IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 85,909

JEFFREY ELY ROBERTS, :

Respondent. :
_____ :

BRIEF OF RESPONDENT ON JURISDICTION

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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_____/

I. PRELIMINARY STATEMENT

Jeffrey Ely Roberts was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "respondent," "defendant," or by his proper name.

Reference to petitioner's jurisdictional brief will be by use of the symbol "PB" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing a copy of the decision on which review is sought, Roberts v. State, 20 Fla. L. Weekly D1207 (Fla. 1st DCA May 18, 1995). Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

As the facts of the case respondent, as does petitioner (PB-2-3), relies upon the facts contained in the majority opinion in Roberts v. State, supra. It should be noted that the specially concurring opinion filed by Judge Van Nortwick does not contain any fact not recited in the majority opinion.

III. SUMMARY OF THE ARGUMENT

Respondent recognizes that the rationale used by the majority in Roberts is incorrect in some respects. However, the actual result in Roberts is in line with controlling case law from this Court and the rules of procedure. The cases relied upon by petitioner as a basis for "conflict" jurisdiction do not in reality conflict with Roberts as they each have substantially different controlling facts than Roberts.

IV. ARGUMENT

THE DECISION OF THE DISTRICT COURT IN ROBERTS V. STATE, 20 FLA. L. WEEKLY D1207 (FLA. 1ST DCA MAY 18, 1995) DOES NOT EXPRESSLY AND DIRECTLY CONFLICT ON THE SAME QUESTION OF LAW WITH AUGSBERGER V. STATE, 20 FLA. L. WEEKLY D1227 (FLA. 2ND DCA MAY 19, 1995); WATTS V. STATE, 593 SO.2D 198 (FLA. 1992); JONES V. STATE, 449 SO.2D 253 (FLA. 1984); OR, HARDWICK V. STATE, 521 SO. 1071 (FLA. 1988).

Petitioner argues that the decision in the instant case, Roberts, expressly and directly "conflicts" on the same question of law with Augsberger, Watts, Jones, and Hardwick, supra, thereby conferring jurisdiction in the Court under Article V, Section 3(b)(3), Constitution of the State of Florida (PB-5-8). Respondent disagrees.

"Conflict" jurisdiction exists where the appellate court applies a rule of law to produce a different result in a case involving substantially the same controlling facts as a case or cases previously decided by this Court or by another district court of appeal. See Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). In the instant case, appellant argues that Roberts does not contain substantially the same controlling facts as Augsberger, Watts, Jones, and Hardwick, supra.

In Augsberger, the defendant expressed dissatisfaction with counsel and requested an opportunity to hire private counsel. When asked, the defendant could not point to any specific act or omission on the part of counsel. The trial court did not think the defendant had the money to hire counsel. The case proceeded to trial with appointed counsel.

On appeal, the second district held that the trial court did not err in not conducting a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975). The reason was because the defendant never made an unequivocal request for self-representation.

Similarly, in Watts, the defendant requested other counsel and complained about his lawyer, but at no time did he ever ask to represent himself. This Court ruled that, absent an unequivocal request for self-representation, there is not a requirement to conduct a Faretta hearing.

The case here is different from Augsberger and Watts. In the instant case, it is not contested that on, at least three occasions, the defendant here did make unequivocal requests for self-representation, namely, on May 15, June 22, and June 25, 1993 (A-1). The result of these three unequivocal requests was a ruling that the defendant would be allowed to represent himself at trial.

On the day of trial, the defendant questioned where his "co-counsel" Susan was, Susan being the lawyer the defendant had effectively fired by June 25, 1993. Under these facts, the district court held that the trial court erred in simply not making any inquiry whatsoever to determine if appellant wanted to represent himself, or be represented by Susan.

Hardwick is a case where there was not an unequivocal request for self-representation, but where the trial court went ahead and did conduct a full Faretta inquiry. Under these

facts, this Court on appeal held that the trial court did not err in refusing to dismiss court-appointed counsel, appoint the defendant as co-counsel, or permit Hardwick to represent himself. The Court stressed that the trial court "made the proper inquiry." 521 So.2d at 1074.

In this case, respondent made three unequivocal requests for self-representation, which were eventually granted. On the day of trial, however, he made statements evidencing confusion over whether he was representing himself or had co-counsel. The district court in this case in effect held it was error for the trial court to do nothing, in light of the defendant's obvious confusion. Hardwick does not conflict with this case since, in Hardwick, the trial court actually did what the district court in this case faulted the trial court for not doing, namely, conducting an inquiry into the question of counsel.

Lastly, this case does not conflict with Jones. In Jones, the court was "...faced with an obstreperous defendant who might well attempt to disrupt and obstruct the trial proceedings." 449 So.2d at 257. After the subject of counsel was repeatedly raised, the trial court ultimately allowed the defendant to represent himself. On the second day of trial, however, the defendant requested specific counsel.

On appeal, this Court held that the trial court conducted a proper inquiry in allowing the defendant to represent himself, and did not abuse its discretion in not appointing counsel in the midst of trial. The Court observed that

"...neither the exercise of the right of self-representation nor to appointed counsel may by used as a device to abuse the dignity of the court or to frustrate orderly proceedings." 449 So.2d at 253.

The instant case does not involve an obstreperous defendant who attempted to disrupt the orderly processes of the court. The state makes much of the district court's holding calling for a fourth Faretta hearing (PB-7).

Hearing #1 was clearly "caused" by the defendant in that he asked to represent himself, which request was granted. Hearings #2 and #3 were not. Hearing #2 resulted from the fact that the trial judge disagreed with the ruling made by the another trial judge. Hearing #3 occurred in an effort to restore the status quo fashioned by the first trial judge.

And hearing #4 could have easily been accomplished by simply asking the defendant, in light of his statements regarding Susan, if he wished to represent himself or have Susan represent him. If he then said he wished to represent himself, the existence of the previously held hearings would be adequate.

The instant case does not conflict with Jones because this case and Jones have different controlling facts.

For the reasons set forth above, respondent argues that Roberts does not conflict with Jones, Hardwick, Watts, or Augsberger. The fact that there does not appear to be "conflict" jurisdiction does not mean that respondent has no

quarrel with the rationale of the majority opinion in Roberts.

In other words, respondent does not necessarily agree with the rationale used by the majority in the district court, but wholeheartedly argues that the district court reached the correct result.

As noted in the majority opinion, the defendant made unequivocal requests to represent himself on at least three occasions, namely, May 14, June 22, and June 25, 1993. The trial court eventually ruled that respondent would be allowed to represent himself. Yet, when he appeared for jury selection on July 12, 1993, and again when he appeared for trial on July 14, 1993, the trial court did not renew an offer of counsel.

The issue is, given the fact that respondent was allowed to waive counsel, was the trial court under any obligation to renew an offer of counsel at jury selection, and at trial? The answer is clearly "yes" for, as noted in Judge Van Nortwick's concurring opinion, Traylor v. State, 596 So.2d 957 (Fla. 1992) holds that even if counsel is waived, an offer of counsel must be renewed at each subsequent stage at which the defendant appears without counsel. Even in the absence of Traylor, the judge was required to renew the offer of counsel at both jury selection and trial pursuant to Florida Rule of Criminal Procedure 3.111(d)(5), which provides:

> (5) If a waiver [of counsel] is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

The problem with the rationale used by the majority is that it places the burden on a defendant who has waived counsel to initiate further inquiry into counsel. In other words, had respondent not made his statements at trial regarding Susan, the majority in Roberts would presumably have affirmed rather than reversed respondent's case, and what is now Judge Van Nortwick's concurring opinion would be a dissent.

It is wrong to place the burden on the accused when Traylor and Rule 3.111(d)(5) clearly places the burden of renewing offers of counsel squarely upon the trial court judge. The rationale of the majority opinion transforms the "bright line" rule of Traylor and Rule 3.111(d)(5) to a case-by-case determination, in an area of the law where only bright line rules will adequately protect the constitutional rights of citizens charged with crime.

Even though the rationale of Roberts is wrong, the result in the case is a correct one. In any event, Roberts certainly does not conflict with Augsberger, Watts, Hardwick, or Jones, supra.

V. CONCLUSION

Based upon the foregoing analysis and authorities, respondent argues he has established that the Court is without jurisdiction. Respondent requests the Court to issue an order declining the accept jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Dan David, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, this 30 day of June, 1995.

CARL S. McGINNES

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	CASE NO. 85,909
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_____	:	

APPENDIX

rved as to *both* counts. Thus, the uniform commitment to custody, habitual violent felony offender order, and written sentence should be corrected to reflect the 15-year minimum sentence and credit for 234 days time served on Count II.

AFFIRMED IN PART, REVERSED IN PART and REMANDED for further proceedings consistent with this opinion. (MINER and BENTON, JJ., CONCUR.)

* * *

Criminal law—Post conviction relief—Ineffective assistance of counsel—Claim that counsel refused to let defendant testify sufficient to require evidentiary hearing

JOHN ELWOOD BURTON, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-3935. Opinion filed May 16, 1995. An appeal from the Duval County Circuit Court, David C. Wiggins, Judge. Counsel: John Elwood Burton, pro se. No appearance for Appellee.

(PER CURIAM.) We review the denial of appellant's motion for post-conviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure. We affirm in part and reverse in part. The motion raised four grounds for relief, and we affirm the court's denial of the motion on three grounds. In regard to appellant's claim that he was denied the effective assistance of counsel because his trial counsel refused to let appellant testify in his own behalf, however, we reverse and remand for an evidentiary hearing. *Wilson v. State*, 647 So. 2d 185 (Fla. 1st DCA 1994). (MINER, LAWRENCE and BENTON, JJ., CONCUR.)

* * *

JACKSON v. STATE. 1st District. #94-3166. May 16, 1995. Appeal from the Circuit Court for Escambia County. AFFIRMED. *See Edwards v. State*, 20 Fla. L. Weekly D550 (Fla. 5th DCA Mar. 3, 1995); *Callaway v. State*, 642 So. 2d 636 (Fla. 2d DCA 1994), *review granted*, Case No. 84,525 (Fla. Feb. 15, 1995).

* * *

Criminal law—Counsel—Self-representation—Conviction obtained after defendant represented himself at jury trial reversed and remanded for new trial—Where defendant, at beginning of trial, affirmatively evidenced his confusion as to whether or not he was represented by counsel at that time, trial court should have stopped proceedings and conducted a *Faretta* inquiry

JEFFREY ELY ROBERTS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-2586. Opinion filed May 18, 1995. An appeal from the Circuit Court for Alachua County. Nath Doughtie, Judge. Counsel: Nancy A. Daniels, Public Defender; Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Daniel A. David, Assistant Attorney General, Tallahassee, for Appellee.

(MICKLE, J.) Jeffrey E. Roberts (Appellant) appeals from a judgment and sentence on the ground that the trial court violated his state and federal constitutional rights 1) by failing to renew its offer of counsel at his jury trial and 2) by permitting Appellant to represent himself at trial without conducting an adequate inquiry into his waiver of counsel. We are constrained to reverse the judgment and sentence and remand for a new trial.

Appellant was charged by information with an aggravated assault with a deadly weapon. With the jury present in proceedings on May 14, 1993 before Judge #1, Appellant announced, "I want to fire my attorney." Outside the jury's presence, the trial court heard Appellant's complaints about the quality of representation by the assistant public defender, and the court specifically questioned counsel about Appellant's allegations of ineffective assistance. The record supports the finding that Appellant failed to demonstrate any reasonable basis for discharging defense counsel. *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973) (inquiry and findings were necessary to address defendant's pretrial motion to discharge court-appointed counsel). When the court denied Appellant's subsequent request to serve as co-counsel with any other appointed attorney, Appellant asked to represent himself. The trial court then conducted a thorough inquiry pursuant to *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (defendant in state criminal trial has constitutional right to proceed without counsel upon voluntary and intelligent election to do so), and informed Appellant of his options of retaining present trial counsel or of representing himself. When Appellant reiterated his desire for self-representation, the trial court questioned him further and warned him of the hazards of self-representation. At the conclusion of the questioning, the court determined that Appellant had the requisite intelligence and capacity to represent himself, and that the waiver of counsel had been knowingly, voluntarily, and intelligently made. Fla. R. Crim. P. 3.111(d); *Faretta*; *Smith v. State*, 546 So. 2d 61 (Fla. 1st DCA), *rev. den.*, 554 So. 2d 1168 (Fla. 1989). Judge #1 declared a mistrial to afford Appellant an opportunity to prepare his case, and defense counsel was discharged.

In "motion and docket" proceedings before Judge #2 five weeks later, on June 22, 1993, Appellant repeated his intent to represent himself despite the court's warnings about the shortcomings and dangers of self-representation. His former counsel was present and, with Appellant's permission, released findings from a psychological examination indicating that Appellant was "competent" and "capable" and suffering from no mental defect. The trial court conducted an additional inquiry into Appellant's competency to represent himself and specifically questioned him about the nature of the charge, his prior involvement with the criminal justice system, and his knowledge and understanding of certain legal terms and court procedures. The court concluded that Appellant lacked the requisite knowledge for self-representation. Over Appellant's objection, his former counsel was reappointed.

Three days later, at a June 25, 1993, pretrial conference before Judge #3, the assistant public defender was listed as "counsel of record," but Appellant again announced his wish for self-representation. After conducting further inquiry, the trial court found that Appellant could represent himself without trial counsel's assistance. Jury selection was set for three weeks later.

On July 12, 1993, jury selection commenced with the announcement by Judge #3 to the venire that Appellant had elected to represent himself and had been found competent to do so. No offer of counsel was made at this proceeding, and the jury was chosen without objection by Appellant.

At the onset of trial on July 14, 1993, the same judge told the jury that Appellant would be "representing himself." After the prosecutor made an opening statement, Appellant asked, "I'd also like to know where my co-counsel is—Susan." Susan is his former defense attorney's name. The trial judge replied, "I don't think you've got, really, a co-counsel in this case." The court did not renew the offer of counsel, and Appellant continued to represent himself. Testimony was presented, closing statements were made, and the jury returned a verdict of guilty as charged.

At the beginning of the actual trial, when Appellant affirmatively questioned his attorney's whereabouts—"I'd also like to know where my co-counsel is—Susan"—this statement should have signalled to the trial court, at a minimum, that Appellant was confused as to whether he was entitled to counsel and whether he was represented by counsel at that time. The trial court should have stopped the proceedings at that point and conducted a *Faretta* inquiry.

Appellant and the state have acknowledged our opinion in *Lamb v. State*, 535 So. 2d 698 (Fla. 1st DCA 1988), in which the trial court granted the defendant's motion to withdraw court-appointed counsel three weeks prior to trial after concluding that the defendant was competent and able to represent himself. Citing the failure to renew the offer of counsel again before trial, the defendant alleged reversible error in the trial court's permitting him to represent himself. We concluded in *Lamb* that the lower tribunal had satisfied Florida procedural requirements because "[t]he pretrial hearing on the waiver of counsel addressed Lamb's competence and ability to appear pro se at the trial stage, and the fact that the trial occurred three weeks later is immaterial." *Id.* at 699. The case at bar is unlike *Lamb*, in that

Appellant Roberts, at the beginning of trial, affirmatively evidenced his confusion as to whether or not he was represented by counsel at that time. This confusion should have triggered further inquiry by the trial judge. Therefore, given the factual differences between *Lamb* and the case at bar, we decline to accept the state's position that *Lamb* is controlling and compels an affirmance.

Accordingly, we are constrained to REVERSE the judgment and sentence and to REMAND the cause for a new trial. (BOOTH, J., CONCURS; VAN NORTWICK, J., CONCURS IN RESULT WITH OPINION.

(VAN NORTWICK, J., concurring in result.) I concur with the result in this case. I write separately because I conclude that a reversal is required in the present case by *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), without regard to whether the Appellant, while unrepresented, placed the trial court on notice that his waiver of a right to counsel may not be knowing by specifically inquiring prior to the onset of trial about his "co-counsel."[1]

In *Traylor*, the Florida Supreme Court ruled that under the Counsel Clause contained in section 16 of the Florida Constitution,[2] a criminal defendant "is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel" *id.* at 968; that "[a]t the commencement of each such stage an unrepresented defendant must be informed of the right to counsel and the consequences of waiver" *id.*; and that "[w]here the right to counsel has been properly waived, the state may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented." *Id.*

In the present case, the Appellant, who was representing himself, was not informed of his right to counsel or consequences of waiver and did not make a knowing, intelligent, and voluntary waiver of his right to counsel either at the commencement of jury selection on July 12 or at the commencement of trial on July 14. Jury selection and trial are each a crucial stage of the criminal proceeding in that, as defined by the *Traylor* court, each is obviously a "stage that may significantly affect the outcome of the proceedings," *id.*; *see also*, *Allen v. State*, 405 S.E.2d 94, 97 (Ga. Ct. App. 1991) (selection of jury recognized as a separate stage for which defendant had right to be present); *Horton v. State*, 170 So. 2d 470, 472 (Fla. 1st DCA 1964) (arraignment, trial, and conviction recognized as separate "critical stages" requiring offer of counsel), *cert. denied*, 174 So. 2d 33 (Fla. 1965).

As a result, while I agree fully with the majority that the Appellant's question at the outset of trial, "I'd also like to know where my co-counsel is—Susan," signalled to the trial court Appellant's confusion concerning the waiver of his right to counsel, I would hold that under *Traylor*, whether or not the Appellant inquired about his "co-counsel," the trial court erred in not advising Appellant of his right to counsel prior to jury selection and again prior to the evidentiary portion of the trial and in not obtaining a waiver at each stage if Appellant elected to continue representing himself. *See also*, *Pall v. State*, 632 So. 2d 1084 (Fla. 2d DCA 1994), and *Jones v. State*, 650 So. 2d 1095 (Fla. 2d DCA 1995) (trial court erred when it failed either before voir dire or before evidentiary portion of trial to renew offer of counsel to unrepresented defendant).

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[1]I also agree with the majority that this case is clearly distinguishable from this court's opinion in *Lamb v. State*, 535 So. 2d 698 (Fla. 1st DCA 1988). I read *Lamb* narrowly as holding that the trial court can satisfy the requirement to provide notice of the right to counsel at the trial stage of a proceeding by addressing the offer of counsel and waiver under Fla. R. Crim. P. 3.111(d)(5) at a pretrial hearing when no other stages occur between the hearing and the trial stage. To the extent that the *Lamb* holding is read more broadly, as argued here by the state, in my opinion *Lamb* would have been overruled *sub silencio* by *Traylor*.

[2]Section 16 of the Florida Constitution provides in part:

> In all criminal prosecutions the accused shall, upon demand, . . . have the right . . . to be heard in person, by counsel or both. . . .

Art. I, §16(a), Fla. Const.

* * *

Criminal law—Prosecutorial misconduct issue was not preserved for appeal and did not constitute fundamental error—Claim of ineffective counsel rejected without prejudice to filing of rule 3.850 motion—Judgment to be corrected to reflect conviction of attempted robbery under correct statutes

OSCAR NERES JONES, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-4174. Opinion filed May 18, 1995. An appeal from the Circuit Court for Bay County. Don T. Sirmons, Judge. Counsel: Nancy A. Daniels, Public Defender, Fred Parker Bingham II, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, Patrick Martin, Assistant Attorney General, Tallahassee, for Appellee.

(ERVIN, J.) Appellant raises five issues challenging his attempted robbery conviction. We affirm the first two regarding jury instructions and the denial of his motion for new trial based on *Ray v. State*, 403 So. 2d 956 (Fla. 1981). The third issue regarding prosecutorial misconduct during cross-examination of a defense witness and closing argument was not preserved for appellate review and does not constitute fundamental error; therefore, we affirm as to that issue. We also affirm appellant's fourth issue asserting ineffective assistance of trial counsel, *see Loren v. State*, 601 So. 2d 271 (Fla. 1st DCA 1992), but we do so without prejudice to appellant's right to file a motion pursuant to Florida Rule of Criminal Procedure 3.850.

We reverse the fifth issue and remand with directions to correct the judgment to reflect that appellant was convicted of attempted robbery, in violation of sections 812.13 and 777.04, Florida Statutes (Supp. 1992 & 1991), not section 812.12.

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings. (MINER and BENTON, JJ., CONCUR.)

* * *

Torts—Negligence—County jail inmate's action against sheriff for injuries received when other inmate pulled out vodka bottle, broke it, and stabbed plaintiff in the eye—Error to enter directed verdict for defendant on ground that plaintiff failed to carry burden to show that defendant's negligence in allowing contraband into jail, rather than fellow inmate's intentional act, was proximate cause of plaintiff's injury—Jury could reasonably find that plaintiff was of the class that jail rules regarding contraband were intended to protect, that his injury was of the type the rules were designed to prevent, and that violation of the rules was proximate cause of injury

CHARLES JACKSON, JR., Appellant, v. ROBERT W. MILNER, JR., BRADFORD COUNTY SHERIFF, Appellee. 1st District. Case No. 94-199. Opinion filed May 18, 1995. An appeal from the Circuit Court for Bradford County. W. O. Beauchamp, Jr., Judge. Counsel: Burney Bivens, Orange Park, for Appellant. Julius F. Parker, Jr. of Parker, Skelding, Labasky & Corry, Tallahassee, for Appellee.

(ZEHMER, C.J.) In August 1988, Charles Jackson, Jr., was an inmate in the Bradford County Jail and was seriously injured during an altercation between two other inmates, one of whom was Bobby Joe Kelly. According to the record, Kelly apparently became enraged when Jackson did not support his cause, pulled out a vodka bottle, broke it, and stabbed Jackson in the eye, causing the loss of the eye. Jackson thereafter sued the Bradford County Sheriff alleging the sheriff was negligent in failing to conduct a thorough and proper search of another inmate (not Kelly) who allegedly initially brought the bottle into the jail and later gave the bottle to Kelly.

During trial, at the close of Jackson's case-in-chief, the sheriff moved for a directed verdict arguing that the intentional act of Bobby Joe Kelly was an active and efficient intervening cause compelling a ruling as a matter of law that any negligence on behalf of the sheriff in failing to conduct a proper and thorough search of an inmate was not the proximate cause of Jackson's