trials are granted or evidentiary hearings ordered where there has been misconduct bv the jury by unauthorized material in the jury room. The Court indicated that there must be a new trial "unless it can be said that there is no reasonable possibility the books affected the verdict." The Court further

stated that on page 745:

> "This court reversed, applying the test of whether it could be said there was no reasonable possibility that the extrinsic matter affected the verdict."

The words of Justice Drew as stated in Grant v. State, 194 So.2d 612 (Fla. 1967) are always applicable:

> "Many a winning touchdown has been called back and nullified because someone on the offensive team violated a rule by which the game was to be played."

A fair trial by an impartial jury is guaranteed by both the Constitution of the United States and of the State of Florida. The Supreme Court of the United States has repeatedly held together with our Courts that trials must be fair and failure to observe fundamental fairness essential to our concept of justice will grant reversal. See Estes v. Texas, 381 U.S. 352, 85 S.Ct. 1628. The Estes case indicated further that identifiable prejudice need not be shown.

It is the defendant's position that there was a flagrant violation of the Rules of Criminal Procedure regarding unauthorized material in the jury room and that denied him a fair trial and he was clearly prejudiced.

Since 1891 the Florida Courts have always

strictly upheld the principle that no extrensic material should be in a jury room during deliberation. Johnson v. State, 9 So.202 (1891).

The trial Court did not overreact and in fact a trial Judge pursuant to Fla. Stat. 921.141 (1) has the authority and *may* summon a special jury for a hearing on the issue of penalty, as follows:

> "...the trial Judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition or penalty....."

CONCLUSION

The trial Court properly granted a mistrial and summoned a new jury to determine the penalty recommendation exercising his discretion and his wisdom in that regard should not be reversed. The State cannot be prejudiced by a new penalty phase hearing by a jury. Only the defendant can be prejudiced by violation of the Rules of Criminal Procedure and a failure to grant him that new penalty phase hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing matter has been furnished to Mark C. Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, by MAIL/~~DELIVERY~~ on this 21st day of May, 1990.

ROBERT T. ADAMS, JR.