IN THE SUPREME COURT OF FLORIDA

BYRON B. BRYANT,

Appellant

Vs.

STATE OF FLORIDA,

Appellee

SUPREME COURT NO. 81,862

CIRCUIT COURT NO. 92-791CF A02

APPEAL FROM CIRCUIT COURT, PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLANT

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STATEMENT OF THE FACTS

Following closing arguments, the jurors requested a readback of the reasons why Detectives Brand and Hartmann arrested Appellant (R1339-1340). The attorneys agreed to a full readback of the testimony of those two officers (R1340).

As the jury was about to be brought back in, defense counsel requested that the Judge wait until Appellant was present. The Judge agreed (R1341-1342). The Judge then asked if he could be excused during the readback. The attorneys agreed (R1342).

The Judge told the jurors that they would have a refreshment break after about two hours and fifteen minutes of readback (R1358) at which time he would be tiptoeing in to see if they wanted to continue or not (R1359). As the readback began, the Judge left to make calls (R1362).

The Judge interrupted the readback forty two minutes later (R1362). The jury wanted to stop the readback, (R1363) but the defense did not agree (R1363-1364), so the readback continued. The Judge again left as the readback resumed, saying he would return shortly after 5 p.m. (R1369).

POINT INVOLVED

VII. DID THE JUDGE COMMIT FUNDAMENTAL ERROR BY LEAVING THE COURTROOM FOR THE READBACK OF TESTIMONY WITHOUT A WAIVER OF HIS PRESENCE BY APPELLANT?

SUMMARY OF ARGUMENT

When the trial Judge did not remain for the readback of testimony, he violated Appellant's right to have him present throughout the trial. Though counsel agreed to it, Appellant was not even there and was never consulted or asked if he agreed. Under these circumstances, there was no valid waiver of the Judge's presence. The error could not have been, and was not harmless.

POINT VII

THE JUDGE COMMITTED FUNDAMENTAL ERROR BY LEAVING THE COURTROOM FOR THE READBACK OF TESTIMONY WITHOUT A WAIVER OF HIS PRESENCE BY APPELLANT

The Judge did not want to sit through a readback of over three hours. He had calls to return and other business to conduct. He asked the attorneys for consent to leave and they gave it. However, it is clear that no one asked the defendant if he agreed, and he never gave his consent.

The problem was well stated by this Court in Brown v. State, 538 So.2d 833 at 834-835 (Fla. 1989):

> "Article I, section 16 of the Florida Constitution and the federal constitution's sixth amendment guarantee criminal defendants trial by an impartial jury. The presence of a judge, who will insure the proper conduct of a trial, is essential to this guarantee."

Appellant was denied his fundamental right to have the Judge present throughout his trial.

This Court has consistently refused to find a waiver of this fundamental right except "in limited circumstances and then only by a fully informed and advised defendant, and not by counsel acting alone" (Brown v. State, supra, 538 So.2d at 835).

In Roberts v. State, 510 So.2d 885 (Fla. 1987), this Court found a valid express waiver of the Judge's presence at a jury view where defense counsel consulted Roberts and entered the waiver in his presence. Roberts does not apply here because Appellant was not even in the courtroom when the purported waiver occurred, and could not have been consulted.

In Carter v. State, 512 So.2d 284 (Fla. 3DCA 1987), cited with approval by this Court in Brown, supra, the Court found no knowing and intelligent waiver of the Judge's presence at voir dire despite want of objection at trial. In McCollum v. State, 74 So.2d 74 (Fla. 1954), this Court reached the same conclusion where the Judge did not accompany the jury to a view of the crime scene.

Brown, supra, involved a case where the Judge was not present to communicate with the jury when it requested transcripts, but there is no reason in law or fact not to apply the same rule to failure of the Judge to remain for the readback. In Maldonado v. State, 634 So.2d 661 (Fla. 5DCA 1994) the Court concluded that a new trial was required where counsel purported to allow the Judge to stay out for the readback. To the same effect is Glee v. State, 639 So.2d 1093 (Fla. 4DCA 1994).

The State will undoubtedly claim that any error was harmless. Both Maldonado, supra, and Glee, supra, consider the error cannot be harmless. Moreover, the importance of the readback cannot be denied. The very fact that the jurors wanted the readback makes it critical. Here, as in Maldonado, supra, we cannot know for sure what was read to the jurors. We do not know whether the court reporter and the jury communicated in any other respect than the reading of the testimony. We do not know the tone of voice the court reporter used. We do not know the court reporter's demeanor and manner in dealing with the jury. This Court cannot determine beyond a reasonable doubt that the verdict was not affected, as required by State v. DiGuilio, 491 So.2d 1129 at 1139 (Fla. 1986).

CONCLUSION

Because the Judge left the readback, a new trial is required.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to SARA D. BAGGETT, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida, 33401, by hand, this 28th day of September, 1994.

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