097 12

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 83,165

FILED
SID J. WHITE
MAR 30 1994
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE

______________________________/

COMMENTS AND RECOMMENDATIONS
OF THE JUVENILE JUSTICE COMMITTEE OF
THE FLORIDA PUBLIC DEFENDER ASSOCIATION

After having received and reviewed the report of The Juvenile Court Rules Committee and The Florida Bar, comes now The Juvenile Justice Committee of The Florida Public Defender Association and files this response to the proposed Amendments to the Florida Rules of Juvenile Procedure.

Rule 8.100 - General Provisions for Hearings.

The Juvenile Court Rules Committee has proposed amending Rule 8.100(c) Invoking the Rule, by adding the following language:

> "However, a victim or victim's next of kin may not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that this person is subpoenaed to testify unless, upon motion, the court determines this person's presence to be prejudicial."

Our committee is opposed to this proposed change and would recommend to this Court that this language be completely removed from the proposed Rules Amendments. Our position is in conformity with that taken by The Florida Bar Board of Governors who have opposed this addition.

The Rule of witness sequestration as codified by existing Rule 8.100(c) is intended to ensure uncolored testimony by witnesses called during delinquency proceedings. As recognized by the United States Supreme Court in Geders v. United States, 425 U. S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976):

> "The aim of imposing 'the rule on witnesses,' as the practice of sequestering witnesses is sometimes called, is two fold. It exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid." (Citation omitted.)

Id., 96 S. Ct. at 1335. This Court has also recognized that the purpose of the Rule is to prevent the shaping of testimony by witnesses. Dumas v. State, 350 So. 2d 464, 465 (Fla. 1977). In Dumas this Court went on to say, "The rule of sequestration is a procedural device available to purify trial testimony when counsel for either side believes it to be advantageous. The rule must be invoked in the first instance by counsel." Id. at 466. In Odom v. State, 403 So. 2d 936 (Fla. 1981), this Court further explained the basis behind the Rule when it said, "The purpose of the rule of sequestration of witnesses 'is to avoid the coloring of a witness's {sic} testimony by that which he has heard from other witnesses who have preceded him to the stand.'" (Citations omitted.) Id. at 941. Clearly, the presumption exists that witnesses may be sequestered prior to their testimony upon the request of counsel in order to ensure a fair and untainted fact-finding process.

The Rules Committee's proposed change is taken almost verbatim from Section 960.001(1)(d)3, Florida Statutes, and this statutory section appears to be an outgrowth of Article I, Section 16(b), of the Florida Constitution. The fundamental effect of the proposed rule change is to remove the presumption for sequestration and to shift the burden to the accused child to demonstrate

prejudice before a witness who is a victim or victim's relative may be excluded.

In Gore v. State, 599 So. 2d 978 (Fla. 1992), cert. den., __ U. S. __, 113 S. Ct. 610, 121 L. Ed. 2d 545 (1992), this Court had the opportunity to examine this issue. In Gore, the defendant was convicted of capital murder. During the course of the trial the victim's stepmother was excused by the trial court from the rule of witness sequestration solely because she was related to the victim. Id. at 985. This Court held that:

> "This provision {Article I, Section 16(b), Florida Constitution} does not provide an automatic exception to the rule of sequestration. While in general relatives of homicide victims have the right to be present at trial, this right must yield to the defendant's right to a fair trial."

Id. at 985-986. In reiterating the purposes underlying the Rule, the Court went on to say:

> "The rule of witness sequestration is designed to help ensure a fair trial by avoiding 'the coloring of a witness's {sic} testimony by that which he has heard from other witnesses who have preceded him on the stand.' (Citations omitted.) However, a defendant does not have an absolute right to exclude witnesses from the courtroom. 'The trial judge is endowed with a sound judicial discretion to decide whether particular prospective witnesses should be excluded from the sequestration rule.'" (Citations omitted.)

Id. at 986. This Court ultimately held that there was no abuse of judicial discretion in allowing the particular witness to remain in the courtroom due to the non-materiality of the witness' testimony as well as her limited participation in the actual trial. Id.

It is apparent from a reading of Gore that this Court has already had an opportunity to evaluate the rule of witness sequestration in terms of victim's rights legislation. In its decision it is clear that these rights are subordinate to the fundamental constitutional rights to a fair trial. Id. at 985-986. The proposed rule change will have the practical effect of placing the right to a fair trial in an inferior relationship to the right of a victim to be present during the accused child's adjudicatory hearing. This effect is a direct result of the proposed rule's reversal of presumptions that result in a presumption against sequestration of a witness because of the witness' status.

In 1992 the Florida Legislature amended Section 90.616, Florida Statutes, by the addition of subsection (2)(d). Chapter 92-107, Section 1, Laws of Florida (1992). The new addition to Section 90.616 provides that:

> "(2) A witness may not be excluded if he is:
> (d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child

> victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial."

Section 90.616(2)(d), Fla. Stat. (1992). Although not identical in wording to the proposed amendment to Rule 8.100(c), the language and intent appear to be similar in nature.

On July 28, 1993, The Florida Bar through the Board of Governors and Executive Director John F. Harkness, Jr., filed a Petition with this Court to adopt, inter alia, the procedural aspects of Chapter 92 - 107, Section 1, as an amendment to the Supreme Court's Rules of Evidence. (Appendix I). The Petition itself, while listing twenty legislative amendments to the Code of Evidence dating from 1981, did not specifically delineate the nature of any of the amendments to the Evidence Code.

On December 16, 1993, in case number 82,146, this Court adopted nineteen of the twenty requests of The Florida Bar including Chapter 92-107, Section 1, Laws of Florida. In re Florida Evidence Code, 18 Fla. L. Weekly S643 (Fla. 12/16/93). It is apparent from reading the opinion that at the time of the issuance of the opinion, there had been no response to the Petition filed therein by The Florida Bar.

On December 30, 1993, a Motion for Rehearing, Motion to Permit Late Filing of Amicus Brief and Rehearing, and Amicus

Curiae Brief were filed by The Honorable Richard L. Jorandby, Public Defender, Fifteenth Judicial Circuit. (Appendix II). On January 27, 1994, The Florida Public Defender Association filed in case number 82,146, its Motion to Adopt the Amicus Curiae Brief of Richard Jorandby. (Appendix III). Although Mr. Jorandby's brief and the position of The Florida Public Defender Association are in reference to an unrelated proposed change to Chapter 90, Florida Statutes, it appears that the Court's opinion in case number 82,146 is not yet final as the Motion for Rehearing is presently under consideration.[1]

Because this Court has previously held that the right to a fair trial supersedes automatic exclusion from the rule of witness sequestration, Gore, supra, at 985-86, and because this Court has yet to adopt any Rule of Evidence or Procedure to the contrary, we are in agreement with the Board of Governors in opposition to this change and would urge this Court to leave Rule 8.100 unchanged vesting discretion in the trial courts to refuse requested sequestration once it is established that there would be no prejudice to the accused child or that the witness is not material or would not be presenting extensive testimony.

---

[1] Undersigned counsel was informed by telephone through the Office of the Clerk, on March 28, 1994, that the Motion for Rehearing in case number 82,146 was still pending.

Rule 8.104 - Testimony by Closed-Circuit Television.

The Juvenile Court Rules Committee and The Florida Bar have proposed changes to Rule 8.104 that eliminate the limitation on the use of closed-circuit television testimony at adjudicatory hearings to cases involving alleged sexual abuse. As proposed to this Court, the amended rule would authorize the utilization of closed-circuit television to present the testimony at an adjudicatory hearing of any witness under the age of sixteen. The Juvenile Justice Committee of The Florida Public Defender Association is opposed to these proposed changes.

The existing rule was adopted in 1992 after the recommendation of The Juvenile Court Rules Committee. In Re Amendments to the Florida Rules of Juvenile Procedure, 608 So. 2d 478 (Fla. 1992). At the time of adoption, the proposal of the Rules Committee was that the rule apply to cases involving sexual offenses as well as child abuse cases. Id. at 479. Referring to Section 92.54, Florida Statutes, this Court declined to broaden the scope of the proposed rule beyond the parameters of Section 92.54. Id.

Subsequent to the adoption of Rule 8.104 and its limitation of applicability to sexual offense cases, the Florida Legislature amended Section 92.54. That section now applies to testimony of all children under age sixteen irrespective of the type of

offense of which the defendant is accused. The proposed amendment appears to be in response to the legislative modification to Section 92.54, Florida Statutes (1993).

Our committee suggests that the Court leave Rule 8.104 unchanged. A careful reading of Section 92.54, Florida Statutes (1993), leads to the conclusion that the legislature was concerned with the confrontational relationships between adult criminal defendants and children as witnesses or victims. Nowhere in Section 92.54 does the legislature refer to juvenile delinquency proceedings or adjudicatory hearings. The references are to trials and defendants. Had the legislature intended to modify juvenile court proceedings as suggested by the Rules Committee, then it can be presumed that these proposed procedures would likely be encompassed either within Chapter 39 or within Section 92.54. The Rules Committee has suggested and The Florida Bar has recommended changes to Rule 8.104 that exceed the legislative intent encompassed within Section 92.54. Absent a clear legislative intent to authorize closed-circuit television testimony in all juvenile court proceedings involving witnesses under the age of sixteen, we believe it to be a more prudent course for this Court to deny the requested change.

Our committee also believes the proposed changes to be ill-advised for additional reasons. First of all, it would seem

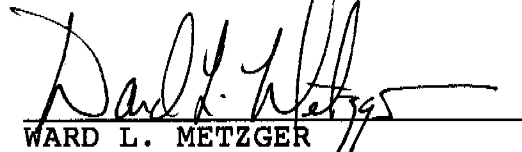
to be unnecessary to extend Section 92.54 to child witnesses in juvenile court. Juvenile court is much different than adult criminal court. Generally, the courtrooms are smaller and much less intimidating than criminal courtrooms. Adjudicatory hearings do not involve juries and by their very nature do not relate to accusations by children against adults. It is our experience that juvenile proceedings involve children as witnesses to a much greater degree than criminal proceedings. This may be due to the fact that children tend to get in trouble together or to do things to each other that result in referrals to the juvenile justice system. Because there are basically no limitations in the existing rule on who may file a request for use of closed-circuit testimony, when the request may be filed, and the proposed amendment expands the rules' application to all child witnesses under age sixteen, we believe that the proposed rule could prove to be quite burdensome to the efficient operation of juvenile court. The ultimate effect of the proposed amendments could impact on a large percentage of juvenile delinquency cases and could result in many continuances and additional hearings all of which would delay commencement and completion of adjudicatory hearings. Depending on how the motions are ruled upon by the trial courts and the existence or lack thereof of technology to comply with constitutional

confrontation guarantees, we would also anticipate an increase in appellate litigation resulting from the proposed changes.

Finally, our committee is concerned with the fiscal impact that the proposed amendments could have among the various judicial circuits of the state. Closed-circuit television technology would need to be available in all juvenile courtrooms in all counties and in many circuits the technology would need to be available simultaneously in multiple courtrooms. Prior to the adoption of this type of rule change, it would be appropriate for both the legislature and this Court to be apprised of the present statewide availability of the necessary equipment as well as accurate estimates as to requisite funding to provide the technology to conform to the intent of the rule. We also anticipate increased discovery and hearing costs resulting from the retention of expert witnesses competent to testify in regard to anticipated emotional harm or distress of child witnesses. We believe that these are matters best left to the province of the legislature which ultimately must provide the financial resources should the legislature deem it appropriate to encompass all child witnesses under age sixteen in juvenile court proceedings within the scope of Section 92.54, Florida Statutes.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

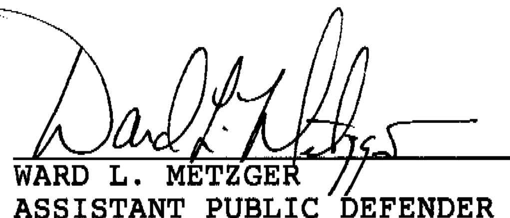
BY: 

WARD L. METZGER
JUVENILE COURT COORDINATOR
Office of the Public Defender
407 Duval County Courthouse
Jacksonville, Florida 32202
(904) 630-1548

FLORIDA BAR NO. 0333662

ON BEHALF OF THE JUVENILE JUSTICE COMMITTEE OF THE FLORIDA PUBLIC DEFENDER'S ASSOCIATION, THE HONORABLE JOSEPH W. DUROCHER, CHAIR

I HEREBY CERTIFY that a copy of the above and foregoing Comments and Recommendations Regarding Proposed Amendments to the Florida Rules of Juvenile Procedure has been furnished to The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, and The Honorable Daniel P. Dawson, Chair, Juvenile Court Rules Committee, 65 E. Central Blvd., Orlando, FL 32801-2429, by mail, this 29th day of March, 1994.



WARD L. METZGER
ASSISTANT PUBLIC DEFENDER