IN THE SUPREME COURT OF FLORIDA

ANDREW LEE GOLDEN

Appellant,

v. CASE NO. 78,982

STATE OF FLORIDA,

Appellee.
_____/

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA**

SUPPLEMENTAL RESPONSE BRIEF OF APPELLEE

MARY LEONTAKIANAKOS
FLORIDA BAR NO. 0510995

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-9105

ATTORNEY FOR THE STATE OF FLORIDA

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ARGUMENT

THE DEFENDANT WAS NOT DENIED HIS RIGHT TO COUNSEL DURING A TRIAL RECESS.

The Defendant now claims that he was denied his right to counsel during a recess in the trial. A review of the record, as well as the law reveals that this claim is without merit.

After the defendant's direct examination the trial judge took a luncheon recess. Prior to the recess the prosecutor advised the judge to instruct the defendant to refrain from discussing "his testimony" with his lawyer (R 2579). At that point the defendant's attorney advised the court that he had already discussed this matter with the defendant at the earlier recess (R 2579). No admonition was given by the court (R 2579).

This Court has held that denial of consultation between a defendant and his lawyer during a trial recess violates the defendant's right to counsel. Amos v. State, 618 So.2d 1074, 1075 (Fla. 1993), Thompson v. State, 507 So.2d 1074, 1075 (Fla. 1987), Bova v. State, 410, So.2d 1343, 1345 (Fla. 1982).[1] However, that was not the situation here.

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[1] This Court has required a harmless error analysis in such situations. Thompson v. State, 507 So.2d 1074, 1075 (Fla. 1987). If this Court somehow construes the trial judge's actions in the instant case to amount to error, such error should be held harmless. There is no reasonable possibility the judge's actions affected the outcome of the case, as the defendant was not prevented from consulting with his lawyer about any non-testimonial aspects of his case.

It is evident from the record that the defendant was not denied access to his lawyer. The prosecutor did not request nor did the trial judge order that the defendant not consult with his lawyer during the recess or be in any way prevented from meeting with him.

The prosecutor's remark was a comment on a lawyer's ethical obligation to not coach his witness about his testimony. The defendant's lawyer simply acknowledged this obligation when he advised the trial judge that he had discussed this with his client at the earlier recess.[2] To now complain that this exchange deprived the defendant of his right to counsel is contrived at best.

The cases cited by the defense are inapposite. They involve situations where (1) the defendant was actually prohibited from consulting with his lawyer by the trial judge and (2) properly objected by evincing his desire to so consult. This did not happen in the instant case. There was no admonition given by the judge to the defendant or his lawyer. Defense counsel simply acknowledged his ethical obligation to not coach his client about his testimony.

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[2] The Defendant now claims alternatively that this statement on the part of his lawyer is somehow blantant evidence of ineffective assistance. This argument must fail, as there is no evidence that anything Mr. Smith said resulted in error, much less in prejudice to the defendant of the level required to establish such a claim. See Strickland v. Washington, 466 U. S. 668, 694 (1984).

The Eleventh Circuit in a recent opinion dealt with a similar situation in Crutchfield v. Wainwright, 803 F.2d 1103 (11th Cir. 1986). That Court was faced with a scenario where there was an actual admonition by the trial judge forbidding the defendant's consultation with his lawyers. Even through the Eleventh Circuit adopted a per se reversible rule in that situation it found no deprivation of the right to counsel in the case before it as there was no indication on the record that the defendant or his lawyers wanted to confer. The Court held "that a defendant or his lawyer must indicate, on the record, a desire to confer in order to preserve a deprivation of assistance of counsel claim." Id. at 1109.

The Eleventh Circuit's approach is sound.[3] In situations where there is no indication on the record that the defendant or his lawyer wanted to confer no error can exist. The onus should be on the defendant to demonstrate (1) that he was prohibited from consulting with his lawyer and (2) that he brought this to the trial judge's attention. This defendant cannot demonstrate either.

RELIEF SHOULD BE DENIED.

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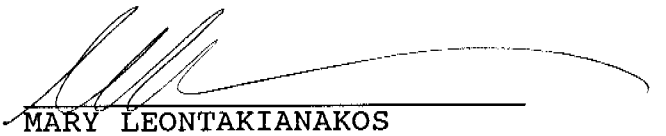
[3] The Third District Court of Appeals has applied the same reasoning in denying such a claim. Recinos v. State, 420 So.2d 95, 98 (Fla. 3d DCA 1982).

CONCLUSION

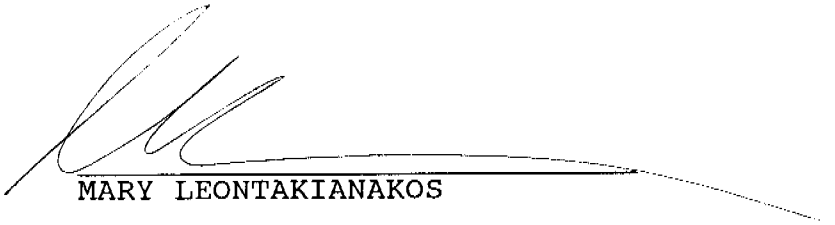
Based on the foregoing argument, the State respectfully requests that this Honorable Court affirm the defendant's conviction and sentence.



MARY LEONTAKIANAKOS
Florida Bar No. 0510995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Attorney for Appellant, GWENDOLYN SPIVEY, Post Office Box 14494, Tallahassee, Florida 32317 on this 10 day of September, 1993.



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