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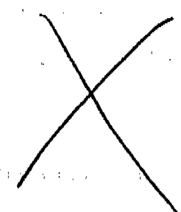
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	CASE NO. 84,732
JOHN WAYNE UPTON,	:	
Respondent.	:	

FILED
SID J. WHITE
FEB 2 1995
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

AMENDED RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
VS.	:	CASE NO. 84,732
JOHN WAYNE UPTON,	:	
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	:	

PRELIMINARY STATEMENT

Respondent was the defendant at trial, the Appellant, below, and will be referred to as the Respondent or Mr. Upton in the following brief. A one volume record on appeal, including the sentencing transcript, will be referred to by "R" followed with the appropriate page number in parenthesis. A two volume transcript of trial will be referred to by "T." All proceedings below were before the Honorable JOHN P. KUDER.

STATEMENT OF THE CASE AND FACTS

By information filed October 16, 1992 Respondent was charged with Count I: armed burglary with a firearm per Section 810.02(2)(b) and 775.087; Count II: sexual battery with a firearm per Section 794.011(3) and 775.087; and Count III: sexual battery with a firearm per Section 794.011(3), Florida Statutes (R 1). Per written waiver, the cause proceeded to a bench trial on February 5, 1993 (R 7, T 1). Respondent was found as to Count I: guilty, as charged; Count II: guilty of the lesser-included offense of battery; and Count III: guilty, as charged (R 8). A PSI was ordered and a scoresheet was provided reflecting 333 points in category two and a permitted sentence of 7 to 17 years prison. The cause proceeded to sentencing on April 15, 1993 whereupon Respondent was adjudicated guilty on all counts and sentenced to Count I: 12 years prison with a three year firearm minimum; Count II: credit for time served; and Count III: 12 years prison with a three year firearm minimum, concurrent to Count I (R 19).

Respondent filed a timely notice of appeal on May 14, 1993 (R 29). The Public Defender was appointed to represent Respondent on June 7, 1993 (R 34).

The First District Court of Appeal reversed the judgement and sentence below. See opinion in Appendix.

SUMMARY OF THE ARGUMENT

An effective waiver of a constitutional right must be knowing, voluntary and intelligent. See Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Logically, in order to find that a waiver is knowing, voluntary and intelligent, there must be, at least, evidence that Respondent was apprised of the waiver -- the waiver must be personal.

The First District Court of Appeal reversed Respondent's conviction because there was no record Respondent personally waived his right to trial by jury. The record contains a written waiver, but it is not signed by Respondent; neither was there any mention of the waiver in open court. Caselaw and the fundamental right to trial by jury require that, where the written waiver is not signed by the defendant and there is no other evidence Respondent has been apprised of the waiver and its meaning, the waiver is invalid. See, Tucker v. State, 559 So. 2d 218 (Fla. 1990); Tosta v. State, 352 So. 2d 526 (Fla. 4th DCA 1977), cert. denied, 366 So. 2d 885 (Fla. 1978); Hurd v. State, 440 So. 2d 691 (Fla. 1st DCA 1983); Williams v. State, 440 So. 2d 1290 (Fla. 4th DCA 1983).

ARGUMENT

DOES A LAWYER'S WRITTEN WAIVER OF JURY TRIAL ON BEHALF OF HIS CLIENT VALIDLY WAIVE THE DEFENDANT'S RIGHT TO A JURY TRIAL WHERE THERE IS NO INDICATION IN THE RECORD THAT THE DEFENDANT AGREED TO THE WRITTEN WAIVER OR OTHERWISE MADE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF HIS RIGHT TO TRIAL BY JURY? [as certified]

The First District Court of Appeal reversed Respondent's conviction because there was no record Respondent personally waived his right to trial by jury. The record contains a written waiver, but it is not signed by Respondent. Neither was there any mention of the waiver in open court.

An effective waiver of a constitutional right must be knowing, voluntary and intelligent. See Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Logically, in order to find that a waiver is knowing, voluntary and intelligent, there must be, at least, evidence that Respondent was apprised of the waiver, that the waiver was personal. Florida Rule of Criminal Procedure 3.260 ensures the waiver will be personal by permitting a defendant to waive a jury trial, in writing. Where the record contains a written waiver, signed by the defendant, caselaw is clear that the waiver should be upheld. Dumas v. State, 439 So. 2d 246 (Fla. 3d DCA 1983) (en banc), review denied, 462 So. 2d 1105 (Fla. 1985); Parker v. State, 636 So. 2d 794 (Fla. 1st DCA 1994). In that case, the defendant's signature is evidence that the waiver was personal.

However, when a defendant's signature does not appear on the written waiver, caselaw is clear that the record must contain other evidence that the defendant was apprised of the waiver. In Tucker v. State, 559 So. 2d 218 (Fla. 1990), for example, there was no written record of the defendant's waiver. Nonetheless, because the court adequately questioned Tucker about the waiver, in open court, and this colloquy was made part of the record, the waiver was upheld. This Court relied on Hoffman v. State, 397 So. 22d 288 (Fla. 1981) in saying that, while Tucker's waiver was not in compliance with Rule 3.260, it was only a technical non-compliance which did not harm the defendant. Plainly, the record showed Tucker had been apprised of his right to jury trial and consented in the waiver.

Caselaw is also clear that where the written waiver is not signed by the defendant and there is no other evidence Respondent has been apprised of the waiver and its meaning, the waiver is invalid. In Tosta v. State, 352 So. 2d 526 (Fla. 4th DCA 1977), cert. denied, 366 So. 2d 885 (Fla. 1978), there was no written record Tosta had agreed to the waiver, but there was an open court inquiry of defense counsel regarding the waiver, in Tosta's presence. That court deemed the record insufficient to support a waiver, as follows:

> [W]here there was no written waiver by the defendant and nothing in the record to show the defendant's concurrence in his counsel's waiver, or that he understood what was meant by waiver of a jury trial, that there was no valid waiver.

Id. at 527. This Court cited Tosta as an example of an insufficient record in its Tucker decision. See, also, Hurd v. State, 440 So. 2d 691 (Fla. 1st DCA 1983); Williams v. State, 440 So. 2d 1290 (Fla. 4th DCA 1983).

Petitioner argues, essentially, three things. First, he claims that a written waiver which is in non-compliance with Rule 3.260 in that the defendant did not sign it, amounts to only a "technical non-compliance" with the rule. Secondly, Petitioner argues that if this non-compliance proves to be significant, as opposed to technical, then this court should recognize defense counsel's authority to waive a defendant's right's, even where the Rules of this Court require otherwise. And finally, Petitioner argues that, even if the right to trial by jury cannot be waived by one's lawyer, the appropriate remedy is not reversal, but rather, a remand for an evidentiary hearing. Ultimately, the state would prefer an outright affirmance, leaving the defendant to bring his claim in a post-conviction motion via Rule 3.850, Florida Rules of Criminal Procedure.

The flaw of petitioner's first point is, of course, that a record which is devoid of any evidence of personal waiver is not merely "technical non-compliance." When, in Tucker, this court found failure to file any written notice only a "technical non-compliance", it was because the trial court had obtained Tucker's personal, oral waiver, in open court. Naturally, as long as a defendant's knowing, voluntary and intelligent waiver is supported by the record, any "technical

non-compliance" with the rule will not result in reversal. Similarly, in Dumas, the defendant's signature on the written waiver constituted evidence of personal waiver. It allowed a presumption that Dumas had been advised by his lawyer of his right to trial by jury and the meaning of such a waiver, a presumption which thereby shifted the burden to Dumas to allege that he was prejudiced, nonetheless.

By contrast, Respondent did not sign the written waiver. Naturally, if there is no record support that Respondent was cognizant of the waiver, then, there can be no presumption that his lawyer advised him of its meaning.

Petitioner must travel all the way to Maine to find his single example of another jurisdiction affirming under roughly similar circumstances. See, Petitioner's Brief on the Merits, p. 6. Petitioner fails to point out, however, that Rule 23(a) of the Maine Rules of Criminal Procedure, which requires a written waiver of jury trial, expressly states:

> [T]he absence of a writing shall not be conclusive evidence of an invalid waiver.

Hence, Petitioner is unable to provide even a single jurisdiction which sympathizes with his views under these circumstances.

Next, Petitioner argues that defense counsel has the authority to waive such rights for his client. Petitioner consistently fails to understand that in order for the waiver to be knowing, voluntary and intelligent, it must be personal,

even though Petitioner's own cases make this point abundantly clear, as follows:

> We begin with the observation that the purpose of [Federal] Rule 23(a) is to ensure that a criminal defendant is aware of his jury right before waiving it and that any waiver is personal and unequivocal. In order to maintain its effectiveness in protecting the underlying constitutional guarantee, we require strict compliance with the rule. Thus reversal is warranted where there is no written waiver signed by the defendant in the record and the defendant asserts either that he was unaware of his jury right or that he did not consent to its waiver. [e.s.]

* * *

> We therefore remand to the district court for an evidentiary hearing on this issue. Unless the government succeeds in proving Garrett's knowledge and consent, express or implied, Garret must be afforded a new trial, before a jury, on the forfeiture issue; only if the augmented record firmly establishes Garrett's knowledge and consent will the forfeiture order stand.

> [16] In concluding, we note:
>
> that it would have been better to do as the rule directs and that much could be said for enforcing it strictly as to such an entire waiver of jury trial. The right involved is a precious one; and a mechanical application of the express, bright-line provision of Rule 23(a) safeguarding it would not be wholly amiss: no written waiver signed by the defendant, no bench trial. [cite omitted]

U.S. v. Garret, 727 F. 2d 1003. at 1013 (11th Cir. 1984).

Finally, Petitioner argues that even if this waiver is deficient, then the appropriate remedy is to remand the case to the trial court for an evidentiary hearing. In support of this proposition, Petitioner cites no Florida cases, but resorts

instead to two federal cases. See Petitioner's Brief on the Merits, p. 6. This proposition is without merit because any evidentiary hearing would necessarily find the defense lawyer refusing to testify against his own client by asserting attorney-client privilege. The Fourth District covered this ground, before:

> [1] As it turns out, the call for an evidentiary hearing in this case has turned into a thicket. Once the hearing commenced, it was impaled upon the thorn of the attorney-client privilege, which has convinced us that it was error to initiate the hearing. On reflection, we now agree with appellant's position that it was incumbent upon the trial court and all counsel involved to see that the record reflected compliance with the rule. If it does not, a post-trial hearing should not be held to resurrect or reconstruct what should have been done initially.

Williams v. State, 440 So. 2d 1290, 1291 (Fla. 4th DCA 1983).[1] Hence, Petitioner's call for an evidentiary hearing would not be a remedy, at all.

Finally, Petitioner cites Parker for the proposition that the appropriate remedy is a Rule 3.850 claim. Parker is distinguishable in that, like Dumas, Parker's written waiver contained Parker's personal signature, thereby creating the presumption that Parker knew of the waiver. Because Respondent

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[1]The State of Florida conceded that the facts of Williams constituted an insufficient waiver. The State of Florida is, apparently, assuming a contradictory position in this case which had identical facts as Williams. Equal protection guarantees do not permit the State to vacilate on this subject. See, State v. Pitts, 249 So. 2d 47 (Fla. 1st DCA 1971); Johnson v. State, 268 So. 2d 170 (FLa. 1st DCA 1972).

did not sign the waiver, and because there is no other record evidence Respondent knew of the waiver, this presumption is not permissible. Moreover, the court cannot find the waiver sufficient, even though it is insufficient, simply because the defendant has an alternative procedural vehicle to seek redress. Whether or not the Rule 3.850 motion would achieve a proper resolution is irrelevant to whether the conviction can be sustained without a proper waiver of jury trial. Hence, Petitioner's suggestion is procedurally misconceived. See, also, Judge Schwartz' dissent from Dumas, pointing out the inherent ineffectiveness of Rule 3.850 hearings, even where the court finds a presumptive waiver.

In conclusion, the burden was on the State to show Respondent's waiver of jury trial was knowing, voluntary and intelligent. Tucker, supra, citing Zellers v. State, 138 Fla. 158, 189 So. 236 (1939). Because Respondent did not sign the written waiver, and because there is no other record evidence Respondent actually knew of the existence of the written waiver, it may not be presumed that Respondent participated in counsel's waiver of his right to trial by jury. Consequently, the record does not support a waiver of jury trial and the only viable remedy is to remand this case for a new trial.

While Petitioner's manipulation of Justice Cardozo and Justice Hand's words evinces his contempt for the Bill of Rights and for our criminal justice system, he does not offer

precedent for a less stringent standard of proof regarding waiver of the right to trial by jury.[2]

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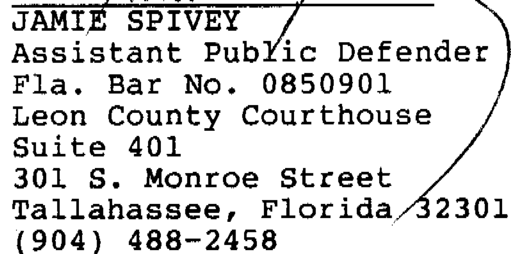
[2] e.g., Justice Hand was referring to a defendant's request to open the grand jury's minutes of an indictment -- not a fundamental right.

CONCLUSION

Based on the foregoing reasoning, caselaw, and other citation of authority, Respondent respectfully requests this Court affirm the decision of the First District Court of Appeal.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Patrick Martin, Assistant Attorney General, by delivery to the Capitol, Plaza Level, Tallahassee, Florida, on this 1 day of February, 1995.

JAMIE SPIVEY

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 84,732

JOHN WAYNE UPTON,

Respondent.

______________________/

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

Upton v. State,
___ So. 2d ___, 19 Fla. L. Weekly D2294
(Fla. 1st DCA October 28, 1994).

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JOHN WAYNE UPTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93-1583

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OCT 31 1994

CRIMINAL APPEALS
DEPT. OF LEGAL AFFAIRS

Opinion filed October 28, 1994.

An appeal from Circuit Court for Escambia County. John Kuder, Judge.

Nancy A. Daniels, Public Defender, and Jamie Spivey, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

Docketed 10-31-94 Florida Attorney General

ALLEN, J.

The appellant challenges his convictions and sentences following a non-jury trial. Because the record does not demonstrate that the appellant made a knowing, voluntary, and intelligent waiver of his right to trial by jury, we reverse.

The record reveals that the appellant was tried without a jury pursuant to a written waiver signed only by his attorney and the

prosecutor. A defendant's knowing, voluntary, and intelligent waiver of jury trial must appear in the record. Tucker v. State, 559 So. 2d 218 (Fla. 1990); Hurd v. State, 440 So. 2d 691, 693 (Fla. 1st DCA 1983). In this case, there is no indication that the appellant made a knowing, voluntary and intelligent waiver of his right to a jury trial. No inquiry was made of him as to whether he concurred in his attorney's waiver or whether he understood what was meant by waiver of a jury trial. See id.; Tosta v. State, 352 So. 2d 526 (Fla. 4th DCA 1977), cert. denied, 366 So. 2d 885 (Fla. 1978). We therefore reverse the appellant's convictions and sentences and remand for further proceedings. However, we certify to the supreme court the following question of great public importance:

> Does a lawyer's written waiver of jury trial on behalf of his client validly waive the defendant's right to a jury trial where there is no indication in the record that the defendant agreed to the written waiver or otherwise made a knowing, voluntary and intelligent waiver of his right to trial by jury?

REVERSED AND REMANDED.

WEBSTER, J., CONCURS; LAWRENCE, J., CONCURS AND DISSENTS WITH WRITTEN OPINION.

Lawrence, J., concurring and dissenting.

Because I view the instant written waiver, signed by Upton's lawyer, as adequate to waive the client's right to jury trial, I dissent. Neither Tucker v. State, 559 So. 2d 218 (Fla. 1990), nor Hurd v. State, 440 So. 2d 691 (Fla. 1st DCA 1983), requires reversal of Upton's convictions and sentences. The Tucker court held, in response to a certified question, that a defendant's oral waiver of a jury trial is valid where the defendant is represented by a lawyer, and a full explanation of the consequences is given by the trial judge. We merely held in Hurd that, where there is neither a written waiver nor an oral inquiry on the record, any asserted waiver is invalid. The instant record, by contrast, contains a written waiver signed by Upton's lawyer.

Florida Rule of Criminal Procedure 3.260 provides: "A defendant may in writing waive a jury trial with the consent of the state." Even if rule 3.260 required that the written waiver be executed personally by Upton, as opposed to his counsel, the Tucker court made it clear that technical compliance with the rule is not required:

> Technical noncompliance with a rule of procedure is permissible if there is no harm to the defendant. *Hoffman v. State*, 397 So. 2d 288, 290 (Fla. 1981) (the rules of criminal procedure are not intended to furnish a procedural device to escape justice).

Tucker v. State, 559 So. 2d at 220.

We recently held in Parker v. State, 636 So. 2d 794 (Fla. 1st DCA 1994), that Tucker should not be interpreted as requiring the trial court to establish in open court that a waiver was freely and voluntarily made, when technical compliance with rule 3.260 was made. Moreover, we said that "if Parker's waiver was not in fact freely and knowingly given, the appropriate mode of relief is by a Rule 3.850 motion for post-conviction relief." Parker, 636 So. 2d at 795.

We should follow the rationale of our sister court in Dumas v. State, 439 So. 2d 246 (Fla. 3d DCA 1983) (en banc), *review denied,* 462 So. 2d 1105 (Fla. 1985), and conclude that a presumption is raised that a waiver of jury trial is knowingly and intelligently made under the circumstances of the instant case. The burden then would shift to Upton to show facts to the contrary. This would be consistent with our decision in Parker, approving postconviction relief as a remedy, and the rule requiring prejudice, as discussed in Tucker. Significantly, Upton has not alleged at any time that his waiver resulted in prejudice to him.

I agree that this issue is one of great public importance, and therefore join in certification of the question.