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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,308

GEORGE MYLES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

In this reply brief, as in the initial brief of petitioner on the merits, all emphasis is supplied unless the contrary is indicated.

ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO COMMUNICATE ELECTRONICALLY WITH HIS LAWYER DURING THE CLOSED CIRCUIT TESTIMONY OF THE ALLEGED CHILD VICTIM WHERE SECTION 92.54(4), FLORIDA STATUTES (1987) REQUIRES SUCH MEANS OF COMMUNICATION, AND THE DENIAL OF SUCH MEANS OF COMMUNICATION DEPRIVED THE DEFENDANT OF HIS RIGHT TO COUNSEL AND RIGHT OF CONFRONTATION GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The state makes basically two arguments in this case. First, the state argues that Section 92.54(4), Florida Statutes (1987) does not mandate electronic means of communication between an accused and his attorney during the closed circuit testimony of a child witness, and that the alternative means of communication utilized in this case were sufficient. Second, the state claims that any error in the trial court's failure to provide electronic means of communication does not require reversal because there was no objection to the procedure utilized by the trial court and because Mr. Myles never attempted to communicate with his attorney through the means supplied by the trial court.

The state's sole citation of authority in support of its argument for a permissive interpretation of the term "may" in Section 92.54(4) is this Court's recent decision in *Burdick v. State*, 17 F.L.W. S88 (Fla. February 6, 1992). In *Burdick*, this Court held that the use of the term "shall" in Section 775.084(4)(a), Florida Statutes (1989) is permissive, as is the use of the term "may" in Section 775.084(4)(b). However, this holding was based on this Court's detailed analysis of the particular legislative history behind Section 775.084(4), which analysis led this Court to the following conclusion:

> Thus, contrary to the State's assertion, it seems clear that the legislature has now at least tacitly *approved*, not rejected, this Court's interpretation of subsection (4)(a) as providing for a permissive, as opposed to a mandatory, life sentence.
>
> In any event, we note that our harmonious construction of section 775.084(4)(a) and section 775.084(4)(b) makes eminent sense. There is no reason why the legislature would have mandated life sentences for habitual first-degree felony offenders but left permissive the sentencing for habitual first-degree *violent*

> felony offenders. If anything, logic would dictate that the legislature would have intended the reverse.
>
> It follows that section 775.084(4)(b), which expressly uses the discretionary word "may," is also permissive as to life sentencing. We are not persuaded by any of the State's arguments that we should construe the word "may" to mean "shall" when in the context of the same subsection we previously held the word "shall" to mean "may".

17 FLW at S89 (emphasis in original).

Unlike Section 775.084(4), there is nothing in the legislative history behind Section 92.54(4) to indicate that the term "may" should be construed as permissive. Both logic and the principles of statutory construction recited in the initial brief in this case dictate that the term "may" in Section 92.54(4) should be construed as mandatory. The state makes no attempt to distinguish any of the authorities cited in the initial brief which hold that the term "may" should be construed as mandatory in statutory contexts similar to the use of the term "may" in Section 92.54(4). Those authorities[1] establish that Section 92.54(4) mandates electronic means of communication between the accused and his attorney during the closed circuit testimony of a child witness if the accused wishes to avail himself of such means of communication.

Thus, the alternative non-electronic means of communication utilized by the trial court in this case were insufficient because electronic means of communication are mandated by Section 92.54(4). Furthermore, the state's brief gives the erroneous impression that the means of communication utilized by the trial court in this case allowed Mr. Myles to communicate with his attorney in writing *during* the testimony of the child witness. The record in this case clearly establishes that Myles was only allowed to communicate with his attorney during the testimony of the child witness by orally communicating with the bailiff who would then relay the message to defense counsel through the trial judge.

The judge stated the following concerning Myles' communication with his attorney during the child's testimony:

---

[1]*Weston v. Jones*, 41 Fla. 188, 25 So. 888 (1899); *Comcoa, Inc. v. Coe*, 587 So.2d 474 (Fla. 3d DCA 1991); *Woodland v. Lindsey*, 586 So.2d 1255 (Fla. 4th DCA 1991); *Williamson v. State*, 510 So.2d 1052 (Fla. 3d DCA 1987); 49 Fla.Jur.2d Statutes §18 (1984).

> Rather than the microphone here, I would prefer that he tells the bailiff whatever he wants, and the bailiff can come in and tell me and then I can stop or delay the proceedings in there, depending upon what he says.
>
> * * * * * * *
>
> So, I would prefer not to have the microphone. If he wants to communicate with us in there --
>
> The bailiff will be in here. He will tell the bailiff and the bailiff will immediately come in, and we'll either stop -- stop the procedure, come back, and have the jury go back.
>
> * * * * * * *
>
> I'm giving him the right to communicate with his attorney by telling the bailiff, and let him tell you immediately whatever he says.
>
> I can't imagine that five seconds is going, or ten seconds is going to cause any problem. And, if it did it would be enough for a mistrial anyhow, if it was that serious of a matter.

(TR. 850-852). The judge stated the following concerning Myles' written communication with his attorney:

> We're in there. We're all in there. The only one that's here is Mr. Myles, and he's going to have a microphone on for emergency use only, and I can't imagine what the emergency would be.
>
> I mean, he can write down anything he wants on a pad of paper, and before you cross-examine the witness I'll have a break and you can come back in here and talk with him and discuss with him whatever you want.
>
> He can write out any questions that he wants you to ask his daughter, but I see no reason to have the microphone here.
>
> * * * * * *
>
> He's got something to communicate, he can write it down and tell you about it before you cross-examine. I can't imagine anything except that microphone might cause him to say something to you over it that the jury might hear.

(TR. 850-852).

These portions of the record make it clear that Myles' communication with his attorney during the child's testimony was limited to oral communications through the bailiff, while any

written communications could only take place after the conclusion of the child's direct examination and prior to cross-examination. As detailed in the initial brief of petitioner, this alternative means of communication utilized by the trial judge was wholly inadequate because it lacked any semblance of immediacy or privacy. Requiring Mr. Myles to orally relate to the bailiff all communications with his attorney constituted a serious violation of the attorney-client privilege. Certainly, in a normal trial setting where both the accused and his attorney were sitting at counsel table the bailiff would be absolutely prohibited from listening to conversations between the accused and his counsel.

In light of the attorney-client privilege, Mr. Myles' failure to avail himself of the oral-relay-through-the-bailiff system devised by the trial judge does not in any way support a claim of harmless error in the trial court's refusal to follow the electronic communication requirements of Section 92.54(4). The state's attempt to establish a claim of harmless error based on Myles' failure to orally communicate with the bailiff must also be rejected because the trial court had given Myles good cause to believe that any oral statement he made in the presence of the jury would subject him to a jail sentence for contempt:

> [DEFENSE COUNSEL]: I would leave --
>
> In an abundance of caution, I would leave the microphone.
>
> I'm not sure how --
>
> THE COURT: The thing is I don't want --
>
> In other words, if he communicates with you and says she's a liar, and he says it loud enough for the jury to hear it, I don't want that to happen.
>
> Now, if he has no method to communicate to you in there, he can't possibly say it. *If he says it, nobody is going to hear it except the jury, and at that time I'm going to put him in jail right away and take him out of the courtroom* because if he says anything in front of jury when you can't hear it, it's absolutely useless and he's only doing something to get it to the jury.
>
> So, I would prefer not to have the microphone.

(TR. 851). Considering this warning by the trial judge, and considering the attorney-client privilege, Mr. Myles cannot be faulted for not attempting to orally communicate to the bailiff

matters which he wished to discuss with his attorney.

Myles did take advantage of the written option offered by the trial judge because that option did not risk a breach of the attorney-client privilege or a jail sentence for contempt. However, as the trial judge did not allow Myles to give his written communications to his attorney until after the direct examination of the child witness, this option was wholly inadequate, as it lacked any semblance of the immediacy required for meaningful communication between Myles and his attorney during the testimony of the chief prosecution witness. Furthermore, this option obviously did not satisfy the requirement of electronic means of communication mandated by Section 92.54(4).

Thus, Mr. Myles cannot be said to have forfeited his right to complain on appeal about the violation of Section 92.54(4) because he did not avail himself of the oral-relay-through-the-bailiff system devised by the trial judge. Equally unavailing is the state's claim that the defense failed to object to the trial court's refusal to supply electronic means of communication. The state presents this argument in the following fashion:

> Most significantly, defense counsel did not object to the absence of electronic communication between Defendant and himself; rather, defense counsel stated, "All right Judge.". (T. 852).

(Brief of Respondent on the Merits at page 11).

This claim by the state that defense counsel did not object and simply stated, "All right, Judge", constitutes a gross misrepresentation of the state of the record in this case. What actually occurred in this case is that prior to the closed-circuit testimony of the child witness, the bailiff provided Myles with a microphone so that he could communicate with his attorney during that testimony (TR. 848). The trial judge initially agreed to let Mr. Myles use the microphone (TR. 849). However, the judge almost immediately changed his mind, ordered the microphone to be disconnected, and explained the alternative method to be utilized for communication between Myles and his attorney (TR. 850).

After the judge issued his ruling limiting communication to non-electronic means, defense counsel specifically requested that the electronic means of communication be restored:

MR. CARTER: I would leave --

In an abundance of caution, I would leave the microphone.

I'm not sure how --

(TR. 850). The judge then advised defense counsel that he would not allow Myles to use a microphone, and that the system devised by the court was going to be the only means of communication (TR. 850-852). Defense counsel responded to this mandate by pointing out the statutory requirement concerning communication between the accused and his attorney during closed-circuit testimony (TR. 852). It was only after this repeated objection was again met by the trial judge's insistence on the non-electronic means of communication that defense counsel stated "All right, Judge." (TR. 852). When viewed in its proper context, this statement was nothing more than an acknowledgement of the judge's ruling after it became clear that defense counsel's objections were being rejected by the trial court. Accordingly, the trial court's error in refusing to follow the mandatory electronic communication requirements of Section 92.54(4) was not waived by any failure to object by defense counsel.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that Court to reverse his judgments of conviction and sentences and remand the case to the trial court with directions that he be granted a new trial.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 1st day of April, 1992.

HOWARD K. BLUMBERG
Assistant Public Defender